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“Ethnic Cleansing” in the Case-Law of the International Court of Justice and the International Criminal Court: A Judicial Thorn or a Well-Needed Approach?

Its Use and Possible Evolution in Genocide Law

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Introduction

Mid-May 2025, the UN Human Rights Chief Volker Türk declared regarding the situation in Gaza that "This latest barrage of bombs, forcing people to move amid the threat of intensified attacks, the methodical destruction of entire neighbourhoods, and the denial of humanitarian assistance underline that there appears to be a push for a permanent demographic shift in Gaza that is in defiance of international law and is tantamount to ethnic cleansing".[1] However, more and more organizations such as Amnesty International and Human Rights Watch are claiming that a genocide is taking place in the same place.[2]

Research shows that the terms ethnic cleansing and genocide are used in an interchangeable way, that the chosen label does not translate the actual harm committed and that the use of ethnic cleansing often even bleaches the atrocity of genocide and undermines the prevention of it.[3] The two main actors in the application of international law are the International Court of Justice (ICJ) and the International Criminal Court (ICC) and they should therefore be the most pertinent to assess the question of the (correct) use of the terms ethnic cleansing and genocide.

From this context the following research question emerged:

> *"Ethnic Cleansing" in the case-law of the International Court of Justice and the International Criminal Court: a judicial thorn or a well-needed approach?*

The underlying research will be the use and possible evolution of the term in genocide law.

To address this question fully, will first be dressed the definition of ethnic cleansing (I.). In a second time will be analysed the different decisions of the International Court of Justice (II.) and of the International Criminal Court (III.) that are pertinent in regard of the research. A fourth section will hold a comparison between the two (IV.). In the light of those analysis, I will plead for an enlargement of the concept of genocide to include ethnic cleansing (V.).

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[1] Press Release Office of the High Commissionner for Human Rights, *Türk deplores Gaza escalation pleads for global action to stop more killings,* 16 May 2025.
[2] Amnesty International report: '*You Feel Like You Are Subhuman': Israel's Genocide Against Palestinians in Gaza,* 5 December 2024; Human Rights Watch, *Extermination and Acts of Genocide - Israel Deliberately Depriving Palestinians in Gaza of Water*, 19 December 2024.
[3] R Blum and others, '"Ethnic Cleansing" Bleaches the Atrocities of Genocide' (2007) 18 The European Journal of Public Health 204; Jennifer Kirby-Mclemore, 'Settling the Genocide v. Ethnic Cleansing Debate: Ending the Misused of the Euphemism Ethnic Cleansing' (2022) 50 109.

I. Definition of Ethnic Cleansing

Before delving into the analysis of the decisions of the ICJ and ICC, it is necessary to have an understanding of the word 'ethnic cleansing'. Being still a young word, it is necessary to understand the origins of the term (1.). To understand its use in a law context, a summary of its use in legal sources will be dressed (2.). Will be addressed the (non-)existence of the term in international law and the apparent link with genocide (3.) Finally, an overview will try to assess the definition of the term "ethnic cleansing" (4.)

1. Origins of the Term

Ethnic cleansing did appear in the aftermath of the events that happened in Yugoslavia, Bosnia and Herzegovina and Croatia. It seems impossible to determine when exactly the term was first employed and in which context.[4] The term emerges as a translation of the Serbo-Croatian terms *etnicko ciscenje*[5], words used by Serbian commanders as military code-words for "leaving nobody alive".[6]

The concept of "cleansing" however appeared a bit earlier, in the context of the different attempts in Europe to render an ethnically homogenous community.[7] References to that concept can be found in different European languages as from the nineteenth-century. The most well-known term is the German *Judenrei* ("clean of Jews") used by Nazi Germany.[8] As advanced by Ther, we can speak of a "pan-European concept" of cleansing that is closely associated with the idea that an ethnically homogeneous nation-state is the pinnacle of political development.

The term "ethnic" refers to a group of people who share a distinct racial, national, religious, linguistic or cultural heritage. This includes shared history, perceptions, group identity, and a shared memory of past glories and traumas.[9]

[4] Drazen Petrovic, 'Ethnic Cleansing - An Attempt at Methodology' (1994) 5 342.
[5] Daniele Conversi, *Cultural Homogenization, Ethnic Cleansing, and Genocide*, vol 1 (Oxford University Press 2017) <http://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-139> accessed 12 February 2025; Kirby-Mclemore (n 3).
[6] Blum and others (n 3).
[7] Philipp Ther, *The Dark Side of Nation-States: Ethnic Cleansing in Modern Europe* (Charlotte Kreutzmüller tr, 1st edn, Berghahn Books 2014) <http://www.jstor.org/stable/10.2307/j.ctt9qd3ng> accessed 15 May 2025.
[8] Jaakko Heiskanen, 'In the Shadow of Genocide: Ethnocide, Ethnic Cleansing, and International Order' (2021) 1 Global Studies Quarterly 1.
[9] Carrie Booth Walling, 'The History and Politics of Ethnic Cleansing' (2000) 4 The International Journal of Human Rights 47.

It is interesting to note that "ethnic cleansing" was used as a perpetrator's term "embedding rather than criticizing their particular meaning of 'cleanliness' or purification'".[10] It was used for the positive side of 'cleanliness'. That purity hided the dirtiness of its implementation: forced deportation, rape and murder.[11]

As from the summer of 1992, the term "ethnic cleansing" started to emerge through the utilization of it by Western commentators regarding the events happening in the Former Yugoslavia.[12]

During the 1990s, the term was used with different approaches. Ethnic cleansing could have been described as a 'practice', "a set of different actions, directly or indirectly related to military operations, committed by one group against members of other ethnic groups living in the same territory".[13] To include a more systemic view, ethnic cleansing could be described as a policy.[14] Lastly, ethnic cleansing can be described as a regional analysis. However, that approach lack to assess the global aims of an ethnic cleansing policy.[15]

The term "ethnic cleansing" slowly appeared in the official language of diplomacy and international law: often, the term was used there were the legal requirement for proof of intent to commit genocide was unsatisfying.[16]

2. Use in Legal Sources

Before diving in the jurisprudence of the ICC and ICJ, it is relevant to look at the use of the term "ethnic cleansing" in legal sources. Although ethnic cleansing has does not appear in international legislation or primary sources of law, some legal documents do mention it.

First used by the perpetrators of the crimes, it gradually penetrated the language of diplomacy and international law. Therefore, we will first address the use of it in the United Nations (UN) documents (2.1.). A quick assessment of the jurisprudence of the International Criminal

[10] Martin Shaw, *Genocide and International Relations: Changing Patterns in the Transitions of the Late Modern World* (1st edn, Cambridge University Press 2013).
[11] Walling (n 9).
[12] Heiskanen (n 8).
[13] Petrovic (n 4).
[14] ibid.
[15] ibid.
[16] Blum and others (n 3).

Tribunal for former Yugoslavia (YCTY) is also necessary to help establish the full picture regarding the evolution and use of the term "ethnic cleansing" (2.2.)

2.1. UN Law

The first definition of "ethnic cleansing" was established in November 1992 by a report from the Special Rapporteur of the Commission on Human Rights, Tadeusz Mazowiecki: "the term ethnic cleansing refers to the elimination by the ethnic group exerting control over a given territory of members of other ethnic groups".[17] The Special Rapporteur later on argued that: "ethnic cleansing may be equated with the systematic purge of the civilian population based on ethnic criteria, with the view of forcing it to abandon the territories where it lives".[18] A following clarification of the definition was brought by the UN Commission of Experts in its first interim Report: ethnic cleansing is about "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area".[19] The Commission of Experts in its final report of May 1994 used the same definition and added the following description to ethnic cleansing: "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".[20] This attempt at defining ethnic cleansing did not result in the adoption of laws specifically directed at preventing or punishing ethnic cleansing.[21]

In 1993, the UN referred to the term in seven subsequent Security Council Resolutions.[22] In the Resolution 771 and 780 the UNSC condemns expressly the violations of international humanitarian law "including those involved in the practice of ethnic cleansing". In the Resolution 787, it adds that "any taking of territory by force or any practice of 'ethnic cleansing' is unlawful and unacceptable […] and insists that all displaced persons be enabled to return in peace to their former homes".

