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ARTICLES

GRASSROOTS NARRATIVE BUILDING AS AN ANSWER TO STATE-CONTROLLED DISINFORMATION: CREATING AN "ARTSAKH ARCHIVE" TO DOCUMENT ETHNIC DISPLACEMENT IN NAGORNO-KARABAKH

Michael M. Epstein, J.D., Ph.D.[1]

Abstract

This article posits the creation of an "Artsakh Archive," a catalog that would collect and organize real-time content uploaded to social media, documenting the displacement of Armenians from Nagorno-Karabakh between 2020 and 2023. The archive aims to create an accessible, searchable database that preserves a public record of the ordinary lives of those displaced. The author introduces the concept of "account-ability," a strict, viewpoint-neutral framework for scholars to use in devising and curating the archive. As an account-ability project, the Artsakh Archive would provide grassroots narratives that would counter state-sponsored disinformation and misinformation that is prevalent in the region. If carefully implemented, the Artsakh Archive could potentially provide admissible evidence of ethnic cleansing and forced migration before the International Criminal Court and other judicial bodies.

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[1] Michael Epstein is a Professor of Law and Supervising Editor of the Journal of International Media & Entertainment Law at Southwestern Law School, Director of the Amicus Project at Southwestern Law School, and Director of the Entertainment and Media Law Concentration at Southwestern Law School. My thanks to Alexandra E. Kerecman for her research assistance.

I. INTRODUCTION

This article examines how grassroots social media has transformed the traditional state-controlled ethnic displacement narrative. In the past, authoritarian states tightly regulated information from ethnic non-state enclaves through state propaganda and censorship by the state.[2] This was evident in the conflict over the largely unrecognized Artsakh Republic in Nagorno-Karabakh.[3] However, the emergence of grassroots social media[4] has decentralized information production, enabling ordinary citizens to document and share firsthand experiences of ethnic displacement from inside conflict zones.[5]

Ethnic Armenians displaced from the Nagorno-Karabakh region can use grassroots social media to document the reality of their forced evacuation and diaspora into Armenia and beyond. The old aphorism about the tree falling in a deserted forest is apt here. If forced evacuations and the struggles of displaced people are not documented or shared, the world may not know about them, and their suffering could go unnoticed. Grassroots social media acts as the "witness," ensuring the displacement is seen, heard, and acknowledged globally.

To control the narrative of their displacement, non-state populations must actively use social media platforms—not only to chronicle their persecution and evacuation but also to tell the story of their displaced lives.

To counter ongoing social media disinformation and state-sponsored propaganda from Azeri sources, trained archivists can compile a searchable collection of social media content posted online by ethnic Armenians before and during their displacement from Artsakh. The database,

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[2] *See generally* Philip Bennett & Moises Naim, *21st-century censorship*, COLUM. JOURNALISM REV. (Jan. 5, 2015), https://www.cjr.org/cover_story/21st_century_censorship.php (detailing how various countries around the globe are controlling media to limit stories of wrongdoing from Russia creating its own state media after shuttering several media outlets to Turkey jailing or fining journalists who write critical articles on the government); Jon Allsop, *The insidious spread of 'foreign agent' laws*, COLUM. JOURNALISM REV. (Oct. 31, 2023), https://www.cjr.org/the_media_today/alsu_kurmasheva_arrest_foreign_agent_laws.php (detailing how Russia has set the precedent for other countries to censor journalists by declaring critical journalists as "foreign agents").

[3] Jon Allsop, *Azerbaijan cracks down on the free press. Again.*, COLUM. JOURNALISM REV. (Dec. 12, 2023), https://www.cjr.org/the_media_today/azerbaijan_press_freedom_nagorno_karabakh.php; Arzu Geybullayeva, *Azberbaijani authorities disrupt internet nationwide amid Nagorno-Karabakh clashes*, GLOB. VOICES ADVOX (Sept. 30, 2020, 13:15 PM), https://advox.globalvoices.org/2020/09/30/azerbaijani-authorities-disrupt-internet-nationwide-amid-nagorno-karabakh-clashes/.

[4] Tom O'Connor, *Armenia and Azerbaijan's Supporters Are at War Around the World, Using Social Media to Fight*, NEWSWEEK (Oct. 12, 2020, 2:19 PM), https://www.newsweek.com/armenia-azerbaijan-supporters-war-around-world-fight-social-media-1537654 (providing the number of social media posts and accounts made from 2007 to September 2020); *see* Simon Kemp, *Digital 2023: Azerbaijan*, DATAREPORTAL (Feb. 13, 2023), https://datareportal.com/reports/digital-2023-azerbaijan (providing statistics on how many social media users are in Azerbaijan, where Nagorno-Karabakh is located).

[5] Ryan O'Farrell, *Using OSINT & Social Media to Track the Nagorno-Karabakh War*, OFFBEAT (Jan. 15, 2021), https://offbeatresearch.com/2021/01/using-osint-social-media-to-track-the-nagorno-karabakh-war/; *TikTok restricted in Azerbaijan and Armenia amid clashes over Nagorno-Karabakh*, NETBLOCKS (Sept. 14, 2022), https://netblocks.org/reports/tiktok-restricted-in-azerbaijan-and-armenia-amid-clashes-over-nagorno-karabakh-3An4pky2.

conceived herein as the "Artsakh Archive," would catalog actual social media posts uploaded by individuals and groups during the time they lived in the enclave. The goal would be to create a publicly accessible database that documents, in real-time, the ordinary lives of those displaced. This archive would serve as a valuable record for researchers and would potentially provide admissible evidence of ethnic cleansing and forced migration before the International Criminal Court.

II. THE ETHNIC DISPLACEMENT IN NAGORNO-KARABAKH

Nagorno-Karabakh is a largely remote, mountainous region in the Caucasus, spanning about 1,700 square miles.[6] Armenians view the area as the cradle of their culture, holding deep historical significance for them.[7] It is also land that lies wholly within the borders of the modern state of Azerbaijan.[8] Though there was periodic violence between Armenian Christians and Muslim Azeris living side by side, the division between political rule and ethnic identity remained mostly muted due to control by imperial powers, including Persia and, during the nineteenth century, Russia.[9] During the Soviet era, Nagorno-Karabakh was recognized as an autonomous political entity.[10] However, like Azerbaijan and the neighboring Republic of Armenia, the region's government authorities operated as client states under Moscow's hegemony.[11]

In the final years of the Soviet Union, both Azerbaijan and Armenia sought to assert political control over Nagorno-Karabakh, leading to ethnic clashes and competing claims of sovereignty.[12] After the Soviet Union's collapse, Azerbaijan and Armenia fought the First Nagorno-Karabakh War,[13] causing 30,000 casualties and countless refugees on both sides.[14] With military support from Russia, Armenians negotiated a ceasefire that resulted in the establishment

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[6] *Armenia-Azerbaijan: Both sides defy Nagorno-Karabakh ceasefire calls,* BBC (Oct. 1, 2020), https://www.bbc.com/news/world-europe-54366616.

[7] *See* Dale Berning Sawa, *Monumental loss: Azerbaijan and 'the worst cultural genocide of the 21st century*, GUARDIAN (Mar. 1, 2019, 8:29 AM), https://www.theguardian.com/artanddesign/2019/mar/01/monumental-loss-azerbaijan-cultural-genocide-khachkars; Simon Maghakyan & Sarah Pickman, *A Regime Conceals Its Erasure of Indigenous Armenian Culture*, HYPERALLERGIC (Feb. 18, 2019), https://hyperallergic.com/482353/a-regime-conceals-its-erasure-of-indigenous-armenian-culture/.

[8] *Nagorno-Karabakh profile*, BBC (Jan. 30, 2024), https://www.bbc.com/news/world-europe-18270325.

[9] *See generally* Galina M. Yemelianova, *The De Facto State of Nagorno-Karabakh: Historical and Geopolitical Perspectives*, 75 EUR.-ASIA STUD. 1336 (2023) (detailing the history of Nagorno-Karabakh from the 16th century to the Second Karabakh War); *Nagorno-Karabakh: Historical data*, EMBASSY OF ARM. TO U.S., https://usa.mfa.am/en/karabagh (last visited Oct. 18, 2024) (detailing some history that predates the Ottoman Empire controlling the area).

[10] *See generally* Arsène Saparov, *Why Autonomy? The Making of Nagorno-Karabakh Autonomous Region 1918-1925*, 64 EURO.-ASIA STUD. 281 (2012) (detailing the process of the creation of the Nagorno-Karabakh Autonomous Oblast); SHAHEN AVAKIAN, NAGORNO KARABAGH: LEGAL ASPECTS 13-25 (5th ed. 2015) (discussing the creation of the Nagorno-Karabakh Autonomous Oblast and its Sovietization).

[11] Yemelianova, *supra* note 9, at 1339-49.

[12] *Id.* at 1348-54.

[13] *Id.* at 1349-50.

[14] Center for Preventive Action, *Nagorno-Karabakh Conflict*, GLOB. CONFLICT TRACKER (Mar. 20, 2024), https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict.

of the Republic of Artsakh, granting ethnic Armenians self-determination over the former Soviet autonomous territory and some surrounding areas.[15] In the ensuing years, the international community did not recognize the Artsakh Republic as a sovereign state.[16] Azerbaijan, with some success, argued that de facto Armenian rule amounted to an ethnic cleansing of Azeris in the region.[17]

By 2020, several developments shifted the balance of power in the region. Following Russia's 2014 incursion into Ukraine, Russia scaled back its longstanding presence as peacekeeper in the region.[18] Meanwhile Azerbaijan, enriched by the development of its oil and gas industry, upgraded its military capabilities with precision-guided missiles and drones.[19] In September 2020, Azerbaijan initiated what became known as the Second Nagorno-Karabakh War.[20] Over the course of forty-four days, Azeri forces captured one-third of the region,[21] including two ethnic Armenian population centers, as well as all of the surrounding areas that Artsakh had occupied as a buffer zone.[22]

The Second Nagorno-Karabakh War caused significant displacement of ethnic Armenians, particularly in and around the cities of Shusha and Hadrut.[23] Azeri forces then mounted a blockade of the Lachin Corridor, isolating the Armenian population in Artsakh from Armenia and the rest

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[15] Sonni Efron, *Armenia, Azerbaijan Agree to a Cease-Fire*, L.A. TIMES (May 17, 1994, 12:00 AM), https://www.latimes.com/archives/la-xpm-1994-05-17-mn-58811-story.html.

[16] *Nagorno-Karabakh Profile*, *supra* note 8.

[17] Shahin Abbasov, *Azerbaijan: Baku Presses Genocide Recognition Campaign for Khojaly*, EURASIANET (Feb. 28, 2012), https://eurasianet.org/azerbaijan-baku-presses-genocide-recognition-campaign-for-khojaly.

[18] Matthew Stein, *The Evolutionary Russian View of Peacekeeping as Part of Modern* Warfare, FOREIGN MIL. STUD. OFF., 13-16 (Mar. 24, 2023), https://fmso.tradoc.army.mil/2023/2023-03-24-the-evolutionary-russian-view-of-peacekeeping-as-part-of-modern-warfare-matthew-stein-update/; Robyn Dixon & Francesca Ebel, *Russia Failed to Keep Peace in Nagorno-Karabakh, Pivoting Away from Armenia*, WASH. POST (Sept. 30, 2023, 3:43 PM), https://www.washingtonpost.com/world/2023/09/30/russia-nagorno-karabakh-peacekeepers-failure/.

[19] Joshua Kucera, *Azerbaijan acquires new missiles in escalating arms race with Armenia*, EURASIANET (June 12, 2018), https://eurasianet.org/azerbaijan-acquires-new-missiles-in-escalating-arms-race-with-armenia; Robyn Dixon, *Azerbaijan's drones owned the battlefield in Nagorno-Karabakh – and showed future of warfare*, WASH. POST (Nov. 11, 2020, 4:06 PM), https://www.washingtonpost.com/world/europe/nagorno-karabkah-drones-azerbaijan-aremenia/2020/11/11/441bcbd2-193d-11eb-8bda-814ca56e138b_story.html.

[20] Yemelianova, *supra* note 10, at 1356-57; Avet Demourian, *Tensions Mount as Armenia and Azerbaijan Continue Fighting*, WASH. POST (Sept. 28, 2020, 10:18 PM), https://www.washingtonpost.com/world/national-security/armenia-azerbaijan-clash-in-separatist-region-for-a-2nd-day/2020/09/28/13555590-01fa-11eb-b92e-029676f9ebec_story.html.

[21] Andrew E. Kramer, *In Nagorno-Karabakh, Signs of Escalating and Widening Conflict*, N.Y. TIMES https://www.nytimes.com/2020/09/29/world/middleeast/nagorno-karabakh-armernia-azerbaijan.html (last visited Oct. 18, 2024); Andrew E. Kramer, *Facing Military Debacle, Armenia Accepts a Deal in Nagorno-Karabakh War*, N.Y. TIMES (Feb. 25, 2021), https://www.nytimes.com/2020/11/09/world/middleeast/armenia-settlement-nagorno-karabakh-azerbaijan.html; Anton Troianovski, *In Bitter Nagorno-Karabakh War, a Reordering of Regional Powers*, N.Y. TIMES (Feb. 25, 2021), https://www.nytimes.com/2020/11/10/world/europe/armenia-azerbaijan-nagorno-karabakh.html.

[22] *Second Karabakh War: Outcomes*, U.S.C. DORNSIFE: INST. OF ARM. STUD. (Dec. 1, 2020), https://armenian.usc.edu/second-karabakh-war-preliminary-outcomes/.

[23] *Id.*; Rym Momtaz, *Azerbaijan Claims Capture of Major Nagorno-Karabakh City*, POLITICO (Nov. 8, 2020, 1:29 PM), https://www.politico.eu/article/azerbaijan-armenia-nagorno-karabakh-second-largest-city-capture/.

of the world.[24] This blockade caused significant deprivation for the 120,000 ethnic Armenians in the region, as Azeris forces prevented the delivery of food, electricity, water, and humanitarian aid.[25] In September 2023, Azeri armed forces invaded the remaining parts of Nagorno-Karabakh, including the capital of Stepanakert, encountering minimal military resistance.[26] Within days, the Republic of Artsakh collapsed, and virtually all of the remaining ethnic Armenians in the region were permitted to flee through the Lachin Corridor to Armenia.[27] In 2024, it is estimated that fewer than fifty ethnic Armenians remain in Nagorno-Karabakh.[28]

III. THE LACK OF MEDIA COVERAGE AND PUBLIC AWARENESS

Despite the tragedy of ethnic displacement in the region, Nagorno-Karabakh is largely unknown outside of Armenian and Azeri communities.[29] During the Soviet era, the ethnic conflict played out internationally as a domestic dispute within the U.S.S.R.[30] After the collapse of the Soviet Union, the conflict was viewed as a struggle between two Russian client states, with no political connection to the West.[31] Both Azerbaijan and Armenia remained firmly within Russia's sphere of influence.[32] Without a clear ally to support, Western media paid little attention to the conflict.[33] The remoteness of the mostly rural, mountainous region and the dangers faced by journalists covering the conflict on the ground further contributed to the lack of coverage.[34]

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[24] *Azerbaijan fully reclaims lands around Nagorno-Karabakh*, AL JAZEERA (Dec. 1, 2020), https://www.aljazeera.com/news/2020/12/1/azeri-forces-raise-flag-in-last-district-handed-back-by-armenia.

