# Genocide and/or Ethnic Cleansing:

# Recognition, Prevention and the Need for Definitional Clarity?

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To start as we don't mean to go on – let us begin, in true academic style, with a fairly lengthy quotation, taken here from the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*:

> Based on many reports describing the policy and practices conducted in the former Yugoslavia, "ethnic cleansing" has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population on ghetto area, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention.[1]

The reason for opening with this excerpt is that it directly speaks to the definitional confusion that has surrounded the term "ethnic cleansing" ever since its introduction in the context of mass violence in the former Yugoslavia. That acts of ethnic cleansing might "constitute crimes against humanity", be "assimilated to specific war crimes" and/or "fall within the

[1] Final Report of the Commission of Experts, 27 May 1994, Part III: General Studies, B. Ethnic Cleansing, UN Doc S/1994/674, paragraph 56 of the First Interim Report S/25274, p. 4 of 22.

meaning of the Genocide Convention" indicates what to those who subscribe to the value of specificity of legal definitions must appear an alarming lack of clarity. Such definitional imprecision is by no means a mere matter for ivory-tower (legal) intellectuals, but can – and herein lies the premise and burden of the present lecture – have serious repercussions in terms of inhibiting the effective recognition and prevention of genocide.

Objections to the use of the term ethnic cleansing have long-since been manifold. It has been dismissed as too hazy and vague – a product of journalistic verbiage rather than proper legal reflection. The apparently 'positive' connotations of cleansing (cleanliness, purification etc.) have been considered an inapt and immoral signifier of violence and brutality. The term has, moreover, also been seen as a dangerous euphemism for covering up the full horror of genocide.

All such criticisms have their obvious justifications. For what follows here, the latter point is, though, particularly salient. To outline the core issue in bare terms: the argument is that usage of the term ethnic cleansing masks – or can mask – the atrocities of genocidal violence, and that this, in turn, obstructs recognition of such instances. Ethnic cleansing thus represents, in this optic, a rhetorical appellation of greatest advantage to either – or both – *genocidaires* keen to avoid being held to full account for their actions, or for observers who lack the will to confront and stop genocide.

Should we start to dig around at this issue, it ought not take us too long to recognise the absence of an accepted legal definition of ethnic cleansing as a key factor – probably *the* key factor – that facilitates such cowardly avoidance. Ethnic cleansing continues to occupy a peculiar grey-zone between recognition and non-recognition in international law. On the one

hand, the term has entered into legal usage: it is not only referenced in the Final Report of the Commission of Experts cited above, but also in a number of the UN's Security Resolutions relating to the conflict in the former Yugoslavia. On the other, however, it still has not been codified in international law, and has usually – often in a fairly *ad hoc* manner – been characterised as a particular form of other previously defined crimes (i.e. crimes against humanity, war crimes, genocide). The disjunction here is striking, and in view of such, we might agree with the verdict of Blum, Stanton, Sagi and Richter that it is "ironic that the UN itself adopted a euphemism invented by Milosevic, an accused perpetrator of genocide, despite its never having been formally defined or recognized as a term with specific legal status and mandated obligations".[2] The briefest of glances at the work of the ICTY reveals, moreover, the footprint of this inconsonance. The case law of the Tribunal has, time and again, made mention of practices of ethnic cleansing, though seldom as an act in and of itself – references to such acts have usually been used to supply background context to cases or else evidence of other related crimes. To cite just a couple of examples that attest to this: in the *Vasiljević* case, the Trial Chamber associated ethnic cleansing with the practice of crimes against humanity;[3] both the *Krstić* and *Nikolić* Trial Chambers, meanwhile, bracketed ethnic cleansing to genocide.[4] That the term invariably appears, in court proceedings, within quotation marks also provides a stark visual reminder of its uncertain status within the parameters of international law. We might recall, moreover, that the defence in the *Kovacevic* case openly used the absence of a legal definition to object to the prosecutor's use of the

[2] Rony Blum, Gregory H. Stanton, Shira Sagi, and Elihu D. Richter, '"Ethnic Cleansing" Bleaches to Atrocities of Genocide', *The European Journal of Public Health*, (Advance Access, published 18 May 2007), 1-6, p. 1.
[3] Prosecutor v. *Vasiljević*, Case N° IT-98-32, Judgment, Trial Chamber II, 29 November 2002, paras 58, 191 and 192.
[4] Prosecutor v. *Krstić*, Case N° IT-98-33, Judgment, Trial Chamber I, 2 August 2001, para. 619, and Prosecutor v. *Nikolić*, Case N° IT-94-2-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber I, 20 October 1995, para. 34.

term, pointedly observing that it "does not exist in [the] Genocide Convention or in the international customary law."[5]

The overarching point here can, again, be fairly simply made. The current status of ethnic cleansing within international law – or, rather, its lack of clear status – breeds confusion rather than certainty and is inimical to a just and efficient recognition of genocide. To resolve this, we might, as far as I can see, proceed along one of two pathways. The one would be to eschew the term entirely in legal debate and discourse. This is an argument that has been put forward by several parties, and is obviously not without merit – the term, as it currently exists in its vague formulation, quite feasibly does more harm than good. The other option, meanwhile – and that for which I intend here to plead – would be to work towards a proper legal classification and qualification of ethnic cleansing within the framework of international law.

