

PERSECUTION AS A CRIME AGAINST HUMANITY IN THE CONTEXT OF THE NAGORNO-KARABAKH CONFLICT

Gurgen Petrossian*

TABLE OF CONTENTS

I. INTRODUCTION	43
II. HISTORICAL CONTEXT SURROUNDING THE CRIME OF PERSECUTION.....	45
A. THE CRIME OF PERSECUTION BEFORE WWII	47
B. THE CRIME OF PERSECUTION AFTER WWII	52
III. THE CRIME OF PERSECUTION	60
A. GENERAL PRINCIPLES.....	61
B. ELEMENTS OF CRIME.....	64
1. SEVERELY DEPRIVING ONE OR MORE PERSONS OF FUNDAMENTAL RIGHTS, CONTRARY TO INTERNATIONAL LAW.....	64
2. TARGETING SUCH PERSON OR PERSONS BY REASON OF THE IDENTITY OF A GROUP OR COLLECTIVITY, OR TARGETING THE GROUP OR COLLECTIVITY AS SUCH	65
3. SUCH TARGETING WAS BASED ON POLITICAL, RACIAL, NATIONAL, ETHNIC, CULTURAL, RELIGIOUS, GENDER AS DEFINED IN ARTICLE 7, PARAGRAPH 3, OF THE STATUTE, OR OTHER GROUNDS THAT ARE UNIVERSALLY RECOGNIZED AS IMPERMISSIBLE UNDER INTERNATIONAL LAW.....	66
4. THE CONDUCT WAS COMMITTED IN CONNECTION WITH ANY ACT REFERRED TO IN ARTICLE 7, PARAGRAPH 1, OF THE STATUTE OR ANY CRIME WITHIN THE JURISDICTION OF THE COURT.....	67
5. THE CONDUCT WAS COMMITTED AS PART OF A WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST A CIVILIAN POPULATION.	68
6. THE PERPETRATOR KNEW THAT THE CONDUCT WAS PART OF OR INTENDED THE CONDUCT TO BE PART OF A WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST A CIVILIAN POPULATION.....	70

* Senior Officer for International Criminal Law at the International Nuremberg Principles Academy, Lecturer at the Friedrich-Alexander Erlangen-Nürnberg University, Chair of the German-Armenian Lawyers' Association. The Author thanks *Kiran Mohandas Menon* for his support in finalizing this article.

IV. THE CRIME OF PERSECUTION AGAINST ARMENIANS IN RELATION TO NAGORNO-KARABAKH CONFLICT	70
A. CONTEXT OF DISCRIMINATION AND VIOLENCE AGAINST THE ARMENIANS	74
1. ARMENIANS.....	74
2. DISCRIMINATION AGAINST ARMENIANS IN AZERBAIJAN...	75
B. JURISDICTION UNDER THE ROME STATUTE	82
1. TERRITORIAL AND TEMPORAL SCOPES	83
2. DEPORTATION AS CRIMES AGAINST HUMANITY	86
3. PERSECUTION ON GROUNDS OF ETHNICITY AND/OR RELIGION.....	89
4. OTHER INHUMANE ACTS	90
5. CONTEXTUAL ELEMENTS OF CRIMES AGAINST HUMANITY	93
V. POSSIBLE PROCEEDINGS BEFORE THE INTERNATIONAL CRIMINAL COURT	94
A. COMPLEMENTARITY.....	96
B. GRAVITY	97
C. INTERESTS OF JUSTICE.....	98
VI. CONCLUSION	99

I. INTRODUCTION

By the end of September 2023, over 100,000 Armenians residing in Nagorno-Karabakh were forcibly displaced from their ancestral homeland, where they had lived for centuries.¹ This displacement is attributed to Azerbaijan's longstanding state policy of fostering animosity and discrimination against the Armenian population in Nagorno-Karabakh, actions that potentially constitute persecution under Article 7(1)(h) of the Rome Statute. On November 14, 2023, the Republic of Armenia ratified the Rome Statute,¹ thereby extending the jurisdiction of the International Criminal Court not only to crimes committed within Armenia's territory but also to ongoing offenses connected to the Nagorno-

¹ See Armenia and Karabagh: The Struggle for Unity 73-103 (Christopher J. Walker ed., 1991).

¹ See Press Release, Int'l Crim. Ct., Armenia joins the ICC Rome Statute (Nov. 17, 2023) (on file with author).

Karabakh conflict, as will be explained in this article,² as it will be explained in this article. This ratification will facilitate the prosecution of crimes such as deportation and persecution of Armenians forced to relocate to Armenia, thereby enabling jurisdiction over these ongoing offenses.³

Persecution, as defined by established jurisprudence and Article 7(2)(h) of the Rome Statute, refers to the intentional and severe deprivation of fundamental rights contrary to international law based on the identity of a group or collective.⁴ For over three decades, Azerbaijani authorities have systematically targeted Armenians, employing tactics such as spreading hate speech aimed at dehumanizing Armenians. While physical discrimination against Armenians within Azerbaijan proper was not permanent due to the Armenians in Nagorno-Karabakh living independently, those Armenians who came under Azerbaijani control in any capacity were subject to humiliation, torture, or loss of life. The persistent persecution of Armenians has a historical connection to the Armenian genocide and the underlying ideology of Pan-Turkism, which perceived Armenians as an impediment to the geographic unity of Turkic populations.⁵

This article will elaborate on the historical, political, and legal foundations that have driven and sustained such persecution against the Armenian population in the region. It is organized into four sections. The initial section will explore the historical background surrounding the concept of persecution and its evolution as a crime as developed by the jurisprudence of the International Military Tribunal. The second section will analyze the elements of persecution as outlined in the Rome Statute. Subsequently, the third section will investigate empirical evidence concerning discrimination and state-sponsored policies of hatred within the context of the Nagorno-Karabakh conflict, resulting in deportation. Finally, the fourth section will focus on applying these

² Dr. Gurgen Petrossian, *Armenia as the 124th Member to the Rome Statute*, OpinioJuris Blog (Sept. 22, 2023), <https://opiniojuris.org/2023/09/22/armenia-as-the-124th-member-to-the-rome-statute/>.

³ Cf. Prosecutor v. Bangladesh, ICC-RoC46(3)-01/18-37, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ¶ 76 (Sept. 6, 2018) (positing that the Court may have jurisdiction under Article 12(2)(a) of the Rome Statute for crimes against humanity of persecution for cross-border transfers).

⁴ Prosecutor v. Du [Ko Tadi], Case. No. IT-94-I-T, Opinion and Judgment, ¶ 694 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

⁵ See David Babayan, *The Artsakh Problem and the Ideology of Pan-Turkism*, 12 21st Century 2, 76-111 (2011).

defined concepts to the current scenario and to the proceedings before the International Criminal Court.

II. HISTORICAL CONTEXT SURROUNDING THE CRIME OF PERSECUTION

The evolution of the crimes of persecution and genocide, respectively, is closely intertwined with the evolution of the crime of genocide. This connection stems from the fact that genocide always involves a special intention to destroy a specific group of people based on discriminatory grounds. Throughout history, numerous genocides have occurred,⁶ targeting identifiable groups due to individuals' membership in those groups. However, according to Article 2 of the Genocide Convention, genocide specifically entails the intent to destroy, in whole or in part, a racial, national, religious, or ethnic group. In contrast, the crime of persecution, as a crime against humanity, does not require specific intent to destroy, making its elements broader as long as the chapeau elements of crimes against humanity are satisfied.

Persecution, as a crime, is a relatively modern concept closely associated with discrimination. Although both involve the mistreatment or unjust treatment of individuals or groups, they differ in scope and severity. Discrimination embraces unfair treatment or bias against individuals or groups.⁷ In contrast, persecution involves the systematic mistreatment or targeting of individuals or groups based on their identity, beliefs, or associations, often with the intent to suppress, intimidate, or eliminate them. It typically encompasses more severe and prolonged forms of discrimination, including acts of violence.⁸ While discrimination may serve as a precursor to persecution,⁹ the

⁶ Cf. Convention on the Prevention and Punishment of the Crime of Genocide, pmbl., Dec. 9, 1948, 78 U.N.T.S. 277.

⁷ *Discrimination*, Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/discrimination> (last visited Apr. 7, 2024).

⁸ See, e.g., Council Directive 2004/83/EC, on Minimum Standards for the Qualification and Status of Third-Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12, ch. I, art. 9(2)(b), on legal, administrative, police, and/or judicial measures that are in themselves discriminatory and constitute acts of persecution.

⁹ 2 Guénaél Mettraux, *International Crimes Law and Practice* 664 (2020); Beatriz Manz, *Refugees of a Hidden War: The Aftermath of Counterinsurgency in Guatemala* 191 (1987).

latter represents a heightened and amplified level of injustice and oppression.

Across history and geographies, many nations, groups, individuals and identities have experienced discrimination and persecution. The biblical tale of Cain and Abel¹⁰ stands as among the inaugural portrayals of murder and persecution, stemming from jealousy and resentment provoked by God's favoritism towards Abel's offering.¹¹ During ancient times and the Middle Ages, persecution often arose from religious discrimination intertwined with political, social, economic, and cultural factors, leading to the targeting of Jews, Christians, Muslims, and other groups. For example, traditional polytheistic priests and temples faced persecution during Akhenaten's rule in 14th-century BCE Egypt,¹² as did Jews under Antiochus IV Epiphanes in the 2nd-century BCE Seleucid Empire,¹³ in Roman Empire¹⁴ and the Middle Ages.¹⁵ Christians experienced persecution in the Roman¹⁶ and Persian Empires¹⁷ during the 1st to 4th centuries CE, and Pagans faced oppression after Christianity's spread across Europe.¹⁸ Iconoclasm emerged in the Byzantine Empire during the 8th and 9th centuries.¹⁹ Muslims and Jews encountered persecution during the Crusades²⁰ and the Inquisitions,²¹ and witch hunts targeted

¹⁰ *Genesis* 4:8 (New Int'l Version).

¹¹ Samuel B. Schieffelin, *The Foundations of History, a Series of First Things* 62-63 (3rd ed. 1863).

¹² 66 T.E. Weckozicz & H.P. Liebel-Weckowicz, *A History of Great Ideas in Abnormal Psychology* 241 (G.E. Stelmach & P.A. Vroon eds., 1990).

¹³ Chris Seeman, *Antiochus' Persecution in Josephus' War*, 1 Alpha 11-14 (2017); David Whitten Smith & Elizabeth Geraldine Burr, *Understanding World Religions: A Road Map for Justice and Peace* 60 (2007).

¹⁴ Steven Leonard Jacobs, *A Short History of Judaism and the Jewish People* 115 (2024).

¹⁵ *Id.* at 123.

¹⁶ Elizabeth DePalma Digeser, *Breaking the Apocalyptic Frame, in Heirs of Roman Persecution: Studies on a Christian and Para-Christian Discourse in Late Antiquity* (Éric Fournier & Wendy Mayer eds., 2020).

¹⁷ Kyle Smith, *Constantine and the Captive Christians of Persia* 4-12 (2016).

¹⁸ Ramsay MacMullen, *Christianity and Paganism in the Fourth to Eighth Centuries* 1-31 (1997).

¹⁹ Mike Himphreys, "First Iconoclasm, ca. 700-780," in *A Companion to Byzantine Iconoclasm* 325 (Mike Himphreys ed., 2021).

²⁰ David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* 93 (2015).

²¹ Mauricio Drelichman, Jordi Vidal-Robert & Hans-Joachim Voth, "The Long-Run Effects of Religious Persecution: Evidence from the Spanish Inquisition," 118 *Proc. Nat'l Acad. Sci.* 33, 1-9 (2021).

primarily women accused of witchcraft across Europe and Colonial America.²²

During periods dominated by colonialism and industrialization, political motives became increasingly influential in driving persecution compared to earlier periods. This resulted in a rise in colonial ambition, power struggles, and ideological conflict. This phenomenon shaped the intricacies and patterns of oppression during these eras. The persecution of Indigenous peoples across various continents, the transatlantic slave trade, oppression in the Ottoman Empire, political persecution in the Soviet Union, and the atrocities committed in Nazi Germany and other parts of the world all illustrate how hundreds of thousands of people have suffered throughout human history because of their beliefs and identities.

A. THE CRIME OF PERSECUTION BEFORE WWII

Throughout human history, alongside instances of persecution as previously highlighted, measures have also been taken to protect certain circles of individuals and groups at risk of persecution or discrimination. Before being officially recognized as a crime of persecution in the modern sense, different nations addressed the concept of equality in various ways within their legal systems. The examples, while not explicitly anti-discrimination as understood today, included provisions aimed at safeguarding vulnerable groups such as slaves, widows, and orphans, hinting at fostering a degree of equality within certain contexts. It is crucial to interpret these provisions considering the historical context and hierarchical, stratified social and cultural norms prevalent at those times. For instance, Laws 209 and 210 of the Code of Hammurabi from 18th-century BCE state:

“If a man strike a free-born woman so that she lose her unborn child, he shall pay ten shekels for her loss.”
“If the woman dies, his daughter shall be put to death.”

Although these laws may not initially appear to advocate for equality, they do assign a specific value to the harm suffered by a woman. This suggests a level of recognition regarding the rights and worth of individuals, regardless of gender.

²² Brian Pavlac, *Witch Hunts in the Western World* (2009).

Additionally, another form of minimal protection and acknowledgment was provided for slaves under Law 199 of the Code of Hammurabi.

"If he put out the eye of a man's slave, or break the bone of a man's slave, he shall pay one-half of its value."

The Edicts of Ashoka, dating back to the 3rd century BCE in ancient India, provide a notable example of religious tolerance and anti-discrimination.²³ The seventh edict states:

*"The beloved of the gods, king Piyadasi, desires that all religions should reside everywhere, for all of them desire self-control and purity of heart. But people have various desires and various passions, and they may practice all of what they should or only a part of it. But one who receives great gifts yet is lacking in self-control, purity of heart, gratitude and firm devotion, such a person is mean."*²⁴

Within the framework of anti-discrimination norms, it's important to highlight the Constitutio Antoniniana, promulgated by Emperor Caracalla in 212 CE during the Roman Empire. Through this decree, the Emperor instituted a uniform citizenship status for people from various cultural backgrounds spanning three continents regardless of their origin.²⁵ While it eliminated the previous distinctions between Civies (Roman citizens) and Peregrini (non-citizens), historians suggest that it subsequently contributed to social discrimination within society as it ultimately deepened social discrimination by transforming citizenship into a fiscal tool that widened economic disparities and reinforced cultural hierarchies within the empire.²⁶

The Magna Carta of 1215 provides another means of safeguarding individuals from discrimination, as seen in clauses 39

²³ Cf. Robert Yelle, *"Was Aśoka really a secularist avant-la-lettre? Ancient Indian pluralism and toleration in historical perspective,"* 56 *Modern Asian Studies* 750-751 (2022).

²⁴ Ven Dhammika, *The Edicts of King Asoka* 21 (1993).

²⁵ Cédric Brélaz, *"Experiencing Roman Citizenship in the Greek East during the Second Century CE: Local Contexts for a Global Phenomenon,"* in *Roman and Local Citizenship in the Long Second Century CE 277* (Myles Lavan & Clifford Ando eds., 2021).

²⁶ Charles Whittaker, *Rome and Its Frontiers* 206 (2002); Wolf Liebeschuetz, *"Citizen Status and Law in the Roman Empire and the Visigothic Kingdom,"* in *Strategies of Distinction* 134 (Helmut Reimitz & Walter Pohl eds., 2023).

and 40, which granted people the right to restrain the authority of the government.²⁷

“Clause 39: No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.”

“Clause 40: To no one will we sell, to no one will we refuse or delay, right or justice.”