[25] Gabriel Gavin, *'Nobody is helping us': Inside the fall of Nagorno-Karabakh*, POLITICO (Sept. 22, 2023, 7:19 PM), https://www.politico.eu/article/nagorno-karabakh-armenia-azerbaijan-war-inside/; Armen Sarkissian, *The Humanitarian Crisis in Nagorno-Karabakh is a Textbook Example of Ethnic Cleansing*, TIME (Jan. 12, 2023, 10:57 AM), https://time.com/6246850/armenia-azerbaijan-nagorno-karabakh-lachin-corridor/.

[26] Matthew Mpoke Bigg & Ivan Nechepurenko, *Understanding the Dispute Between Armenia and Azerbaijan*, N.Y. TIMES (Sept. 28, 2023), https://www.nytimes.com/article/armenia-azerbaijan-clashes.html; Joel Gunter, *Deserted Nagorno-Karabakh reveals aftermath of lightning-fast Armenian defeat*, BBC (Oct. 3, 2023), https://www.bbc.com/news/world-europe-66995976.

[27] Ivan Nechepurenko & Nyree Abrahamian, *Refugees Flee to Armenia as Breakaway Enclave Comes Under Azerbaijan's Control*, N.Y. TIMES (Oct. 2, 2023), https://www.nytimes.com/2023/09/24/world/europe/armenians-nagorno-karabakh-azerbaijan.html; Sarkissian, *supra* note 26.

[28] David Ignatius, *A cry for the refugees of emptied Nagorno-Karabakh: 'We are nobody'*, WASH. POST (Mar. 11, 2024, 2:09 PM), https://www.washingtonpost.com/opinions/2024/03/11/david-ignatius-nagorno-karabakh-refugees-azerbaijan-enclave/ (reporting that between twenty-one and thirty ethnic Armenians remain in the area).

[29] Marc Champion & Tony Halpin, *What's Nagorno-Karabakh and Why do Azerbaijan and Armenia Fight Over It?*, BLOOMBERG (Sept. 20, 2023, 9:38 AM), https://www.bloomberg.com/news/articles/2023-09-20/nagorno-karabakh-why-do-azerbaijan-and-armenia-dispute-it.

[30] *See, e.g.*, P. L. Dash, *Nationalities Problem in USSR: Discord Over Nagorno-Karabakh*, 24 ECON. & POL. WEEKLY 72, 72-73 (1989); A. N. Yamskov, *Ethnic Conflict in the Transcausasus: The Case of Nagorno-Karabakh*, 20 THEORY & SOC'Y. 631, 631 (1991); Tamara Dragadze, *The Armenian-Azerbaijani Conflict: Structure and Sentiment*, 11 THIRD WORLD Q. 55, 60 (1989); Svante E. Cornell, *Turkey and the Conflict in Nagorno-Karabakh: A Delicate Balance*, 34 MIDDLE E. STUD. 51, 52-54 (1998).

[31] *Id.* at 57-58.

[32] *Id.*

[33] Lilit Markosian, *The Story of Nagorno-Karabakh is Incomplete*, COLUM. JOURNALISM REV.: CRITICISM (Sept. 7, 2021), https://www.cjr.org/criticism/nagorno-karabakh.php.

[34] *Id.* (noting the "practical limitations" contributing to the lack of media coverage).

Additionally, the area lacks natural resources or UNESCO World Heritage Sites that might otherwise attract public interest.[35]

The difficulty and cost of covering such a remote region also dissuaded legacy media outlets from investing in on-the-ground reporting.[36] As the global media sector has become less profitable, many electronic news platforms and print newspapers have reduced the resources for international reporting, relying instead on local sources, including bloggers and citizen journalists.[37] The BBC and Deutsche Welle, state-supported broadcasters in Great Britain and Germany respectively, were among the few exceptions, devoting substantial coverage to the conflict during and between the First and Second Nagorno-Karabakh Wars.[38]

Western media's reliance on local reporting also played into the hands of the Azeris to restrict the flow of independent information from the region.[39] Azerbaijan, an authoritarian state with strict control over its media,[40] curtailed access to the Lachin Corridor during the blockade, limiting entry to Azeri journalists and criminalizing unauthorized entry into the region without the government's permission.[41] Numerous reports surfaced of arrests by Azeri forces and detentions by civilian vigilantes supported by the Azeri government.[42] According to Reporters Without Borders, an independent Spanish journalist was escorted by state-employed Azeri media guides who prevented access to Russian peacekeepers and ethnic Armenians.[43] Even Azeri journalists not aligned with the government were denied entry into the region.[44]

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[35] Jim Heintz, *Tensions high over isolated Azerbaijan region*, A.P. NEWS (Jan. 22, 2023, 1:39 AM), https://apnews.com/article/politics-soviet-union-armenia-azerbaijan-business-b5a385835f0f3227911494bc8f23ea27 (detailing how Nagorno-Karabakh is an isolated mountainous area "smaller than the U.S. state of Delaware" and is connected to Armenia only by a single almost four mile road, Lachin Corridor).

[36] Dan Halton, *International News in the North American Media*, 56 INT'L J. 449, 503 (2001).

[37] Gretchen A. Peck, *Citizen Journalism: With newsroom resources stretched thin, local news publishers consider whether and how to embrace community reporting*, ED. & PUBLISHER (June 6, 2023, 12:00 AM), https://www.editorandpublisher.com/stories/citizen-journalism-with-newsroom-resources-stretched-thin-local-news-publishers-consider-whether,244033; Darryl Holliday, *Journalism is a public good. Let the public make it.*, COLUM. JOURNALISM REV. (Dec. 15, 2021), https://www.cjr.org/special_report/journalism-power-public-good-community-infrastructure.php.

[38] *See, e.g., Armenia-Azerbaijan conflict: Tanks ablaze as fighting erupts over disputed region*, BBC (Sept. 27, 2020), https://www.bbc.com/news/videos/cde7z65yr7ko; *See, e.g., Nagorno-Karabakh: Azerbaijan announces capture of major city*, DW (Nov. 8, 2020), https://www.dw.com/en/nagorno-karabakh-azerbaijan-announces-capture-of-major-city/a-55536491.

[39] Markosian, *supra* note 33.

[40] *Id.*

[41] *Id.*

[42] *Azerbaijan arrests journalist, charges another as press crackdown continues*, REUTERS (Jan. 15, 2024), https://www.reuters.com/world/asia-pacific/azerbaijan-arrests-journalist-charges-another-press-crackdown-continues-2024-01-15/; *see also Crushing Dissent: Repression, Violence, and Azerbaijan's Elections*, HUM. RTS. WATCH (Jan. 22, 2004), https://www.hrw.org/report/2004/01/22/crushing-dissent/repression-violence-and-azerbaijans-elections (covering the willingness of Azerbaijani authorities to allow and abet vigilante violence against dissidents).

[43] *After three-month blockade, RSF urges Azerbaijan and Russian peacekeepers to let reporters visit Nagorno-Karabakh*, REPS. WITHOUT BORDERS (Oct. 3, 2023), https://rsf.org/en/after-three-month-blockade-rsf-urges-azerbaijan-and-russian-peacekeepers-let-reporters-visit.

[44] *Müstəqil jurnalistlər Şuşa-Xankəndi yolundakı aksiyaya buraxılmadı* [*Independent journalists were not allowed to participate in the action on the Shusha-Khankendi road*], MEYDAN.TV (Dec. 15, 2022),

Western media accounts briefly reported on the fall of Artsakh and the ethnic migration that followed, including a tragic gas explosion,[45] but ongoing coverage of the aftermath was soon eclipsed by news of another ethnic conflict, the Israeli-Hamas war.[46] The capitulation of the Artsakh government and mass exodus of Armenians occurred in late September and early October, only a few days before Hamas launched its surprise attack on Israel.[47] Given the global interest in the Middle East conflict, it is understandable that media outlets prioritized coverage of the attack and Israel's subsequent incursion into Gaza.[48] While articles about Nagorno-Karabakh occasionally appeared in the *New York Times* after October 7, they were largely pushed off the front page, buried in less prominent sections of the website or app.[49] The primary international focus quickly shifted to the crisis in Israel and accusations of ethnic cleansing in Hamas-controlled Gaza.

In the summer of 2024, ethnic displacement and disruption in the Middle East remained the most reported global story. Stories about Israel, Gaza, and related stakeholders in the conflict consistently appeared as top stories in electronic media and on the front page of print publications.[50] Coverage of the Armenian diaspora from Nagorno-Karabakh and coverage of the ethnically cleansed region itself was rare.[51] Western news outlets have never been particularly invested in covering the crisis in Nagorno-Karabakh as a human tragedy. In the weeks and months

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https://storage.googleapis.com/qurium/www.meydan.tv/az-article-musteqil-jurnalistler-susa-xankendi-yolundaki-aksiyaya-buraxilmadi.html?fbclid=IwAR2-QvQPSn_ja7dvsG8Fx0sKVaPbxwt8v1WbPdeBkJqJtPmbdZXzh_OzMc8.

[45] Ivan Nechepurenko, *Death Toll Rises After Explosion at Nagorno-Karabakh Fuel Depot*, N.Y. TIMES (Sept. 26, 2023), https://www.nytimes.com/2023/09/26/world/europe/azerbaijan-nagorno-karabakh-explosion.html.

[46] Josef Federman & Issam Adwan, *Hamas surprise attack out of Gaza stuns Israel and leaves hundreds dead in fighting, retaliation*, AP NEWS (Oct. 7, 2023), https://apnews.com/article/israel-palestinians-gaza-hamas-rockets-airstrikes-tel-aviv-11fb98655c256d54ecb5329284fc37d2.

[47] *Id.*

[48] Adam Johnson & Othman Ali, *Coverage of Gaza War in the New York Times and Other Major Newspapers Heavily Favored Israel, Analysis Shows*, INTERCEPT (Jan. 9, 2024, 6:00 AM), https://theintercept.com/2024/01/09/newspapers-israel-palestine-bias-new-york-times/ (detailing a quantitative analysis that shows over 1,100 articles were written about the Israel-Hamas war in its first six weeks in publications such as the New York Times, Washington Post, and Los Angeles Times).

[49] Search for articles about Nagorno-Karabakh, N.Y. TIMES, https://www.nytimes.com/search?dropmab=false&endDate=2024-06-05&query=nagorno%20karabakh&sort=best&startDate=2023-10-07 (last visited Oct. 18, 2024) (showing 14 articles written about Nagorno-Karabakh in the New York Times since the start of the Israel-Hamas conflict); Search for articles about Nagorno-Karabakh, L.A. TIMES, https://www.latimes.com/search?q=%22nagorno%20karabakh%22&s=1&p=1 (last visited Oct. 18, 2024) (showing 15 articles mentioning Nagorno-Karabakh in the Los Angeles Times since the start of the Israel-Hamas conflict).

[50] *See, e.g.,* Front Page from October 8, 2023, N.Y. TIMES, https://www.nytimes.com/issue/todayspaper/2023/10/08/todays-new-york-times (last visited Oct. 18, 2024); Front Page from October 9, 2023, N.Y. TIMES, https://www.nytimes.com/issue/todayspaper/2023/10/09/todays-new-york-times (last visited Oct. 18, 2024); Front Page from October 10, 2023, N.Y. TIMES, https://www.nytimes.com/issue/todayspaper/2023/10/10/todays-new-york-times (last visited Oct. 18, 2024); Front Page from October 11, 2023, N.Y. TIMES, https://www.nytimes.com/issue/todayspaper/2023/10/11/todays-new-york-times (last visited Oct. 18, 2024).

[51] Search for articles with terms "Nagorno-Karabakh" and "ethnic cleansing," N.Y. TIMES, https://www.nytimes.com/search?dropmab=false&query=nagorno%20karabakh%20ethnic%20cleansing&sort=best (last visited Oct. 18, 2024) (showing thirty-four results from 1992 to 2023).

following the Hamas attacks, celebrity anchors made multiple trips to cover the human suffering in Israel.[52] Although Western journalists have limited access to Gaza, they have reported on the suffering there by relying on local contacts.[53] The ongoing human tragedy in the Middle East has resonated palpably in America and beyond. For example, consider the upheaval at U.S. universities in the spring of 2024.[54] There are no campus encampments protesting the ethnic cleansing in Artsakh, no Anderson Cooper or Thomas Friedman traveling to Yerevan or Syunik to assess the suffering of ethnic Armenians forcibly displaced from their homes in Stepanakert. Without action, the ethnic displacement in Nagorno-Karabakh may quickly become a historical footnote forgotten by most, except for those who lived through it.

IV. THE CONCEPT OF "ACCOUNT-ABILITY"

A. The Value of Oral Histories

This article explores a concept referred to as "account-ability," which involves the collection of firsthand accounts that aggregate to construct a narrative. In some respects, account-ability is not entirely new. Oral history traditions could be considered a form of account-ability, as accounts are passed down through generations and serve to shape historical or mythical narratives. Scholarly collections of recorded oral accounts are more closely akin to the principle of account-ability because they preserve permanent records of those who witnessed events.[55] In that sense, it is less about a narrator controlling the story—such as with the Exodus story of Passover[56] or Homer's *Iliad*[57]—and more about the individual accounts that, when aggregated, allow users to construct a historical narrative.

The scholarly methodology of oral history, which utilizes recording devices to preserve histories that might otherwise be forgotten, was largely devised in 1948 by Allan Nevins at Columbia University.[58] Soon after, the United States government adopted oral history practices to archive recorded interviews conducted by folklorists during the 1930s with formerly enslaved

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[52] Jeremy Barr, *News networks 'scrambling' to get journalists to Israel*, WASH. POST (Oct. 9, 2023, 5:38 PM), https://www.washingtonpost.com/style/media/2023/10/09/journalists-israel-hamas-coverage-danger/.