The term, thus initially used by the perpetrators, then by the journalists and politicians, has been adopted as part of the official vocabulary of the different organs of the United Nations, governmental and non-governmental international organizations.[23] The irony must be

[17] UN Doc. A/47/666 and S/24809, 17 November 1992.
[18] UN Doc. E/CN.4/1994/110, 21 Februari 1994.
[19] UN Doc. S/25274, para. 55., 9 Februari 1993.
[20] UN Doc. S/1994/674, 27 May 1994.
[21] Kirby-Mclemore (n 3).
[22] United Nations Security Council (UNSC) Resolutions 771, 780, 787, 808, 819, 827, 836.
[23] Petrovic (n 4).

underlined that the UN used a word that was used by the perpetrators of the genocide held in Serbia, one that had and has never been defined formally or legally recognized as a term with a legal status and mandated obligations.[24] The 819 resolution mentions for the first time "the overall abhorrent campaign of ethnic cleansing" by the Bosnian Serb party.

Based on research of the database of the UN, two more recent resolutions do mention the term "ethnic cleansing". The UNSC Resolution 1674, adopted on 28 April 2006, affirms the responsibility of States to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.[25] It basis itself on the 2005 World Summit Outcome Document, a resolution taken by the General Assembly of the UN that states out the parameters for the Responsibility to Protect.[26] In the context of the tenth anniversary of its systematic work on the protection of civilians in armed conflict, the UNSC reaffirms the same in its Resolution 1894.[27]

The UN General Assembly Resolution of December 1992 denounced the "abhorrent policy of 'ethnic cleansing', which is a form of genocide".[28] It thus qualifies the acts as ethnic cleansing but condemns them through genocide. In the First interim Report of February 1993, ethnic cleansing was meaned to be contrary to international law and that it "could also fall within the meaning of the Genocide Convention".[29] Those declarations show tendency to recognize similarities between ethnic cleansing and genocide.[30]

In addition, it is interesting to note, that in the most recent UN Resolutions, it being by the Security Council or the General Assembly, the term ethnic cleansing appears in the enumeration in the Responsibility to Protect resolution. As a reminder:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.

[24] Blum and others (n 3).
[25] UNSC Resolution 1674, 28 April 2006.
[26] UN Doc A/RES/60/1, 16 September 2005.
[27] UNSC Resolution 1894, 11 November 2009.
[28] UN Doc. A/RES/47/121, 18 December 1992.
[29] UN Doc. S/25274, para. 55., 9 Ferbruari 1993.
[30] Ouédraogo, 'Génocide et « nettoyage Ethnique » : Quelle Différence En Droit International Pénal ?' (23 December 2014) <https://www.quidjustitiae.ca/fr/blogue/genocide-et-nettoyage-ethnique-quelle-difference-en-droit-international-penal>.

This wording seems to acknowledge that ethnic cleansing bears a certain individuality, that is not exactly the same as crimes against humanity or genocide. The order in which the enumeration is done seem not to bear any particular importance as there is no indication of level of gravity.

2.2. Jurisprudence ICTY

To address the research question completely it is necessary to outline the findings of the International Criminal Tribunal of the former Yugoslavia (ICTY). As the origin of the term itself appears from that conflict, the first use in decision was in this tribunal.

The Statute that created the ICTY did not mention “ethnic cleansing” as a crime. The UN documents that framed the Tribunal’s mandate noted that crimes in former Yugoslavia often took the form of “so-called ‘ethnic cleansing’”, on the basis of the UN documents mentioned above. While the prosecution indicted a few perpetrators on that basis (see e.g . The Lasva Valley case and Milosević’s indictment), the Court did not judge any of the accused on that basis. It focused on prosecuting specific war crimes and crimes against humanity underlying ethnic cleansing. However, some cases did underline the similarities between genocidal policies and policies of ethnic cleansing.[31]

The ICTY never codified ethnic cleansing as a novel crime. It has instead absorbed the phenomenon into existing categories. Its jurisprudence consistently interpreted forced displacement as a crime, it being under persecution or related crimes against humanity, or war crimes, when committed with discriminatory intent. According to ICTY law, the term "ethnic cleansing" is a policy descriptor. It is prosecuted only through the tribunal's recognised offences.

3. Link with Genocide

Ethnic cleansing is not a legal term. International law is silent about the meaning and definition of ethnic cleansing.[32] The lack of clearly established definition leads to the fact the term is often considered under other crimes. The ambivalence of the UN documents and the doctrine obliges us to address the link between ethnic cleansing and genocide.

[31] ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, para. 562 (2 August 2001).
[32] Martin Steinfeld, ‘When Ethnic Cleansing Is Not Genocide: A Critical Appraisal of the ICJ’s Ruling in *Croatia* v. *Serbia* in Relation to Deportation and Population Transfer’ (2015) 28 Leiden Journal of International Law 937.

It is quite clear in the international community that ethnic cleansing does not automatically amounts to genocide.[33] This affirmation was for example advanced by the ICTY Trial Chamber in the Stakic case when pointing out that a distinction must be drawn between the destruction of a group and its dissolution. The mere dissolution of (part of) a group does not amount to genocide.[34]

Those elements, the differences between makes it compulsory to briefly address the discussion existing in the legal doctrine between ethnic cleansing and genocide, before addressing the use of the term "ethnic cleansing" in the decisions of the ICC and the ICJ.

Genocide is defined in article II of the Convention on the Prevention and Punishment of the Crime of Genocide[35].

> *Genocide means any of the following acts committed with the 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.

The definition of genocide is mainly composed by two criteria: the objective element and the subjective element. While the objective element is "easy" to establish as it is a material element that must respond to the limited acts enumerated in the article above, the subjective element is constituted by the intentional element (*dolus specialis*). That element is hard to prove.

For a situation to be qualified as genocide, only one of the objective elements must be fulfilled. They must not be cumulative.

[33] Maja Munivrana Vajda, 'Ethnic Cleansing as Genocide – Assessing the Croatian Genocide Case before the Icj' (2015) 15 International Criminal Law Review 147.
[34] ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Judgment, para. 519 (31 July 2003).
[35] Convention on the Prevention and Punishment of the Crime of Genocide, 9 december 1948, New York.

To understand the mental element a bit better, the *dolus specialis* is often compared with the special intent needed to distinguish murder and manslaughter.[36] However, comparing that *dolus specialis* with the *dolus specialis* at an international level seems dangerous as the realities between those two levels are very different: the intent and the perpetrator are way easier to identify and its impact is not the same. The difference between those two levels should not be put in comparison.

3.1. Ethnic Cleansing that Amounts to Genocide?

It is however clear that the two can fall within the same ambit. This can be the case for example if ethnic cleaning is done through the (mass) killings of a group in order to be removed from a delimited territory.[37] This example fulfils article 2(a) of the Genocide Convention.

A violation of Article 2(b) could be ascertained in case there results serious bodily or mental harm from the forced expulsion of group members from their homes. The ICTY Trial Chamber in *Blagojević and Jokić* found that the atmosphere around the forced transfer of women, children and elderly people amounted to such a traumatic experience that it amounted to the mental harm to members of the group such as established by point (c). However, in that case the ICTY considered that the *dolus specialis* was not proven.[38]

Article 2(c) is the one that is most often associated with ethnic cleansing. Yet, the ICJ considers that the "deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group".[39] When analysing the decisions of the international courts further, we will address further the view of the ICJ regarding the matter.

This view is not unanimously shared by the legal doctrine. Some consider that the expulsion of part of a population can illustrate the intention to destroy a group, while other argue that that approach is counterproductive as the same argument could be used for crimes against humanity or war crimes. And as the intentions of both are qualified by some 'as fundamentally opposed', that approach could cause juridical complexities.[40]

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[36] Doris L Bergen and others, '*The Holocaust and the Nakba: A New Grammar of Trauma and History*' (2021) 54 Central European History 112.
[37] Vajda (n 33).
[38] ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, para. 647 (17 January 2005).
[39] ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, para 190.
[40] Ouédraogo (n 30); Vajda (n 33).

Regarding Article 2(d), ethnic cleansing can be associated with genocide when, as explained by Vajda, "expulsion is carried out in such a way that it leads to the separation of members of the opposite sex, and in particular when combined with the effects of mass murders (of members of one sex)".[41] This discussion was partially held in the *Tolimir* judgement. The ICTY addressed that one of the consequences of the transfer and number of deaths of middle aged men had an impact on the decrease of birth as many women had decided not to remarry due to "the lack of similarly-aged men, the loss of husband's pension upon remarriage, the social stigma of remarriage and feelings of guilt".[42] Yet again, the ICTY was not persuaded that it was the indented result of the measure.