The Bill of Rights, particularly Section 1 of the Fourteenth Amendment to the U.S. Constitution enacted in 1868, contains a similar provision interpreted by the U.S. Supreme Court as prohibiting government discrimination, applying to diverse forms of discrimination such as racial segregation, gender discrimination, and discrimination based on other protected characteristics.²⁸

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

In addition to being addressed through national regulations historically, protections for minorities and anti-discrimination norms also began to be indirectly implied in international treaties. For instance, the Treaty of Westphalia from 1648 laid down principles of sovereignty and affirmed states' rights to determine their own laws regarding religious freedoms under the principle of *cuius regio, eius religio*, thereby indirectly safeguarding minority rights.²⁹ On a bilateral level, the protection of minorities, aimed at providing them with security and safeguarding their rights, was

²⁷ Maleiha Malik, *"Magna Carta, Rule of Law and Religious Diversity,"* in *Magna Carta, Religion and the Rule of Law* 254 (Robin Griffith-Jones & Mark Hill eds., 2015).

²⁸ *Brown v. Board of Education*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

²⁹ Tore Lindholm, *"Philosophical and Religious Justification of Freedom of Religion or Belief,"* in *Facilitating Freedom of Religion or Belief: A Deskbook* 29 (Tore Lindholm, Cole Durham, & Bahia Tahzib-Lie eds., 2004).

addressed in various treaties. For instance, Article VII of the Treaty of Küçük Kaynarca from 1774 obligated the Ottoman Empire to the Russian Empire to ensure continuous protection for the Christian religion and its churches.³⁰ The safeguarding of minority rights within the Ottoman Empire was further addressed in subsequent treaties, such as the Treaty of Adrianople of 1829, the Treaty of San Stefano of 1878, and the Treaty of Berlin of 1878. These agreements imposed additional obligations on the Ottoman Empire to provide increased rights and protections to minority groups.³¹

During World War I, the Allied powers of the Entente denounced the atrocities inflicted upon the Armenian population by the Ottoman Empire as crimes against humanity and civilization, holding individual members of the Ottoman government personally responsible.³² Following the war, the Allies initiated preparations to fulfill their declaration. At the second plenary session of the Paris Peace Conference on January 25, 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, commonly referred to as the "Commission of Fifteen," was formed with the objective of investigating and documenting the violations of international law committed by Germany and its allies during the war.³³ The commission's report outlined a catalog of crimes, which also encompassed offenses perpetrated by the Ottoman Empire against its own population. However, due to divergent perspectives within the commission regarding the legal classification of crimes against

³⁰ The Sublime Porte promises to protect constantly the Christian religion and its churches, and it also allows the Ministers of the Imperial Court of Russia to make, upon all occasions, representations, as well in favour of the new church at Constantinople, of which mention will be made in Article XIV, as on behalf of its officiating ministers, promising to take such representations into due consideration, as being made by a confidential functionary of a neighboring and sincerely friendly Power, Treaty of Peace (Küçük Kaynarca), 1774, VII, Great Britain, 72 Parliamentary Papers, 171-179 (1854); see also similar protection in the Article XIII of the Treaty of Karlowitz from 1699, Treaty of Bucharest from 1812.

³¹ Geoff Gilbert, *"Religio-nationalist Minorities and the Development of Minority Rights Law,"* 25 Rev. Int'l Stud. 397-400 (1999).

³² France, Great Britain, and Russian, Joint Declaration, US Nat'l Archives Record Group 59, 867.4016/67 (May 28, 1915) cited in Paul Bartrop, *Modern Genocide* 164 (2019).

³³ *"Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties"* 14 Am. J. Int'l L., 1/2 95 (Jan. - Apr., 1920); David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I* 13 Fordham Int'l L.J. 1 87 (1989).

humanity, the report failed to arrive at a definitive conclusion but mentioned that the Central Powers and their allies have violated not only the established laws and customs of war, but also the elementary laws of humanity.³⁴ The Istanbul trials targeting perpetrators within the Ottoman Empire primarily adhered to the national criminal code, devoid of explicit acknowledgment of the nature of crimes against humanity.³⁵ Among the charges leveled against the perpetrators of the massacres in the Ottoman Empire during the Istanbul trials was one based on Article 56 of the Imperial Ottoman Penal Code, which states:

*“Whoever dares to make the people of Ottoman dominions arm themselves against each other, to instigate or incite them to engage in mutual slaughter, or to bring about acts of rapine, pillage, devastation of the country, or homicide in various places, is, if the disorder takes effect entirely or if a commencement of the disorder has been made, likewise put to death.”*³⁶

This provision in the Ottoman Empire's penal system prohibited inciting individuals within its dominions to engage in mutual slaughter, pillage, devastation, or homicide, encompassing actions that could result in persecution of any group within the empire. Although this article did not explicitly reference minorities or offer direct protection for them, its broad interpretation allows for the understanding that instigating any group within the Ottoman Empire could lead to criminal prosecution, indirectly safeguarding minorities residing there. Thus, it corresponds with the concept of persecution by forbidding actions that could inflict harm or violence on any population within the empire.

The trials in Istanbul from 1919 to 1920, were declared null and void by the Grand National Assembly upon assuming political power in 1922. Subsequently, the Assembly abolished the occupation of the Allied powers.³⁷ Nevertheless, those trials constituted the initial stages in the establishment and conception of the legal framework for crimes against humanity.

³⁴ “*Comm’n on Responsibility of the Authors of the War*”, 14 Am. J. Int’l L. 123 (1920).

³⁵ Gurgen Petrossian, *Staatenverantwortlichkeit für Völkermord* 70-83 (2019); Vahagn Dadarian & Taner Akcam, *Judgment at Istanbul* 59 (2011).

³⁶ John Strachey Bucknill, Haig Apisoghom Utidjian, *The Imperial Ottoman Penal Code* (1913).

³⁷ Gurgen Petrossian, *Staatenverantwortlichkeit für Völkermord* 63 (2019).

B. THE CRIME OF PERSECUTION AFTER WWII

During World War II, the Allied powers began calling for the accountability of Nazi perpetrators for the atrocities committed against their own population, which went well beyond traditional war crimes. To address this, they established the United Nations War Crimes Commission, which was tasked with collecting evidence for the prosecution of criminals, in the name of mankind.³⁸ During the Legal Committee's meetings, it was proposed to extend the discussion to encompass the crimes perpetrated by Nazis against German Jews and Catholics, in addition to other atrocities rooted in religious or racial prejudice. These proposals underscored the significance of upholding principles of laws of humanity,³⁹ previously not accepted after World War I. During the drafting of the Charter for the Nuremberg Trials at the London Conference, the term "crimes against humanity" was introduced, linking these offenses to the context of war, where persecutions based on political, racial, or religious grounds were a separate offence as part of crimes against humanity.⁴⁰

At the International Military Tribunal, the indictment charged the defendants with a "Common Plan or Conspiracy" spanning 25 years, describing the Nazi Party as the central tool for coordinating the aims of the conspiracy, which include consolidation of power, use of terror, suppression of trade unions, attacks on Christian institutions, persecution of Jews, and regimentation of youth were deliberate steps toward fulfilling this common plan. The Nazi government's persecution of Jews was meticulously detailed during the Tribunal's proceedings, depicting a consistent and systematic cruelty on an immense scale. Ohlendorf, a key figure in the RSHA⁴¹ and Einsatzgruppen, testified to the methods employed in the extermination of Jews, including the use of firing squads.⁴² The anti-Jewish policy was deeply ingrained in Nazi ideology, evident in the Party Program's

³⁸ Cherif Bassiouni, *Crimes Against Humanity* 72-73 (2011).

³⁹ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* 175 (1948).

⁴⁰ Robert Dubler & Matthew Kalyk, *Crimes Against Humanity in the 21st Century: Law, Practice, and Threats to International Peace and Security* 47 (2018); Cherif Bassiouni, *Crimes Against Humanity* 121-122 (2011).

⁴¹ Reichssicherheitshauptamt (Reich Security Main Office).

⁴² Trial of the Major War Criminals Before the International Military Tribunal, Judgment, Oct. 1, 1946 at 491.

declaration and its dissemination through publications like “Der Stürmer”. As the Nazis consolidated power, persecution against Jews intensified, resulting in the implementation of discriminatory laws and violent attacks such as pogroms.⁴³ As World War II progressed, this persecution escalated into a systematic campaign of extermination known as the “final solution,” particularly in occupied territories.⁴⁴ The Einsatzgruppen, supported by the military, were responsible for carrying out mass killings of Jews in areas controlled by Germany. Notably, concentration camps like Auschwitz emerged as hubs for mass extermination, where millions of Jews were murdered in gas chambers and subjected to forced labor. Testimonies from figures like Hoess, the commandant of Auschwitz, shed light on the horrific methods used in these extermination processes.⁴⁵ Additionally, atrocities included inhumane experiments on camp inmates and the ruthless exploitation of victims' bodies and possessions. The persecution extended beyond Germany's borders, with German authorities orchestrating the deportation and extermination of Jews in countries under their influence. Estimates from figures like Adolf Eichmann suggest that around 6 million Jews fell victim to Nazi policies during this dark chapter of history.⁴⁶

The tribunal concluded that prior to the onset of World War II, Germany witnessed extensive political assassinations and persecution, notably targeting political dissidents and Jewish individuals. While these actions were not definitively classified as crimes against humanity by the Tribunal due to their indirect connection with specific offenses, they nevertheless reflected the regime's escalating brutality. With the outbreak of war in 1939, this brutality intensified, leading to a notable surge in war crimes and crimes against humanity, particularly linked to aggressive military operations.⁴⁷ As a result, the tribunal determined that of the 24 defendants, the following 16 key Nazi figures were culpable for

⁴³ Gesetz zur Wiederherstellung des Berufsbeamtentums 1933 (Law for the Restoration of the Professional Civil Service) excluding Jews from public office, Gesetz zum Schutz des deutschen Blutes und der deutschen Ehre 1935 (Nuremberg Racial Law), stripping Jews of citizenship and prohibited intermarriage, Kristallnacht pogrom of 9–10 November 1938 marking a transition from legal discrimination to state-sponsored terror.

⁴⁴ Trial of the Major War Criminals Before the International Military Tribunal, Judgment, Oct. 1, 1946 at 493.

⁴⁵ *Id.* at 495.

⁴⁶ *Id.* at 496.

⁴⁷ *Id.* at 498.

crimes against humanity, specifically stemming from the crime of persecution:

- *Hermann Göring*: His involvement in the Nazi regime's persecution was extensive and undeniable, encompassing the use of slave labor and implementation of anti-Jewish laws.⁴⁸
- *Rudolf Hess*: While evidence suggested Rudolf Hess might have been aware of crimes in the East and endorsed discriminatory laws, the tribunal did not find enough evidence to convict him of participation.⁴⁹
- *Joachim von Ribbentrop*: He significantly contributed to the execution of Hitler's "final solution" by expediting the deportation of Jews to the East through diplomatic channels and participating in conferences advocating for their extermination or internment in concentration camps.⁵⁰
- *Ernst Kaltenbrunner*: During Kaltenbrunner's tenure as head of the RSHA, he oversaw and facilitated the continuation of persecution through methods such as torture, confinement in concentration camps, and the implementation of the "final solution" of the Jewish question, with approximately 6 million Jews murdered under his supervision.⁵¹
- *Alfred Rosenberg*: Rosenberg, while acknowledging and occasionally objecting to the brutal treatment of Eastern peoples, actively participated in stripping territories of resources, implementing segregation policies against Jews, and overseeing the deportation and exploitation of laborers from the East, contributing to the persecution and suffering inflicted upon the population. Additionally, he helped to formulate the policies of Germanization, exploitation, forced labor, and extermination of Jews and opponents of Nazi rule, and he set up the administration which carried them out.⁵²
- *Hans Frank*: Frank, as Governor General of occupied Polish territory, played a significant role in the persecution of Jews through the implementation of discriminatory laws, establishment of ghettos, and the systematic extermination

⁴⁸ *Id.* at 527.

⁴⁹ *Id.* at 529.

⁵⁰ *Id.* at 532.

⁵¹ *Id.* at 538.

⁵² *Id.* at 540.

of millions of Jews, while also overseeing policies of economic exploitation and deportation of slave laborers.⁵³

- *Wilhelm Frick*: Frick, deeply involved in the administration of anti-Semitic laws, including the Nuremberg Decrees, actively enforced policies aimed at eliminating Jews from German life and economy, extending these measures to occupied territories, and overseeing the deportation and extermination of Jews, while also turning a blind eye to atrocities committed in concentration camps and facilitating Germanization efforts in various regions.⁵⁴
- *Julius Streicher*: Streicher, known as "Jew-Baiter Number One," actively promoted anti-Semitic propaganda through his publication, "Der Stürmer", advocating for the persecution and extermination of Jews both within Germany and internationally.⁵⁵ "Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination Streicher's relentless incitement to murder and extermination."⁵⁶ Although vehemently denying awareness of mass Jewish executions, evidence indicated that he was well-informed about the progression of the Holocaust, receiving reports on atrocities and death tolls from Jewish publications.⁵⁷
- *Walther Funk*: In his various roles, Funk actively participated in economic discrimination against Jews, facilitated the exploitation of occupied territories, and indirectly contributed to the utilization of concentration camp labor, implicating him in the persecution perpetrated by the Nazi regime.⁵⁸
- *Baldur Von Schirach*: Von Schirach actively participated in the deportation of Jews from Vienna to the East, where he knew they faced extermination, and was informed of and complicit in the implementation of Nazi policies aimed at persecuting Jews and exploiting forced labor.⁵⁹
- *Fritz Sauckel*: Sauckel, appointed Plenipotentiary General for the Utilization of Labor by Hitler, orchestrated a

⁵³ *Id.* at 543.

⁵⁴ *Id.* at 546.

⁵⁵ *Id.* at 547.

⁵⁶ *Id.* at 548.

⁵⁷ *Id.* at 549.

⁵⁸ *Id.* at 551.

⁵⁹ *Id.* at 565.

program of forced labor involving the deportation and exploitation of over 5,000,000 individuals, demonstrating overall responsibility for the systematic persecution and suffering inflicted upon them.⁶⁰

- *Alfred Jodl*: Jodl, despite moral objections, facilitated the implementation of orders such as the Commando Order and directives for ruthless actions in occupied territories, demonstrating his involvement in policies contributing to persecution and brutality during World War II.⁶¹
- *Arthur Seyss-Inquart*: Seyss-Inquart, as Deputy Governor General of Poland and Reich Commissioner for the Netherlands, actively advocated and implemented harsh occupation policies, including the persecution and deportation of Jews, suppression of opposition through terrorism, and forced labor programs, making him complicit in War Crimes and Crimes against Humanity during the Nazi occupation.⁶²
- *Albert Speer*: Speer, although not directly administratively responsible for the slave labor program, actively advocated and participated in its implementation, demanding labor from occupied territories, being aware of the coercion involved, and establishing mechanisms that, while somewhat less inhumane than deportation, still contributed to the exploitation of forced labor, thus implicating him in War Crimes and Crimes against Humanity.⁶³
- *Konstantin von Neurath*: von Neurath, as Reich Protector for Bohemia and Moravia, von Neurath implemented Nazi policies of repression, exploitation, and anti-Semitism.⁶⁴
- *Martin Bormann*: As Hitler's deputy and head of the Nazi Party Chancellery, Bormann wielded extensive authority over laws, directives, and Party agencies, actively participating in the implementation of ruthless policies, including the persecution of Jews and, exploitation of forced labor.⁶⁵

In the subsequent Nuremberg Trials, also known as the Nuremberg Military Tribunals (NMT), which followed the

⁶⁰ *Id.* at 567.

⁶¹ *Id.* at 570.

⁶² *Id.* at 576.

⁶³ *Id.* at 578.

⁶⁴ *Id.* at 582.

⁶⁵ *Id.* at 586.

International Military Tribunal and encompassed twelve additional proceedings held before United States constituted tribunals between 1946 and 1949 under Control Council Law No. 10, the crime of persecution was examined in various contexts.⁶⁶ They included the systematic persecution under the Nazi regime encompassing Jews, Roma, and other ethnic groups for extermination or forced labor, as well as political dissidents, activists, and resistance members based on their beliefs. Additionally, religious persecution targeted Jews primarily, subjected to discrimination and extermination due to anti-Semitic policies. Persecution extended to marginalized groups like homosexuals, disabled individuals, Jehovah's Witnesses, and others deemed undesirable by the Nazi regime.