[53] Yasmeen Serhan, *Palestinian Journalists Offer a Rare Glimpse into Life Inside Gaza. But for How Long?*, TIME (Dec. 8, 2023, 6:25 AM), https://time.com/6343715/israel-hamas-war-journalists-gaza/; Ruth Michaelson, '*I'm not just covering the news – I'm living it': Gaza's citizen journalists chronicling life in war*, GUARDIAN (Dec. 12, 2023), https://www.theguardian.com/world/2023/dec/12/gaza-citizen-journalists-war-footage-israel.

[54] *Campus protests: Pro-Palestinian demonstrations spread as some schools crack down*, NBC NEWS (Apr. 26, 2024), https://www.nbcnews.com/news/us-news/live-blog/columbia-protests-live-update-encampment-continue-college-negotiates-p-rcna14911.

[55] *See generally* Jessica Enoch and Pamela VanHaitsma, *Reading the Rhetoric of Digital Archives in the Undergraduate Classroom*, 67 COLL. COMPOSITION & COMMC'N 216 (Dec. 2015).

[56] Dara Lind, *What is the Passover story?*, VOX (Aug. 5, 2014, 2:29 PM), https://www.vox.com/2014/8/5/18001980/what-is-the-passover-story.

[57] John Miles Foley, "*Reading" Homer Through Oral Tradition*, 34 COLL. LITERATURE 1 (2007).

[58] Louis Starr, *Oral History*, ORAL HIST.: AN INTERDISCIPLINARY ANTHOLOGY 39-40 (David K. Dunway & Willa K. Baum eds., 2d ed. 1996); *id.* at 39 (The editors of this book declare this Starr essay to be "the best overall introduction to …oral history" and "required reading" if one is trying to gain knowledge on the topic.).

people and others associated with American subcultures during the New Deal.[59] The government preserved the New Deal interviews in part because of their "enduring archival value."[60] Since then, the use of oral history has increased significantly as technological advances have made it easier and less expensive to record interviews.[61] Digital storage capabilities have also made recordings more accessible to scholars and the public.[62] Written accounts have become more labor-intensive since interviews are often less spontaneous and responses more heavily edited.[63]

In 1949, Columbia University's oral history project recorded an interview with Judge Learned Hand, marking the first use of a tape recorder in a rigorous, scholarly context.[64] Although several universities began collecting oral histories for autobiographical and special projects, the practice did not gain widespread traction until the 1960s, coinciding with the mainstream availability of portable tape recorders.[65] During this era, academic institutions, often in collaboration with museums, historical societies, or libraries, conducted oral interviews stored on cassette tapes and accompanied by written transcripts.[66] By 1973, one-third of all oral history centers in the United States were affiliated with either public or independent colleges.[67]

However, the dominance of universities in oral history began to wane in the late 1970s and 1980s.[68] During this period, historians increasingly left academia to undertake contract work for corporations or agencies, collecting oral histories for these entities.[69] This shift led to a divergence in methodology, influenced by the people's history movement,[70] which empowered interview subjects to act as "their own historians," offering their personal interpretations of historical events rather than merely serving as sources.[71] Prominent oral history projects from this era included those focusing on African American history, feminism, corporate history, and the histories of various ethnic groups.[72]

The rise of digital technology in the 1990s ushered oral history into a new era.[73] Oral historians transitioned from using cassette tapes and manuscripts to recording interviews that could

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[59] *Id.* at 43.
[60] *Id.*
[61] Catherine Freemon, *How Digital Technology Has Changed Oral History*, WM. & MARY: LEMON PROJECT (May 24, 2013), https://lemonproject-branchout.pages.wm.edu/how-digital-technology-has-changed-oral-history/.
[62] *Id.*
[63] *Id.* at 41.
[64] *Id.* at 44.
[65] *Id.* at 45-46.
[66] *Id.* at 46-48.
[67] *Id.* at 48.
[68] *See* Ronald J. Grele, *Directions for Oral History in the United States*, ORAL HIST.: AN INTERDISCIPLINARY ANTHOLOGY 72-73 (David K. Dunway & Willa K. Baum eds., 2d ed. 1996); Daniel R. Kerr, *Allan Nevins is Not My Grandfather: The Roots of Radical Oral History Practice in the United States*, RADICAL ROOTS: PUB. HIST. & TRADITION SOC. JUST. ACTIVISM 23, 34 (Denise D. Meringolo ed. 2021).
[69] *Id.*
[70] Kerr, *supra* note 68, at 34; Alistair Thomson, *Four Paradigm Transformations in Oral History*, 34 ORAL HIST. REV. 49, 53-58 (2007).
[71] Kerr, *supra* note 68, at 34.
[72] Grele, *supra* note 68, at 66-67.
[73] *See* Sherno Berger Gluck, *Reflecting on the Quantum Leap: Promises and Perils of Oral History on the Web*, 41 ORAL HIST. REV. 244, 245-46 (2014).

be shared online.[74] This technological shift expanded the reach and impact of oral history by enabling the creation of interactive websites featuring recordings alongside images, maps, and other resources.[75] The Internet, particularly social media, has further facilitated the work of oral historians[76] by allowing people to share their perspectives on historical events in real-time.[77] This enables historians to interpret near-contemporaneous social media content instead of relying solely on retrospective interviews conducted years later.[78]

Recent oral history projects that incorporate digital technology and social media posts cover diverse topics such as ethnic displacement,[79] war crimes in countries like Syria,[80] environmental issues,[81] and social movements.[82] These projects reflect the evolving methodologies and broadening scope of oral history in the digital age.

B. How an Account-ability Project Differs from Oral Histories

What sets an account-ability project apart from oral history is that firsthand accounts are made in real-time and speak for themselves. Oral history collections, by contrast, typically reflect on past events, with stories told in hindsight. Certain stories may be given prominence because the storytellers, and often the scholars curating these collections, already know how the historical timeline unfolds. The selection of oral history subjects and the questions asked often reflect the ideology and worldview of the scholar-curator. While it is impossible to be completely free of bias, a true account-ability project aims to remain content-neutral in its selection criteria and in the nature of the accounts collected.

In a true account-ability project, scholars would take an empirical approach, selecting accounts based on the time, place and manner of stories, instead of the content. For this approach to be effective, it is essential that the accounts are created in real-time, not in hindsight. While some may draw parallels to U.S. free speech jurisprudence, the more appropriate comparison would be the rules of evidence. Properly constructed, an account-ability project collects testimony that reflects what witnesses believed they were experiencing in real-time – the type of testimony

[74] *Id.* at 245-46; Peter B. Kaufman, *Oral History in the Video Age*, 40 ORAL HIST. REV. 1, 3-5 (2013); Steffi de Jong, *Witness as Object: Video Testimonies Holocaust Museums*, *in* 10 MUSEUMS & COLLECTIONS 75 (Mary Bouquet & Howard Morphy eds., 2018).
[75] Katja Müller*, Digital Archives and Collections: Creating Online Access to Cultural Heritage*, *in* 11 ANTHROPOLOGY MEDIA, 145-46 (Mark Allen Peterson & Sahana Udupa eds., 2021); Kaufman, *supra* note 81, at 3-4.
[76] *See* Gluck, *supra* note 73.
[77] *Id.*
[78] *See* Reisa Levine, *Oral History in the Age of Social Media Networks: Life Stories on CitizenShift and Parole Citoyenne*, *in* REMEMBERING MASS VIOLENCE: ORAL HIST., NEW MEDIA & PERFORMANCE, 131 (Steven High, Edward Little, & Thi Ry Duong eds., 2014).
[79] *Id.*
[80] Dima Saber & Abdul Rahman al-Jaloud, *The Syrian Archive Digital Memory Project: Archiving as Testimony, as Evidence, as Creative Practice*, *in* 37 VISUAL ANTHROPOLOGY 19, 21 (2024).
[81] Anne Valk & Holly Ewald, *Bringing a Hidden Pond to Public Attention: Increasing Impact Through Digital Tools*, *in* 40 ORAL HIST. REV. 8, 10-11 (2013).
[82] *See generally* Ashlyn Velte, *Ethical Challenges and Current Practices in Activist Social Media Archives*, *in* 81 AM. ARCHIVIST 112 (2018) (detailing various database archives ran by universities that have collected social media posts for events like the Occupy Wall Street movement and police brutality as part of the Black Lives Matter movement).

that would be admissible in a court of law. In contrast, oral histories are often shaped by the passage of time and the biases of perspective, making them more analogous to hearsay evidence, which is typically inadmissible in court.[83] These distinctions may have real-world implications in courts that may need to review historical accounts of war crimes or crimes against humanity, a point explored later in this article.

Social media database archives are designed to preserve digital content related to two main types of events. The first category focuses on capturing social media posts that are part of activist movements promoting social justice.[84] The second category centers on preserving posts and videos from citizens documenting violence and potential crimes in war zones.[85] The Artsakh Archive would primarily focus on the second category, collecting real-time social media posts that chronicle the lives of ordinary people before and during a period of ethnic displacement.

Universities and local historical societies typically support and curate databases for social justice movements involving activist social media posts.[86] Given the ethical issues involved in collecting and preserving such data, archivists often source posts by studying specific user accounts or through hashtags and keyword searches.[87] The purpose of these activist archives is to preserve the voices of organizers and activists who might otherwise remain unrecognized and fade into obscurity.[88] By amplifying these voices, social media archivists provide a broader narrative that contrasts with mainstream media coverage.[89] Users of these databases typically search the archives via keyword queries, tags, or advanced search options.[90]

For digital media archives preserving evidence of war crimes or ethnic displacement, funding primarily comes from NGOs and crowdsourcing.[91] There is limited scholarship on using databases to store user-created evidence in these contexts,[92] with most research focusing on examples like the Syrian Archive.[93] According to its curators, the Syrian Archive serves two main purposes.[94] First, it allows Syrians in war zones to document their history authentically, free from external adulteration.[95] Contributors emphasize the importance of creating a lasting narrative, even

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[83] *See generally* R. Kenneth Kirby, *Phenomenology and the Problems of Oral History*, 35 ORAL. HIST. REV. 22 (2008).
[84] *See generally* Velte, *supra* note 82.
[85] Saber & al-Jaloud, *supra* note 80, at 21; *see What We Do*, MNEMONIC, https://mnemonic.org/ (last visited Oct. 18, 2024) (a non-profit group created to archive digital media related to potential war crimes in Syria, Sudan, Ukraine, and Yemen).
[86] Velte, *supra* note 82, at 113.
[87] *Id.* at 114.
[88] *Id.* at 113.
[89] *Id.*
[90] *Archiving the Occupy Movements From 2011*, OCCUPY ARCHIVE, https://occupyarchive.org/ (last visited Oct. 18, 2024); *Documenting Ferguson*, WASH. U. LIBRS., http://documentingferguson.wustl.edu/omeka/items/browse?collection=62 (last visited Oct. 18, 2024).
[91] MNEMONIC, *supra* note 85.
[92] *See* Saber & al-Jaloud, *supra* note 80.
[93] Jeff Deutch & Hadi Habal, *The Syrian Archive: A Methodological Case Study of Open-Source Investigation of State Crime Using Video Evidence from Social Media Platforms*, 7 STATE CRIME 46 (2018).
[94] Saber & al-Jaloud, *supra* note 80, at 25-30.
[95] *Id.* at 25-26.

if much of the population is decimated by conflict.[96] This archive helps Syrians control the narrative of events in their country.[97] Second, the Syrian Archive aims to preserve social media posts and videos as potential evidence for future war crime prosecutions against the Syrian government.[98] This content often represents the "only available record of the uprising and war . . . ."[99] While it is uncertain whether courts will admit this evidence, many contributors cite its potential legal use as a primary motivation for their participation.[100]

A notable feature of the Syrian Archive website is the "Syrian Digital Memory" tab.[101] Although not yet fully operational, this section aims to contextualize and humanize the digital memories of the Syrian uprising and conflict through oral history interviews.[102] These interviews with social media contributors will provide personal and collective memories, offering a more nuanced understanding of the events from those who lived through them.[103] This initiative underscores the importance of preserving the human element within digital archives, ensuring that the memories and experiences of eyewitnesses remain accessible.[104]

C. Account-ability Project Content as Admissible Court Evidence

Scholarship on the admissibility of oral history as evidence in courts primarily exists within the context of Canadian cases concerning tribal land claims.[105] Canadian courts have adapted their rules of evidence to permit Indigenous populations to present oral histories as evidence to establish claims over disputed lands.[106] Despite the hearsay rule, Canadian courts admit Indigenous oral histories under either a pedigree or reputation hearsay exception.[107] If these exceptions are not satisfied, the courts adopt a liberal interpretation of the best evidence rule or judicial notice to allow the oral histories.[108]

However, the Canadian courts' relaxed approach to oral history admissibility appears to be an outlier. Generally, it is difficult to establish non-testimonial out-of-court statements as factual, which is a necessary predicate for allowing a hearsay exception.[109] Courts may rightly question

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[96] *Id.* at 25.
[97] *Id.* at 26 ("This archive is our memory, as my mother says: 'Tomorrow, this is the story you will tell your kids.' Except, I will also be able to show them.").
[98] *Id.* at 27-29.
[99] *Id.* at 27.
[100] *Id.* at 28-29 ("Since I started documenting the revolution, I was hoping my pictures would be used to put him on trial, to face his [Bashar al-Assad] crimes…. But it is us, our duty to do something about this. Even after he dies, we need to continue with this to bring justice for the families.").
[101] *Syrian Digital Memory*, SYRIAN ARCHIVE, https://syrianarchive.org/en/memory (last visited Oct. 18, 2024).
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *See* Hope M. Babcock, *"[This] I Know from My Grandfather": The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims*, 37 AM. INDIAN L. REV. 19 (2012-13); Lori Ann Roness & Kent McNeil, *Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts*, 39 J. WEST 66 (2000).
[106] Babcock, *supra* note 105, at 21-22.
[107] *Id.* at 51-52; Roness & McNeil, *supra* note 105, at 68-69.
[108] Babcock, *supra* note 105, at 52-55.
[109] When a hearsay statement is not admissible under a nominal hearsay exception, the evidence may fall under the FRE 807 residual hearsay exception when "(1) the statement is supported by *sufficient guarantees of*

the accuracy of historical account and the motive of both the speaker and the historian. While bias and agenda are especially concerning with individual oral histories, even the establishment of a meta-narrative through an entire archive could be problematic. These accounts often reflect events that people experienced—directly or indirectly—at an earlier point in life. Memories fade with the passage of time, and the way memories are constructed may be influenced by events that occurred before and after the specific historical timeline.[110]

Oral history accounts are typically shaped by prompts constructed by historians[111] who may struggle to insulate their work from their own biases. Courts could legitimately question the rigor of the scholarship behind the selection of participants, the conduct of the interviewers, and the narrative assumptions made by the oral historians in creating the archive. In politically polarizing, contentious historical disputes, it is easy imagine dueling oral history projects, each conceived to advance the narrative assumptions of scholars who believe in their side's "truth."[112] Fundamentally, oral histories are stories, and stories can be influenced by both the storyteller and the compiler or publisher.