While some authors argue that ethnic cleansing does meet the elements of the forcible transfer of children[43], this view is quite controversial as the core of article 2(e) addresses the separation of children from their own group and that ethnic cleansing, by definition, refers to an entire group.[44]

3.2. Core Differences Between Ethnic Cleansing and Genocide

While there is existing discussion around the similarities between ethnic cleansing and genocide, some consider that the assimilation of the two is erroneous as the two notions are based on different aims: while genocide is about destroying a group physically or biologically, ethnic cleansing is about displacing a group. Ethnic cleansing is thus all about a territorial goal. Consequently, the *dolus specialis* required for genocide is for some considered as inexistent in the case of ethnic cleansing.[45]

Politically, we could therefore say that the aims of each action are different: whereas ethnic cleansing has the aim to consolidate the power of the oppressing people over territory, the aim of genocide is to annihilate the people, have his eradication.[46]

[41] Vajda (n 33).
[42] ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2, Judgment, paras. 767 (12 December 2012).
[43] Micol Sirkin, 'Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations' (2010) 33 489.
[44] Vajda (n 33).
[45] Ouédraogo (n 30).
[46] Walling (n 9).

It can be considered that today “ethnic cleansing” occupies “a middle ground between genocide and homogenization, and includes any policy aimed at the eradication of an ethnic group from a given territory whether physically (by relocation or murder) or culturally”.[47]

3.3. Could We Talk of Custom?

In the Drafting of the Genocide Convention, there was a will of certain countries to add cultural genocide in the definition established in the Article II. Syria made a proposition of cultural destruction, but this was rejected.[48]

In the *Prosecutor v Krstić* case, the ICTY confronted the question of a possible emergence of custom regarding the question whether “genocide embraces those acts whose foreseeable or probable consequence is the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act".[49] The ICTY continues by stating that “wheter this interpretation can be viewed as reflecting the status of customary international law at the time of the acts involved here is not clear”. However, the ICTY did not consider the existing legislation[50] in states nor a complete analysis of the legal doctrine nor its own review of the *travaux préparatoires* of the Genocide Convention.[51] Based thereon, it concluded that “for the purpose of this case, the Chamber will therefore adhere to the characterisation of genocide which encompass only acts committed with the *goal* of destroying all or part of a group”[52].

Even if ethnic cleansing sometimes amounts to genocide, there is no indication that it is a generality that would be part of customary international law. There was no thorough analysis by the ICTY to assess the customary nature of the genocidal intent. Are the international permanent courts going to conclude the same? This will be analysed under part II and III.

4. Definition

After those different analysis, it is necessary to try to esquisse a definition of ethnic cleansing.

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[47] Conversi (n 5).
[48] Cultural destruction was qualified in the Draft articles of the ad hoc Committee as ““any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin, or religious belief of its members such as: 1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing or circulation of publications in the language of the group; 2. Destroying or preventing the use of libraries, museums, schools, historical institutions and objects of the group”.
[49] ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, para. 571 (2 August 2001)
[50] Croatian legislation, German case-law, UN Resolutions as mentionned above.
[51] Alexander KA Greenawalt, ‘“With Intent to Destroy, In Whole or In Part”: Genocide, Ethnic Cleansing, and a Lost History’ (2024) 2024 Wisconsin Law Review 933.
[52] ICTY, *Prosecutor v. Krstić*, para. 571.

The different actors that were mentioned above (ICTY, UN, …) do describe ethnic cleansing in different ways. As outlined by Petrovic, ethnic cleansing can be considered in different ways: as a practice, as a policy or as a regional analysis.[53] Assessing ethnic cleansing just as a practice has for consequence that the acts can be analysed in an isolated way and thus overlooks the global picture, the system in which underliers each act. It is also difficult to recognise the global aims of the ethnic cleansing policy just by describing a very specific region. That is why international bodies rather tend to use the policy approach as it considers the elaborate policy between individual acts.[54] This would be te approach taken in the paper.

Turning to definitions, ethnic cleaning is qualified by Conversi as "the middle ground between genocide and homogenization, […] it includes any policy aimed at the eradication of an ethnic group from a given territory whether physically (by relocation or murder) or culturally".[55] This definition however does not seem precise enough as it describes more than it defines.

Petrovic, that attempted a methodical approach to define ethnic cleansing, concludes that ethnic cleansing is "a well-defined policy of a particular group of persons to systematically eliminate another group from a given territory on the basis of religious, ethnic or national origin. Such a policy involves violence and is very often connected with military operations. It is to be achieved by all possible means, from discrimination to extermination, and entails violations of human rights and international humanitarian law".[56] This definition already gives more elements to understand the scope and impact of ethnic cleansing.

The discussion showed some inconsistencies in the law of genocide. As resumed by Vajda "some derive from the drafting process of narrowing the original concept of genocide, as presented by Lemkin and suggested in the first drafts, whereas others result from the clash between the restrictive theoretical interpretation of this crime and its broader practical application".[57] However, those elements were mentioned to depict the discussions around ethnic cleansing, not as a way to take any conclusion as this point.

To resume, the main characteristics could be enumerated as followed:

a) A transfer of people: it can be outside or within a state

[53] Petrovic (n 4).
[54] ibid.
[55] Conversi (n 5).
[56] Petrovic (n 4).
[57] Vajda (n 33).

b) The forced character of the displacement[58]
c) A systematic character
d) Perpetration against particular groups of individuals: the target is defined by the origin of the group (ethnic, national, religious, or other characteristics), not by its activity. This means that the perpetration is against a given population, especially civilians (not combatants for example)[59]
e) The use of violations of human rights and/or international humanitarian law

Some consider that ethnic cleansing gets more of an expression or a description of criminal behaviours rather than a single category of crime.[60] This consideration will be addressed through the analysis of the decisions of the permanent courts, the International Court of Justice and the International Criminal Court.

II. Case-law of the International Court of Justice

The International Court of Justice has been created in the aftermath of the Second World War and is the principal judicial organ of the United Nations. It was established by the Charter of the UN in June 1945 and began to work in April 1946.

Its jurisdiction in contentious cases is based on the consent of the parties, which can be expressed through special agreements, jurisdictional clauses in treaties, or by declarations under Article 36(2) of the ICJ Statute accepting the Court's compulsory jurisdiction. By article IX of the Genocide Convention, the disputes between state parties relating to the interpretation, application or fulfilment of the Genocide Convention must be submitted to the ICJ.

The Court rendered its first substantive judgement under the Genocide Convention in February 2007 in the case Bosnia and Herzegovina v Serbia and Montenegro (1.).[61] A second, similar case, was rendered in 2015. The case also concerned the application of the Genocide Convention, this time between Croatia and Serbia (2.). Those two cases will be analysed in depth. A third point will address the similarities and difference between those two judgements

[58] Sirkin (n 43).
[59] Petrovic (n 4).
[60] Robert I Rotberg, 'Genocide and Ethnic Cleansing: Our Global Past' (2017) 48 The Journal of Interdisciplinary History 71.
[61] Anja Seibert-Fohr, 'The ICJ Judgment in the Bosnian Genocide Case and Beyond: A Need to Reconceptualize?' [2009] SSRN Electronic Journal 1.

(3.). A last point will address the different pending cases that the Court will have to judge at one point, that could have some implications regarding the notion of ethnic cleansing (4.).

1. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide **(Bosnia and Herzegovina v. Serbia and Montenegro),** Judgment of 26 February 2007 (hereinafter Bosnian Genocide case).

The Bosnian Genocide judgement was the first one where the violation of the Genocide Convention was pleaded and reached the merits stage.[62]

The proceedings were initiated on 20 March 1993, by the Government of the Republic of Bosnia and Herzegovina against the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Genocide Convention as well as various matters which Bosnia and Herzegovina claimed were connected therewith.[63] The Court rendered its final judgement in 2007.