After the Nuremberg Trials and considering the impact of two world wars, the international community incorporated the term "persecution" into the Convention Relating to the Status of Refugees in 1951. This was done recognizing that persecution is a fundamental reason why individuals flee their home countries.⁶⁷ Article 1 A (2) of the Refugee Convention defines a refugee as someone who, due to a well-founded fear of being persecuted for reasons such as race, religion, nationality, membership in a particular social group, or political opinion, is outside their country of nationality and unable to receive protection from that country. Given the distinct mandates of international criminal law and refugee law, with the former focused on criminal retribution and the latter on addressing human rights violations, it's important to note that mass human rights abuses can also constitute international crimes.⁶⁸ This underscores the linkages and interconnectedness between the two fields at this stage. The determination of persecution in a refugee context does not automatically imply a

⁶⁶ *Justice Case* (USA v. Altstötter et al.), *Medical Case* (USA v. Karl Brandt et al.), and *Ministries Case* (USA v. von Weizsäcker et al.), explored the crime of persecution in diverse settings, such as the judicial system, medical experimentation, and governmental policy, thereby expanding the legal interpretation of crimes against humanity beyond the direct acts of killing to encompass systematic oppression and discrimination.

⁶⁷ Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 44-70* (Andreas Zimmerman, Terje Einarsen, Franziska Hermann ed., 2024).

⁶⁸ See 15 YAO LI, *Persecution in International Criminal Law and International Refugee Law* in ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 301-302 (2020); cf. Prosecutor v. Tadić, Case No. IT-94-I-T, Judgment, 694 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

corresponding crime against humanity, as additional elements are needed for the latter, but when a crime of persecution is established, it can often align with persecution within the refugee definition.⁶⁹ Beyond the Refugee Convention, numerous international human rights instruments established after World War II also address the prohibition of persecution and discrimination, including

- the Universal Declaration of Human Rights,
- the International Covenant on Civil and Political Rights,
- the International Covenant on Economic, Social and Cultural Rights,
- the Convention on the Elimination of All Forms of Racial Discrimination,
- the Convention on the Elimination of All Forms of Discrimination against Women,
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,
- International Convention on the Suppression and Punishment of the Crime of Apartheid
- the Convention on the Rights of the Child,
- the Convention on the Rights of Persons with Disabilities,
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,
- the European Convention on Human Rights,
- the American Convention on Human Rights,
- the African Charter on Human and Peoples' Rights.

The crime of persecution was not widely discussed internationally as a criminal matter until the dissolution of the Soviet Union. It only gained significant attention within the conflicts of the Former Yugoslavia and Rwanda, where egregious human rights violations occurred. The International Military Tribunal did not extensively analyze the concept of persecution,⁷⁰ prompting newly established *ad hoc* tribunals to delve deeper into its understanding. However, it is noteworthy that during the drafting of the Nuremberg Charter, persecution was not regarded as an independent crime but rather linked to other offenses

⁶⁹ *Id.* at 310.

⁷⁰ ROBERT DUBLER & MATTHEW KALYK, CRIMES AGAINST HUMANITY IN THE 21ST CENTURY: LAW, PRACTICE, AND THREATS TO INTERNATIONAL PEACE AND SECURITY 59 (2018).

committed during World War II.⁷¹ Given the longstanding consideration of anti-discrimination regulations and agreements throughout human history, the utilization of the concept of persecution *stricto sensu* in criminal matters represented a groundbreaking development at the International Military Tribunal. The concept of persecution was also hitherto not known to the major criminal justice systems.⁷²

Observing the evolution of the crime of persecution as a crime against humanity reveals its foundation in intentional discrimination, which results in the violation of an individual's fundamental rights based on particular criteria. This discrimination directly denies individuals their human rights, contravening established international agreements. Persecution is differentiated from institutionalized discrimination by its focus on individual rights violations and the requirement for the discriminatory actions to be part of an organized system and policy. Ultimately, persecution stems from a significant breach of the right to equality that hinders the enjoyment of basic rights. It is possible to conceptualize the hierarchy of discrimination and its various manifestations according to the following levels:

Level 1 - Discrimination: This level encompasses acts of prejudice or bias against individuals or groups based on certain characteristics such as race, religion, ethnicity, gender, sexual orientation, or disability. Discrimination can manifest in various forms, including verbal harassment, social exclusion, unequal treatment, or violence. This type of discrimination is primarily individual and often occurs in isolated instances.

Level 2 - Institutionalized Discrimination: At this level, discriminatory practices or policies become embedded within the structures and institutions of society, such as the legal system, government policies, education, employment, and housing. These discriminatory practices may not necessarily target specific individuals but operate at a systemic level, perpetuating inequalities and disadvantages for certain groups. Institutionalized discrimination frequently stems from long-standing norms and may often be unintentional in nature.

⁷¹ U.N. War Crimes Comm'n, History of the United Nations War Crimes Commission and the Development of the Laws of War 175 (1948).

⁷² M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 396 (2011).

Level 3 - Persecution: Persecution represents the most severe form of discrimination, involving systematic and targeted violations of individual rights based on certain inherent or innate characteristics, such as race, religion, ethnicity, or political beliefs. Persecution requires institutionalization, meaning that discriminatory actions are organized and implemented as part of a broader system or policy within a society or government. This level often involves widespread human rights abuses, including violence, torture, and forced displacement. At the level of persecution, clear intentionality is already evident.

Level 4 - Genocide: Genocide represents the most extreme and inhumane manifestation of persecution. In other words, when persecution reaches the level of deliberate and purposeful actions aimed at annihilating a group or a portion thereof, it can be categorized as genocide.⁷³

Persecution, as evident from a brief historical overview, can manifest in various forms, including murder, sexual violence, assault, theft, and property destruction. As previously discussed, it may also involve other dimensions such as limiting access to certain professions, segregating society, creating ghettos, and perpetrating economic discrimination.⁷⁴ It is important to note that this list is not exhaustive; persecution can take on diverse appearances if done with the requisite discriminatory intent.

III. THE CRIME OF PERSECUTION

Following the onset of conflicts in the former Yugoslavia and Rwanda, the international community opted to draw upon the legacy of Nuremberg to address and punish the atrocities perpetrated within those conflicts. Consequently, the United Nations Security Council established the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). One of the concepts adopted from the International Military Tribunal was the classification of persecution as a crime against humanity.

Article 5 (h) of the ICTY Statute granted the tribunal authority to prosecute individuals accountable for persecution

⁷³ Prosecutor v. Kupreškić et al., Case No IT-95-16-T, Judgment, 636 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).

⁷⁴ See e.g. Carlos Santiago Nino, *The Human Rights Policy of the Argentine Constitutional Government: A Reply*, 11 Yale J for Int'l L. 217-229 (1985).

based on political, racial, and religious grounds⁷⁵ committed within armed conflicts, whether international or internal, and directed against any civilian population. Conversely, Article 3 (h) of the ICTR Statute empowers the tribunal to prosecute those responsible for persecution based on political, racial, and religious grounds when committed as part of a widespread or systematic attack against any civilian population due to national, political, ethnic, racial, or religious grounds. The primary contrast between the statutes lies in the constituent elements of crimes against humanity; one statute regards armed conflict as a prerequisite, while the other does not mention the necessity of armed conflict.

As the *ad hoc* tribunals grappled with cases and interpreted their statutes, the international community engaged in active discussions to establish a universal system for prosecuting international crimes. The goal was to move beyond the limited jurisdictions of the existing international criminal tribunals. In the negotiations concerning the Rome Statute, the foundational document for the International Criminal Court, several outlined aspects were accepted and integrated into the statute. Among these was a clearer and broader scope of the crime of persecution under crimes against humanity. Contrasted with the statutes of the *ad hoc* tribunals, Article 7 (1) (h) of the Rome Statute includes the following concept:

“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”

““Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” Article 7 (2)(g) of the Rome Statute.

A. GENERAL PRINCIPLES

In its initial ruling, the ICTY Trial Chamber in the case of Tadić delineated that the crime of persecution encompasses acts or omissions that are persecutory in nature and based on

⁷⁵ Prosecutor v. Tadić. Case No. IT-94-1-T, Judgment 713 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

discriminatory grounds like race, religion, or politics. These acts must be intended to cause and result in the violation of an individual's fundamental rights.⁷⁶ The interpretation of persecution as a crime against humanity adds the requirement that the act must be carried out with discriminatory intent.⁷⁷ Examples of the accused's actions include attacks on specific areas, the seizure and relocation of civilians to camps, beatings, and killings, all of which infringed upon the fundamental rights of victims based on religious and political discrimination.⁷⁸ Accordingly, persecution involves acts or omissions that (1) discriminate in practice and deny or infringe upon fundamental rights as outlined in international customary or treaty law, and (2) are deliberately carried out with the intention to discriminate based on political, racial, or religious grounds.⁷⁹

One key distinguishing element between the crime of persecution and other forms of crimes against humanity is that persecution necessitates the commission of other crimes with the specific intent of discrimination.⁸⁰ Therefore, it cannot be considered as a standalone crime; rather, it necessitates the presence of other crimes. Additionally, the ICTY has established that the prosecutorial acts outlined in the crime of persecution do not necessarily need to be explicitly prohibited under its statute, and their legality internationally or domestically is inconsequential.⁸¹ However, their gravity should align with the crimes listed within the category of crimes against humanity and be assessed on a case-by-case basis.⁸²

The persecutory acts identified by the *ad hoc* tribunals include such acts, as participation in attacks on civilians, including indiscriminate attacks on cities, towns, and villages, seizure, collection, segregation, and forced transfer of civilians to camps, calling out civilians, beatings, forms of sexual assault, attacks on

⁷⁶ *Id.* at ¶ 715.

⁷⁷ *Id.* at ¶ 716.

⁷⁸ *Id.* at ¶ 717.

⁷⁹ Prosecutor v. Matrić ICTY Case No. IT-95-14-T, Judgement 113 (June 12, 2007); cf. Prosecutor v. Tuta, Stela ICTY Case No. IT-98-34-T, Judgment ¶ 634 (Mar. 31, 2003).

⁸⁰ Prosecutor v. Blaškić ICTY Case No. IT-95-14-A, Judgement 164 (July 29, 2004).

⁸¹ Prosecutor v. Kupreškić et al. Case No. IT-95-16-A, Judgment, ¶ 614 (Jan. 14, 2000).

⁸² Prosecutor v. Krnojelac ICTY Case No. IT-97-25-T, Judgment 435 (Mar. 15, 2002), cf. Prosecutor v. Nahimana et al. ICTR Case No. ICTR-99-52-A, Appeal Judgment ¶ 987 (Nov. 28, 2007).

property that destroy the livelihood of a certain population, destruction or willful damage to religious and cultural buildings, plunder of property, which can be serious due to its magnitude or the value of stolen property, unlawful detention of civilians, infliction of serious bodily and mental harm, withdrawal of voting rights, under specific circumstances,⁸³ “hate speech”.⁸⁴

The legal finding by the ICTR Appeals Chamber concerning hate speech indicates that in extreme circumstances, such as when hate speech is coupled with incitement to commit genocide and is part of a wider campaign of discriminatory acts, it may constitute the crime of persecution. The extreme situation in question involves hate speech that extends beyond verbal attacks, including direct incitement to commit genocide, as well as participation in a broader pattern of discriminatory actions, such as physical violence against individuals and property. This hate speech targets a specific group based on prohibited discriminatory grounds, intensifying its gravity and contributing to an environment of persecution against the targeted group.⁸⁵ In contrast, offensive speech alone typically does not result in convictions for crimes against humanity.

In order to qualify as crimes against humanity, the Elements of Crimes of the International Criminal Court stipulates that six elements must be satisfied within the context of the crime of persecution, namely:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, or gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

⁸³ Prosecutor v. Nahimana et al. ICTR Case No. ICTR-99-52-A, Appeal Judgment ¶ 986 (Nov. 28, 2007).

⁸⁴ Lovell Fernandez, *Religious persecution as a crime against humanity*, in 6:1/2 IJRF 165 (2013); Prosecutor v. Kvočka et al. ICTY Case No. IT-98-30/1-T, Judgment ¶ 185 (Nov. 2, 2001).

⁸⁵ Fausto Pocar, *Persecution as a Crime Under International Criminal Law*, 2 J. Nat'l Sec. L. & Pol'y 260-261 (2010); Prosecutor v. Nahimana et al. ICTR Case No. ICTR-99-52-A, Appeal Judgment ¶ 987 (Nov. 28, 2007).

4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

B. ELEMENTS OF CRIME

*1. SEVERELY DEPRIVING ONE OR MORE PERSONS OF
FUNDAMENTAL RIGHTS, CONTRARY TO INTERNATIONAL LAW*

Article 21 (1)(b) of the Rome Statute mandates that the International Criminal Court shall apply applicable treaties and the principles and rules of international law, including established principles from the international law of armed conflict. While there is ongoing debate about the application of international treaties and their relevance for the Court,⁸⁶ it remains within the Court's discretion to consider these agreements in the context of crimes of persecution and fundamental human rights.⁸⁷ This includes taking into account international agreements that establish the framework for protecting fundamental human rights, as previously mentioned.⁸⁸ Those fundamental rights may include variety of rights, whether derogable or not, such as the right to life, the right not to be subjected to torture or cruel, inhuman, or degrading treatment, freedom of expression, freedom of assembly and association, and the right to private property.⁸⁹ The determination of severe deprivation of rights should be made on a case-by-case basis, considering the cumulative impact of acts.⁹⁰ The requirement that the deprivation of rights must be contrary to international law

⁸⁶ Margaret deGuzman, "Article 21" in Commentary to the Rome Statute ¶ 20-22 (Kai Ambos ed., 2020).

⁸⁷ Colin Flynn, *Is Article 21 of the Rome Statute an Impediment to the Development of Sentencing Principles at the International Development of Sentencing Principles at the International Criminal Court Criminal Court* in 32 Florida Journal of International Law 69-70 (2020).

⁸⁸ Situation in The Republic of Burundi, ICC-01/17-X Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp (Oct. 25 2017), ¶ 132 (Nov. 9 2017).

⁸⁹ *Id.* at ¶ 132.

⁹⁰ Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 992 (July 8, 2019).

means there is no justification for impeding the concerned right.⁹¹ Acts falling under the list of crimes against humanity as defined in Article 7 of the Rome Statute automatically meet the threshold of severity.⁹² In other cases where the acts do not fall under the listed crimes, the Court should assess the impact and severity of the violation of fundamental rights, taking into account the cultural, social, and historical contexts and complexities surrounding the conflict.

2. TARGETING SUCH PERSON OR PERSONS BY REASON OF THE IDENTITY OF A GROUP OR COLLECTIVITY, OR TARGETING THE GROUP OR COLLECTIVITY AS SUCH

The Elements of Crimes elucidate that persecution encompasses both the targeting of individuals due to their group affiliation and the targeting of the group as a whole. Persecution, as defined by the Statute, extends beyond particular groups, necessitating that the group or collectivity and its members are "identifiable," whether through objective criteria or the subjective perceptions of the accused.⁹³ This concept finds support in indications of discriminatory intent in the commission of persecution.⁹⁴

The "group" includes individuals sharing identifiable characteristics, such as ethnicity, nationality, or political affiliation. The "collectivity" expands this notion to include individuals from diverse groups who share common identities, such as ideology, thereby broadening the scope of protected populations under international criminal law. This broader concept of "collectivity" suggests that individuals from various groups can come together based on shared characteristics beyond traditional identifiers, forming a collective identity that transcends specific group boundaries.⁹⁵

⁹¹ *Id.* at ¶ 993.

⁹² *Id.* at ¶ 994; Prosecutor v. Ongwen, Case No. ICC-02/04-01/15 Judgment, ¶ 2845-2849 (Feb. 4, 2021).

⁹³ Valerie Suhr, Rainbow Jurisdiction at the International Criminal Court 196-197 (2022); Prosecutor v. Ongwen, Case No. ICC-02/04-01/15 Judgment, ¶ 2735 (Feb. 4, 2021).

⁹⁴ Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 1010 (July 8, 2019).