The use of digital user-generated evidence in international courts like the International Criminal Court ("ICC") mostly remains a hypothetical.[113] This largely stems from the ICC's limited number of cases involving digital user-generated evidence, offering little in concrete rulings to establish future evidentiary rules.[114] In *Prosecutor v. Al Mahdi*, the ICC confronted the issue of whether to admit citizen-filmed videos as evidence for the Office of the Prosecutor's ("OTP") case.[115] The tribunal did not rule on the admissibility of this evidence because Al Mahdi's defense did not object.[116] Similarly, in *Prosecutor v. Al-Werfalli*–known as the ICC's "first social media case" due to its reliance on social media videos–presented an opportunity for the ICC to establish firm rules regarding user-generated evidence.[117] However, the case was dropped without any rulings on the evidence following the defendant's death.[118]

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trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Fed. R. Evid. 807(a) (emphasis added).

[110] *See generally* R. Kenneth Kirby, *Phenomenology and the Problems of Oral History*, 35 ORAL HIST. REV. 22 (2008).

[111] *See generally* Nicholas Mariner, *Oral History: From Fact Finding to History Shaping,* 14 E. ILL. UNIV.: HISTORIA 60-69 (2005).

[112] *Compare Oral history interviews of the Israel Documentation Project*, U.S. HOLOCAUST MEM'L MUSEUM, https://collections.ushmm.org/search/catalog/irn500067 (last visited Oct. 18, 2024) *with Palestinian Oral History Archive*, AM. U. BEIRUT, https://libraries.aub.edu.lb/poha/ (last visited Oct. 18, 2024).

[113] Lindsay Freeman, *Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials*, 41 FORDHAM INT'L L. J. 283, 288 (2018).

[114] *Id.* at 289-90, 317-18.

[115] *Id.* at 317 (citing Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-T-4-Red-ENG, Judgment, (Aug. 22, 2016)).

[116] *Id.* at 317.

[117] *Id.* at 331-32 (citing Prosecutor v. Al-Werfalli, Case No. ICC-01-11-01/17-2, Warrant of Arrest (Aug. 15, 2017)).

[118] Press Release, ICC, ICC terminates proceedings against Mahmoud Mustafa Busayf Al-Werfalli following confirmation of his passing, ICC Press Release ICC-CPI-20220615-PR1660 (June 15, 2022).

The ICC retains the authority to tighten the standards on user-generated evidence.[119] Currently, the ICC admits any evidence that is relevant and whose probative value outweighs any prejudicial effect on the defendant.[120] When properly managed, user-generated evidence can significantly enhance an OTP case. A 2018 law review article on user-generated evidence asserted:

> At its best, user-generated evidence promises to provide a form of visual and oral testimony that (i) is secured in real-time, thereby removing the opportunity for evidence to be lost or destroyed; (ii) is not subject to manipulation; and (iii) can be obtained with potentially zero risk to ICC investigators and the witnesses they would otherwise contact.[121]

The admissibility of such evidence holds great potential benefit for a well-designed and implemented account-ability project. It reflects the principle of res ipsa loquitur: let the user-generated real-time content speak for itself.[122]

V. THE ARTSAKH ARCHIVE: AN ACCOUNT-ABILITY REMEDY FOR NAGORNO-KARABAKH

The Artsakh Archive would be a collection of social media posts uploaded by people living in Nagorno-Karabakh between 2020 and 2023, a period coinciding with the Second Nagorno-Karabakh War and the ensuing ethnic displacements.[123] These posts, sourced from platforms like Instagram, Facebook, Twitter, and other regionally popular social media sites,[124] would be organized in a searchable database accessible to the public.

For the Artsakh Archive to be a bona-fide account-ability project, it must collect posts in a strictly content-neutral manner. The Archive, for example, would aim to collect *all* posts from the region, regardless of the topic or the poster's ethnic identity. The objective of the Artsakh Archive is to let firsthand, real-time accounts tell the story of life in the region, creating a narrative of the Artsakh experience through the aggregation of social media posts. If certain posts diverge from the aggregated narrative, that variation would underscore the Archive's value. The essential point of an account-ability project is to let the posts narrate the story.[125]

[119] Freeman, *supra* note 113, at 329-30.
[120] *Id.* at 294.
[121] Rebecca Hamilton, *User-Generated Evidence*, 57 COLUM. J. TRANSNATIONAL L., 22 (2018).
[122] *Res Ipsa Loquitur*, BLACK'S LAW DICTIONARY (11th ed. 2019) (translating to "the thing speaks for itself," a tort concept where a scenario is so unique that common sense and experience allows one to infer that negligence occurred).
[123] *See supra* Part II and Part IV.B.
[124] *See* O'Connor, *supra* note 5; *see* Kemp, *supra* note 5; *see also* Elise Thomas & Albert Zhang, *Snapshot of a shadow war: a preliminary analysis of Twitter activity linked to the Azerbaijan-Armenia conflict*, AUSTL. STRATEGIC POL'Y INST. (Oct. 2020), https://ad-aspi.s3.ap-southeast-2.amazonaws.com/2020-10/Snapshot%20of%20a%20shadow%20war.pdf?VersionId=lSv3bbW7nlLmCGYmvte8M2R.SfCkR75N.
[125] R.T. Naylor, *Wash-out: A Critique of Follow-the-Money Methods in Crime Control Policy*, 32 CRIME L. & SOC. CHANGE 1 (1999) (describing an example of where the court follows the evidence. In this instance, courts tend to follow money trails to prosecute money laundering defendants).

In fashioning a process-based aggregation of posts to counter online political disinformation, content neutrality is crucial. Beyond mere redactions to ensure privacy,[126] any indication that the empirical information is being curated to promote a particular viewpoint could generate skepticism among those wary of ideological influence. Some may argue that even an unfiltered database could exhibit viewpoint bias in its search engine design.[127] To address this, a social media archive would undergo professional scrutiny by an academic institution that authenticates and organizes empirical social media posts based principally on the time and location of the posting—information already embedded as metadata.[128]

To be clear, certain choices related to search parameters may not be entirely content-neutral. In the Artsakh Archive, one could envision search terms reflecting the daily experiences of those who lived in the region, like "family celebration" or "religious worship." The collection could also be searchable by specific event dates, including military incursions, or by geo-location. Additionally, the search function could allow for intersections of multiple terms, enabling results for a "family celebration" at a church in a specific village on a specified date.[129]

Building the search engine would require collaboration among archivists and software engineers, guided by scholars aware of potential biases and censorship issues. Content-based identifiers, limited to search cataloging would be subject to updates, but the empirical data in the archive would remain unaltered. With respect to the content itself, the focus would remain on identifying and authenticating the empirical social media information without any censorship, contextualization, or annotation, allowing the authenticated information to essentially speak for itself.

This approach means that some posts could contain deliberate disinformation, inadvertent misinformation, or accurate yet Azeri-sympathetic content. However, this may be a necessary trade-off to avoid ideologically driven censorship. The advantage of an account-ability project is that disinformation and misinformation are mitigated through aggregation. Most social media posts that describe eyewitness accounts of events show a degree of shared accuracy. Individual posts may be embellished, but that layer of falsehood can often be detected across numerous accounts of the same event.

The free speech value of this process-based account-ability approach could serve as a powerful antidote to wartime disinformation. In the Artsakh Archive, the empirical nature of the content could offer a robust counter to state-supported propaganda, particularly when aggregated. For instance, if one database entry provides an account conflicting with an Azeri propaganda

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[126] Privacy redactions would include medical, financial, legal and identity records that would typically be kept confidential. These redactions could be made voluntary, allowing participants to opt in.

[127] Eric Goldman, *Search Engine Bias and the Search Engine Utopianism*, 8 YALE J. L. & TECH. 188, 192 (2006) (noting that "search engines generally tune their ranking algorithms to support majority interests").

[128] *Understand metadata concepts*, ADOBE, https://experienceleague.adobe.com/en/docs/experience-manager-65/content/assets/administer/metadata-concepts (Mar. 13, 2024) (data relating to where or when an image was taken that is automatically embedded into the photograph without any additional steps by the photographer).

[129] *See, e.g.*, *Archives of American Art*, SMITHSONIAN, https://www.aaa.si.edu/search/collections (last visited Oct. 18, 2024) (allowing users to search the oral history by choosing multiple tags like occupation of the interviewee and topic or theme of the interview).

source, the accuracy of each may be debatable. However, the cumulative weight of dozens or perhaps hundreds of independent firsthand accounts diverging from the Azeri narrative would outline the true series of events.

The posts in the Artsakh Archive may provide the ICC and other judicial bodies with admissible evidence of crimes committed in the region. While one person may deliberately fabricate an eyewitness account, it would be implausible for a large segment of the population to do so simultaneously. The more firsthand accounts gathered, the greater likelihood that the underlying events are accurately documented.

VI. CONCLUSION

The ethnic Armenian community of Artsakh may no longer control their land, but they can still preserve, control, and share their stories. These stories will not tell themselves, and without a structured plan, they will never reach a global audience. An organized effort is essential to build this narrative of ethnic displacement. Account-ability at its core is about building narrative capacity. With the assistance of NGOs, universities, and other non-state groups, former residents of Artsakh can contribute to a searchable database detailing their firsthand accounts of events before, during, and after their displacement. Through the Artsakh Archive, scholars may be able to document crimes committed during the forced displacement of the ethnic Armenian community from the region.

Since the people of Artsakh no longer reside in Nagorno-Karabakh, the creation of an account-ability project requires the collection of years of social media posts created by the ethnic Armenian population in the region. Some posts may have been intended for public consumption, while others may have captured mundane and familial stories. These public and personal social media posts, aggregated in a curated database, will convey what life was once like in Artsakh. Posts created after Artsakh's fall will document what life has become for those now displaced. This comprehensive database will make these stories accessible to scholars, lawyers, journalists, folklorists, and the public both now and in the future. True justice and reconciliation cannot begin until everyone gains access to the unfiltered truth.

NAVIGATING UNCHARTED TERRITORIES: HUMAN RIGHTS IMPLICATIONS OF EMERGING TECHNOLOGIES IN UNRECOGNIZED STATES – LESSONS FROM THE NAGORNO-KARABAKH CRISIS

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Abstract

This paper explores the ethical, legal, and practical implications of integrating emerging technologies into the governance frameworks of unrecognized or partially recognized states, with a focus on human rights. Using the Nagorno-Karabakh conflict as a case study, the research delves into how advanced technologies have reshaped the dynamics of warfare and governance. It examines the ethical concerns related to privacy, surveillance, and civilian casualties, and highlights the limitations of current international legal frameworks in addressing these challenges. The paper argues for the establishment of robust international norms and policies to govern the use of emerging technologies, ensuring they contribute to peace, stability, and the protection of human rights in conflict-affected regions. By providing a comprehensive analysis of the interplay between technology and governance in unrecognized states, this study aims to inform policymakers, practitioners, and scholars on the need for a balanced approach that prioritizes human rights and ethical standards.

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I. INTRODUCTION

In an era where technology is rapidly reshaping every facet of human existence, the intersection of emerging technologies and human rights has become a critical area of study. This is particularly pertinent in unrecognized or partially recognized states, where governance challenges and political isolation create a unique and often volatile environment. These regions, operating in a state of limbo without full international recognition, face significant obstacles in establishing stable governance frameworks.[2] The integration of advanced technologies into these contexts not only offers potential pathways for innovation and progress but also raises profound ethical, legal, and practical concerns.[3]

The Nagorno-Karabakh conflict provides a stark and illuminating case study for examining these issues. As a predominantly ethnic Armenian enclave within the internationally recognized borders of Azerbaijan, Nagorno-Karabakh has been the epicenter of a protracted and deeply complex conflict.[4] This region declared independence in 1991, leading to a brutal and ongoing struggle between Armenia and Azerbaijan.[5] The recent resurgence of hostilities highlights the transformative role of emerging technologies in modern warfare and governance, with both sides employing advanced weaponry, cyber capabilities, and sophisticated surveillance tools.[6]

This paper seeks to explore the multifaceted implications of integrating emerging technologies into the governance frameworks of unrecognized states, with a particular focus on human rights. By delving into the Nagorno-Karabakh conflict, the paper examines how technologies such as drones, precision-guided munitions, and cyber capabilities have influenced the dynamics of the conflict while posing significant ethical and human rights challenges. The aim is to provide a comprehensive analysis that highlights the urgent need for robust international norms and policies to govern the use of these technologies, ensuring they contribute to peace, stability, and the protection of human rights in conflict-affected regions.