There is neither the space nor the inclination here for unfolding the full legal reasoning for such a claim. Essentially, it rests with the view that ethnic cleansing, if properly codified in international law, would provide a useful category for defining a specific set of violent practices that, while perhaps similar to genocide (and other international crimes) in several respects, differ in terms of both the physical acts and, above all, intentionality. Introducing a new classification of ethnic cleansing as an independent crime with its own specific *actus reus* and *mens rea* would, in my view, not only help to close off a potentially troubling loophole in current international law provisions, but also allow for a more precise understanding and implementation of applicable definitions of genocide, crimes against

[5] International Criminal Tribunal for the Former Yugoslavia, Case number IT-97–24-PT, http://www.un.org/icty/transe24Kovacevic/980227it.htm

humanity and war crimes – all of which would aid the goal, to which we all surely subscribe, of an optimally just and effective legal response to instances of mass violence.

In terms of upholding this claim, I wish here to focus attention fairly selectively on just a couple of points relating to the difference between ethnic cleansing and genocide. For it is in relation to this particular pairing that the greatest controversy persists, with many commentators, critics and experts – both academic and non-academic – arguing for an essential equivalency between the two. Compelling evidence to the contrary can, however, be gleaned from several key sources. One such would be the documentation of the drafting history of the Genocide Convention itself, which reveals a very clear and conscious decision to limit applicability to 'physical destruction'. In the supplementary comments to the initial Secretariat draft, we find clear expression of the fact that the proposed definition of genocide does not cover "certain acts which may result in the total or partial destruction of a group of human beings […], namely […] mass displacements of population" and, a little later, the confirmation that such mass displacement "does not constitute genocide". In other words, those practices we now commonly associate with ethnic cleansing were expressly excluded from the conventional definition of genocide. Despite the developments brought forth by the case law of the ICTY and the ICTR, moreover, there is scant evidence to support any suggestion of a widening to cover practices of displacement. On the contrary, the proceedings of the ICTY, too, (as the body that has been most heavily involved in the punishment of crimes associated with ethnic cleansing) militate against any suggestion of sameness: there have been a number of occasions on which the Tribunal has noted and upheld how the practice of ethnic cleansing does not share the *dolus specialis* of genocide – that is, the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group". Again, we might pull out a few examples to illustrate this: the Trial Chamber in the *Tadic*

case from 1997 stated, for instance, that Serb forces had pursued a "practice of ethnic cleansing" so as to achieve "the redistribution of populations, by force if necessary, in the course of achieving a Greater Serbia", yet made no reference to genocide. Similar verdicts were reached in both *Krstić* and *Sikirika et al.*, where the accused were adjudged not have acted with the specific genocidal intent and thus not to be liable for charges of genocide. The picture that emerges from the ICTY case law, with regards to ethnic cleansing, is thus of a distinct set of practices geared towards the removal of a particular group from a given territory – without the (genocidal) intent to physically exterminate the target the group. The ICJ has, moreover, reasserted this viewpoint in its judgment on the applicability of the Genocide Convention to the situation in Bosnia, openly stating that the practices of deportation or displacement commonly associated with ethnic cleansing do not, even if pursued via force, equate to the destruction of a particular group. Thus it concludes that despite the obvious similarities observed by the ICTY, notably in the *Krstić* case, between policies of genocide and ethnic cleansing respectively, a clear distinction must be made between physical destruction (genocide), on the one hand, and displacement or expulsion of a group (ethnic cleansing), on the other.

The reason for citing such instances here is that they supply clear legal guidance on the fundamental difference in terms of intentionality between ethnic cleansing and genocide. As such, it seems apparent that this distinction should be acknowledged, maintained and set down in as concrete terms as possible. Thus we can argue that it is not, in fact, the introduction of the concept of ethnic cleansing into popular, academic and legal discourse that muddies the waters, as has been frequently claimed, but rather the tendency to ignore, whether willingly or unwillingly, the established difference between ethnic cleansing and genocide, as it has been framed by various relevant international legal instruments.