The ICJ (hereinafter, in part II: the Court) ruled that, while acts of genocide were committed during the 1992–1995 Bosnian War, notably the Srebrenica massacre, where over 8,000 Bosniak men and boys were killed, Serbia was not directly responsible for committing genocide or for conspiring to commit it. However, the Court found that Serbia violated its obligations under the Genocide Convention by failing to prevent the genocide at Srebrenica and failing to punish those responsible**,** in particular by not arresting and transferring General Mladić to the ICTY. This was the first time the ICJ confirmed that genocide had occurred under the Convention but did not hold a state directly responsible for perpetrating it.

The main question, in regard to the subject of this thesis, is the analysis regarding intent and 'ethnic cleansing' and the approach used on the argument of Bosnia regarding the "pattern" of acts that would result in intent. In the Bosnian Genocide judgement, there is a subdivision that specifically refers to ethnic cleansing (part IV (8)).

In a first part, will be addressed the reasoning of the Court, linked with the comments regarding its arguments (1.1.). It will be followed by critics on the case in its globality (1.2.).

[62] ibid.
[63] Bosnian Genocide Case para. 1

1.1. Legal Reasoning of the Court

As we have seen in the first part, there is an important place kept for the aspect of "intent" in the genocide/ethnic cleansing debate. The ICJ, before addressing the part of ethnic cleansing first reminds the difference between an ordinary crime against humanity, persecution (as a crime against humanity). The Court cites the *Kupreškic et al.* case: "the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. […] the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate […] While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong".[64] Such as the ICTY, the ICJ thus makes a difference between three levels of crimes: "ordinary" crimes against humanity, persecution as a crime against humanity and genocide as the extreme form of persecution.

Another point of attention is that the Court rejects so-called "negative genocide".[65] The genocidal acts must be addressed to whole or in part of a group for their identity. As explained by the Court, "it is a matter of who those people are, not who they are not".[66]

The ICJ then turns to its analysis assessing the notions of intent and ethnic cleansing.

Before delving into its analysis, the ICJ first defines ethnic cleansing, based on the meaning decided by the Interim Report by the Commission of Experts: "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area".[67]

It pursues by adding that the term does not appear in the Genocide Convention. Based thereon, the Court considers that "neither the intent, as a matter of policy, to render an area "ethnically

[64] ICTY. *Kupreškic et al.*, Case No. IT-95-16-T, Judgment, para. 636 (14 January 2000); Bosnian Genocide Case para.187-189.
[65] Greenawalt (n 51).
[66] Bosnian Genocide Case para.193
[67] ibid. para.190

homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide".[68]

It focusses its reasoning on the distinction of the characteristic of genocide to *destroy*. It considers that "the deportation or displacement of members of a group is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement".[69] Unfortunately, the Court does not elaborate on the rationale of the distinction. It only focusses its reasoning based on the fact that dislocation does not necessarily amounts to the destruction of the group.[70]

It pursues by saying that it is possible that acts of ethnic cleansing can constitute genocide, but that is not always the case. Acts of ethnic cleansing "may be significant as indicative of the presence of a specific intent inspiring those acts". Forcibly displacing a population can thus be used to infer genocidal intent but does not on its own establish genocidal intent.[71]

The Court does use extracts from the *Krstic and Stakic* case from the ICTY in its reasoning. While addressing that part that says that "there 'are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing[72]'", it adds an extract from the Stakic that "yet "[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 suffice for genocide"[73].

It concludes by saying that "ethnic cleansing", in the context of the Genocide Convention, has no legal significance of its own.

Later on, the Court is not convinced by the evidence brought by the parties that the massive killings were committed with the specific intent of the perpetrators to destroy the group.[74] It bases itself again on the judgements of the ICTY: those convicted by it were not founded to

[68] ibid. para.190
[69] ibid.
[70] Sirkin (n 43).
[71] ibid.
[72] *Krstic,* para. 562.
[73] *Stakic*, para. 519.
[74] Bosnian Genocide Case, para.277.

have acted with specific intent. It acknowledges that the acts could amount to war crimes or crimes against humanity by the Court has no jurisdiction in this case to assess that.[75]

The contention of Bosnia that the *dolus specialis* can be inferred from the overall pattern of the acts perpetrated throughout the conflict is reacted on by the Court at paragraph 370 of the judgement. The Court considers that there is no question of a genocide, save for the events of July 1995 at Srebrenica, because "the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident"[76].

The Court considers that "the *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 demonstrated 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."[77] It refers again to case law of the ICTY, to the different judgements relating to genocide, to demonstrate that the proposition of Bosnia is not consistent with those findings of the ICTY.[78]

The Court thus concludes that the Applicant failed to demonstrate the intent "either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent".[79]

It seems thus that the Court decided to take a very narrow approach and to look at the picture as a sum of acts instead of a global picture that would have permit acts and policy of ethnic cleansing to be considered as genocide.

1.2.Critical Look

As underlined by the legal doctrine, there is a major problem lying in the method of analysis of the Court: the cutting of the events into pieces undermined the general question of responsibility of the former Yugoslavia.[80] This narrow approach of the Court impairs the nature of the State responsibility. Such a narrow approach is more pertinent in cases of criminal law,

[75] ibid. para.277
[76] ibid. 370
[77] ibid. para.373
[78] ibid. para.374
[79] ibid. para.376
[80] Seibert-Fohr (n 61).

but in regard to international law and state responsibility -which is completely different from individual criminal responsibility-, it is very restricting to look at the conduct of the immediate perpetrator and if it can be attributed to the State.

A suggested approach to avoid such a problem would have been to interpret differently "the duty to refrain", by using considerations of international human rights law. When using the same approach as for human rights violations (where it is state responsibility that is at stake), a state can be responsible for a human rights violation "even if the state official who is the immediate perpetrator is not criminally responsible for murder".[81] The scope of the Genocide Convention englobes the duty of each state to not contribute to genocide. The Court's focus on crimes and attribution overlooks an important aspect of the state its primary obligations under the Convention.

This way of thinking makes the difference between the responsibility for active involvement and the responsibility to fail to intervene when individuals commit crimes. The Court itself acknowledged that the former State of Yugoslavia was aiding the perpetrators of the crimes with political, military and financial aid, that even continued during the massacre of Srebrenica.[82]

In such a broader approach, the consequences of the acts of ethnic cleansing would have been constituents of a genocidal intent and thus fulfilling the conditions of the Genocide Convention.

Moreover, the analysis of the ICJ was only limited to the notion of genocide.[83] It is a pity that the Court did not address the legal qualification of the term "ethnic cleansing" at the time. As resumed by Qerimi, "this statement is of paramount importance, as it signifies that, indeed, ethnic cleansing has no legal practical significance of its own beyond the genocide context or, alternatively, beyond the context of the crimes against humanity".[84]

Some authors even argue that Serbia was able to evade responsibility for the Bosnian genocide thanks to the euphemism "ethnic cleansing". It goes as far as to say that "after its introduction

[81] ibid.
[82] Bosnian Genocide Case para.422
[83] Qerim Qerimi, '"All You Can Do Is Pray": Implications for Human Rights Advocacy of the Lack of Recognition of Ethnic Cleansing as an International Crime on Its Own' (2018) 10 Journal of Human Rights Practice 508.
[84] ibid.

by perpetrators of genocide, the euphemisms was able to upend the intended application of the Genocide Convention".[85]

2. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide **(Croatia v. Serbia),** Judgment of 3 February 2015 (hereinafter: Croatian Case)

Another case was brought in front of the ICJ that addresses partially the same questions than the Bosnian Genocide case.

On 2 July 1999, Croatia filed an Application against the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Genocide Convention.

The Court ruled on 3 February 2015 that although serious crimes were committed by both Croatian and Serbian forces during the 1991–1995 armed conflict following the breakup of Yugoslavia—including killings, displacement, and destruction of property—neither party proved the specific intent (*dolus specialis*) required for genocide under the Genocide Convention.

Croatia alleged that Serbia committed genocide during the 1991 military campaign known as "Operation Storm," while Serbia counterclaimed with allegations against Croatia. The Court acknowledged that atrocities occurred, particularly against ethnic Serbs and Croats, but concluded that the evidence did not demonstrate genocidal intent, and thus no violation of the Genocide Convention was established by either state.

The States parties to the case do not refer to "ethnic cleansing" as such but -in the case of Croatia-argued that "forced displacement, accompanied by other acts listed in Article II of the Convention, and coupled with an intent to destroy the group, is a genocidal act."[86]

This falls within the definition of "ethnic cleansing" as discussed above. However, will citing its 2007 judgement regarding the Bosnian Genocide case, the Court does not redefine ethnic cleansing.