⁹⁵ Cf. Markus Wagner, "The ICC and its Jurisdiction - Myths, Misperceptions and Realities" 7 Max Planck UNYB 409, 445 (2003); Situation in The Republic of Burundi, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the

3. SUCH TARGETING WAS BASED ON POLITICAL, RACIAL, NATIONAL, ETHNIC, CULTURAL, RELIGIOUS, GENDER AS DEFINED IN ARTICLE 7, PARAGRAPH 3, OF THE STATUTE, OR OTHER GROUNDS THAT ARE UNIVERSALLY RECOGNIZED AS IMPERMISSIBLE UNDER INTERNATIONAL LAW

To qualify as persecution, it is essential to determine why the perpetrator deprived the victim of fundamental rights, distinguishing personal motives from discriminatory intent. The requirement here is that the targeted individuals, group, or collectivity share a specific identity, such as political, racial, national, ethnic, cultural, religious, or gender identity, or any other ground universally recognized as impermissible under international law. Assessing the identifiability of the group necessitates considering the cultural, political, and social context of the situation, along with the subjective perception of belonging by both the perpetrator and the victim.⁹⁶ Some chambers have argued that victims must be members of the intended persecuted group to constitute persecution, while others have interpreted it more broadly, considering discrimination based on the perpetrator's perception.⁹⁷ The disagreement lies in whether victims mistakenly targeted due to their perceived group membership can be considered to be persecuted. Tribunals such as the ECCC Supreme Court Chamber require victims to actually belong to the targeted group,⁹⁸ while others, like the ICTY, adopt a broad interpretation.⁹⁹ The ICC Statute leans towards the broader interpretation, suggesting that a person need not be part of the group as long as the group itself was targeted.¹⁰⁰ This perspective, which centers on discrimination rooted in perceived group affiliation rather than actual membership, showcases a nuanced comprehension of

Situation in the Republic of Burundi" ICC-01/17-X-9-US-Exp (Oct. 25 2017), ¶ 133 (Nov. 9 2017).

⁹⁶ See ICC, Policy on Gender Persecution ¶ 44 (Dec. 2022).

⁹⁷ Prosecutor v. Duch, 001/18-07-2007/ECCC/SC, Judgment, ¶ 274-275 (Feb. 3, 2010); Prosecutor v. Krnojelac, IT-97-25-A, Judgment, ¶ 185-186 (Sept. 17, 2003).

⁹⁸ Prosecutor v. Duch, 001/18-07-2007/ECCC/SC, Judgment, ¶ 274-275 (Feb. 3, 2010).

⁹⁹ Prosecutor v. Krnojelac, IT-97-25-A, Judgment, ¶ 185-186 (Sept. 17, 2003).

¹⁰⁰ Situation in The Libyan Arab Jamahiriya, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al- Senussi, Case No. ICC-01/11, ¶ 42-65 (Jun. 11, 2011).

persecution. It underscores the perpetrator's intent and the broader ramifications, such as prompting members of the targeted group to vacate the territory, within the context of a systematic or widespread attack.¹⁰¹

An essential component here is the discriminatory intent of the perpetrator to target specific individuals, which should be distinguished from personal motives, such as individualized vendettas.¹⁰² Discriminatory intent is evident when a perpetrator specifically aims to treat a targeted group unequally.¹⁰³ This intent can be shown through the disproportionate use of persecutory conduct against one group. Targeting may be based on beliefs of superiority or inferiority. However, personal motives lacking discriminatory intent do not negate the presence of discriminatory intent in persecutory acts.¹⁰⁴

4. THE CONDUCT WAS COMMITTED IN CONNECTION WITH ANY ACT REFERRED TO IN ARTICLE 7, PARAGRAPH 1, OF THE STATUTE OR ANY CRIME WITHIN THE JURISDICTION OF THE COURT.

As mentioned earlier, persecution is not considered a standalone crime but rather must be linked to other crimes within the jurisdiction of the Court.¹⁰⁵ These crimes may include crimes of war, genocide, or any other listed under crimes against humanity.

¹⁰¹ Robert Dubler, Matthew Kalyk, *Crimes Against Humanity in the 21st Century: Law, Practice, and Threats to International Peace and Security*, 894 (2018); *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment, ¶1011 (Jul. 8, 2019).

¹⁰² *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Judgment, ¶ 887 (Jan. 27, 2014).

¹⁰³ ICC, *Policy on Gender Persecution* ¶ 49 (November 2022).

¹⁰⁴ *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgment, ¶463 (Feb. 3, 2005); Gregor Maučec, “*Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities—the Case for Intersectional Consideration of Mass Atrocities*” 12 *Journal of International Dispute Settlement*, 42, 71-73 (2021).

¹⁰⁵ *Situation in The Republic of Burundi*, ICC-01/17-X Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, ICC-01/17-X-9-US-Exp (Oct. 25 2017), ¶ 131 (Nov. 9 2017).

*5. THE CONDUCT WAS COMMITTED AS PART OF A
WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST A
CIVILIAN POPULATION.*

The crime of persecution must be part of a widespread or systematic attack directed against a civilian population. According to Article 7(3) of the Elements of Crimes of the Rome Statute, such an attack refers to a course of conduct involving multiple acts listed in Article 7(1),¹⁰⁶ committed against any civilian population pursuant to, or in furtherance of, a State or organizational policy.¹⁰⁷ The acts need not constitute a military attack. It is understood that the 'policy to commit such an attack' requires that the State or organization actively promote or encourage such an attack against a civilian population.¹⁰⁸

For the purpose of demonstrating the "multiple commission of acts" under Article 7, only those acts listed in Article 7(1)(a) to (k) of the Rome Statute may be considered. However, acts not included in Article 7(1) can still be relevant for other aspects, such as establishing the nature of the attack or the involvement of a State or organizational policy.¹⁰⁹ To determine who constitutes a civilian, Article 50 of Additional Protocol I to the Geneva Conventions (August 12, 1949) should be referred to. It defines a civilian as any person who does not belong to one of the categories of persons listed in Article 4A (1), (2), (3), and (6) of the Third Convention and Article 43 of the Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.¹¹⁰ The presence of non-civilians within a civilian population does not negate its civilian character, and various factors are considered to determine if an attack was primarily directed towards civilians¹¹¹. These factors include the means and methods used, the status and number of victims, the discriminatory nature of the attack, and compliance with the laws of war.¹¹²

¹⁰⁶ Prosecutor v. Bemba, Case No. ICC-01/05-01/08 Judgment, ¶¶ 149-151 (Mar. 21, 2016).

¹⁰⁷ *Id.* at ¶¶ 152-156.

¹⁰⁸ *Id.* at ¶¶ 157-161.

¹⁰⁹ Prosecutor v. Bemba, Case No. ICC-02/05-01/08 Judgment, ¶ 151 (Mar. 21, 2016).

¹¹⁰ *Id.* at ¶ 152.

¹¹¹ Prosecutor v. Stakić, Case No. IT-97-24/T, Judgment, ¶ 627 (Jul. 31, 2003); Prosecutor v. Katanga, Case No. ICC-01/04-01/07 Judgment ¶ 1104 (Mar. 7, 2014).

¹¹² Prosecutor v. Bemba, Case No. ICC-01/05-01/08 Judgment ¶ 154-155 (Mar. 21, 2016).

Another element that is necessary to fulfill in the context of the crimes against humanity is the State or organizational policy, which gives a distinct purpose to an organized body of people.¹¹³ The notion of "policy" in crimes against humanity does not require formalization; instead, it can be deduced from several factors indicating a systematic assault on a civilian population, such as

- i) the planning or direction of the attack;
- ii) a recurring pattern of violence, such as repeated actions following the same sequence;
- iii) the utilization of public or private resources to advance the policy;
- iv) the participation of State or organizational forces in committing crimes;
- v) statements, instructions, or documentation from the State or organization endorsing or encouraging crimes;
- vi) an underlying motivation; and
- vii) preparations or coordinated mobilization orchestrated by the State or organization.¹¹⁴

Evidence must establish that the conduct was executed in accordance with the State or organizational policy, demonstrating a connection between the perpetrators' actions and the overarching policy.¹¹⁵ For an attack to be considered a crime against humanity, it must be either widespread or systematic in nature. In this context, "widespread" denotes an extensive assault affecting numerous individuals, typically demonstrating seriousness and collective execution, with the evaluation based on both quantitative measures and overall impact.¹¹⁶ The term "systematic" in the context of crimes against humanity indicates a methodical and organized approach to acts of violence, suggesting that they are not random occurrences. It entails the presence of consistent patterns of criminal conduct, characterized by deliberate repetition of similar acts aimed at achieving specific effects on a civilian population. When assessing the systematic nature of an attack, factors such as the repetition of identical or similar acts, consistent modus

¹¹³ *Id.* at ¶ 158.

¹¹⁴ *Id.* at ¶ 160; Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 674 (Jul. 8, 2019).

¹¹⁵ Prosecutor v. Bemba, Case No. ICC-01/05-01/08 Judgment ¶ 161 (Mar. 21, 2016).

¹¹⁶ Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 691 (Jul. 8, 2019)

operandi, and uniform treatment of victims across a broad geographic area, are considered.¹¹⁷

The single acts, such as a crime of persecution under crimes against humanity, must be integral components of the widespread or systematic attack against a civilian population. This connection is established through an objective assessment of various factors including the characteristics, aims, nature, and consequences of the acts, with consideration given to their temporal and geographical proximity and the core of the attack.¹¹⁸

6. THE PERPETRATOR KNEW THAT THE CONDUCT WAS PART OF OR INTENDED THE CONDUCT TO BE PART OF A WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST A CIVILIAN POPULATION.

The perpetrator must be aware that an attack directed at civilian population is taking place and that their actions are part of that attack. However, this knowledge does not require awareness of all the characteristics of the attack nor the precise details of the plan or policy behind it. Instead, it is sufficient that the perpetrator knew or intended for their actions to be part of a widespread or systematic attack on a civilian population.¹¹⁹

IV. THE CRIME OF PERSECUTION AGAINST ARMENIANS IN RELATION TO NAGORNO-KARABAKH CONFLICT

Following the First World War and the Armenian Genocide, the collapse of the Russian and Ottoman Empires led to the emergence of three democratic republics in the Transcaucasian region in May 1918: Armenia, Azerbaijan, and Georgia. Meanwhile, Nagorno-Karabakh, historically inhabited by Armenians but falling within the borders of Azerbaijan, became a focal point of contention. Armenians in Nagorno-Karabakh convened assemblies in 1918, declaring it an independent administrative and political entity and expressing their desire to reunite with Armenia. This declaration was met with resistance from Azerbaijan, supported by the Turkish military. The situation escalated with Turkish military intervention in Baku and the

¹¹⁷ *Id.* at ¶ 692-693.

¹¹⁸ *Id.* at ¶ 696; Prosecutor v. Bemba, Case No. ICC-02/05-01/08 Judgment ¶ 165 (Mar. 21, 2016).

¹¹⁹ *Id.* at ¶ 167.

subsequent massacres of Armenians,¹²⁰ reminiscent of the Armenian Genocide of 1915.¹²¹ Despite initial Armenian resistance and hopes for reunification with Armenia, the withdrawal of Turkish forces temporarily relieved tensions.¹²²

The brief period of autonomy swiftly came to an end when the Red Army quickly took control of the regions. This communist party, through administrative reshuffling, assigned Nagorno-Karabakh to the Azerbaijan Socialist Soviet Republic.¹²³ A decree issued on July 6, 1921, granted the predominantly¹²⁴ Christian Armenian populace in Nagorno-Karabakh a heightened level of self-governance¹²⁵. In 1923, the Soviet government of Azerbaijan SSR declared Nagorno-Karabakh an Autonomous Oblast (NKAO).¹²⁶ Throughout the Soviet era, tensions simmered between the Armenian and Azerbaijani populations in Nagorno-Karabakh. Armenians in NKAO felt marginalized and discriminated against by Azerbaijani authorities, who pursued policies aimed at diluting Armenian influence and identity in the region.¹²⁷ On this basis, Armenians often appealed to Moscow for help in reunification with the Armenian SSR,¹²⁸ despite facing restrictions and infrastructure discrimination from Baku's central authorities, particularly with regard to access to gas, water and electricity. Armenian protests continued into the 1960s and 1970s.¹²⁹ In the late 1980s, Armenians launched a petition

¹²⁰ Robert Evan Ellis, *The Fall of Communist and Ethnic Violence* 62 (1995).

¹²¹ Nikolay Hovhannisyan, *The Karabakh Problem* 21 (2004).

¹²² Christian Mkhitarian, "*Historische Darstellung in Berg-Karabach*" in *Berg-Karabach* 53-57 (Gurgen Petrossian, Sarah Babaian, Arlette Zakarian eds., 2022).

¹²³ See more in *id.* at 61-62.

¹²⁴ According to the 1923 census, 94.4% of the 157,800 residents were Armenians, see Dov Lynch, *Engaging Eurasia's Separatist States* 36-37 (2004).

¹²⁵ Claude Mutaftian, "*The History & Geopolitics of Nagorno-Karabagh*" in *The Caucasian Knot* 136-137 (Levon Chorbajian, Patrick Donabedian, Claude Mutaftian eds., 1994).

¹²⁶ Svante Cornell, *Small Nations and Great Powers* 60 (2001).

¹²⁷ Emmanuel Karagiannis, *Energy and Security in the Caucasus* (2013) 137; Sarah Babaian, "*Das völkerrechtliche Selbstbestimmungsrecht Berg-Karabachs*" in *Berg-Karabach* 99-100 (Gurgen Petrossian, Sarah Babaian, Arlette Zakarian eds., 2021) 99-100.

¹²⁸ Sarah Babaian, "*Das völkerrechtliche Selbstbestimmungsrecht Berg-Karabachs*" in *Berg-Karabach* (Gurgen Petrossian, Sarah Babaian, Arlette Zakarian eds., 2021) 98; Gurgen Petrossian, "*Sezessionsrecht als Form des Selbstbestimmungsrechts*" in *Jahrbuch der Öffentliche Sicherheit* 821 (Martin Möllers and Robert van Ooyen eds., 2021).

¹²⁹ Michael Kembeck, Sargis Ghazaryan, "*Timeline 1918-2011*", in *Europe's Next Avoidable War* 24 (Michael Kembeck, Sargis Ghazaryan 2011); Sarah

campaign for reunification with Armenia, which officially began in 1987.

The emergence of the “Karabakh Movement” in Armenia further strengthened the push to integrate the NKAO into the Armenian SSR and ultimately contributed to a myriad of factors that led to the dissolution of the USSR. Armenian demands and activism led to pogroms in Sumgait on February 27, 1988 and in Kirovabad in November 1989. This persecution extended to Baku, where Armenians were specifically targeted, compelling them to flee Azerbaijan.¹³⁰ The SSRs' independence from the USSR and the NKAO's 1991¹³¹ proclamation as the Republic of Nagorno-Karabakh sparked a war that ended with the Bishkek Protocol ceasefire.¹³² The ceasefire established in 1994 was breached for the first time in April 2016, leading to numerous war crimes committed against both Armenian soldiers and civilians.¹³³ Four years later, Azerbaijan initiated a large-scale war against Nagorno-Karabakh, leading to the withdrawal of Armenians from various regions within Nagorno-Karabakh and the recurrence of war crimes against Armenian soldiers and civilians.¹³⁴ Following the trilateral

Babaian, “*Das völkerrechtliche Selbstbestimmungsrecht Berg-Karabachs*“ in *Berg-Karabach 98* (Gurgen Petrossian, Sarah Babaian, Arlette Zakarian eds., 2021).

¹³⁰ Kirril Shields, Nikki Marczak, *Genocide Perspectives* 188 (2020).

¹³¹ See the analysis of the legal framework of the secession from USSR in Gurgen Petrossian, “*Sezessionsrecht als Form des Selbstbestimmungsrechts*“ in *Jahrbuch der Öffentliche Sicherheit* 824-828 (Martin Möllers and Robert van Ooyen eds., 2021).

¹³² Bishkek Protocol, U.N. Peacemaker (May 5, 1994).

¹³³ Human Rights Defender (Ombudsman), *Interim Public Report Atrocities Committed by Azerbaijani Military Forces Against the Civilian Population of the Nagorno Karabakh Republic and Servicemen of the Nagorno Karabakh Defence Army On 2-5 April 2016* (Apr. 2016), https://www.eoi.at/wp-content/uploads/2018/09/Interim_Public_Report_NKR-Omb_FINAL-1.pdf (last visited May 3, 2024).