II. CONTEXT AND CHALLENGES OF UNRECOGNIZED STATES

Unrecognized or partially recognized states, often referred to as de facto states,[7] exist in a precarious legal and political limbo. These entities declare independence and maintain control over

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[2] *See generally* NINA CASPERSEN, UNRECOGNIZED STATES IN THE INTERNATIONAL SYSTEM (Gareth Stansfield eds., 2011).
[3] *See generally* MICHAEL J. BOYLE, DRONES IN GLOBAL SECURITY (Oxford Rsch. Encyclopedia of Int'l Stud. ed., 2022).
[4] *Nagorno-Karabakh Conflict*, CTR. FOR PREVENTATIVE ACTION: GLOB. CONFLICT TRACKER (Mar. 20, 2024), https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict.
[5] *See* SVANTE CORNELL, SMALL NATIONS AND GREAT POWERS: A STUDY OF ETHNOPOLITICAL CONFLICT IN THE CAUCASUS 47-48 (Nicholas Awde ed., 2001).
[6] *See* Grudi Angelov, *Military Implications of the Nagorno-Karabakh Conflict: Tactics and Technologies*, 51 INFO. & SEC.: INT'L J. 49, 49-55 (2022).
[7] Burak Bilgehan Ozpek, *The Role of Democracy in the Recognition of De Facto States: An Empirical Assessment*, 20 GLOB. GOVERNANCE 585, 585 (2014).

a specific territory and population, yet they lack widespread international recognition.[8] Examples include Nagorno-Karabakh, Transnistria, Abkhazia, and South Ossetia.[9] While these regions may exhibit many attributes of sovereign states such as functioning governments, military forces, and distinct national identities, they remain outside the formal framework of international law and diplomacy.[10]

The defining characteristic of unrecognized states is their ambiguous status.[11] They are often born out of conflict and exist in a state of tension with the parent states from which they seek independence.[12] This lack of recognition leads to profound challenges in governance and development.[13] Without formal recognition, these states cannot participate in international organizations, access global markets and financial systems, or benefit from international legal protections and aid.[14] Consequently, they operate in isolation, often relying on limited resources and informal networks to sustain their administrations and economies.[15]

A. Governance Challenges

The governance challenges faced by unrecognized states are multifaceted and deeply rooted in their ambiguous international status. The absence of recognition means that these entities are excluded from the benefits of international cooperation and assistance, hindering their ability to establish stable and effective governance structures.[16]

Political instability remains a significant hurdle in unrecognized states, where the continuous threat of military intervention and political upheaval hampers efforts to establish stable institutions. In these contexts, leaders frequently resort to authoritarian measures to maintain control and suppress dissent, exacerbating governance challenges.[17] This reliance on authoritarianism fosters a cycle of instability and repression, as seen in cases like Nagorno-Karabakh, where unregulated power dynamics among military leaders and local warlords undermine the viability of democratic governance.[18] The inability to effectively integrate these

[8] Sophie Rodger, *Building A Nation: Unrecognized States and the Enduring Power of Identity*, 10 ST. ANTONY'S INT'L REV. 53, 53-54 (2015).
[9] Z.Z. Bakhturidze & Natalia A. Vasilyeva, *Unrecognized States of the Post-Soviet Space: Problems and Prospects*, 7 POST-SOVIET ISSUES 30, 31 (2020).
[10] *See generally* Jonte van Essen, *De Facto Regimes in International Law*, 28 UTRECHT J. INT'L & EUR. L. 31, 33 (2012).
[11] *See generally* Caspersen, *supra* note 2.
[12] *See* Helge Blakkisrud*, Surviving Without Recognition: De Facto States*, *in* THE ROUTLEDGE HANDBOOK OF SELF-DETERMINATION AND SECESSION 343-58 (Ryan D. Griffiths, Aleksandar Pavković, & Peter Radan eds., 2023).
[13] *Id.*
[14] *See generally* Laurence Broers, *Recognizing Politics in Unrecognised States: 20 Years of Enquiry into the De Facto States of the South Caucasus*, 1 CAUCASUS SURV. 59, 60 (2013).
[15] *Id.*
[16] *See generally* Caspersen, *supra* note 2.
[17] *See generally South Ossetia (unrecognized state): Background*, MINORITY RTS. GRP, https://minorityrights.org/country/south-ossetia-unrecognized-state/.
[18] Richard Antaramian & Rafael Khachaturian, *Azerbaijan's Ethnic Cleansing of Nagorno-Karabakh Is Fueled by Regional Power Struggles*, JACOBIN (Sept. 28, 2023), https://jacobin.com/2023/09/azerbaijan-nagorno-karabakh-armenian-ethnic-cleansing.

military actors into legitimate state structures and the dependence on informal economies contribute further to this instability, complicating the establishment of robust democratic frameworks essential for long-term peace and security.[19]

Unrecognized states experience challenging economic conditions marked by rampant corruption, reliance on illicit trade, and the inability to provide essential services.[20] The economy in unrecognized states is frequently described as "devastated, informal, or illicit," with the lack of legitimate economic engagement further stifling innovation and perpetuating corruption.[21] The economic challenges faced by unrecognized states translate into widespread poverty and lack of access to basic services.[22] Ongoing or sporadic conflicts contribute to severe human rights abuses, including indiscriminate violence, forced displacement, and destruction of civilian infrastructure.[23] Without access to international markets and banking systems, these regions are cut off from essential resources and opportunities for growth.[24] This isolation leads to a reliance on smuggling and black markets, often resulting in large gray and black sectors that dominate their economies.[25] Additionally, the disruption of traditional economic ties and the challenges of post-war recovery limit the ability of de facto authorities to provide essential public services. The expectation for these authorities to deliver on security and services in the wake of secession creates a significant gap, as they struggle to build a tax base without international recognition. This situation not only marginalizes these regions economically but also fosters an environment where illicit activities become a primary means of survival.[26]

B. Human Rights Concerns

Human rights issues are pervasive in unrecognized states. These states "are frequently born out of conflict, exist in volatile parts of the world, and crucially lack the protection provided by norms of non-intervention."[27] This absence of legal recognition leaves unrecognized states in a precarious position, where they exist "in the shadows of international relations" under constant threat of renewed conflict.[28] The politics of identity can lead to exclusionary practices that marginalize certain groups within their populations.[29] Ultimately, the interplay of limited international support and the complexities of internal identity politics exacerbate the human rights challenges faced by individuals in unrecognized states.

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[19] *See generally* Blakkisrud, *supra* note 12.
[20] *Id.*
[21] *Id.* at 350.
[22] Tatiana Gnuva, *Unpacking the Humanitarian Crisis in Nagorno-Karabakh,* BORGEN PROJECT (Oct. 3, 2023), https://borgenproject.org/humanitarian-crisis-in-nagorno-karabakh/.
[23] *See* Sharmila Devi, *Aid Agencies Rush to Support Nagorno-Karabakh Refugees*, 402 LANCET 1315, 1315 (2023).
[24] *See generally* UNRECOGNIZED STATES IN THE INTERNATIONAL SYSTEM, *supra* note 2.
[25] *Id.*
[26] *See* Blakkisrud, *supra* note 12.
[27] Rodger, *supra* note 8, at 78.
[28] *Id.* at 54.
[29] *Id.* at 56.

The use of emerging technologies in these conflicts introduces new dimensions of human rights violations.[30] Unrecognized states present a unique and challenging landscape for governance and human rights. Their ambiguous status and the resulting political and economic isolation create an environment where human rights are frequently compromised, and governance is fraught with instability and ambiguity.[31] Understanding these contexts is crucial for addressing the broader implications of emerging technologies in such regions, as explored in subsequent sections of this paper.

III. ROLE OF EMERGING TECHNOLOGIES

A. Technological Advances in Conflict

The Nagorno-Karabakh conflict serves as a striking example of how emerging technologies can reshape the landscape of modern warfare. Throughout the hostilities, both Armenia and Azerbaijan deployed a range of advanced technologies that significantly influenced the conflict's dynamics and outcomes.[32] Unmanned drones were used extensively by both sides for reconnaissance, surveillance, and targeted strikes.[33] These aerial platforms provided real-time intelligence on enemy positions, allowing for precise targeting and enhanced battlefield awareness.[34] The use of drones not only minimized the risk to personnel but also enabled high-precision attacks on military and strategic targets, thereby shifting the tactical advantages towards the more technologically equipped forces.[35]

Cyber capabilities also played a crucial role in the conflict. Both Armenia and Azerbaijan engaged in cyber warfare to disrupt enemy communications and digital infrastructure.[36] Cyber-attacks targeted government websites, military databases, and civilian infrastructure, aiming to sow chaos, gather intelligence, and undermine the enemy's operational effectiveness.[37] This digital dimension of the conflict highlighted the increasing importance of cybersecurity and information warfare in contemporary military strategy.[38]

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[30] Angelov, *supra* note 6, at 50-51.
[31] *See generally* Caspersen, *supra* note 2.
[32] Angelov, *supra* note 6, at 50.
[33] *Id.* at 50-51.
[34] *Id.*
[35] Antonio Calcara et al., *Why Drones Have Not Revolutionized War: The Enduring Hider-Finder Competition in Air Warfare*, 46 INT'L SEC. 130, 131 (2022).
[36] Antoaneta Roussi, *Warring parties turned to spyware in Azerbaijan-Armenia conflict*, POLITICO (May 25, 2023, 1:51 PM), https://www.politico.eu/article/warring-parties-spyware-azerbaijan-armenia-conflict-pegasus-hacking/#:~:text=The%20intrusive%20spyware%20tool%20Pegasus,in%20a%20new%20report%20Thursday; *see also* Andrius Bivainis, *Multi-Dimensional Assessment of the Second Nagorno-Karabakh War*, 38 SEC. & DEF. Q. 51, 53-57 (2002).
[37] Margarit Petrosyan, *The Role of Non-State Actors in Modern Warfare: The Case of Syria and Nagorno-Karabakh*, 26 J. BALKAN & NEAR E. STUD. 149, 153 (2024).
[38] *Id.*

Precision-guided munitions, including smart bombs and guided missiles, were another key technological advancement utilized during the Nagorno-Karabakh conflict.[39] These weapons, equipped with advanced guidance systems, allowed for highly accurate strikes on specific targets, reducing collateral damage and increasing the effectiveness of military operations.[40] The deployment of such munitions underscored a shift towards more targeted approaches in modern warfare, where precision and minimization of unintended damage are paramount.[41]

B. Ethical and Human Rights Implications

While the tactical advantages of these emerging technologies are evident, their use also raises significant ethical and human rights concerns.[42] These technologies often blur the line between combatant and civilian, as seen in the discussions around the ethical implications of "man out of the loop" decisions.[43] Specifically, "[l]oitering munitions that are capable of making autonomous… attack decisions are particularly problematic, because no human being is involved in making the actual decision to attack and potentially kill other humans."[44] Such capabilities not only challenge international humanitarian law but also pose significant moral dilemmas as they may lead to indiscriminate targeting,[45] thereby amplifying the demand for a comprehensive ethical framework governing their use. The performance of these systems, particularly in the face of countermeasures and denied communications, further complicates their integration into military strategy, suggesting that their operational effectiveness is not fully understood, raising questions about the overarching responsibility to protect human rights in conflict scenarios.[46]

One of the primary ethical concerns is the issue of privacy and surveillance.[47] The extensive use of drones for reconnaissance and intelligence gathering implicates serious privacy violations,[48] as these technologies can intrude on the private affairs of individuals and communities. The constant surveillance creates an environment of perpetual monitoring, eroding the sense of security and autonomy among civilians. This intrusion is not limited to the battlefield; drones can survey residential areas, making civilians feel that they are always being watched. The psychological

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[39] Josef "Polo" Danczuk, *Bayraktars and Grenade-Dropping Quadcopters: How Ukraine and Nagorno-Karabakh Highlight Present Air and Missile Defense Shortcomings and the Necessity of Unmanned Aircraft Systems*, 103 MIL. REV. 21, 22 (2023).
[40] *Id.* at 22-23.
[41] *Id.*
[42] *See* Jon Lake, *Weapons that Watch and Wait*, ARMADA INT'L (Sept. 25, 2024), https://www.armadainternational.com/2024/09/weapons-that-watch-and-wait/ (recognizing that "[t]he use of loitering munitions during the 2020 Nagorno-Karabakh war… have brought this emerging technology into the limelight, demonstrating their potential on the modern battlefield, and highlighting some of the issues surrounding their use.").
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *See* Anastasiia Kutynska & Maryna Dei, *Legal Regulation of the Use of Drones: Human Rights and Privacy Challenges*, 8 J. INT'L LEGAL COMMC'N 39, 40 (2023).
[48] *Id.* at 47.

impact of such pervasive surveillance can lead to increased stress and anxiety, disrupting the daily lives and mental well-being of the affected populations.[49]

Civilian casualties and the indiscriminate use of force are also critical issues. While precision-guided munitions are designed to minimize collateral damage, their deployment in densely populated areas can still result in significant civilian harm.[50] Moreover, the potential for errors in targeting, or the deliberate targeting of civilian infrastructure by combatants, raises profound ethical questions regarding the principles of proportionality and discrimination in the conduct of hostilities.[51] Drone operators, often located thousands of miles away from the conflict zone, may become desensitized to the human cost of their actions.[52]

The impact on human rights extends beyond the immediate physical destruction caused by these technologies. The Nagorno-Karabakh conflict saw the proliferation of propaganda, misinformation, and hate speech delivered through social media platforms.[53] These digital tools were hijacked to spread inflammatory rhetoric, incite violence, and manipulate public opinion, exacerbating ethnic tensions and contributing to a climate of fear and hostility.[54] Social media platforms such as Facebook and Twitter became battlegrounds for information warfare where both sides sought to influence international opinion and recruit sympathizers.[55] The spread of fake news and doctored images fueled hatred and mistrust, further disrupting reconciliation efforts.[56]

In conclusion, while emerging technologies such as drones, cyber warfare, and precision-guided munitions offer significant tactical advantages in conflict, their use in unrecognized states like Nagorno-Karabakh raises profound ethical and human rights concerns.[57] The potential for privacy violations, civilian casualties, and the spread of misinformation highlights the need for robust international norms and regulations to govern the deployment of these technologies. It is imperative that the international community address these issues to ensure that the use of advanced technologies in conflict aligns with humanitarian principles. Ensuring accountability for violations, promoting transparency in the use of these technologies, and fostering international

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[49] *See* Judith Uchidiuno, et al., *Privacy and Fear in the Drone Era: Preserving Privacy Expectations Through Technology*, *in* EXTENDED ABSTRACTS OF THE 2018 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 17-18 (2018), https://www.amnesty.org.au/wp-content/uploads/2021/01/In-the-line-of-fire-Armenian-Azerbaijani-conflict.pdf.

[50] *See* Amnesty Int'l, *In the Line of Fire: Civilian Casualties from Unlawful Strikes in the Armenian-Azerbaijani Conflict Over Nagorno-Karabakh*, (2021), https://www.amnesty.org/en/documents/eur55/3502/2021/en/.

[51] *See* Shamkhal Abilov & Ismayil Isayev, *The Consequences of the Nagorno–Karabakh War for Azerbaijan and the Undeniable Reality of Khojaly Massacre: A View from Azerbaijan*, 45 POLISH POL. SCI. Y.B. 291, 295-97 (2016).

[52] Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT'L L. 675, 701 (2012).

[53] *See* Arthur Atanesyan, *Media Framing on Armed Conflicts: Limits of Peace Journalism on the Nagorno-Karabakh Conflict,* 14 J. INTERVENTION & STATEBUILDING 27, 29-30 (2020).

[54] *Id.*

[55] *Id.* at 31-32.

[56] Muhammad Fahim & Nazmul Islam, *Mapping the Air Time of Eastern & Western Media on Conflict and War: A Comparative Study of BBC, DW, TRT and Al Jazeera on the Coverage of Second Nagorno-Karabakh War & the Aftermath,* 37 COMMC'N & SOC'Y 79, 80 (2024).