The Court just answers by quoting its decision in the Bosnian Genocide case (2007): " neither the intent, as a matter of policy, to render an area 'ethnically homogeneous' or the operations

[85] Kirby-Mclemore (n 3).
[86] Croatian Case para. 161

carried out to implement such policy can *as such* be designated as genocide".[87] It thus underlines again the difference between the intent to deport or displace and the intent to destroy, partially or in whole. Destruction is in the eye of the Court not an automatic consequence of the displacement.

Acts of ethnic cleansing can constitute genocide if they can be "characterized as, for example, 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', contrary to Article II, paragraph *(c)*, of the Convention, provided such action is carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region…" . But ethnic cleansing has still no legal significance of its own in the context of the Genocide Convention.

Later on, the Court discusses the lack of proof of Serbia's "pattern of conduct" argument.[88] In their view, not all the acts alleged by Serbia as constituting the physical element of genocide have been factually proved. And for those which have been -the killing of civilians and the ill-treatment of defenceless individuals- were not committed on a scale as such that they could only point to the existence of a genocidal intent.[89] This reasoning demonstrates that the Court considers that each incident separately must fulfil the conditions of the Genocide convention to be considered as such. It refuses to consider things globally.

On the allegation of Serbia that the administrative measures to prevent Krajina Serbs from returning home, if proven true, the Court considers that it will still not amount to the destruction of the group as the infliction of damage upon a group or the removal from one from a territory is not the same.[90] However, the Court does not seem to take into account the direct consequence of such measure: *in fine* it will result in destruction.

3. Articulation with the Bosnian Genocide Case

The Court in the Serbian case had the opportunity to elaborate on the role of ethnic cleansing as the genocide Convention does not provide provisions on the matter.[91] However, the ICJ does

[87] Croatian Case para.162
[88] Emphasize of the Court itself.
[89] Croatian Case para. 512
[90] ibid. para. 514
[91] Steinfeld (n 32).

not deviate from the Bosnian Case and rather reaffirms its 2007 statement.[92] The Court even goes as far as to recall the findings of the Bosnian Genocide case and "which must now be regarded as solidly rooted in its jurisprudence".[93]

In the assessment of ethnic cleansing by the ICJ, there are two attention points to address. Firstly, there is a jurisdictional hinder: the Court was only seized based on article IX of the Genocide Convention and that has important implications: the ICJ has only jurisdiction with regard to disputes relating to the interpretation, application or fulfilment of the Genocide Convention. It was thus not competent to judge whether the acts of ethnic cleansing would be falling under another type of crime. It has not the power to allege breaches of other obligations under international law, for example those protecting human rights in armed conflict.[94]

Secondly there is an interpretational hinder: stating the decision of the 2007 judgement, the Court is explicitly stating in the judgement of 2015 the solid rooting of its jurisprudence regarding two findings. The Court expresses those findings as follows:

"First, what is generally called "ethnic cleansing" does not in itself constitute a form of genocide. Genocide presupposes the intent physically to destroy, in whole or in part, a human group as such, and not merely a desire to expel it from a specific territory. Acts of "ethnic cleansing" can indeed be elements in the implementation of a genocidal plan, but on condition that there exists an intention physically to destroy the targeted group and not merely to secure its forced displacement […]. Secondly, for a pattern of conduct, that is to say, a consistent series of acts carried out over a specific period of time, to be accepted as evidence of genocidal intent, it would have to be such that it could only point to the existence of such intent, that is to say, that it can only reasonably be understood as reflecting that intent".[95]

However, there was no obligation of the Court to state this, or to go in the same way. It could have deviated of its original position, even if it is not surprising it goes for consistency.

To conclude, the Court failed -twice- to set a precedent to condemn forcible removal, expulsion and deportation of entire populations. It could have used this opportunity to condemn the

[92] Qerimi (n 83); Steinfeld (n 32).
[93] Croatian Case para. 510
[94] Croatian Case para.85; Bosnian Genocide Case.
[95] Croatian Case para.510

atrocities of ethnic cleansing and make a precedent that would have been workable to facilitate the proper investigation of the crimes.[96]

4. Pending Cases

There are no other cases that have been judged that include the notion of ethnic cleansing. However, we must address the upcoming cases and their facts to be attentive to their potential importance and to keep an eye on the future pronunciations of the Court. In the chronological order, there is the case of The Gambia v Myanmar (4.1.), Armenia v Azerbaijan (4.2.) and South Africa v Israel (4.3.).

4.1. The Gambia v Myanmar (2019)

In 2019, The Gambia filed an Application Instituting Proceedings and Request for Provisional Measures against Myanmar. It is based on the application of the Genocide Convention.

The Application concerns "acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group, a distinct ethnic, racial and religious group that resides primarily in Myanmar's Rakhine State. These acts, which include killing, causing serious bodily and mental harm, inflicting conditions that are calculated to bring about physical destruction, imposing measures to prevent births, and forcible transfers, are genocidal in character because they are intended to destroy the Rohingya group in whole or in part".[97]

The international (non-governmental) organizations such as Amnesty International are warning about ethnic cleansing in Myanmar since November 2017.[98]

4.2. Armenia v Azerbaijan (2021)

Armenia filed in an Application Instituting Proceedings and Request for Provisional Measures against Azerbaijan in 2021. Armenia claims that Azerbaijan's use and toleration of racist hate speech both reflect and facilitate its broader policy of ethnically cleansing Azerbaijan and Nagorno-Karabakh of Armenians and Armenian heritage.

[96] Steinfeld (n 32).
[97] ICJ, Application Instituting Proceedings and Request for Provisional Measures, The Gambia v Myanmar, 19 November 2019, para. 2.
[98] Amnesty International, 'Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya, as Ethnic Cleansing Continues' <https://primarysources.brillonline.com/browse/human-rights-documents-online/briefing-myanmar-forces-starve-abduct-and-rob-rohingya-as-ethnic-cleansing-continues;hrdhrd9211201892110288> accessed 18 May 2025.

For once, the application based itself on the application of the International Convention on the Elimination of All Forms of Racial Discrimination.

4.3. South Africa v Israel (2023)

On the 29th of December 2023, South Africa filed in an application instituting proceedings against Israel on the basis that Israel failed to fulfil its obligations under the Genocide Convention. South Africa relies on the facts of "— against a background of apartheid, expulsion, ethnic cleansing, annexation, occupation, discrimination, and the ongoing denial of the right of the Palestinian people to self-determination — Israel, since 7 October 2023 in particular, has failed to prevent genocide and has failed to prosecute the direct and public incitement to genocide. More gravely still, Israel has engaged in, is engaging in and risks further engaging in genocidal acts against the Palestinian people in Gaza".[99]

The ICJ will have thus to address the question of the ethnic cleansing background regarding the Genocide Convention.

III. Case Law of the International Criminal Court

There is no final judgement of the ICC that makes use of the term 'ethnic cleansing'. The first trace of the term in its jurisprudence appears in the decision of the pretrial chamber I regarding Omar Al Bashir regarding the acts committed between 2003 and 2008 in Soudan (1.). A few other pending cases will be mentioned as they will maybe one day be of interest to this analysis (2.).

1. Pre-trial Chamber I, Omar Al Bashir (Soudan)[100]

The first case mentioning ethnic cleansing in the jurisprudence of the ICC, is the decision of the pre-trial Chamber I of the ICC, in 2009.

In short, as it was just at the pre-trial stage, the Chamber found reasonable grounds to believe that Al Bashir, President of Sudan at the time of acts committed between 2003 and 2008, bore criminal responsibility for war crimes, crimes against humanity, and genocide committed in Darfur, Soudan. The Prosecutor alleged that Sudanese forces and allied militias

[99] ICJ, Application Instituting Proceedings containing a Request for Provisional Measures, South Africa v Israel, 29 December 2023.
[100] ICC Pre-trial Chamber I, The Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest, para. 145 (4 March 2009) (hereinafter: Al Bashir I).

systematically attacked civilians in non-Arab ethnic groups - especially the Fur, Masalit, and Zaghawa ethnises - through killings, forced displacement, rape, and destruction of villages, which the Chamber characterized as part of a state policy.