¹³⁴ Human Rights Watch, *Azerbaijan: Unlawful Strikes in Nagorno-Karabakh* (Dec. 11, 2020), <https://www.hrw.org/news/2020/12/11/azerbaijan-unlawful-strikes-nagorno-karabakh> (last visited May 3, 2024); Human Rights Watch, *Azerbaijan: Armenian Prisoners of War Badly Mistreated* (Dec. 2, 2020), <https://www.hrw.org/news/2020/12/02/azerbaijan-armenian-prisoners-war-badly-mistreated> (last visited May 3, 2024); Democracy Today: *44-Day War: War Crimes and International Law* (2021), <https://www.wfm-igp.org/wp-content/uploads/Democracy-Today-War-Crimes-and-International-Law.pdf> (last visited May 3, 2024); Baroness Cox, *Continuing Impunity: Azerbaijani-Turkish offensives against Armenians in Nagorno Karabakh* (Apr. 21, 2021), <https://www.hart-uk.org/baroness-cox-publishes-report-continuing-impunity-azerbaijani-turkish-offensives-against-armenians-in-nagorno-karabakh/> (last visited May 3, 2024); Ad Hoc Public Report *Responsibility of Azerbaijan for*

agreement between Russia, Armenia, and Azerbaijan on 10 November 2020, a fragile and unstable ceasefire was established — one that Azerbaijan has repeatedly violated. Since 2021, Azerbaijan has not only violated the ceasefire in Nagorno-Karabakh but also initiated aggression against the Republic of Armenia. Escalations in May 2021¹³⁵ and September 2022¹³⁶ led to Azerbaijan imposing a blockade on Nagorno-Karabakh, imposing famine from December 2022 to September 2023.¹³⁷ In September, Azerbaijan launched another attack on Nagorno-Karabakh, resulting in the exodus of the entire Armenian population from the region.¹³⁸

From a historical standpoint, the emergence and accentuation of ideologies such as Pan-Turkism¹³⁹ worsened these tensions, prompting efforts to consolidate territory and assert dominance over ethnically diverse areas like Nagorno-Karabakh. Additionally, the collapse of the Ottoman Empire and the subsequent Armenian Genocide from 1915 to 1923 significantly influenced the region's dynamics, with the Armenian population in Nagorno-Karabakh striving to establish autonomy and safeguard their cultural identity in light of past persecution. The arbitrary

Torture and Inhuman Treatment of Armenian Captives: Evidence-Based Analysis (Sept. 2021),

<https://ombuds.am/images/files/8f33e8ccaac978faac7f4cf10442f835.pdf> (last visited May 3, 2024); Open Society Foundation Armenia, Human Rights Violations during the 44-Day War in Artsakh (2022), https://www.osf.am/wp-content/uploads/2022/06/Fact-Finding-Report_FINAL_web.pdf (last visited May 3, 2024).

¹³⁵ Vahe Sarukhanyan, *May 2021: Azerbaijani Troops Occupied 3,200 Hectares of Sovereign Republic of Armenia Territory*, Hetq (May 6, 2021), <https://hetq.am/en/article/144181> (last visited May 3, 2024).

¹³⁶ The Human Rights Defender of the Republic of Armenia: Ad Hoc Public Report on Consequences of Azerbaijani Military Attack on the Republic of Armenia (2022), <https://www.ombuds.am/images/files/fc7d77e1dcd3e0573173dfa7314e6c46.pdf> (last visited May 3, 2024).

¹³⁷ Ronald Suny, *Nagorno-Karabakh blockade crisis: Choking of disputed region is a consequence of war and geopolitics*, The Conversation (Aug. 18, 2023), <https://theconversation.com/nagorno-karabakh-blockade-crisis-choking-of-disputed-region-is-a-consequence-of-war-and-geopolitics-211717> (last visited May 3, 2024).

¹³⁸ Al Jazeera, *Armenia says more than 100,000 people fled Nagorno-Karabakh* (Sep. 30, 2023), <https://www.aljazeera.com/news/2023/9/30/more-than-80-percent-of-nagorno-karabakh-people-have-fled-armenia-govt>, (last visited May 3, 2024).

¹³⁹ Gorgen Petrossian, *Staatenverantwortlichkeit für Völkermord* 121–123 (2019).

border decisions made by Soviet authorities in the early 20th century further heightened tensions, as they neglected to address the historical and demographic complexities of the area.

A. CONTEXT OF DISCRIMINATION AND VIOLENCE AGAINST THE ARMENIANS

1. ARMENIANS

Armenians are a distinct ethnic group indigenous to the Armenian Highlands, characterized by their ancient culture and history, and they communicate and script in their own language and alphabet. The Armenian language is categorized as a distinct branch within the Indo-European language family.¹⁴⁰ The predominant religious affiliation among Armenians is the Armenian Apostolic Church established as far back as the 4th century. In Azerbaijan, where the population is primarily composed of Turkic Azerbaijanis, state policy—reinforced by Turkish denialism¹⁴¹—rejects the notion that Armenians are indigenous to the Armenian Highlands. Instead, it claims that Armenians were relocated to the South Caucasus as part of Russian strategies following their acquisition of the region. Instead, it claims that Armenians were relocated to the South Caucasus as part of Russian strategies following their acquisition of the region."¹⁴² Regarding Nagorno-Karabakh, Azerbaijani authorities assert that the region did not belong to historical Armenia but was instead a part of Caucasian Albania, the predecessor of the Republic of Azerbaijan.¹⁴³ Notably, the manipulation of history played a key

¹⁴⁰ Simon Payaslian, *The History of Armenia* 4–10 (2007).

¹⁴¹ Murat Sofuoglu, *Why Azerbaijanis and Armenians have been fighting for so long*, TRT World (2020), <https://www.trtworld.com/magazine/why-azerbaijanis-and-armenians-have-been-fighting-for-so-long-38163> (last visited May 3, 2024); Armenian Claims and Historical Facts, Ministry of Foreign Affairs of the Republic of Türkiye, 7, <https://www.mfa.gov.tr/data/DISPOLITIKA/ErmeniIddialari/ArmenianClaimsandHistoricalFacts.pdf> (2005) (last visited May 3, 2024).

¹⁴² Amina Nazarli, *Historian: Armenians are not native population of Asian continent*, Azernews (Nov. 6, 2016), <https://www.azernews.az/nation/104479.html> (Sep. 30, 2023) (last visited May 3, 2024); *History of Irevan*, Ministry of Defence of the Republic of Azerbaijan, <https://mod.gov.az/en/the-history-of-iravan-410/> (last visited May 3, 2024).

¹⁴³ “*History of Garabagh*” in Ministry of Defense of the Republic of Azerbaijan, <https://mod.gov.az/en/history-of-karabakh-075/> (last visited May 3, 2024).

role in the genocidal policies of Nazi Germany¹⁴⁴ and Rwanda,¹⁴⁵ where persecuted victims were portrayed as outsiders or implicated in conspiracy theories of other states. Within the Ottoman Empire's context of Pan-Turkism or Pan-Turanism, Armenians were viewed as significant impediments to achieving this objective.¹⁴⁶ Ziya Gökalp, a pioneer of the ideology¹⁴⁷ who was later prosecuted before the Istanbul tribunal, testified in court in 1919 that Azerbaijani Turks had already commenced efforts toward realizing Turan. He emphasized that spreading the Turkish language and embracing Turkish literature would strengthen unity among all Turks.¹⁴⁸ Presently, Azerbaijani policy towards Armenians makes no distinction between those from Armenia, Nagorno-Karabakh or diaspora. It rejects the entirety of Armenian history and culture, asserting that Armenians did not inhabit Armenian regions with the aim of direct territorial bordering with Turkey.¹⁴⁹

2. DISCRIMINATION AGAINST ARMENIANS IN AZERBAIJAN

In its initial report following Azerbaijan's accession to the Council of Europe in 2002, the European Commission against Racism and Intolerance (ECRI) highlighted the prevalent animosity towards Armenians due to the Nagorno-Karabakh conflict. It noted that Armenians living in Azerbaijan often conceal their ethnic identity to avoid discrimination, while hate speech and derogatory remarks against Armenians are commonly observed.¹⁵⁰

In 2006, ECRI raised graver apprehensions about the treatment of Armenians, observing that despite recommendations, discrimination against them escalated, relegating them to a status akin to second-class citizens and the discrimination against Armenians, particularly in accessing public services, alongside inflammatory rhetoric, leads to the denial of basic rights, such as pension allowances and employment opportunities, prompting

¹⁴⁴ Wolfgang Benz, *Holocaust* 16-18 (2014).

¹⁴⁵ Leonhard Bergmann, *Mission und Gewalt*, Kolonialismus 238 (Mihran Dabag, Horst Gründer, Uwe-K. Ketelsen 2004).

¹⁴⁶ Taner Akcam, *Shameful Act* 88 (2007).

¹⁴⁷ Michael Hesemann, *Völkermord an den Armeniern* 118-120 (2015).

¹⁴⁸ See Key Indictment in Guren Petrossian, *Staatenverantwortlichkeit* 74-77, 122 (2019).

¹⁴⁹ Galina M. Yemelianova, *The De Facto State of Nagorno-Karabakh*, 75 *Europa-Asia Stud.* 8, 1354-1356 (2023).

Historical and Geopolitical Perspectives

¹⁵⁰ European Comm'n Against Racism & Intolerance, *First Report on Azerbaijan* ¶ 50-55 (June 28, 2002).

many Armenians to conceal their ethnicity, while Azerbaijani individuals and NGOs aiding Armenians also encounter threats and harassment.¹⁵¹ In 2016 the ECRI notes that an entire population has been raised overtly exposed to the hateful rhetoric by political leaders, educational institutions and media. According to a survey conducted in 2012, 91% of Azerbaijanis considered Armenia as the greatest enemy of Azerbaijan.¹⁵² Furthermore, the report particularly highlighted its dismay over the pardon and release of Ramil Safarov, convicted of murdering an Armenian army officer, by the Azerbaijani government, noting the risk of fostering impunity for perpetrators of serious racist crimes.¹⁵³ The discrimination based on the Ramil Safarov case was later confirmed by the European Court of Human Rights.¹⁵⁴ The court pointed out that the statements of a number of Azerbaijani officials glorifying Ramil Safarov, his actions, and his pardon were particularly concerning and a large majority of officials expressed special support for the fact that the crimes were specifically directed against Armenian soldiers and therefore congratulated Ramil Safarov for his actions, calling him a patriot, a role model, and a hero.¹⁵⁵

In 2023, the ECRI similarly to Committee on the Elimination of Racial Discrimination (CERD)¹⁵⁶ was concerned by the presence of discriminatory language in Azerbaijani school textbooks, particularly targeting Armenians, which could fuel further hostilities among young people.¹⁵⁷ Moreover, ECRI expressed grave concerns, while monitoring the aftermath of the Second Karabakh War and examining video footages, including the inauguration of the Baku Trophy Park in April 2021 depicting Armenian military equipment and personnel in a highly negative

¹⁵¹ European Comm'n Against Racism & Intolerance, *Third Report on Azerbaijan* ¶¶ 106-115 (Dec. 15, 2006); European Comm'n Against Racism & Intolerance, *Fourth Report on Azerbaijan* ¶¶ 98- 101 (Mar. 23, 2011).

¹⁵² European Comm'n Against Racism & Intolerance, *Fifth Report on Azerbaijan*, ¶ 25 (Mar. 17, 2016).

¹⁵³ *Id.* ¶ 38; see also Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Azerbaijan* ¶ 15 (June 10, 2016).

¹⁵⁴ *Minasyan & Makuchyan v. Azerbaijan & Hungary*, App. No.17247/13, ¶¶ 213-221 (Eur. Ct. H.R. May 26, 2020).

¹⁵⁵ *Id.* ¶ 220.

¹⁵⁶ Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Periodic Reports of Azerbaijan* ¶ 34 (Sep. 22, 2022).

¹⁵⁷ European Comm'n Against Racism & Intolerance, *Sixth Report on Azerbaijan* ¶ 13 (Mar. 23, 2023).

light and widespread criticism regarding the aggressive language and frequent use of adversarial narratives, which propagate racist stereotypes and sustain animosities.¹⁵⁸

CERD in its observations from 2022 expressed deep concerns regarding severe human rights violations against Armenian prisoners of war and civilians, such as extrajudicial killings, torture, arbitrary detention, and destruction of civilian infrastructure by the Azerbaijani forces. Additionally, the report highlighted damage to Armenian cultural heritage sites and the propagation of racial hatred and stereotypes against Armenians, both online and by public figures.¹⁵⁹

Although there are numerous ongoing proceedings at the European Court of Human Rights (ECtHR) related to recent events,¹⁶⁰ judgments have already been rendered regarding incidents preceding the Second Nagorno-Karabakh war. In the *Saribekyan, Balayan v. Azerbaijan* case, a civilian was detained after crossing the northeastern Armenian-Azerbaijani border, with Azerbaijani authorities alleging him to be an Armenian spy planning a school attack. On 4 October 2010, the complainant's son was discovered hanged in his cell during detention, initially deemed a suicide by Azerbaijani medical reports. However, upon examination, injuries suggesting violence inflicted during detention were found, resulting in a violation of Article 2 of the European Convention on Human Rights.¹⁶¹ Furthermore, although the court could not definitively determine if the victim was tortured during detention, evidence of pre-death mistreatment was confirmed, constituting a violation of Article 3 of the European Convention on Human Rights (ECHR).¹⁶² In the case of *Badalyan v. Azerbaijan* the complainant disappeared near the northeastern

¹⁵⁸ *Id.* ¶¶ 40, 57; see abuses, torture and mistreatment of Armenians in U.S. Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices: Azerbaijan (2021) 4, 18-19, https://www.state.gov/wp-content/uploads/2022/03/313615_AZERBAIJAN-2021-HUMAN-RIGHTS-REPORT.pdf (last visited May 6, 2024); see also Human Rights Violations during the 44-Day War in Artsakh (2022), https://hcav.am/wp-content/uploads/2021/12/Fact-Finding-Report_FINAL_web.pdf (last visited May 6, 2024).

¹⁵⁹ Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Periodic Reports of Azerbaijan* ¶ 4 (Sept. 22, 2022).

¹⁶⁰ Inter-State Applications Lodged by Armenia against Azerbaijan, App. Nos. 42521/20, 33412/21, 42445/21, 15389/22 (Eur. Ct. H.R.).

¹⁶¹ *Saribekyan & Balayan v. Azerbaijan*, App.No. 35746/11 ¶¶ 67-70 (Eur. Ct. H.R. Jan. 30, 2020).

¹⁶² *Id.* ¶¶ 85-87.

border between Armenia and Azerbaijan and was later detained by Azerbaijani forces. He was held captive for 22 months during which he endured mistreatment, including insufficient food, denial of toilet access, physical torture, and psychological abuse. Upon his return to Armenia, he was diagnosed with chronic delusional disorder, persistent reactive paranoia, and a herniated disc, which the European Court of Human Rights concluded were primarily or partially a result of his detention conditions, constituting a violation of Article 3 ECHR.¹⁶³ In the *Petrosyan v. Azerbaijan* case another civilian crossed the Armenian-Azerbaijani border and entered an Azerbaijani village, where he was initially seen drinking tea in civilian attire before being detained by Azerbaijani forces. Azerbaijan later reported his sudden death due to acute heart and lung failure after being forced to wear military clothing. While Azerbaijan claimed the person was part of a subversive group and died during an operation, the complainant alleged that Azerbaijani forces killed or beheaded him. The ECtHR found violations of Article 2 and Article 3 of the European Convention on Human Rights due to discrepancies in autopsy reports, lack of investigation by Azerbaijan, and evidence suggesting pre-death mistreatment.¹⁶⁴ In the case of *Khojoyan and Vardazaryan v. Azerbaijan*, an elderly man was detained by Azerbaijani forces at the northeastern Armenian-Azerbaijani border and later released to Armenia with injuries consistent with torture. Despite evidence of mistreatment, including gunshot wounds and the presence of petroleum and Apaurin in his blood, Azerbaijan failed to provide a reasonable explanation for the cause of the injuries or the need to shoot a 77-year-old man. The European Court of Human Rights found violations of Article 2 and Article 3 of the European Convention on Human Rights due to lack of medical attention, failure to investigate the detainee's status, and evidence suggesting torture.¹⁶⁵

In the ongoing legal proceedings at the International Court of Justice (ICJ), within the context of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Azerbaijan has faced three preliminary measures designed to confront the imminent risk of racial discrimination

¹⁶³ *Badalyan v. Azerbaijan*, App. No. 51295/11 ¶ 48 (Eur. Ct. H.R. July 22, 2021).