[57] Lake, *supra* note 42.

cooperation are crucial steps in mitigating adverse impacts and upholding the dignity and rights of affected populations.

IV. CASE STUDY—NAGORNO-KARABAKH CONFLICT

The Nagorno-Karabakh conflict is one of the most enduring and complex territorial disputes in the post-Soviet space, rooted in the early 20th century but coming to a head in the late 1980s.[58] The region of Nagorno-Karabakh, predominantly populated by ethnic Armenians, is geographically located within the borders of Azerbaijan.[59] Tensions between the Armenian and Azerbaijani populations in the area have existed for decades, but the conflict escalated dramatically as the Soviet Union began to collapse.[60]

In 1988, the Nagorno-Karabakh Autonomous Oblast, then part of the Azerbaijan SSR, sought to join the Armenian SSR, triggering violent clashes between Armenians and Azerbaijanis.[61] The ensuing years saw the formal declaration of independence by Nagorno-Karabakh in 1991.[62] This declaration led to a full-scale war between Armenia and Azerbaijan from 1992 to 1994, resulting in significant casualties and the displacement of hundreds of thousands of people.[63]

The region's importance lies not only in its ethnic composition but also in its strategic and symbolic value. For Armenia, Nagorno-Karabakh represents a crucial cultural and historical homeland.[64] For Azerbaijan, it is an integral part of its national territory, recognized as such by international law.[65] Despite a ceasefire agreement in 1994, sporadic fighting continued, culminating in a major escalation in 2020.[66] This recent flare-up saw the unprecedented use of advanced military technologies, fundamentally altering the nature of the conflict.[67]

[58] *Nagorno-Karabakh Conflict*, *supra* note 4.
[59] Kaan Díyarbakirlioğlu, *The Nagorno-Karabakh Conflict Between Azerbaijan and Armenia from the Historical Perspective*, 7 INT'L J. SOC., POL'Y & ECON. RSCH. 415, 424 (2020).
[60] Valeri Modebadze, *The Escalation of Conflict Between Armenians and Azerbaijanis and the Problems of Peaceful Resolution of the Nagorno-Karabakh War*, 6 J. LIBERTY & INT'L AFFS. 102, 103 (2021).
[61] Taleh Ziyadov, *The Galtung Triangle and Nagorno-Karabakh Conflict*, 1 CAUCASIAN REV. INT'L AFFS. 31, 35 (2006).
[62] Ali Askerov, *The Nagorno Karabakh Conflict, in* POST-SOVIET CONFLICTS: THE THIRTY YEARS' CRISIS 55, 55 (Ali Askerov, Stefan Brooks, & Lasha Tchantouridze eds., 2020).
[63] Najiba Mustafayeva et al., *The Danger of No Peace, No War In Nagorno-Karabakh*, 16 TURKISH POL'Y Q. 119, 120-21 (2018).
[64] *See* Shir Ashur et al., "Nagorno-Karabakh Conflict: A Geopolitical Analysis" (May 2021) (dissertation, Universidad Carlos III de Madrid) (on file with the Universidad Carlos III de Madrid).
[65] *See* Johanna Popjanevski, *International Law and the Nagorno-Karabakh Conflict*, *in* THE INTERNATIONAL POLITICS OF THE ARMENIAN-AZERBAIJANI CONFLICT: THE ORIGINAL "FROZEN CONFLICT" AND EUROPEAN SECURITY, 23 (Svante E. Cornell ed., 2017).
[66] *Nagorno-Karabakh Conflict*, *supra* note 4.
[67] *Id.*

A. Impact of Technology on the Conflict

The 2020 Nagorno-Karabakh conflict was markedly influenced by the integration of emerging technologies, setting it apart from previous confrontations.[68] Azerbaijan's use of drones, particularly Turkish Bayraktar TB2s and Israeli-made Harop loitering munitions, proved to be pivotal.[69] These drones conducted surveillance, provided real-time intelligence, and executed precision strikes on Armenian positions.[70] The Bayraktar TB2s, equipped with advanced optics and targeting systems, enabled Azerbaijan to conduct comprehensive reconnaissance missions.[71] The real-time intelligence allowed Azerbaijani forces to adjust their strategies dynamically, targeting key enemy assets with unprecedented accuracy.[72] The Harop loitering munitions, designed to seek out and destroy enemy radar systems and other high-value targets, further enhanced Azerbaijan's operational effectiveness.[73] The drones disrupted Armenian defensive strategies and led to significant losses in manpower and materiel.[74]

Cyber capabilities also featured prominently in the conflict.[75] Both sides engaged in cyber warfare, targeting each other's critical cyber infrastructure and military communication networks.[76] Azerbaijani and Armenian cyber operations included distributed denial-of-service (DDoS) attacks, data breaches, and the deployment of malicious software to disrupt and compromise the opponent's digital infrastructure.[77] These cyberattacks aimed to gather intelligence, disrupt operations, and demoralize the opponent.[78]

By targeting military communication networks, each side sought to create confusion and hinder the effectiveness of the other's coordination and command structures. The digital battleground extended the conflict into cyberspace, demonstrating the increased importance of cybersecurity in modern warfare. The impact of these cyber operations extended beyond immediate tactical advantages, highlighting vulnerabilities in critical infrastructure and the potential for long-term disruption in both military and civilian domains.[79]

[68] *See id.*
[69] Calcara, *supra* note 35, at 130.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *See* Simon Anglim, *Azerbaijan's Victory: Initial Thoughts and Observations (and Caveats for the 'Innovative')*, 7 MIL. STRATEGY MAG. 10, 12-13 (2021).
[74] Hülya Kinik & Sinem Çelik, *The Role of Turkish Drones in Azerbaijan's Increasing Military Effectiveness" An Assessment of the Second Nagorno-Karabakh War*, INSIGHT TURK., Fall 2021, at 169.
[75] *See* Asma Rashid, *Nagorno-Karabagh Conflict and Role of Major Powers: An International Law Perspective*, 25 MARGALLA PAPERS 61, 64 (2021).
[76] *See* Jaafar Khashe & Mousa Abdollahi, *The Impact of the Coronavirus Pandemic on the Resumption of the Conflict in Nagorno-Karabakh*, 11 HUMANS. & SOC. SCIS. BULL. FIN. U. 94, 98 (2021).
[77] *See generally* Eric Allen Rowland, *Small Skies: Countering Small UAS on a Multi-Domain Battlefield* (2022) (M.A.S thesis, US Army Command and General Staff College) (on file with author).
[78] *Id.*
[79] *See* Manéh Rostomyan, *From Mountains to Social Media Valleys: A Thematic Analysis of Information Warfare through Telegram Data in the Nagorno-Karabakh War*, 6 J. INTEL., CONFLICT, & WARFARE 1, 1-2 (2023).

The technological superiority of Azerbaijan in these areas was a critical factor in its ability to reclaim territory and achieve its strategic goals.[80] The conflict highlighted how emerging technologies can shift the balance of power and redefine the dynamics of military engagements. The experience in Nagorno-Karabakh offers valuable lessons on the strategic advantages that technological innovations can provide, as well as the challenges and ethical considerations that accompany their use. The conflict underscored the need for a nuanced understanding of how emerging technologies influence modern warfare and the importance of developing robust policies and regulations to address their implications.

B. Human Rights Violations

While the technological advances brought tactical advantages, they also facilitated significant human rights violations. The use of drones and precision-guided munitions led to civilian casualties and the destruction of civilian infrastructure.[81] Homes, schools, and hospitals were not spared, raising serious concerns about the adherence to international humanitarian law principles such as distinction and proportionality.[82] Surveillance technologies and cyber capabilities were also employed to monitor and intimidate civilian populations.[83] The pervasive use of drones created a climate of fear, where civilians felt constantly watched and under threat.[84] Cyberattacks disrupted essential services, exacerbating the humanitarian crisis and undermining access to basic needs.[85]

Communication channels were weaponized to disseminate propaganda and misinformation.[86] These platforms were used to spread inflammatory rhetoric, incite violence, and deepen ethnic divisions.[87] The manipulation of information contributed to a cycle of violence and retribution, complicating efforts to achieve peace and reconciliation.[88] In the context of war, propaganda becomes essential for directing public opinion and justifying military actions.[89]

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[80] Anglim, *supra* note 73, at 14.
[81] Amnesty Int'l, *supra* note 50, at 14.
[82] Hum. Rts. Watch, *Azerbaijan: Unlawful Strikes in Nagorno-Karabakh*, (Dec. 11, 2020), https://www.hrw.org/news/2020/12/11/azerbaijan-unlawful-strikes-nagorno-karabakh.
[83] Davit Khachatryan, *Beyond the Drone Hype: Unpacking Nagorno-Karabakh's Real Lessons*, EVN REP. (May 27, 2024), https://evnreport.com/opinion/beyond-the-drone-hype-unpacking-nagorno-karabakhs-real-lessons/#:~:text=Buzzing%20Skies%20of%20Nagorno%2DKarabakh&text=Armenia%20primarily%20employed%20domestically%20developed,target%20area%20before%20engaging%20it.
[84] Sunil Yadav, *Changing Contours of Drone Warfare – Dawn of a New Reality*, VIVEKANANDA INT'L FOUND. (Feb. 27, 2024), https://www.vifindia.org/article/2024/february/27/changing-contours-of-drone-warfare-dawn-of-a-new-reality.
[85] Hum. Rts. Watch, *supra* note 82.
[86] Atanesyan, *supra* note 53.
[87] AANCHAL ANAND ET AL., NAGORNO KARABAKH: UNDERSTANDING CONFLICT 121 (Dr. P. Terrence Hopmann & Dr. I. William Zartman eds., 2013), https://sais.jhu.edu/sites/default/files/CM%20Field%20Trip%20NK%20March%2029%20Final_1.pdf.
[88] Ondřej Kopečný*, Warfare and Institutional Communication on Social Media in 2020 Nagorno-Karabakh Conflict* (2021) (Master's Thesis, Charles University).
[89] S*ee generally* DAVID VIDAL, PROPAGANDA IN WAR REPORTING ON THE U.S. WAR IN IRAQ (Stanford ed., 2003), https://web.stanford.edu/class/e297a/War%20Reporting%20on%20the%20U.S.%20War%20in%20Iraq.htm.

Additionally, the normalization of these technological abuses can have long-lasting effects on the societal fabric of the affected regions.[90] The psychological impact on civilians, including trauma and anxiety from constant monitoring and cyberattacks, further complicates the path to recovery and reconciliation.[91] These violations not only affect the immediate humanitarian situation but also leave enduring scars[92] on the social and psychological well-being of the population, highlighting the urgent need for robust legal and ethical frameworks to address the misuse of technology in conflict.[93]

The role of international law in addressing these violations is fraught with challenges. Unrecognized states like Nagorno-Karabakh exist in a legal grey area, where the enforcement of international humanitarian and human rights laws is limited.[94] The lack of recognition complicates the application of legal norms and accountability mechanisms.[95] Moreover, the rapid advancement of technology often outpaces the development of corresponding legal frameworks, leaving significant gaps in the regulation of emerging technologies in conflict settings.[96]

The Nagorno-Karabakh conflict underscores the profound impact of emerging technologies on modern warfare and human rights. The tactical advantages provided by drones, cyber capabilities, and precision-guided munitions come with significant ethical and legal implications. The international community must grapple with these challenges to develop robust frameworks that ensure the responsible use of technology and protect human rights in unrecognized or partially recognized states.

V. LEGAL AND POLICY IMPLICATIONS

A. Current Legal Framework

The use of emerging technologies in conflicts, particularly in unrecognized states, presents significant challenges to the existing international legal framework. International humanitarian law (IHL) and international human rights law (IHRL) provide the primary legal structures intended to regulate the conduct of warfare and protect human rights during conflicts.[97] However, these

[90] Uchidiuno, *supra* note 49.
[91] *See generally* CAROLYN YODER, THE LITTLE BOOK OF TRAUMA HEALING: REVISED & UPDATED: WHEN VIOLENCE STRIKES AND COMMUNITY SECURITY IS THREATENED (Carolyn Yoder & Howard Zehr eds., 2020).
[92] A mother spoke of the effects that Azerbaijani strikes had on her young son, "Now my little boy still wakes up saying that there are planes in the sky bombing and that [his sister] is injured and mum is on the ground. He is still traumatized." Uchidiuno, *supra* note 49, at 16.
[93] *See* Amit Kashyap & Parthik Choudhury, *The Impact of New Technologies with the Rapid Global Change on Peace, Security and Development*, 4 INT'L J. L. MGMT. & HUMS. 2728, 2731-32 (2021).
[94] *See* Linda Hamia & Jan Wouters, *De Facto Regimes in Areas of Limited Statehood and the International Rule of Law*, *in* RULE OF LAW AND AREAS OF LIMITED STATEHOOD 47 (2021).
[95] *See* Larissa Ceerbin, *Nagorno-Karabakh: Frozen but Not Forgotten, Reparations in Inter-State Conflict* (2023) (Master's Thesis, Indiana Univ.) (ProQuest).
[96] *See generally* REGULATING TECHNOLOGIES: LEGAL FUTURES, REGULATORY FRAMES AND TECHNOLOGICAL FIXES (Roger Brownsword & Karen Yeung eds., 2008).
[97] *See generally* CHRISTINE BELL, ET AL., INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW (Orna Ben-Naftali ed., 2011).

frameworks were not designed with the complexities of modern technological warfare in mind, resulting in substantial limitations.[98]

Under IHL, key principles such as distinction, proportionality, and necessity govern the use of force in armed conflict.[99] These principles require that parties to a conflict distinguish between combatants and civilians, avoid excessive harm to civilians relative to the military advantage gained, and limit attacks to those necessary to achieve legitimate military objectives.[100] While these principles are foundational, their application to emerging technologies is often ambiguous.[101] For instance, the use of drones for targeted killings raises questions about compliance with the principle of distinction, as the ability to accurately identify targets from a distance can be compromised by faulty intelligence or technological malfunctions.[102] As another example, cyber warfare challenges the principle of proportionality because the impact of cyberattacks on civilian life can be profound and far-reaching.[103]

The legal status of unrecognized states further complicates the application of international law. Entities like Nagorno-Karabakh which lack formal recognition often operate outside the established international legal order.[104] Enforcement of IHL and IHRL is therefore difficult, and accountability mechanisms are weak or non-existent.[105] The absence of recognition means that unrecognized states are excluded from international treaties and conventions, leaving significant legal and regulatory gaps.[106]

In conclusion, while international humanitarian law and international human rights law provide essential guidelines for conflict conduct and individual rights protection, their application becomes increasingly complex in the face of modern technological innovations. Foundational principles like distinction, proportionality, and necessity often fall short in addressing the ambiguities introduced by drones, cyber warfare, and precision-guided munitions. The legal status of unrecognized states further complicates this landscape, creating enforcement gaps and limiting accountability under existing international norms. As technological advancements continue to reshape conflict dynamics, there is an urgent need for the development of adaptable legal

[98] *Id*.
[99] Lawrence Hill-Cawthorne, *The Role of Necessity in International Humanitarian and Human Rights Law*, 47 ISR. L. REV. 225, 225 (2014).
[100] *Id.*
[101] *See generally* Michael N. Schmitt, *Discriminate Warfare: The Military Necessity–Humanity Dialectic of International Humanitarian Law*, *in* PROTECTING CIVILIANS DURING VIOLENT CONFLICT: THEORETICAL AND PRACTICAL ISSUES FOR THE 21ST CENTURY (David W. Lovell & Igor Primoratz eds., 2012).
[102] Sebastian Wuschka, *The Use of Combat Drones in Current Conflicts*, 3 GOETTINGEN J. INT'L L. 891, 895-97 (2011).
[103] *See* Cordula Droege, *Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians,* 94 INT'L REV. RED CROSS 533, 544 (2012).
[104] *See generally* Caspersen, *supra* note 2.
[105] *See* Marco Sassòli, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, *in* YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 45 (2007).
[106] *See* Vera Gowland-Debbas & Gloria Gaggioli, *The Relationship Between International Human Rights and Humanitarian Law: An Overview*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 77-103 (2013).

frameworks that can effectively address these challenges and ensure compliance with humanitarian principles, even in the most complex and politically sensitive contexts.