To have a better understanding of the decision, the reasoning of the Court will firstly be analysed (1.1.). As this decision when to the Appeals Chamber of the ICC, an analysis will be done if its decision and its consequences (1.2.).

1.1.Reasoning of the Chamber

The first mention of the word 'ethnic cleansing' in the decision of the Chamber is in the part regarding war crimes. The Court considers that "there are reasonable grounds to believe that the Soudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) (…) began to resort to acts of armed violence in 2002".[101] It bases (partially) its reasoning on the report of Human Rights Watch that is intituled 'If We Return, We Will Be Killed – Consolidation of Ethnic Cleansing in Darfur- Sudan'. That same source is used to base the reasonable grounds that the core component of the plan to carry out a counter-insurgency campaign against the armed groups was the unlawful attack on the part of the civilian population of Darfur, being largely people from Fur, Masalit and Zaghawa ethnises.[102]

In the analysis of the place of ethnic cleansing, the first step of the ICC is to address the difference between the specific intent required for the crime of genocide and the specific intent required for the crime against humanity of persecution. It quotes the Bosnian Genocide case, itself quoting the ICTY in the *Kurpeskic et al.* case:

"The *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. (…) While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from a viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and

[101]ibid. para. 62.
[102] ibid. para. 214-215.

deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide". [103]

The Court considers that that distinction is pivotal in cases of ethnic cleansing. Thus the ICC defines ethnic cleansing in the same way as the ICJ as "a practice consisting of rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area".[104]

In the same sense as the ICJ, the ICC considers that the practice of ethnic cleansing can amounts to genocide if the objective elements provided for in article 6 of the Statute and the Elements of Crimes with the specific intent to destroy in whole or in part in the targeted. The ICC, contrary to the ICJ, addresses the fact that ethnic cleansing usually amounts to the crime against humanity of persecution.[105]

When assessing if there is a genocidal intent, the Prosecution itself acknowledges that it has no direct evidence and that it only relies on proof by inference.[106] While the Prosecution argues that a genocidal intent can be inferred, the Court considers that there can be a variety of plausible reasons other than the existence of a genocidal intent for the adoption of the strategy of the Government of Sudan, including the intention to conceal the commission of war crimes and crimes against humanity.[107] The Court therefore decided that the Prosecution failed to provide reasonable grounds to believe that there was a *dolus specialis*. The warrant of arrest for Al Bashir was thus not issued on the base of suspicion of genocide.

The Court decided to issue a warrant of arrest for different reasons, the most pertinent is "the forcible transfer as a crime against humanity within the meaning of article 7(1)(d) of the Statute".[108]

1.2.The Appeal and its Consequences

The Prosecution decided to file an appeal against the decision of the 4th of March 2009.

[103] ibid. para. 142.
[104] ibid. para.143; Bosnian Genocide Case para. 190; ICTY, *The Prosecutor v. Jelisic*, Case No. IT-98-33-T, Judgment, paras. 562 and 578 (2 August 2001).
[105] Al Bashir Case para.145
[106] ibid. para.202.
[107] ibid. para.204.
[108] p.92, vii.

What is particularly interesting is that the decision taken by the pre-trial Chamber I was reversed by the Appeals Chamber of the ICC on the basis that the decision to not issue a warrant of arrest based on genocide must be assessed again, as an erroneous standard of proof had been used by the Court: the Pre-Trial Chamber should not require a level of proof that would be required for the confirmation of charges or for conviction.[109]

The Prosecution argued that the forcible displacement of members of the targeted groups is included in the acts within the count of genocide.[110] The ICC assumes that "the underlying acts of genocide by inflicting bodily or mental harm (…) are identical to the underlying acts of crimes against humanity (…)".[111] It considers that the legal characterisation of such acts as crimes against humanity or genocide depend on three elements:

1. The specific contextual elements
2. The requirement that the victims belonged to a targeted group (in case of genocide)
3. The different *mens rea*

The Court acknowledges that there are reasonable grounds to believe that hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of forcible transfer by the Government of Sudan's forces.[112]

Paragraph 30 mentions that "The Chamber is therefore satisfied that there are reasonable grounds to believe that acts of rape, torture and forcible displacement were committed against members of the targeted ethnic groups. Accordingly, the Chamber finds that there are reasonable grounds to believe that the material element of the crime of genocide by causing serious bodily or mental harm, as provided for in article 6(b) of the Statute, is fulfilled."[113] It also adds that the mental element is fulfilled as in can be inferred from the factual circumstances.

[109] ICC Appeals Chamber, The Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-OA, Judgement on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Al Bashir", para. 30 (3 February 2010).
[110] ICC Pre-trial Chamber I, The Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, para. 26 (12 July 2010) (hereinafter Al Bashir II).
[111] ibid. para.27.
[112] ibid. para. 29 (iii).
[113] ibid. para. 30.

Further on, the Court continues its reasoning and adds again that "that one of the reasonable conclusions that can be drawn is that the acts of contamination of water pumps and forcible transfer coupled by resettlement by member of other tribes, were committed in furtherance of the genocidal policy, and that the conditions of life inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the physical destruction of a part of those ethnic groups".[114] The most important element to notice is that in its paragraph 40, the Chamber addresses that the factual circumstances (such as the forcible transfer) lead to group conditions of life calculated to bring about the group's physical destruction.

The findings of the first judgement, not impacted by the decision of the Appeals Chamber, are however not affected by the 2010 decision.

So even if the ICC in its 2009 judgement seems to criminalize ethnic cleansing more under the crime of persecution or the crime of deportation or forcible transfer -which are both crimes against humanity[115]- it seems that the reliance of the ICC on a 'pattern of acts' instead of a sum of individually analysed acts, lets emerge the notion of indirect perpetration.[116] This also permits to move away from the intent of individual perpetrators and from the focus of individual cases.

Based on the differences between genocide and crimes against humanity, it can be argued that the only one difference between genocide and ethnic cleansing is the intent.[117]

2. Other Pending cases

In the Palestinian situation there could also be important decisions being taken. Researchers and NGO's claim that there is an ethnic cleansing and genocide occurring in Palestine[118]

While the Prosecution submitted two applicants of warrants of arrest on the 20 of May 2024. The Pre-trial Chamber I issued on the 24 of November 2024 two warrants of arrest: one for Benjamin Netanyahu and one for Yoav Gallant. They issued those warrants for crimes against

[114] ibid. para. 38
[115] Sirkin (n 43).
[116] Vajda (n 33).
[117] Sirkin (n 43).
[118] See e.g. I. PAPPÉ, *The Ehtnic Cleansing of Palestine*, Oneworld Publications, London, 2006; Amnesty International report: '*You Feel Like You Are Subhuman': Israel's Genocide Against Palestinians in Gaza,* 5 December 2024.

humanity and war crimes but unfortunately, those warrants are classified as 'secret'. They will thus not be discussed furthermore in this research but must be kept in mind.[119]

The ICC is also currently investigating the situation in Myanmar, but no further acts were taken at the moment. But as the case is pending in front of the ICJ, it interesting to keep it in mind and to follow this up.

IV. Comparison

The following points will be addressed in the comparison: the definition of ethnic cleansing (1.), the use of the term (2.), regarding their scope of intervention, the difference between state and individual responsibility (3.) and finally the qualification as ethnic cleansing as crime against humanity (4.) or genocide (5.).

1. Definition of Ethnic Cleansing

A first element to be held in comparison is the way in which each Court defines ethnic cleansing.

Both Courts do define ethnic cleansing as a practice consisting of "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area".[120] While the ICC quotes the ICJ, the ICJ refers to the Interim Report by the Commission of Experts (see part I).

Both Courts thus address the notion in the same way.

2. The Use of the Term 'Ethnic Cleansing'

The Courts are clear that ethnic cleansing in not a legally defined and does not englobe any legal significance or weight.

Both Courts struggle to make a clear distinction between ethnic cleansing and genocide: there is no clear indication when acts of ethnic cleansing amounts to genocide.[121] This has resulted in a way for countries to be able to use that distinction as way to deny the atrocity of their acts.

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[119] Press Release ICC, *Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant*, 21 November 2024, <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges> accessed 18 May 2025.
[120] Al Bashir I, para. 143; Bosnian Genocide Case para. 188.
[121] Greenawalt (n 51).