¹⁶⁴ *Petrosyan v. Azerbaijan*, App. No. 32427/16 ¶¶ 59-61 (Eur. Ct. H.R. Nov. 4, 2021).

¹⁶⁵ *Khojoyan & Vardazaryan v. Azerbaijan*, App. No. 62161/14 ¶ 55 (Eur. Ct. H.R. Nov. 4, 2021).

against Armenians.¹⁶⁶ However, Azerbaijan has failed to comply with these orders.¹⁶⁷

Not only Armenian individuals are being targeted by the Azerbaijani hate policy but also Armenian cultural heritage. In its resolution on destruction of cultural heritage in Nagorno-Karabakh, the EU Parliament condemned Azerbaijan's ongoing policy of erasing Armenian cultural heritage in Nagorno-Karabakh, noting deliberate damage to monuments and religious sites and recognized this as part of a wider pattern of state-promoted Armenophobia and historical revisionism.¹⁶⁸

The pervasive evidence from international institutions regarding the hate policies of Azerbaijani authorities against Armenians is notably evident in the rhetoric of the President of Azerbaijan. Throughout history, military leaders have employed language to vilify the enemy, aiming to prepare soldiers for combat and instill a merciless attitude. This phenomenon is particularly pronounced in autocratic regimes where leaders are revered. Children often mimic the behavioral patterns of their parents, while individuals in state structures emulate the language and conduct of their superiors. In autocratic contexts, subordinates often feel compelled to meet or surpass the expectations of their leaders,

¹⁶⁶ Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), (I.C.J.), Provisional Measures, Order ¶¶391-393 (Dec. 7, 2021); Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), (I.C.J.), Provisional Measures, Order ¶¶28-30 (Feb. 22, 2023); Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), (I.C.J.), Provisional Measures, Order ¶¶ 66-74 (Nov. 17, 2023).

¹⁶⁷ Sarah Babaian & Gurgun Petrossian, *Alle Macht den Staaten?: Wie Anordnungen des Gerichts ausgehebelt werden*, Völkerrechtsblog (Mar. 6, 2023), <https://voelkerrechtsblog.org/de/alle-macht-den-staaten/> (last visited May 6, 2024).

¹⁶⁸ European Parliament Resolution on the Destruction of Cultural Heritage in Nagorno-Karabakh, ¶2, 2022/2582 (RSP) (Mar. 10, 2022); Fernando Camacho Padilla, *Azerbaijan's attacks on Armenian Heritage Aim to Erase an Entire Culture*, The Conversation (Feb. 7, 2024), <https://theconversation.com/azerbajians-attacks-on-armenian-heritage-aim-to-erase-an-entire-culture-222655> (last visited May 6, 2024); Armenian Bar Ass'n & The Mother See of Holy Etchmiadzin, Report and Urgent Call to Action: Erasure of Armenian Heritage by Azerbaijan and Denial of Armenians' Right to Exercise their Christian Religion (2022), <https://armenianbar.org/wp-content/uploads/2022/04/Safeguarding-Armenian-Culture-and-Religious-heritage.pdf> (last visited May 6, 2024).

sometimes resulting in the perpetration of international crimes.¹⁶⁹ State-sanctioned hate speech becomes especially perilous when it assumes a systematic nature, as witnessed in the vilification of Armenians in Azerbaijan, leading to instances of discrimination and violence against them. During the 2020-armed conflict, President Aliyev referred to Armenians in dehumanizing terms, further fueling hostility. This rhetoric permeates through government institutions, media, and education, fostering widespread hatred and culminating in mass demonstrations calling for war and death to Armenians. This phenomenon has been observed in various speeches delivered by the president and other officials, wherein derogatory descriptions of Armenians were employed.¹⁷⁰

- **Animalistic Language:** President Aliyev refers to Armenians as "animals" and "dogs" during the September-November 2020 armed conflict, suggesting they are less than human.
- **Denying Basic Humanity:** President Aliyev and government institutions use derogatory terms and deny the occurrence of the Armenian genocide, stripping Armenians of their dignity and historical suffering.
- **Portrayal as Subhuman:** President Aliyev, other officials and media consistently portray Armenians in negative terms, such as "bandits," "vandals," and "fascists," depicting them as uncivilized and inferior.
- **Reducing to Stereotypes:** Children are taught to view Armenians as enemies from a young age, perpetuating stereotypes and fostering prejudice against them throughout Azerbaijani society.
- **Objectification:** The production of military drones with the inscription "Iti Qovan" (dog chaser) by Azerbaijan's Ministry of Defense reduces Armenians to the status of animals, objectifying them as targets of aggression.

¹⁶⁹ See Gurgen Petrossian, Mariana Amoyan & Christian Mkhitarian, *Hassrede als Staatspolitik*, in *Berg-Karabach: Eine völkerrechtliche Analyse des Konflikts um Artsach* 197, 197–224 (Sarah Babaian & Arlette Zakarian eds., 2022).

¹⁷⁰ *Anti-Armenian Xenophobia and Racism in Azerbaijan*, 18 (2021), <https://transparency.am/assets/documents/1646637425-52831-785.pdf>; Open Society Found. Armenia, *Human Rights Violations During the 44-Day War in Artsakh*, 38 (2022), https://hcav.am/wp-content/uploads/2021/12/Fact-Finding-Report_FINAL_web.pdf.

In summary, the persistent animosity towards Armenians in Azerbaijan, exacerbated by the glorification of figures like Ramil Safarov, who was celebrated for decapitating an Armenian, has influenced younger generations. This has influenced a horrendous reality where Armenians who were captured by Azerbaijanis were subjected to instances of torture or even beheading. Cases presented before the ECtHR indicate that even prior to the Second Nagorno-Karabakh war, human rights violations were not isolated incidents but rather part of a consistent discriminatory policy implemented targeting the Armenians. The dissemination of videos depicting brutal killings and beheadings on various social media platforms during and after the war shows the consequences of the established trend of hate towards Armenians and glorifying of those who have killed them. However, another phenomenon is not solely limited to the act of killing and beheading; rather, it involves the deliberate dissemination of footage on social media platforms. This act serves to convey a message to the entire Armenian population that anyone falling under Azerbaijani control could face similar fate, irrespective of their individual identities or circumstances. The publication and distribution of these video recordings not only induced fear and terror among the impacted population but also likely generated widespread insecurity due to the utilization of advanced military technology and brutality of Azerbaijani soldiers. This transformed social media into yet another arena for conflict, where individuals intimidated one another using the disseminated content, exacerbating psychological warfare. As the conflict transitioned to the digital domain, the intensity of the confrontation heightened, as adversaries were immune to physical harm, resulting in a feeling of gratification from engaging with the enemy in a digital space.¹⁷¹ The publication of these video materials and the use of new military technology have had a psychological impact on society. This parallels the utilization of the Jericho Trumpets on Nazi Stuka aircraft¹⁷² due to their psychological impact on the enemy, inducing feelings of insecurity or prompting them to flee.

¹⁷¹ See also Max Bergmann & Guren Petrossian, *Psychologische und digitale Kriegsführung durch die informelle Verbreitung von Kriegsverbrechen*, in *Handbuch Cyberkriminologie* 402, 402–08 (Thomas-Gabriele Rüdiger & Saskia Bayerl eds., 2023).

¹⁷² Jericho Trumpets were the sirens of Nazi combat aircraft that emitted a distinctive noise during attacks.

The Nagorno-Karabakh blockade initiated in December 2022, followed by Azerbaijan's latest aggression in September 2023, compelled the complete Armenian population to flee Nagorno-Karabakh. Human Rights Watch reported that Armenians fled their homes out of fear and panic, citing concerns about the restrictions on corridor traffic from Armenia and alleged atrocities committed by Azerbaijani forces during previous conflicts, leading to widespread fear and distrust among the population.¹⁷³

B. JURISDICTION UNDER THE ROME STATUTE

Given the question regarding whether the ICC has jurisdiction over the crimes committed in Nagorno-Karabakh, further analysis of jurisdiction is warranted. Under Article 53(1)(a) of the Rome Statute, the first criterion to be examined is whether the facts available provide a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. The Republic of Armenia became a member of the International Criminal Court as of February 1, 2024. However, through its declaration of accession to the Rome Statute, Armenia retroactively acknowledged the jurisdiction of the Court effective from May 10, 2021, at 00:00.¹⁷⁴ The ICC may assert jurisdiction pursuant to the Article 12(2)(a) of the Rome Statute if at least one element of a crime within the jurisdiction of the Court is committed on the territory of the State Party.¹⁷⁵

The following crimes may potentially fall within the jurisdiction of the Court:

- Deportation as a crime against humanity under Article 7(1)(d) of the Rome Statute.
- Persecution on ethnic and/or religious grounds as a crime against humanity under Article 7(1)(h) of the Rome Statute, including acts of deportation and violation of the right to return.

¹⁷³ Human Rights Watch, *Guarantee Right to Return to Nagorno Karabakh* (Oct. 5, 2023), <https://www.hrw.org/news/2023/10/05/guarantee-right-return-nagorno-karabakh>.

¹⁷⁴ Letter of the Ministry of Foreign Affairs of the Republic of Armenia to the Registrar of the International Criminal Court (Nov. 15, 2023), https://www.icc-cpi.int/sites/default/files/2023-11/Letter_MFA.pdf (last visited May 6, 2024).

¹⁷⁵ ICC Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18 ¶ 72 (Sep. 6, 2018).

- Other inhumane acts as crimes against humanity as defined in Article 7(1)(k) of the Rome Statute, specifically the infliction of significant suffering or severe injury through deliberate and serious breaches of the customary international law right of displaced persons to safely and humanely return to their home of origin with which they have a sufficiently close connection.

Crimes being perpetrated in Nagorno-Karabakh, including murder, sexual violence, and torture as crimes against humanity or other war crimes, are likely beyond the jurisdiction of the Court due to temporal and territorial constraints, however, these crimes could still be considered as cumulative incidents.

1. TERRITORIAL AND TEMPORAL SCOPES

For the ICC to have jurisdiction over conduct under Article 5 of the Rome Statute, the criteria must be met, including those related to *ratione materiae*, which encompasses international crimes such as war crimes, crimes against humanity, genocide, and the crime of aggression, as well as requirements regarding *ratione temporis* specified in Article 11 of the Rome Statute, and one of the two criteria outlined in Article 12(2) of the Rome Statute, either *ratione loci* or *ratione personae*. The fundamental question revolves around the examination of the territorial scope of the commission of the crimes, given that Nagorno-Karabakh lies beyond the Court's jurisdiction.

As per Article 12(2)(a) of the Rome Statute, the relevant conduct should take place within the territory of the State Party. In the context of the Bangladesh/Myanmar situation, the Court has emphasized the need to interpret the term 'conduct', suggesting that it may also include the outcomes, such as the actions of victims in response to the perpetrator's behavior.¹⁷⁶ Consequently, in case of the crime of deportation, it is being "completed" when the victims left the area where they were lawfully present.¹⁷⁷ Additionally, customary international law does not forbid states from asserting jurisdiction over acts happening beyond their borders, as long as

¹⁷⁶ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19 ¶ 50 (Nov. 14, 2019).

¹⁷⁷ *Id.* at ¶ 53.

there's a connection with their territory.¹⁷⁸ The Rome Statute does not restrict when the Court can assert jurisdiction over transboundary crimes based on territoriality. Thus, as long as a part of the actus reus takes place within a State Party's territory, the Court can exercise territorial jurisdiction within customary international law boundaries.¹⁷⁹

When analyzing the temporal scope of crimes within the Court's jurisdiction, it is crucial to distinguish between completed, continuing, and composite crimes. A completed crime breaches a primary international obligation without ongoing activity. Once a murder is committed, the crime concludes with the death of the victim. Composite crimes encompass multiple instances of violating a single primary obligation, contrasting with completed crimes, such as the crime of apartheid which spans across a prolonged period and encompasses numerous acts, rather than a single event. Continuing crimes involve ongoing breaches of a primary obligation, sustaining a potentially persistent situation beyond its initial occurrence.¹⁸⁰

Continuing crimes involve a sustained pattern of behavior that results in harm lasting for as long as the harmful effects endure.¹⁸¹ In the ICTR jurisprudence it was established that a crime is considered continuing if it “continues after an initial illegal act has been consummated; a crime that involves ongoing elements [...] (such as driving a stolen vehicle) that continues over an extended period.”¹⁸² As per the definition established by the ICTR, the crime of deportation should be classified as a continuing crime because although it involves a discrete and immediate act of removal, the aggravated harm it causes—namely, relocation to another state—endures until the victims are allowed to return.¹⁸³ Deportation begins with coercive acts that force displacement and

¹⁷⁸ *Id.* at ¶ 57-58.

¹⁷⁹ *Id.* at ¶ 59-61.

¹⁸⁰ Alan Nissel, “*Continuing Crimes in the Rome Statute*” in 25 Mich. J. Int'l L. 661 (2004).

¹⁸¹ Jeffrey Boles, “*Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*” 7 Nw. J. L. & Soc. Pol'y. 228 (2012).

¹⁸² Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Judgment, ¶ 721 (Nov. 28, 2007); in regard to child soldiers, the Trial Chamber has found that enlistment of children under the age of 15 is continuing crime, Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶ 618 (Mar. 14, 2012).

¹⁸³ Cf. Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 307 (Mar. 22, 2006) “deportation does not require an intent that the deportees should not return”.

is only consummated upon crossing an international border. Responsibility for these coercive acts must persist until the point of crossing the border. Even after crossing the border, deportation may continue if the coercive acts prevent victims from returning¹⁸⁴ to their original territory.

Given the ongoing impact of the crime of deportation, another question arises regarding whether the crime, which commenced before the retroactive acknowledgment of the Court's jurisdiction through declaration, would fall within the Court's jurisdiction. International criminal justice typically acknowledges the significance of considering continuing crimes that occurred beyond its jurisdiction if it can be demonstrated that these crimes persisted into the relevant jurisdictional period.¹⁸⁵ The ICC is not confined to exercising temporal jurisdiction only within dates recognized by a state party; it can also investigate ongoing crimes occurring before the acknowledged time limit, as long as the contextual elements remain unchanged.¹⁸⁶

Armenians from different parts of Nagorno-Karabakh have been forcibly removed at various times and are unable to return. It remains unclear whether the ICC will consider jurisdiction to address the crime of deportation arising from the conflict spanning from September 2020 to May 2021. However, it will need to regard the crime of deportation in light of the cumulative evidence at hand.

- a. *During Second Nagorno-Karabakh War Between September and November 2020:* As Azerbaijani forces advanced during the Second Nagorno-Karabakh war, Armenians found themselves unable to return to their homes in cities and villages like Hadrut, Shushi, and others,

¹⁸⁴ Cf. e.g. psychological harm Christoph Safferling, Guren Petrossian, Victims Before the International Criminal Court 168 (2021).

¹⁸⁵ Prosecutor v. Nsengiyumva, Case No. ICTR-96-12-I, Decision on the Defence Motions Objecting to the Jurisdiction of Trial Chamber on the Amended Indictment, ¶ 27-28 (Apr. 13, 2000); Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶ 872 (Jun. 10, 2010); cf. ICC, Situation in Côte d'Ivoire, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire" ¶ 179 (Nov. 15, 2011).