B. Recommendations for Policy and Governance

Addressing the challenges posed by emerging technologies in conflicts, particularly in unrecognized states, requires a comprehensive and multifaceted approach. To enhance the governance of these technologies and strengthen the protection of human rights, several key recommendations are proposed.

First, it is crucial for international legal bodies to develop specific norms and regulations tailored to the unique challenges posed by emerging technologies.[107] Clear guidelines should be established regarding the use of drones, cyber capabilities, and precision-guided munitions. These regulations must ensure that such technologies are employed in accordance with the principles of distinction, proportionality, and necessity. By creating detailed legal standards, the international community can better regulate the deployment of advanced technologies and mitigate potential abuses.[108]

Transparency and accountability are essential components of effective governance. States and non-state actors must commit to greater openness regarding their use of emerging technologies in conflicts. This includes public reporting on drone strikes, cyber operations, and the use of advanced weaponry. Establishing independent monitoring bodies to oversee these activities can ensure compliance with international law and facilitate accountability for any violations. Such transparency not only promotes adherence to legal standards but also builds trust among the international community and affected populations.[109]

Strengthening international cooperation is another critical step. The global community should enhance collaborative efforts to address the legal and ethical implications of emerging technologies. Creating forums for dialogue among states, technology companies, and civil society organizations can help develop shared norms and best practices. These collaborative efforts can bridge regulatory gaps and promote a cohesive approach to technology governance, ensuring that the evolving nature of technology is met with equally dynamic and effective legal responses.[110]

Supporting capacity-building initiatives in unrecognized states is crucial for fostering good governance and adherence to international norms. International organizations and donor states should invest in training for government officials, civil servants, and community leaders on

[107] Int'l Comm. Red Cross, *Ensuring the use of drones in accordance with international law*, 27th Sess. H.R. Council (Sept. 22, 2014).
[108] *See generally* Muhammed Enes Bayrak, *State Responsibility for Targeted Killings by Drones: An Analysis Through the Lens of IHL Principles*, 15 L. & JUST. REV. 81 (2024).
[109] *See* ANDREA BIANCHI & ANNE PETERS, TRANSPARENCY IN INTERNATIONAL LAW 1-3 (Cambridge Univ. Press ed., 2013).
[110] *See* Jens Steffek & Patrizia Nanz, *Emergent Patterns of Civil Society Participation in Global and European Governance, in* CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE: A CURE FOR THE DEMOCRATIC DEFICIT 1-29 (Jens Steffek, Claudia Kissling, & Patrizia Nans eds., 2008).

international legal standards, human rights, and ethical governance practices.[111] Strengthening local institutions can empower unrecognized states to navigate the complexities of modern technology while upholding international norms.[112]

Establishing legal mechanisms for accountability is also necessary. The international community should explore the creation of specialized tribunals or the expansion of the jurisdiction of existing international courts to address human rights violations facilitated by emerging technologies. Such mechanisms can provide a platform for holding perpetrators accountable and ensuring justice for victims.[113]

Finally, promoting ethical standards in the use of emerging technologies is essential. The development of guidelines that minimize civilian harm, protect privacy, and ensure responsible technology use is crucial.[114] Governments and technology companies should conduct thorough human rights impact assessments to identify potential risks and implement measures to mitigate harm. Engaging with ethicists, technologists, and legal experts can help create robust standards that guide the ethical deployment of advanced technologies.[115]

In conclusion, the integration of emerging technologies into conflicts presents profound legal and ethical challenges that the current international legal framework struggles to address. By developing specific norms, enhancing transparency, and promoting international cooperation, the global community can better govern the use of these technologies. Prioritizing human rights and ethical standards will ensure that technological advancements contribute to peace, stability, and the protection of human dignity, even in the most complex and unrecognized regions of the world.

VI. INTERNATIONAL NORMS AND REGULATORY FRAMEWORKS FOR EMERGING TECHNOLOGIES

The use of emerging technologies in conflict zones, particularly in unrecognized states, has highlighted significant gaps and limitations in the existing international regulatory frameworks. This section explores the current international norms governing these technologies, identifies regulatory gaps, and proposes recommendations for enhancing legal and policy frameworks to better address the challenges posed by technological advancements.

[111] *See* Philippe Regnier, *The Emerging Concept of Humanitarian Diplomacy: Identification of a Community of Practice and Prospects for International Recognition*, 93 INT'L REV. RED CROSS 1211, 1213-1234 (2011).
[112] *See generally* Caspersen, *supra* note 2.
[113] *See* Federica D'Alessandra & Kirsty Sutherland, *The Promise and Challenges of New Actors and New Technologies in International Justice*, 19 J. INT'L CRIM. JUST. 9, 10 (2021).
[114] *See generally* Rocci Luppicini & Arthur So*, A Technoethical Review of Commercial Drone Use in the Context of Governance, Ethics, and Privacy*, 46 TECH. SOC'Y 109 (2016).
[115] *See* Kirsten Martin, Katie Shilton & Jeffery Smith, *Business and the Ethical Implications of Technology: Introduction to the Symposium,* 160 J. BUS. ETHICS 307, 307-17 (2019).

A. Existing International Norms

IHL serves as a foundational framework in regulating conduct during armed conflicts.[116] Key treaties, including the Geneva Conventions and their Additional Protocols, establish fundamental principles aimed at protecting innocent civilians.[117] IHL seeks to minimize suffering and ensure humane treatment during conflict.[118] However, the rapid advancement of technology presents new challenges to these established norms. The central principles of distinction, proportionality, and necessity require reinterpretation in the context of modern warfare technologies.[119] The existing legal provisions may not fully address the complexities introduced by these technologies, underscoring the need for ongoing dialogue and adaptation.

Human Rights Law, enshrined in documents such as the Universal Declaration of Human Rights and treaties like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), provides essential protections for fundamental human rights.[120] These instruments address rights such as privacy, freedom of expression, and the right to life, all of which are increasingly pertinent in the context of emerging technologies.[121] The use of surveillance technologies, cyberattacks, and other advancements can infringe upon individual rights, raising questions about the balance between security and human rights.[122] Ensuring that these technologies do not undermine core human rights principles remains a critical challenge for the international community.

Cybersecurity regulations have evolved in response to the rise of cyber warfare.[123] Initiatives such as the UN's Group of Governmental Experts (GGE) on cybersecurity and the Tallinn Manual on the International Law Applicable to Cyber Warfare offer guidance on applying international law to cyber operations.[124] These frameworks aim to protect critical infrastructure and ensure cybersecurity.[125] However, the rapid evolution of cyber threats and the unique

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[116] *See* Remy Jorritsma, *Where General International Law meets International Humanitarian Law: Attribution of Conduct and the Classification of Armed Conflicts,* 23 J. CONFLICT & SEC. L. 405, 406 (2016).
[117] *See* JONATHAN CROWE & KYLIE WESTON-SCHEUBER, PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 18-23 (2013).
[118] *See* Andrew Bartles-Smith, et al., *Reducing Suffering During Conflict: The Interface Between Buddhism and International Humanitarian Law,* 21 CONTEMP. BUDDHISM 369, 408 (2021).
[119] *See* Michael N. Schmitt, *Discriminate Warfare: The Military Necessity–Humanity Dialectic of International Humanitarian Law*, *in* PROTECTING CIVILIANS DURING VIOLENT CONFLICT 85 (David W. Lovell ed., 2012).
[120] U.N. Memorandum, The Foundation of International Human Rights Law, https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law.
[121] *See* MANISULI SSENYONJO, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 65-104 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2009).
[122] *See generally* Debasish Nandy, *Human Rights in the Era of Surveillance: Balancing Security and Privacy Concerns,* J. CURRENT SOC. L. & POL. ISSUES 1, 13-17 (2023).
[123] *See* Antonio Segura-Serrano, *Cybersecurity and Cybercrime: Dynamic Application versus Norm-Development,* 81 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT/HEIDELBERG J. INT'L L. 701, 701-32 (2021).
[124] *Id.*
[125] *Id.*

challenges posed by cyberattacks in unrecognized states highlight the need for more robust and comprehensive regulations.[126]

B. Gaps and Limitations

Despite the presence of international norms, significant gaps persist regarding emerging technologies. The rapid pace of technological advancement often outstrips the ability of existing regulations to keep pace. For instance, the legal frameworks governing drone warfare and cyber operations are still developing and may lack specificity in their application to new technological realities.[127]

Moreover, the regulatory landscape for unrecognized states presents unique challenges. The absence of international recognition and the associated political and legal isolation create barriers to implementing and enforcing international norms.[128] This situation necessitates the development of tailored regulations that can effectively address the complexities of technology use in such contexts. Enforcement of international regulations in unrecognized states poses considerable difficulties. Issues such as jurisdictional disputes, lack of recognized authorities, and political constraints often hinder effective implementation of norms.[129] Monitoring compliance, investigating violations, and holding perpetrators accountable are challenging in such environments. The role of international organizations, including the United Nations and its specialized agencies, is crucial but may be limited by political constraints and the lack of a unified approach to technology-related human rights abuses.[130]

VII. CONCLUSION

The intersection of emerging technologies and human rights in unrecognized states presents both significant opportunities and formidable challenges. As the case of Nagorno-Karabakh illustrates, advanced technologies can dramatically alter the dynamics of conflict and governance. However, without robust legal frameworks and ethical guidelines, their use can lead to severe human rights violations. It is imperative that the international community act swiftly and decisively to address these challenges, ensuring that technology betters society. By enhancing legal standards and prioritizing human rights, states and international bodies can navigate the complexities of the digital age and build a more just and equitable world.

The Nagorno-Karabakh conflict exemplifies how drones, cyber capabilities, and precision-guided munitions have reshaped modern warfare. While these technologies offered significant

[126] *See* Manikant Thakur, *Cyber Security Threats and Counter Measures in Digital Age*, 4 J. APPLIED SCI. & EDUC. 1, 20 (2021).
[127] *See* Denise Garcia, *Future Arms, Technologies, and International Law: Preventive Security Governance*, 1 EUROPEAN J. INT'L SEC. 94, 97 (2015).
[128] *See generally* Caspersen, *supra* note 2.
[129] *Id.*
[130] *See* Edward Newman & Gëzim Visoka, *The European Union's Practice of State Recognition: Between Norms and Interests*, 44 REV. INT'L STUD. 760, 760-86 (2018).

tactical advantages, they also facilitated human rights violations, including civilian casualties, destruction of infrastructure, and the spread of propaganda and misinformation. The analysis of the current legal framework reveals significant gaps and limitations in international laws governing technology in conflicts and unrecognized states. The absence of specific norms and regulations tailored to emerging technologies, coupled with the ambiguous legal status of unrecognized states, complicates the enforcement of international human rights laws.

To address these issues, there are several recommendations aimed at improving legal and policy frameworks. These include developing specific legal norms for emerging technologies, enhancing transparency and accountability, strengthening international cooperation, incorporating human rights into technological development, supporting capacity building in unrecognized states, establishing legal mechanisms for accountability, and promoting ethical standards in technology use.

Looking ahead, several areas warrant further research and attention. First, there is a need for more comprehensive studies on the long-term impacts of emerging technologies on governance and human rights in unrecognized states. Such research should examine not only the immediate effects of these technologies but also their broader socio-political and economic implications. Second, the development of international legal standards must keep pace with technological advancements. Scholars, policymakers, and legal practitioners should collaborate to draft and advocate for new international treaties and conventions that address the unique challenges posed by emerging technologies in conflict settings. Third, continued dialogue and collaboration among stakeholders—including governments, international organizations, technology companies, civil society, and academia—are essential to create a cohesive and effective approach to technology governance. Platforms for multi-stakeholder engagement can facilitate the exchange of best practices, foster mutual understanding, and build consensus on ethical and legal standards.

Lastly, education and capacity-building initiatives should be prioritized to equip leaders in unrecognized states with the knowledge and skills needed to navigate the complexities of modern technology while upholding human rights and ethical governance practices. Investing in education and training can empower local actors to implement responsible and effective governance frameworks that leverage technology for the common good.

ETHNIC CLEANSING AS A CRIME AGAINST HUMANITY: A LEGAL ANALYSIS OF FORCED DEPORTATION IN NAGORNO-KARABAKH

Davit Khachatryan[1]

Abstract

This article examines the possibility of legal prosecution for acts constituting ethnic cleansing under international law, focusing on the applicability of the Rome Statute of the International Criminal Court. Specifically, it explores whether crimes against humanity, particularly forced deportation under Article 7(1)(d) of the Rome Statute, could apply to the actions observed during Azerbaijan's "anti-terrorist operation" in Nagorno-Karabakh on September 19, 2023, which triggered the exodus of over 100,000 Armenians to Armenia. Against the backdrop of Armenia's recent ratification of the Rome Statute, the article addresses the jurisdictional hurdles posed by Azerbaijan's non-membership in the ICC but argues that these challenges are not insurmountable.