Just to try and unpack this question of differences and similarities a little further: an additional reason why a standardised definition of ethnic cleansing may be especially valuable in aiding recognition and prevention is that practices of displacement and removal can often serve as a precursor to full-blown genocide. History provides a number of precedents, and I think we can forego examples at this juncture. Analysis of the manner in which ethnic cleansing may move towards genocide is, in and of itself, somewhat fraught and carries the risk of slipping into its own definitional quagmire, precisely because of the importance of – and difficulties in – establishing intent. The key question to assess, or to try to assess, here is whether practices of ethnic cleansing are consciously directed towards genocidal ends, in which case they can be seen as being pursuant to the act of genocide itself, or whether they carry an effect that furthers genocidal policy without embodying the specific intent to destroy? This question is easy to pose, of course, but far more onerous to actually answer.

Such difficulties notwithstanding, this understanding of the manner in which ethnic cleansing may bleed into genocide, or possibly even serve as an early warning of the latter, represents, in my view, the most useful model for conceptualising the relationship between the two practices. Ethnic cleansing and genocide are not coterminous, and should not be regarded as such. Rather, they occupy distinct positions on a sliding scale or spectrum of violence, marked by a significant different in the intentionality of the act. As William Schabas has put it, genocide is often the last resort of the frustrated ethnic cleanser; in other words, genocidal killings frequently emerge when earlier plans for displacement are thwarted or fail – as a radicalised means of expediting the initial aim of the removal of a particular group from a given territory. This is not, however, to rule out the possibility of such policies also being

undertaken as part of a pre-conceived genocidal plan. Here is not the place to dwell on this point at any length; suffice it to say that there is much scope for extended – probably book-length – analysis on the matter. For present purposes, we might simply note how both dynamics suggest something of the intricate relations between ethnic cleansing and genocide. Crucially, however – and I will dare to reiterate the point at the risk of being accused of over-egging it – the distinction between the two remains and rests squarely with the question of overarching intent, which ought to be fully acknowledged in relevant legal provisions.

Prior to drawing to a close, a brief word on the practicalities of introducing a new legal definition of ethnic cleansing seems warranted. For theorising is all well and good, but the key focus of our energies ought to be on working towards making practicable changes that further the cause of recognition and prevention. On a basic level, the qualification of ethnic cleansing as an independent crime would necessitate the inclusion of a new definition in a separate article within the ICC Statute. This would present no great hurdle; such emendations are foreseen by Article 123 that reads:

> 1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
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> 2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference. […]

The exact procedures for passing such an amendment need not hold us up here; while there are various formalities to be observed, the provisions of the Statute are such that they would allow for the implementation of such a change without any great delay. To put it in blunt terms: the complexities of formal processes would not supply any kind of reason for deciding against making such an amendment. And inasmuch as introducing such a new definition would not, on account of the principle of *nullum crimen nulla poena sine lege*, offer the opportunity for securing justice for past instances of ethnic cleansing, it would provide an important instrument for confronting future instances.

It is at this point that I will finish. To sum up, my argument here proceeded from the view that the current haziness surrounding the legal status of the term ethnic cleansing works counter to just and effective recognition and prevention to genocide. In part, this stems from a general conviction of the need for definitional precision in international law; first and foremost, however, it derives from the specific gravity of the issues at play in relation to instances of mass violence. Having briefly outlined the problems that current uncertainties harbour, I then, in the second part of the lecture, have made the case for a standardised recognition of difference between ethnic cleansing and genocide, and a new legal definition of the former as the most promising way of overcoming such difficulties.

Such changes would, I am convinced, make a vitally significant contribution to understanding and practice in international law, for at least four key reasons. First, by codifying a precise definition that strips away the instability that presently attaches to the term, they would help to secure effective accountability for acts of ethnic cleansing. Second,

they would also – and quite contrary to common fears – aid, rather than hinder, the recognition of genocidal instances: if the conditions of ethnic cleansing were set down in clear, legal terms, it would be less likely that perpetrators of genocide would attempt to seek refuge behind the defence of 'only' being guilt of cleansing. Third, stipulating specific criminal penalties for acts of ethnic cleansing would help further challenge discourses of denial and impunity, and ensure that perpetrators face full justice. Fourth and finally, legal recognition of ethnic cleansing as an independent crime might also serve the ends of effective transitional justice mechanisms by securing redress for victims and ensuring widespread recognition for their suffering. In view of such, I will close with an encouraging appeal for ongoing engagement in the task of establishing greater definitional clarity on such matters as a vital step in furthering the march towards effective recognition, prevention – and indeed prosecution – of those most harrowing instances of mass violence that cut to the core of common humanity.