¹⁸⁶ Victor Tsilonis, The Jurisdiction of the International Criminal Court, (2024) 65; Alan Nissel, "Continuing Crimes in the Rome Statute" in 25 Mich. J. Int'l L. 687 (2004).

which came under Azerbaijani control, compelling them to flee the regions.¹⁸⁷

- b. *After Second Nagorno-Karabakh War between December 2020 and September 2023*: As per the trilateral agreement, the regions of Nagorno-Karabakh were mandated to come under Azerbaijani control, leading to the displacement of the Armenian population from those areas, including Lachin and Qelbajar.¹⁸⁸
- c. *Blockade and last aggression against Nagorno-Karabakh*: Following the Azerbaijani attack on Nagorno-Karabakh in September 2023, a 100,000 Armenians were compelled to flee their homes across the entirety of Nagorno-Karabakh.¹⁸⁹

The crimes mentioned, including deportation, persecution through deportation, and other inhumane acts as crimes against humanity, were perpetrated partially within the territory of Nagorno-Karabakh, falling outside the jurisdiction of the Court, and partially within the territory of Armenia, within the Court's jurisdiction. The attacks on Nagorno-Karabakh involved coercion of Armenians from those areas in Nagorno-Karabakh to cross into Armenia. This cross-border conduct forms the basis for the mentioned crimes.

2. DEPORTATION AS CRIMES AGAINST HUMANITY

Using a variety of coercive measures, Azerbaijani authorities displaced more than 100,000 Armenians from Nagorno-Karabakh, where they were legally residing, to Armenia. As per footnote 12 of Article 7(1)(d) of the Elements of Crimes, the term "forcibly" extends beyond physical force and encompasses threats, coercion, fear of violence, duress, psychological oppression, or abuse of power against individuals, or exploitation of a coercive environment. This means that the displacement of the person is involuntary in nature, where the relevant persons had no genuine

¹⁸⁷ Siranush Sahakyan, *Hadrut: A Community in Exile Committed to Cultural Preservation*, Armenian Wkly (May 16, 2023), <https://armenianweekly.com/2023/05/16/hadrut-a-community-in-exile-committed-to-cultural-preservation>.

¹⁸⁸ Statement by the Prime Minister of the Republic of Armenia, the President of the Republic of Azerbaijan and the President of the Russian Federation (Nov. 10, 2020).

¹⁸⁹ Partick Reeve, "Over 100,000 Armenians have now fled disputed enclave Nagorno-Karabakh" in abc News (Sep. 30, 2023).

choice but to leave.¹⁹⁰ The mere expression of consent does not necessarily indicate genuine choice, especially if the circumstances surrounding the consent involve coercion, threats, or fear and it is essential to consider the broader context, including factors like coercion, and vulnerability of the individuals involved.¹⁹¹ Coercive acts encompass a range of acts, such as killings, sexual violence, physical and psychological violence intended to cause significant suffering or injury to mental or physical health, as well as the destruction of property, including homes and entire villages.¹⁹² The Armenians' exodus from Nagorno-Karabakh to Armenia was not a matter of genuine choice; instead, they were compelled to abandon their homes resulting from the coercive acts.¹⁹³

These coercive acts included:¹⁹⁴

- Unlawful killings of the civilians who remained under the control of Azerbaijani forces.¹⁹⁵
- Torture and mistreatment of civilians and prisoners of war.¹⁹⁶
- Mutilation of bodies.¹⁹⁷

¹⁹⁰ Prosecutor v. Krnojelac, ICTY Case No. IT-97-25-T, Judgment ¶ 474 (Mar. 15, 2002); Prosecutor v. Prlić, ICTY Case No. IT-04-74-T, Judgment ¶ 50-51 (May 29, 2013); Prosecutor v. Karadžić ICTY Case No. MICT-13-55-A, Judgement ¶ 585 (Mar. 20, 2019); Prosecutor v. Kenyatta and Hussein Ali, Case No. ICC-01/09-02/11 Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 244 (Jan. 23, 2012).

¹⁹¹ Prosecutor v. Krnojelac, ICTY Case No. IT-97-25-A, Judgment ¶ 229 (Sep. 17, 2003).

¹⁹² *Id.*

¹⁹³ Cf. Prosecutor v. Ruto, Kosgey, Sang, Case No. ICC-01/09-01/11 Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 245 (Jan. 23, 2012); Davit Khachatryan, “*Transboundary Elements of Crime: A Case of Armenian Ethnic Cleansing before the ICC?*” in *Völkerrechtsblog* (Nov. 23, 2023), <https://voelkerrechtsblog.org/de/transboundary-elements-of-crime/> (last visited May 6, 2024).

¹⁹⁴ Cf. ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19 ¶ 104-108 (Nov. 14, 2019); ICC, Situation in Georgia, Decision on the Prosecutor’s request for authorization of an investigation, No. ICC-01/15 ¶ 22 (Jan. 27, 2016).

¹⁹⁵ Human Rights Violations during the 44-Day War in Artsakh 67-78 (2022), https://hcav.am/wp-content/uploads/2021/12/Fact-Finding-Report_FINAL_web.pdf (last visited May 6, 2024).

¹⁹⁶ *Id.* at 49-66.

¹⁹⁷ “*Torture, mutilation cases reported amid Azerbaijan's September aggression against Nagorno-Karabakh-Armenian Ombudsperson*” in

- Sexual violence committed against Armenian women.¹⁹⁸
- Acts of physical and psychological violence causing great suffering or serious injury to the body or to mental or physical health, such as a nine-month blockade of Nagorno-Karabakh and a policy of imposing intentional starvation.¹⁹⁹
- The policy of hatred towards Armenians, which includes the dissemination of video footage depicting violence against Armenians, as described earlier.
- Destruction of Armenian cultural heritage.²⁰⁰
- Destruction of property.²⁰¹
- Impunity for those actions.

The catalogue of coercive acts only scratches the surface of the broader campaign of terror inflicted upon Armenians in Nagorno-Karabakh from 2020 to 2023. There is no indication to suggest that an "evacuation" of the civilian population was necessary, or carried out, for genuine reasons of population security or "imperative" military necessity.²⁰² Rather, based on the coercive methods used to displace them, and the discriminatory context, the arbitrary and discriminatory displacement of the Armenian population was impermissible under international law. Armenians

Armenpress (May 2, 2024), <https://armenpress.am/eng/news/1136212/> (last visited May 6, 2024).

¹⁹⁸ "(18+) Desecration of female Armenian soldier by Azerbaijani troops" in azeriwarcrimes (Sep. 19, 2022), <https://azeriwarcrimes.org/2022/09/19/desecration-of-female-armenian-soldier-by-azerbaijani-troops/> (last visited May 6, 2024).

¹⁹⁹ Luke Harding, "They want us to die in the streets": inside the Nagorno-Karabakh blockade" in The Guardian (Aug. 22, 2023), <https://www.theguardian.com/world/2023/aug/22/inside-nagorno-karabakh-blockade-armenia-azerbaijan> (last visited May 6, 2024).

²⁰⁰ Armenian Bar Association, The Mother See of Holy Etchmiadzin, Report And Urgent Call To Action; Erasure of Armenian Heritage by Azerbaijan and Denial of Armenians' Right to Exercise their Christian Religion (2022), <https://armenianbar.org/wp-content/uploads/2022/04/Safeguarding-Armenian-Culture-and-Religious-heritage.pdf> (last visited May 6, 2024).

²⁰¹ Amos Chapple, "Church, Entire Village 'Erased' In Azerbaijan's Recaptured Nagorno-Karabakh" in RadioFreeEurope (Apr. 24, 2024), <https://www.rferl.org/a/azerbaijan-armenia-nagorno-karabakh-heritage-destruction-karintak-dasalti/32918998.html> (last visited May 6, 2024); see e.g. William Schabas, "Al Mahdi Has Been Convicted of a Crime He Did Not Commit" 49 Case Western Reserve J Intl Law 1, 100 (2017).

²⁰² Article 49 of the Geneva Convention IV; Prosecutor v. Blagojević, Jokić ICTY Case No. IT-02-60-T, Judgment ¶ 597-600 (Jan. 17, 2005).

residing in Nagorno-Karabakh had been living there for decades and were legally established in the region.

3. PERSECUTION ON GROUNDS OF ETHNICITY AND/OR RELIGION

If individuals are forcibly removed from a non-member state to a member state based on any of the grounds outlined in Article 7(1)(h) of the Statute, the Court could potentially exercise jurisdiction over the crime against humanity of persecution. This is because one aspect of this crime in the case of a cross-border transfer occurs within the territory of a State Party.²⁰³

Severe deprivation of fundamental rights: Deportation constitutes a severe deprivation of human rights, including the right of individuals to live in their communities and homes, and may amount to persecution.²⁰⁴

Targeting by reason of identity: The individuals were targeted because of their association with the Armenian community, characterized by its ethnic and religious composition. Although religion may not be the sole motive for their targeting, the distinctive religious beliefs and cultural heritage of Armenians are also being threatened, as evidenced by the destruction of Armenian cultural landmarks detailed previously. The Azerbaijani perpetrators, in targeting Armenians, showed no discrimination based on whether the victims were Catholics, Evangelicals, or members of the Apostolic Church; their primary objective was simply to target individuals of Armenian descent. This is exemplified by an incident during the 2016 war, where one of the perpetrators decapitated an Armenian Yazidi soldier and shared the footage and pictures on social media platforms.²⁰⁵ It was only later realized that the victim was not Armenian but Yazidi.²⁰⁶ Nevertheless, the perpetrator's primary intent was to target

²⁰³ ICC Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18 ¶ 76 (Sep. 6, 2018).

²⁰⁴ Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 218 (Sept. 17, 2003).

²⁰⁵ "Karabakh conflict: Azerbaijani soldiers behead Ezidi from Armenia" in Ezidi Press, (Apr. 4, 2016), <https://www.ezidipress.com/en/karabakh-conflict-azerbaijani-soldiers-behead-ezidi-soldier-from-armenia/> (last visited May 6, 2024).

²⁰⁶ *Id.*

Armenians, and as the Yazidi soldier was fighting in the Armenian army, he fell victim to this brutal act.

Discriminatory intent: The discriminatory intent is reflected in public statements made by the Azerbaijani officials and perpetrators on the ground, as well as in the social media posts and statements, as mentioned above.²⁰⁷ The discriminatory intent is further illustrated by the deliberate targeting and destroying of Armenian churches and Armenian cultural heritage,²⁰⁸ falsely labeling them as Albanian churches and distorting religious historical truths.²⁰⁹

4. OTHER INHUMANE ACTS

Preventing Armenians from returning may come under the jurisdiction of the Court under Article 7(1)(k) of the Rome Statute, provided that the necessary threshold conditions are met.²¹⁰ The compelled displacement of Armenians was a central component of violence, accompanied by a deliberate and severe denial of the right for recently displaced Armenians from Nagorno-Karabakh to

²⁰⁷ Xenophobia and racism in Azerbaijan Anti-Armenian (2021), <https://transparency.am/assets/documents/1646637425-52831-785.pdf> (last visited May 6, 2024) 17-22; Center for Truth and Justice, Conclusive Evidence Of Ilham Aliyev's Intention To Invade And Occupy Armenia (2024), <https://www.cftjustice.org/wp-content/uploads/2024/04/Catalogue-of-Evidence-State-Official-Media.pdf> (last visited May 6, 2024).

²⁰⁸ Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 207 (Feb. 26, 2001); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 1024 (Sept. 1, 2004); cf. Prosecutor v. Gotovina et al, Case No. IT-06-90-T, Judgment, 1843 (Apr. 15, 2011); Pablo Gavira Diaz, *The Liability for Attacks Against Immovable Cultural Objects*, INT'L CRIM. L. 360 at 393 (2022).

²⁰⁹ Jasmine Dum-Tragut, Jost Gippert, "Caucasian Albania in Medieval Armenian Sources (5th–13th Centuries)," in *Caucasian Albania* 77 (Jasmine Dum-Tragut, Jost-Gippert eds., 2023); Jasmine Dum-Tragut "One or two? On Christological and Hierarchical Disputes and the Development of the 'Church of Albania' (4th–8th centuries)," in *Caucasian Albania* 320 (Jasmine Dum-Tragut, Jost-Gippert eds., 2023); Armenian Bar Association, *The Mother See of Holy Etchmiadzin, Report And Urgent Call To Action; Erasure of Armenian Heritage by Azerbaijan and Denial of Armenians' Right to Exercise their Christian Religion*, 19 (2022), <https://armenianbar.org/wp-content/uploads/2022/04/Safeguarding-Armenian-Culture-and-Religious-heritage.pdf> (last visited May 6, 2024); ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19 ¶¶ 109-111 (Nov. 14, 2019).

²¹⁰ ICC Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18 ¶ 78 (Sept. 6, 2018).

return, resulting in significant suffering or substantial harm to their mental or physical well-being. This cross-border transfer serves as the foundation for the crime of other inhumane acts by violating the right to return of the right to return. The arbitrary refusal to allow the right to return may amount to conduct resembling the crime of persecution, as outlined in Article 7(1)(k) of the Rome Statute.²¹¹ This is applicable if the act is characterized by the perpetrator's grave behavior and leads to considerable suffering or serious harm to the victim. The implementation of specific regulations, laws and actions targeting housing and property, alongside deportation, amounts to persecution, driven by discriminatory motives as was found in relation to Krajina Serbs.²¹² In certain regions under Azerbaijani control, entire Armenian villages have been erased, preventing Armenian individuals from returning.²¹³

According to the Statute, the inhumane act should impose a sufficient degree of harm upon a person, qualified as great suffering or serious injury to the body, mental or physical health. Preventing someone from returning to their own country can meet the threshold for persecution due to several factors. Firstly, it exacerbates the anguish experienced by individuals who have been uprooted from their homes and forcibly displaced from their country. This exacerbation of suffering adds weight to the severity of the persecution. Secondly, it intensifies the uncertainty surrounding the victims' future, as they are unable to reclaim their homes and livelihoods. Consequently, they are forced to live under deplorable conditions, further contributing to their hardship and suffering.²¹⁴ This suffering encompasses residing in temporary and substandard housing, the breakdown of family ties, unemployment, severe poverty, hunger and malnutrition, poor health, loss of legal status and corresponding rights, and experiencing additional

²¹¹ *Id.* ¶ 77.

²¹² Prosecutor v. Gotovina et al., Case No. IT-06-90-T, Judgment, ¶ 1843 (Apr. 15, 2011).

²¹³ Amos Chapple, *Church, Entire Village 'Erased' In Azerbaijan's Recaptured Nagorno-Karabakh*, RADIOFREEEUROPE (Apr. 24, 2024), <https://www.rferl.org/a/azerbaijan-armenia-nagorno-karabakh-heritage-destruction-karintak-dasalti/32918998.html> (last visited May 6, 2024); *Satellite images show Azerbaijan's destruction of village in Artsakh*, PANORAMA.AM (Apr. 8, 2023), <https://www.panorama.am/en/news/2023/04/08/destruction-village-Artsakh/2818095> (last visited May 6, 2024).

²¹⁴ ICC Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC-RoC46(3)-01/18, ¶ 77 (Sept. 6, 2018).

victimization through further criminal acts, all of which exacerbate their distress.

Similar nature of the act: the right to return enshrined in Article 13(2) of the Universal Declaration of Human Rights states that everyone has the right to leave any country, including his/her own, and return to his/her country. The right to return is embedded within various legal frameworks and is an essential component of international customary law.²¹⁵ In the context of the Nagorno-Karabakh conflict, the ECtHR addressed the issue of the right to return in *Sargsyan v. Azerbaijan*. The Court, referring to International Humanitarian Law, affirmed that displaced persons have the right to voluntarily and safely return to their homes or habitual residences once the causes of their displacement cease to exist.²¹⁶ The ruling also enforced the principle of non-discrimination and the government's obligation to protect the property rights of all individuals, regardless of their ethnicity or displacement status.²¹⁷ Therefore, the deliberate infringement of the right to return by state agents by its nature constitutes an act falling within the category of inhumane acts.

Gravity: It is crucial to note that the gravity test hinges on a detailed assessment of individual cases, considering all contextual factors of the conflict. Despite Azerbaijani authorities' claims regarding Nagorno-Karabakh Armenians' citizenship,²¹⁸ there is a lack of proactive measures to alleviate anti-Armenian sentiments. Instead, they continue an aggressive campaign, labeling the Republic of Armenia under an irredentist vision and conception as western Azerbaijan.²¹⁹ This not only obstructs Armenians' right to return

²¹⁵ Hurst Hannum, *The Right to Leave and Return in International Law and Practice* 57-58 (2021); *Sargsyan v. Azerbaijan*, App. No. 40167/06, ¶ 95 (ECtHR June 16, 2015).