As illustrated by Serbia in the Bosnian Genocide case, the focus is put on the legal discussion, to counter the accusations of genocide, thus shifting the discussion from the facts and acts to the complexities of legal characterization.[122]

Another main problem is that even the Courts use the term without even defining it clearly. It is used in a "know it when you see it" manner but as seen above, it is not written in a clear legal text, and that the legal doctrine does not have a unanimous way of defining it.[123] That lacune makes it difficult for the Courts to establish whether or not acts of ethnic cleansing constitutes acts on its own and a crime of its own, if it is included per se under the crimes against humanity or if it amounts to genocide.

3. Between State and Individual Responsibility

The main similarities between the two courts are their permanency and their international scope. The core difference between the jurisdiction of the ICJ and the ICC is that the ICJ is competent for disputes between states[124] whereas the ICC is competent over persons for the most serious crimes of international concern.[125]

This difference in jurisdiction has an impact on their way of handling their legal questions.

The Bosnian Genocide Case, even if it has a few flaws as mentioned in its analyse, still bears a lot of importance as it is the landmark in the recognition of state responsibility for genocide under the Genocide Convention.[126] However, the means and methods of the Court to assess the case blurs the difference in nature between the criminal responsibility of individual perpetrators and the responsibility of the state for its participation in genocide. The ICJ tried to look for the mental element through the lens of State responsibility. But as addressed in the first part when discussing the difference between *dolus specialis* at the individual level and the international context, can a State have a mental element? In practice we should look for a plan or policy instead of a "mental element".[127] Otherwise, the Court would have to consider that a single individual committed one of the acts with a genocidal specific intent. As the Genocide

[122] ibid.
[123] Meghan M Garrity, '"Ethnic Cleansing": An Analysis of Conceptual and Empirical Ambiguity' (2023) 138 Political Science Quarterly 469.
[124] United Nation Charter.
[125] Art. 1 Rome Statute.
[126] Seibert-Fohr (n 61).
[127] William A Schabas, 'Whither Genocide? The International Court of Justice Finally Pronounces' (2007) 9 Journal of Genocide Research 183.

Convention is silent about a policy element, it has led to the conclusion that it is not an element of the crime. However, as argued by Shabas, the Element of Crimes of the Rome Statute do mention that "the [genocidal] conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction".[128]

So, ironically, the efforts of the International Court of Justice to align the standards of state responsibility for genocide with the standards of individual criminal responsibility may have made things more difficult than necessary. The obligation under the Genocide Convention goes beyond crimes and attribution: states should be obliged to refrain from any kind of involvement in genocide.

The Croatian case was a possibility to refine its decision of 2007 and goes further and beyond its reasoning, maybe more from a human rights perspective[129], but unfortunately, the ICJ did only rooted its jurisprudence of 2007 and did not use its chance to sharpen its way of addressing the case.

The roles of the ICC and the ICJ are therefore normally not competing but complementary: they seek to render justice against here, genocide, but by different means. Proceedings in front of the ICJ permits to have a more macro-perspective that criminal courts are not capable to attain. The ICJ, by developing a threshold that is so high that it can only covers the most serious acts of states and needs a very high standard of proof, that is difficult to attain.[130]

With the ICJ using more of a method used in international criminal law, it would have seem logical that the ICC, while judging kind of the same facts, would use a similar method for its analysis of the acts in Soudan, were the allegations were similar than in the Bosnian case.

However, when looking at the reason of the pretrial chambre I in the Al-Bashir case, it seems that the ICC did deviate from the reasoning of the ICJ by using another method to assess individual responsibility.

[128] ICC, Elements of Crime, RC/9/11, 2010.
[129] Seibert-Fohr (n 61).
[130] ibid.

4. Ethnic Cleansing as a Crime Against Humanity

The ICJ, not being competent in the cases analysed for other crimes than genocide, does not qualify the acts of ethnic cleansing in any other way as by the negative: ethnic cleansing does not amount *per se* to genocide.

The ICC however, in its first judgement regarding the warrant of arrest of Al Bashir, does mention that ethnic cleansing usually amounts to the crime against humanity of persecution. It does not give any indication regarding the basis of this affirmation. This assessment is not taken up in the second decision.

It is Deportation or forcible transfer of population is considered as a crime against humanity, based on article 7 of the Rome Statute. This is defined by the second Alinea of the article as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law". However, ethnic cleansing is more distinctive than a forced population transfer as it represents an escalation: the transfer is entirely based on ethnic criteria.[131] It therefore rather amounts to persecution, that includes the characteristic of targeting a specific group.

Rotberg considers that ethnic cleansing is more of an expression or a description of different criminal behaviour instead than a single category of crime per se.[132] That is why acts of ethnic cleansing are part of war crimes or crimes against humanity: there is not "a crime of ethnic cleansing".

Article 7(2)(a) states that "Attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack".

However, limiting ethnic cleansing to war crimes or crimes against humanity, in opposition with "genocide", seems undermining the importance of the genocide aspect. As underlined by Greenawalt, "almost any conceivable case of genocide will also involve the commission of

[131] Walling (n 9).
[132] Rotberg (n 60).

crimes against humanity and perhaps other offenses for which international law assigns individual criminal responsibility".[133]

5. Ethnic Cleansing as Genocide?

The conclusion regarding the method of the ICJ is clear. As outlined by Steinfeld, "in the context of ethnic cleansing, it would seem to be difficult, if not impossible, for any state to be held legally responsible for acts of genocide according to the Court's interpretation of the Convention".[134]

Another point of comparison between the two Courts is that they both address that the targeted group of genocide must have particular positive characteristics (national, ethnic, racial or religious). Negative genocide is thus clearly excluded. Both the ICC and the ICJ refer to the drafters of the Convention and their close attention to the "positive identification of groups with specific distinguishing well-established, some said immutable, characteristics".[135]

Even if not taking any decision on the merits, the ICC seems more open to link ethnic cleansing with genocide, as proven by the decision of the Appeals Chambers regarding the decision of the pre-trial Chamber I regarding Al Bashir. The reliance of the ICC on a "pattern of acts" permits to address the global picture instead of focusing on different individual acts that should all include the subjective and the objective element. However, it will take a bit of time to await the decision as Al Bashir has still not been arrested.

V. Towards an Enlargement of the Concept of Genocide that Includes Ethnic Cleansing

The courts have struggled to interpret and qualify ethnic cleansing. In regard will all that has been said above, the enlargement of the concept of genocide that includes ethnic cleansing seems a solution. This part will justify the rationale for such an interpretation (1.), the explanation of the knowledge-based approach (2.), the judicial benefits of such an approach (3.) and finally a more interdisciplinary approach to demonstrate the sociological importance of such an approach (4.).

[133] Greenawalt (n 51).
[134] Steinfeld (n 32).
[135] ICC Appeals Chamber, para.135; Bosnian Genocide Case, para. 194; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ. Reports 1951,* p.23.

1. Rationale of Such an Interpretation

Regarding everything that has been said above, how do we account for the significant differences in the levels of destruction, namely that in one case we can speak of ethnic cleansing and the other case of genocide?[136]

Some consider that there are key differences between ethnic cleansing and genocide. The first difference is with regard to territory. In their eyes, ethnic cleansing leads to a possibility to find a new homeland, whereas genocide would lead to a space of nihilism and death.[137] Murder in cases of genocide would have as objective to end the group itself, whereas murderous cleansing would only be used as a tool to aim at expelling the surviving population from its territory.[138]

A second element that is advanced is a certain mortality rate. Ethnic cleansing is less deadly than genocide.[139] Even if the doctrine often talks about a certain threshold, the "quantity" of the impact is left to the interpretation of the Courts. However, as analysed by Blum the frequency and ratio of the use of the terms genocide and ethnic cleansing by the UN and human rights organizations show no relationship between death tolls and the scale of atrocity. It is therefore up to the Court to assess whether the certain threshold is attained. It must just be able to make abstraction of the wording used by the other actors to qualify the situations it has to judged, as those qualifications are not founded on any rationality.

The most important element is of course the question of genocidal intent. How is it justifiable regarding the existing law and case-law to assess that acts of ethnic cleansing must fall within the ambit of genocide as understood under the Genocide Convention?