²¹⁶ *Id.* ¶¶ 231-232.

²¹⁷ *Id.* ¶ 240.

²¹⁸ *The Armenian population of Karabakh citizenship dilemma - Analysis from Baku*, JAMSNEWS (Oct. 10, 2022), <https://jam-news.net/the-armenian-population-of-karabakh-citizenship-dilemma-analysis-from-baku/> (last visited May 6, 2024).

²¹⁹ Center for Truth and Justice, *Conclusive Evidence Of Ilham Aliyev's Intention To Invade And Occupy Armenia* (2024), <https://www.cftjustice.org/wp-content/uploads/2024/04/Catalogue-of-Evidence-State-Official-Media.pdf> (last visited May 6, 2024); Thomas de Waal, *The End of Nagorno-Karabakh*, FOREIGN AFFAIRS (Sept. 26, 2023), <https://www.foreignaffairs.com/armenia/end-nagorno-karabakh> (last visited May 6, 2024).

but also engaging in actions that lead to the forced displacement of Armenians from Armenian territory.²²⁰ Additionally, as mentioned earlier, the intentional destruction of entire villages serves as another grave obstacle to Armenians' ability to return. Therefore, the impediment to a safe and humane return to Nagorno-Karabakh carries a gravity similar to other inhumane acts.

A differentiation exists between the crime of deportation and the prevention of safe and humane return, which constitutes an inhumane act. While deportation involves forcing an individual to leave the region, the latter is akin to metaphorically "locking the door behind" them.

5. CONTEXTUAL ELEMENTS OF CRIMES AGAINST HUMANITY

In order to fall under the jurisdiction of the Court, the identified crimes must fulfill the contextual elements of crimes against humanity.

Attack directed against any civilian population: The crimes outlined above, including civilian killings, sexual violence, and property destruction, are not sporadic occurrences; rather, they exhibit common traits in terms of the nature of the acts, the targeted population, and the alleged perpetrators. Despite Azerbaijani authorities' assertion that their actions targeted the political leadership of Nagorno-Karabakh, it is challenging to distinguish this, as the animosity towards Armenians extends beyond political figures to encompass the entire Armenian population, both in Nagorno-Karabakh and those residing in Armenia and the diaspora. Therefore, it is clear that the contextual element of an attack directed against any civilian population is present.

State policy: The course of conduct described above, which includes various crimes, along with the campaign against Armenians, a systematic institutional oppression, public statements by senior officials portraying Armenians as enemies, and the failure to take effective action to hold perpetrators accountable or prevent future crimes, unmistakably demonstrates distinct patterns of violence involving Azerbaijani state actors.

²²⁰ Armenian government confirms Azerbaijani forces occupy 31 Armenian villages, 301.am (Mar. 3, 2024), <https://www.301.am/armenian-government-confirms-azerbaijani-forces-occupy-31-armenian-villages/> (last visited May 6, 2024).

Widespread and systematic nature of the attack: The threshold for an attack, whether conducted over a vast geographical expanse or confined to a smaller area but affecting a significant number of civilians,²²¹ is satisfied by the mass deportation of the entire population of Nagorno-Karabakh. The criterion of organized acts of violence and the unlikelihood of their random nature, often demonstrated through recurring patterns of similar criminal conduct,²²² is also fulfilled, as attacks against the civilian population occurred regularly from 2020 to 2023.

Nexus: The acts described above are part of a widespread and systematic attack against the civilian population, rather than isolated or sporadic incidents that vary significantly in context and circumstances.

V. POSSIBLE PROCEEDINGS BEFORE THE INTERNATIONAL CRIMINAL COURT

In 1998, the Republic of Armenia showed intent by signing the Rome Statute, yet its formal ratification hit a roadblock in 2004. This pause was prompted by the Constitutional Court's identification of conflicts between the Statute and Armenia's own constitution. As the conflict unfolded, non-governmental organizations took proactive steps by invoking universal jurisdiction. They filed criminal complaints under the principle of universal jurisdiction in countries like Argentina, Sweden, and Germany,²²³ targeting those accountable for grave atrocities committed during the hostilities. Additionally, amidst the turmoil,

²²¹ Prosecutor v. Bemba, Case No. ICC-02/05-01/08, Judgment, ¶ 163 (Mar. 21, 2016).

²²² Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, ¶ 223 (June 12, 2014).

²²³ Criminal complaint to the Federal Prosecutor General in Karlsruhe for war crimes committed against persons in the current Karabakh war by Azerbaijani soldiers (Oct. 21, 2020), <https://dearjv.de/criminal-complaint-to-the-federal-prosecutor-general-in-karlsruhe-for-war-crimes-committed-against-persons-in-the-current-karabakh-war-by-azerbaijani-soldiers/> (last visited May 6, 2024); Ergänzung zur Strafanzeige beim Generalbundesanwalt in Karlsruhe wegen Kriegsverbrechen gegen Personen im Zusammenhang mit dem bewaffneten Konflikt um Berg-Karabach (Oct. 21, 2021), <https://dearjv.de/ergaenzung-zur-strafanzeige-beim-generalbundesanwalt-in-karlsruhe-wegen-kriegsverbrechen-gegen-personen-im-zusammenhang-mit-dem-bewaffneten-konflikt-um-berg-karabach/> (last visited May 6, 2024).

there emerged discussions regarding whether the Republic of Artsakh, Nagorno-Karabakh, should emulate the State of Palestine's strategy.²²⁴ This strategy involved initiating proceedings to accept the jurisdiction of the International Criminal Court. Post-2020 war, these NGOs intensified their efforts, seeking innovative avenues to address the egregious war crimes that transpired. The aggression of the Republic of Azerbaijan against the Republic of Armenia in 2021 intensified those efforts by the NGOs to advocate for ratification of the Rome Statute. In late 2022, the government expressed its readiness to join the ICC and initiated an application process for review at the Constitutional Court.²²⁵ This move was prompted by several amendments to the Constitution since 2004.

The Court reexamined its earlier decision on the ICC's role in Armenia's criminal justice system, finding it lacks the capacity to supplement national jurisdiction. It compared the purposes of the Armenian Constitution and the Rome Statute, emphasizing a shared commitment to universal values in combating serious crimes. Consequently, it deemed Armenia's inability to effectively address such crimes as unconstitutional. Additionally, it ruled that the ICC's complementary jurisdiction to restore adherence to constitutional obligations does not interfere unconstitutionally with Armenia's sovereignty.²²⁶ Furthermore, the Court concluded that obligations under Article 105 of the Statute are voluntary and arise only upon ratification, not automatically.²²⁷ The Republic of Armenia officially deposited the instrument of ratification of the Rome Statute of the ICC on November 14, 2023.

²²⁴ Guren Petrossian, "International Prosecution of Macro-Crimes Committed During the Third Artsakh War," in 3 Sci. Artsakh at 98, 100 (2021).

²²⁵ *Armenian government starts process of ratifying Rome Statute over Azeri war crimes, risk of new aggression*, ARMENPRESS (Dec. 29, 2022), <https://armenpress.am/eng/news/1100784/> (last visited May 6, 2024).

²²⁶ See the decision of the Court on The Case Concerning the Constitutionality of the Obligations Prescribed by the Rome Statute of The International Criminal Court Signed On 17 July 1998 (Mar. 23, 2023) https://www.concourt.am/decision/full_text/64b67c71ee311_1680e.pdf (last visited May 6, 2024); Guren Petrossian, "Armenia as the 124th Member to the Rome Statute," *Opinio Juris* (Sept. 22, 2023) <https://opiniojuris.org/2023/09/22/armenia-as-the-124th-member-to-the-rome-statute/> (last visited May 6, 2024).

²²⁷ Arnold Vardanyan, "From an Unconstitutional Rome Statute to Its Constitutionality: Why It Took Over 20 Years for Armenia to Join the ICC?" *EJIL:Talk!* (Feb. 8, 2024), <https://www.ejiltalk.org/from-an-unconstitutional-rome-statute-to-its-constitutionality-why-it-took-over-20-years-for-armenia-to-join-the-icc/> (last visited May 6, 2024).

Armenia's ratification opens two potential avenues for the Court's jurisdiction regarding the conflict:

- International crimes committed within the territory of the Republic of Armenia since May 10, 2021.
- Transboundary international crimes committed within the territory of Nagorno-Karabakh since May 10, 2021, as previously outlined.

Armenia faces political pressure from neighboring countries such as Turkey, Russia, and Azerbaijan; therefore, it is improbable that Armenia will invoke jurisdiction under Article 14 of the Rome Statute in the near future, given the ongoing peace negotiations. If other states do not make a referral in this regard, the only option is for the ICC Prosecutor to initiate proceedings *proprio motu*.

Based on this, the ICC Prosecutor should also assess admissibility in accordance with Article 17 of the Rome Statute, which requires proof of complementarity, gravity and interests of justice. Therefore, the Prosecutor should assess whether potential cases against perpetrators for crimes such as deportation, persecution, and other inhumane acts would be admissible.

A. COMPLEMENTARITY

To determine if a potential case is inadmissible under Article 17 of the Statute, the Prosecutor must ascertain if there are current or previous investigations or prosecutions or if the state with jurisdiction has opted not to prosecute the individual in question. Only if these conditions are met, will the Prosecutor further need to investigate the issues of unwillingness and inability.²²⁸ The failure of the state to investigate or prosecute renders a case admissible before the Court, contingent upon an evaluation of gravity under Article 17(1)(d) of the Rome Statute.

²²⁸ Prosecutor v. Katanga and Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 78 (Sept. 25, 2009); Situation in The Republic of Burundi, ICC-01/17-X, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi," ICC-01/17-X-9-US-Exp, (Oct. 25 2017), ¶ 146 (Nov. 9, 2017).

Position of Azerbaijan: Azerbaijan refutes allegations of deportations of Armenians from Nagorno-Karabakh, and the Author cannot confirm any ongoing investigations into such deportations. Although Azerbaijani prosecutors have announced charges against four Azerbaijani soldiers for crimes against Armenians back in 2020, no additional information is available.²²⁹ However, Azerbaijani authorities have initiated unlawful arrests and prosecutions of Armenian prisoners of war and civilians.²³⁰ It is unlikely that Azerbaijan will investigate any crime committed against Armenians.

Position of Armenia: Armenia initiated investigations against the Azerbaijani military and political leadership since September 2020, and these investigations are still ongoing.²³¹ However, there is currently no public information available regarding the stage of these investigations. It is only known that, in response to Armenia's request, one of the alleged perpetrators was arrested in Russia but later released for unspecified reasons. Given that the deportation victims reside in Armenia, investigative authorities should continue their investigations based on the principle of complementarity. However, unlike Ukraine, Armenia does not recognize trials conducted *in absentia*, making it unlikely and unable that Armenia will effectively prosecute the perpetrators who are residing in Azerbaijan.

B. GRAVITY

In assessing gravity, it is important to consider perspectives such as the degree of responsibility for the alleged crimes, as well as the nature, scale, manner of commission, and impact of alleged

²²⁹ Ulkar Natiqqizi, "One year after arrests for war crimes, Azerbaijan remains silent," Eurasianet (Dec. 15, 2021), <https://eurasianet.org/one-year-after-arrests-for-war-crimes-azerbaijan-remains-silent> (last visited May 6, 2024).

²³⁰ Ulkar Natiqqizi, Ani Mejlumyan, "Armenian soldiers on trial in Azerbaijan," Eurasianet, (Jul. 1, 2021), <https://eurasianet.org/armenian-soldiers-on-trial-in-azerbaijan> (last visited May 6, 2024); Joshua Kucera, "Concerns About Victor's Justice As Nagorno-Karabakh's Leaders Are Behind Bars And Facing Trial In Azerbaijan," RadioFreeEurope, (Oct. 11, 2023), <https://www.rferl.org/a/karabakh-leaders-arrested-azerbaijani-victor-justice-armenia-courts/32633354.html> (last visited May 6, 2024).

²³¹ "Armenia Investigative Committee launches criminal prosecution against Azerbaijan military, political leadership," News.am (Nov. 6, 2023), <https://news.am/eng/news/791121.html> (last visited May 6, 2024).

crimes.²³² Regarding greatest responsibility, the potential case of deportation implicates high authorities of Azerbaijan, who are alleged to have established institutionalized discriminatory and hateful policies against Armenians. In terms of nature, the crime of deportation is highly serious. The coercive acts underlying the crime committed during 2023 involved multiple offenses, as described above. Concerning scale, the entire territory of Nagorno-Karabakh was impacted by the crime of deportation, resulting in the forced removal of over 100,000 Armenians from the region. The manner of the commission involved targeting victims based on ethnic and/or religious affiliations as members of the Armenian group. As for impact, the alleged crimes have had profound repercussions on both individual victims and the broader Armenian population, affecting not only those from Nagorno-Karabakh but Armenians as a whole.

C. INTERESTS OF JUSTICE

Under Article 53(1) of the Rome Statute, while jurisdiction and admissibility are prerequisites for proceeding, the "interests of justice" serve as a potential counterbalance that may justify not proceeding. The Prosecution need not demonstrate that an investigation serves the interests of justice but rather assess whether circumstances exist that argue against conducting an investigation at the present time.²³³ The severity and extent of the alleged crimes, involving the deportation of Armenian people and denial of their right to return to Nagorno-Karabakh, along with patterns of criminality and involvement of senior military and government officials, strongly support the need for an investigation. The Prosecutor must still consider the interests of justice, which includes crime prevention and security concerns, while recognizing that broader issues of international peace and security fall outside the ICC's mandate and decisions not to proceed based on the interests of justice should be seen as a last resort.²³⁴

²³² Situation in The Republic of Burundi, ICC-01/17-X, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi," ICC-01/17-X-9-US-Exp (Oct. 25 2017), ¶ 184 (Nov. 9 2017).

²³³ *Id.* ¶ 190.

²³⁴ ICC-OTP, Policy Paper on the Interests of Justice 8-9 (2007); Drazan Đukic, "Transitional justice and the International Criminal Court – in "the interests of justice"? " 89 *International Review of the Red Cross* 696-700 (2007).

V. CONCLUSION

Due to the limited international media coverage of the Nagorno-Karabakh conflict, the anti-discriminatory actions taken by Azerbaijani authorities often go unnoticed. This silence can lead to misconceptions that nothing significant is occurring in Nagorno-Karabakh and that Armenians are leaving voluntarily. However, this is not the case. Armenians have been forced to leave Nagorno-Karabakh due to persecution, a fact frequently emphasized by Armenians but often ignored by the international community. The patterns of oppression originating from the Armenian Genocide of 1915 persist against the Republic of Armenia. The covert policy of Pan-Turkism, as highlighted in Ziya Gökalp's testimony during the Istanbul Trial, illustrates this reality. Azerbaijan's aims to conquer Armenia and deport Armenians, as regularly promoted through its media channels. The International Military Tribunal emphasized in its judgment that Julius Streicher's propaganda was akin to poison for German society, fueling anti-Semitism. Similarly, the youth in Azerbaijan have been indoctrinated with hatred towards Armenians, with instances like the glorification of Ramil Safarov's beheading of Armenians serving as examples to be emulated and to gain recognition. The inauguration of a trophy park in Baku featuring Armenian puppets is yet another contemporary example of how Azerbaijan treats Armenians. These actions collectively represent a vivid display of animosity towards Armenians. Referring to the Nuremberg Principles, those accountable for international crimes must face consequences. Failure to hold individuals responsible would signify another instance of the international community's inability to combat impunity for such crimes.

In pursuing accountability before the International Criminal Court, the Office of the Prosecutor could adopt a jurisdictional strategy similar to that used in the *Bangladesh/Myanmar* situation. There, the Court established jurisdiction over the crime of deportation on the basis that part of the conduct—the victims' crossing of the border—occurred on the territory of a State Party. By analogy, the forced displacement of Armenians from Nagorno-Karabakh to Armenia engages the Court's territorial jurisdiction under Article 12(2)(a) of the Rome Statute. The OTP could therefore prioritize documenting the cross-border elements of deportation and persecution, demonstrating that the *actus reus* was completed within Armenian territory.