The intent of ethnic cleansing would be to drive out a population whereas that of genocide is to destroy it. Making a difference between the two erases the fact that genocidal acts have both intents: it involves the intentional destruction of a substantial part of an ethnic group, the specific intent required to prove genocide, and the intent to terrorise a population into flight or forced deportation.[140]

[136] Bergen and others (n 36).
[137] ibid.
[138] Walling (n 9).
[139] Bergen and others (n 36).
[140] Blum and others (n 3).

The ICJ lack to assess that ethnic cleansing causes permanent destruction.[141] They base their reasoning on the mere words "intent to destroy" and by making having a strict interpretation of the physical or mental destruction. However, as pointed out by Greenwalt and others, when looking at the drafting behind the last element that can define genocide -the forced transfer of children-, it shows that this includes a broader concept of destruction than the one that the courts are applying.[142]

Finally, by just going back to the roots of the notion of genocide, genocide is a denial of the right of existence of entire human groups. Transferring people, rendering a territory homogenous, … is per definition denying their existence.

2. Knowledge-Based Approach

Some consider that ethnic cleansing cannot equate with genocide even if it can be its precursor and that it can involve 'genocidal acts'.[143] However, ethnic cleansers are well aware that there is a permanent effect after having removed or forced to flee part (or whole) of a population.

Based thereon, as proposed by Greenwalt, a knowledge-based approach is a manner to put the focus on "the destructive result of genocidal acts instead of the specific reasons that move particular individuals to perform such acts".[144] The point of this approach is to restructure genocidal intent and to lower the mental threshold.

This approach permits to acknowledge the destruction of the group's social cohesion.[145] It is even arguable that it would acknowledge the destruction of the ties with a certain territory.

3. Judicial Benefits

There are almost no meaningful distinctions in terms of the legal consequences of characterising a crime as genocide rather than as a crime against humanity.[146] There is one crucial difference: the ICJ is competent for the dispute between State parties, even if there is no consent of both.[147] Limiting ethnic cleansing as a crime against humanity and not genocide, is withdrawing every specificity linked to the crime of genocide from an act that is almost the

[141] Sirkin (n 43).
[142] Greenawalt (n 51).
[143] Walling (n 9).
[144] Alexander KA Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 Columbia Law Review 2259.
[145] Vajda (n 33).
[146] Schabas (n 127).
[147] Blum and others (n 3).

same as genocide. Moreover, the Genocide Convention imposes a duty to prevent, in contrast with the duty to punish that only permits action after the atrocities take place.[148] The same goes for the incitement to commit the crime: while inciting someone to commit a crime of humanity does not generate criminal responsibility, genocide does.[149]

Regarding proof, it lowers the standard of proof to a more attainable level: instead of looking that every individual perpetrator selects their victims based on their group identity, selection can be viewed in the general context in which the victims are targeted: as advanced by Greenawalt, "knowledge of the criteria for selection should be enough to extend liability."[150]

Of course such a knowledge-based approach put together with the words "in whole or in part" of the genocide definition, would open the qualification of genocide to various situations: hateful murdering of a small group of two or three people because of their ethnicity for example could amount to genocide since the perpetrator acted "knowing" that the consequence of his intentions amount to destroying a part of the group. However, that problem does also emerge with the strict purpose standard as it is possible for a perpetrator to clearly want to destroy a miniscule part of a group.[151] It is however clear from the ILC that it must be a substantial part of a particular group.[152] As proposed by Greenawalt, as culpability would be based on the knowledge of the destructive effects, it makes sense that the threshold regarding the "substantial part of a group" would be set higher: the perpetrators of the prosecution must be aware that their actions would pose a serious threat to the future survival of the (segment of the) group.[153]

Secondly, based on article IX of the Genocide Convention, the International Court of Justice has automatic jurisdiction over disputes involving state parties to the Genocide Convention, regarding the interpretation, application of fulfilment of the Convention. That includes also the possibility for the judge to find the State responsible. Whereas it needs consent of both states to assess crimes against humanity, as there is no customary rule or treaty that confers such jurisdiction to the ICJ.[154]

[148] Article VIII, IX Genocide Convention.
[149] Art. 25 Rome Statute.
[150] Greenawalt (n 144).
[151] ibid.
[152] Report of the International Law Commission on the Work of Its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 87, UN Doc. A/51/10 (1996)
[153] Greenawalt (n 144).
[154] Sirkin (n 43).

Thirdly, using a knowledge-based approach helps to address the problems of subordinate actors or a lack of clarity of goals of destruction.

4. Sociological Importance

Law is necessary to ensure the working of society. As law regulates how we work today, it is important that it is accessible to everyone.

Therefore, another crucial aspect to consider is a more sociological one. Ethnic cleansing has itself acquired a "rhetorical power" of its own.[155] even if genocide is interpreted by individuals in different ways, everyone has some sense of its meaning. Genocide still resonates as the crimes of crimes. Defining and judging a situation as genocide permits to categorize the atrocity and to be remembered in history.[156]

The overlapping over ethnic cleansing and genocide in the public sphere, it being by traditional media or individuals, is not fortuitous: acts of ethnic cleansing are often confused with genocidal acts. Is that confusion maybe not the fruit of a lack of clarity, or would I dare say, a lack of sense? As advanced by Blum, would the use of the term genocide in an earlier step regarding the situations of Bosnia, Kosovo, Rwanda or even Darfur have permitted an earlier reaction of the international community and avoided thousands of deaths? The role of prevention of the Genocide Convention seems somewhat difficult to apply.

For that reason, the wording used by governments is of key importance when it is about responsibility to deal with the horror and belittle or exaggerate the brutality of same events.[157] The use of 'genocide', 'ethnic cleansing' or 'population transfer' does not engage the same implications.

Taking the knowledge-based approach permits to get out of the complicated, for a lot of people illogic, reasoning of courts. By blurring the discourse by decisions that do not make sense for the large public, it makes justice inaccessible, disconnected of reality. In a world where the separation of powers and the importance and the legitimacy of the judiciary is put into question, it is the more important to be able to be audible, to be able to address in a clear way the law.

[155] Walling (n 9).
[156] Greenawalt (n 51).
[157] Walling (n 9).

Judiciary is submitted to the will of States, but it must be bold to adapt its vision to the reality of today.

There is always a fear of diluting to much a term: that is what is called the dilution metaphor.[158] This theory argues that opening the door to too many situations, it would "dilute" the meaning and the power of the term. However, there is no real reason why genocide should be limited to only a few very special cases.[159] It is rather a chance to open the field of such studies to englobe more situations and includes all those well-known or even forgotten genocides.

Conclusion

Defining the term "ethnic cleansing" is no minor matter: between the declarations of the UN organs, the lack of legal clarity and the assessment of the International Courts, no unanimous definition is anchored.

The use of ethnic cleansing by the ICJ and the ICC does not make it any easier. At the moment, their jurisprudence is not enough developed to obtain conclusive answers. While the ICJ is clear that ethnic cleansing does not (automatically) amounts to genocide, it has not yet got the occasion and power to define under which crimes States could be held accountable for acts of ethnic cleansing. The ICC seems more open to have a less narrow approach than the ICJ but as no decision on the merits still has been taken regarding situations that could address ethnic cleansing, it remains to be seen what the future holds.

While waiting for such decisions, a few critics may emerge to eventually convince the Courts to have a broader approach. Because is it really necessary to distinguish between cases in which perpetrators intend to destroy a protected group, either wholly or in part, and cases that may have similar consequences but lack such intent?[160] When looking at some national and internationals situations currently ongoing, such as in Myanmar, Ukraine, Palestine etc. there is a necessity of opening the definition of genocide to more modern challenges instead as a concept that is mostly used as a reminder of the Holocaust.[161] Especially as research argues

[158] Alexander Laban Hinton, 'Critical Genocide Studies' (2012) 7 Genocide Studies and Prevention 4.
[159] ibid.
[160] Greenawalt (n 51).
[161] Vajda (n 33).

that ethnic cleansing "bleaches the atrocities of genocide and its continuing use undermines the prevention of genocide".[162]

Some consider that adding ethnic cleansing as a specific crime may be a solution. This was not addressed in this paper but can for sure be considered in future research.

In any case, the conclusion is the same: acts of ethnic cleansing must not be tolerated and even if considered as not amounting to genocide, it should be an indicator that the risk of genocide is real and that the mechanisms there to prevent genocide must be activated : the main objective stays to prevent any groups' uprooting or destruction.

[162] Kirby-Mclemore (n 3).

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