Drawing parallels with precedent cases including the forcible deportation of the Rohingya minority, the article establishes a legal framework for Armenia or any ICC member state to invoke Article 14 of the Rome Statute and present the case before the ICC Prosecutor. This article serves as a steadfast rejection of impunity on the international stage, advocating for the fundamental rights of forcibly displaced Armenians and emphasizing the imperative of justice in addressing egregious human rights violations in conflict zones. Through a comprehensive exploration of these legal dimensions, the article contributes to the ongoing discourse on accountability and the protection of fundamental rights in conflict-affected regions.

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I. INTRODUCTION

The conflict in Nagorno-Karabakh escalated in September 2020 when Azerbaijan launched a major offensive.[2] Amid Azerbaijan's military advance, Russia brokered a ceasefire agreement on November 10, 2020.[3] The agreement allowed Armenia to use the Lachin Corridor to provide essential supplies to the population. In December 2022, Azerbaijani state-backed activists began blocking the Lachin Corridor, causing a humanitarian crisis in the region.[4] On September 19, 2023, Azerbaijan then launched an "anti-terrorist operation" in Nagorno-Karabakh, occupying the region.[5] Within 24 hours, the Armenian de facto authorities agreed to a ceasefire, resulting in the surrender of Nagorno-Karabakh to Azerbaijan. This triggered the exodus of over 100,000 Armenians from the region to Armenia.

On October 12, 2023, the Parliamentary Assembly of the Council of Europe (PACE) addressed the humanitarian and human rights crisis in Nagorno-Karabakh in response to the September Azerbaijani military operation.[6] PACE concluded that the massive exodus of almost the entire Armenian population from Nagorno-Karabakh led to "reasonable suspicions" of ethnic cleansing.[7] It noted that "the practice of 'ethnic cleansing' may give rise to individual criminal responsibility under international law," in accordance with the Rome Statute of the International Criminal Court (ICC) and general international law.[8]

II. ORIGINS OF INTERNATIONAL CRIMINAL LAW

International criminal law has evolved from diverse origins. War crimes find their roots in the established laws and customs of war, which afford specific protections to individuals during armed conflicts. Genocide and crimes against humanity emerged to shield individuals from what

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[2] *Nagorno-Karabakh Conflict*, CTR. FOR PREVENTATIVE ACTION (Mar. 20, 2024), https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict.

[3] 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), https://www.primeminister.am/en/press-release/item/2020/11/10/Announcement/.

[4] *Azerbaijan: Blockade of Lachin corridor putting thousands of lives in peril must be immediately lifted*, AMNESTY INT'L (Feb. 9, 2023), https://www.amnesty.org/en/latest/news/2023/02/azerbaijan-blockade-of-lachin-corridor-putting-thousands-of-lives-in-peril-must-be-immediately-lifted/; Giorgi Gogia, *Hardship in Nagorno-Karabakh as Lifeline Road Remains Blocked*, HUM. RTS. WATCH (Feb. 21, 2023), https://www.hrw.org/news/2023/02/21/hardship-nagorno-karabakh-lifeline-road-remains-blocked; *Averting a New War between Armenia and Azerbaijan,* INT'L CRISIS GRP. (Jan. 30, 2023), https://www.crisisgroup.org/europe-central-asia/caucasus/nagorno-karabakh-conflict/266-averting-new-war-between-armenia-and-azerbaijan; Jolanda Andela & Tatevik Manucharyan, *130 days and counting: A responsibility to end the blockade of the Lachin Corridor*, EJIL:TALK! (May 2, 2023), https://www.ejiltalk.org/130-days-and-counting-a-responsibility-to-end-the-blockade-of-the-lachin-corridor/.

[5] *Azerbaijan Wants to "Reintegrate" Nagorno-Karabakh Through Force*, ECONOMIST (Sept. 19, 2023), https://www.economist.com/europe/2023/09/19/azerbaijan-wants-to-reintegrate-nagorno-karabakh-through-force.

[6] EUR. CONSULT. ASS., *The humanitarian situation in Nagorno-Karabakh Resolution*, Doc. No. 2517 (2023), https://pace.coe.int/en/files/33145/html [hereinafter PACE Resolution].

[7] *Id.* at ¶ 13.

[8] *Id.*

is now commonly referred to as gross human rights abuses, including those perpetrated by their governments. Except for the crime of aggression, which focuses on inter-state conflict, the primary concern of international criminal law[9] is safeguarding individuals from large-scale atrocities. As articulated by the Appeals Chamber in the *Tadić* case at the International Criminal Tribunal for the Former Yugoslavia (ICTY): "A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach... international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings."[10]

The evolution of crimes against humanity and the establishment of human rights law was motivated in part by a desire to prevent the recurrence of the atrocities witnessed during the rise of Nazi Germany.[11] Consequently, the contemporary framework of human rights law, encompassing economic and social rights alongside civil and political rights,[12] shares a significant foundation with international criminal law.[13] As the Tribunal explained its practice in the *Kunarac* case:

> [b]ecause of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law.[14]

While international human rights law focuses on safeguarding individual rights, international criminal law aims to hold states accountable through individual criminal responsibility for serious crimes committed within or in association with state policies and actions.[15]

Additionally, international criminal law serves other utilitarian goals that relate to the future of societies affected by international crimes. Prosecutions may provide victims with a sense

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[9] The foundations of international criminal law are rooted in the sources outlined in Article 38(1)(a)-(d) of the Statute of the International Court of Justice. These sources encompass treaty law, customary law, general principles of law, and, as a supplementary means for interpreting the law, judicial decisions and writings of prominent legal scholars. DAPO AKANDE, OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 43 (Antonio Cassese et al. eds., 2009) (internal citations omitted).

[10] Prosecutor v. Tadić, No. IT-94-1-AR 72, Judgment, ¶ 97 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter *Tadić* Judgment].

[11] Frans Viljoen, *International Human Rights Law: A Short History*, UN: UN CHRONICLE (Jan. 1, 2009), https://www.un.org/en/chronicle/article/international-human-rights-law-short-history.

[12] Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, 26 EUR. J. INT'L L. 787, 787-790 (2015).

[13] Raul Emilio Vinuesa, *Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*, Y.B. INT'L HUM. L. 69, 70-76 (1998); WILLIAM A. SCHABAS, HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 281 (Janusz Symonides ed., 2003).

[14] Prosecutor v. Kunarac, No. IT-96–23-T, Judgment, ¶ 467 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) [hereinafter Kunarac 2001 Judgment].

[15] In broad terms, there are two approaches to justifying punishment: forward-looking, which considers the consequences of punishment, and backward-looking, which focuses on the crime itself. The primary purposes often cited for the practice of punishment are retribution and deterrence. *See* Stanley Cohen, *An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment*, 27 MCGILL L. J. 73, 73 (1981); HERBERT L. A. HART, PUNISHMENT AND RESPONSIBILITY 1-14 (Oxford Univ. Press ed., 2d ed. 1968).

of justice or closure, either through seeing their persecutors prosecuted or through the process of testifying.[16] The ICC in the *Al Mahdi* case recognized the role of sentencing in acknowledging harm to victims,[17] and the ICTY in the *Nikolić* case emphasized the importance of punishment that responds to calls for justice from victims.[18]

International criminal law serves as a potent tool to address the allegations of ethnic cleansing by Azerbaijan in Nagorno-Karabakh discussed above. This article asserts that there is not only strong evidentiary support for initiating international criminal proceedings against Azerbaijan concerning the expulsion of the entire Armenian population from Nagorno-Karabakh, but also a moral and legal imperative to do so.

III. ARMENIA V. AZERBAIJAN BEFORE THE ICJ

On September 16, 2021, Armenia initiated legal proceedings against Azerbaijan[19] before the ICJ, alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination[20] ("CERD") and seeking interim measures. In its Order, the ICJ outlined four provisional measures against Azerbaijan, one against Armenia, and one involving both parties.[21] Subsequently in December 2022, Armenia approached the court seeking a provisional measure to compel Azerbaijan to lift the blockade of the Lachin Corridor and ensure unhindered movement. The court granted this request on February 22, 2023.[22] Azerbaijan blatantly disregarded the court's Order.[23]

On September 28, 2023, Armenia submitted its fifth request for provisional measures.[24] In this submission, Armenia alleged that earlier that month, Azerbaijan initiated a full-scale military offensive targeting the 120,000 ethnic Armenians residing in Nagorno-Karabakh.[25] The offensive reportedly involved indiscriminate shelling of civilian areas, resulting in numerous civilian

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[16] Patrick Keenan, *The Problem of Purpose in International Criminal Law*, 37 MICH. J. INT'L L. 421, 426-27, 468-70 (2016).
[17] Prosecutor v. Ahmad Al Faqi Al Mahdi, No. ICC-01/12–01/15–171, Judgment and Sentence, ¶ 67 (Sept. 27, 2016).
[18] Prosecutor v. Nikolić, Sentencing Judgment, No. IT-02–60/1-S, ¶ 82 (Int'l Crim. Trib. for the former Yugoslavia Dec. 2, 2003).
[19] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Verbatim Record, 2021 I.C.J. (Oct. 14, 2021), https://www.icj-cij.org/sites/default/files/case-related/180/180-20211014-ORA-01-00-EN.pdf.
[20] G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination United Nations (Dec. 21, 1965).
[21] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, 2021 I.C.J. 362, ¶ 89-97 (Dec. 7, 2021), https://www.icj-cij.org/sites/default/files/case-related/180/180-20211207-ORD-01-00-EN.pdf.
[22] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, 2023 I.C.J. 14, ¶ 62 (Feb. 22, 2023), https://www.icj-cij.org/sites/default/files/case-related/180/180-20230222-ord-01-00-en.pdf.
[23] PACE Resolution, *supra* note 6, at ¶¶ 1-2.
[24] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, 2023 I.C.J. 2, ¶ 13 (Nov. 17, 2023), https://www.icj-cij.org/sites/default/files/case-related/180/180-20231117-ord-01-00-en.pdf [hereinafter 2023 I.C.J. 2].
[25] *Id.* at ¶ 14.

casualties and the forced displacement of tens of thousands of ethnic Armenians from Nagorno-Karabakh to Armenia.[26] In November 2023, the ICJ issued provisional measures[27] against Azerbaijan for the forced displacement of ethnic Armenians.[28] The court indicated that Azerbaijan must:

1. (i) Ensure that persons who have left Nagorno-Karabakh after 19 September 2023 and who wish to return to Nagorno-Karabakh are able to do so in a safe, unimpeded, and expeditious manner; (ii) ensure that persons who remained in Nagorno-Karabakh after 19 September 2023 and who wish to depart are able to do so in a safe, unimpeded and expeditious manner;
   (iii) ensure that persons who remained in Nagorno-Karabakh after 19 September 2023 or returned to Nagorno-Karabakh and who wish to stay are free from the use of force or intimidation that may cause them to flee.
2. (i) Protect and preserve registration, identity, and private property documents and records concerning those who left, wish to return, and who remained in Nagorno-Karabakh after 19 September 2023; and (ii) have due regard to such documents and records in its administrative and legislative practices.
3. Report to the Court on the steps taken to give effect to the provisional measures indicated and to the undertakings made by the Agent of the Republic of Azerbaijan, on behalf of his Government, at the public hearing that took place on the afternoon of 12 October 2023, within eight weeks.[29]

The legal effect of provisional measures is underscored by Article 94(1) of the UN Charter which mandates Member States to abide by the decisions of the ICJ in any case to which they are a party.[30] This principle was affirmed in the *LaGrand* case[31] and subsequently adhered to by the United States in the *Avena and Other Mexican Nationals* case.[32] Furthermore, Article 94(2) of the UN Charter stipulates that if a party fails to fulfill its obligations under a judgment of the court, the other party may seek assistance from the UN Security Council.[33] Another enforcement remedy exists in Article 11 of its Internal Judicial Practice, wherein the ICJ retains the authority to monitor

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[26] *Id.*

[27] Notably, the ICJ typically indicates such measures when irreparable prejudice or consequences could be caused. "Irreparable" refers to a "violation of rights which, due to their nature, would not be susceptible to reparation, restoration, or adequate compensation." Inter-Am. Comm'n H.R., Rules of Procedure of the Inter-American Commission on Human Rights, Art. 25(2)(c), *entered into force* Aug. 1, 2013, https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/rulesiachr.asp#:~:text=%E2%80%9Cirreparable%20harm%E2%80%9D%20refers%20to%20injury,reparation%2C%20restoration%20or%20adequate%20compensation. In cases where urgency, irreparable harm, and plausibility are taken into account, the court may opt to intervene with provisional measures to safeguard the integrity of the original work pending a final decision. *See* G.A. Res. A/RES/66/138, art. 6 (Dec. 19, 2011).

[28] 2023 I.C.J. 2, *supra* note 24, at ¶ 28.

[29] *Id.* at ¶ 74.

[30] U.N. Charter art. 94(1).

[31] LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, 506 (June 27), https://www.icj-cij.org/sites/default/files/case-related/104/104-20010627-JUD-01-00-EN.pdf.

[32] Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 141 (Mar. 31), https://www.icj-cij.org/sites/default/files/case-related/128/128-20040331-JUD-01-00-EN.pdf.

[33] U.N. Charter art. 94(2).

compliance with its orders.[34] When the court issues a provisional measure, an ad hoc committee is established to assess compliance and periodically report on that compliance to the court.[35] Parties report to the committee regarding steps taken towards compliance, and the committee reports its findings and recommendations to the court.[36]

Should Azerbaijan fail to comply with the provisional measures, Armenia retains the option to bring the matter before the UN Security Council.[37] The Security Council may propose or decide on measures ensuring the implementation of the judgment, although the Council may not intervene on its own. In practice, however, the Council has never levied enforcement measures pursuant to Article 94(2).[38] Some scholars argue that the Council may only enforce formal final ICJ judgments, not orders on provisional measures.[39] In any event, the political motivations of permanent Security Council members, particularly Russia,[40] could stifle any enforcement action.[41]

IV. INTERNATIONAL CRIMES: SCOPE AND COMPARISON

A. Defining the Notion of International Crime

The notion of an "international crime" presupposes the existence of international criminal law.[42] International criminal law primarily focuses on prohibitions directed at individuals, with breaches triggering penal sanctions imposed by a state. International crimes encompass specific and exceptionally grave violations of international law, including genocide, war crimes, crimes against humanity, torture, and enforced disappearance.[43]

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[34] Resolution concerning the Internal Judicial Practice of the Court, 1976 I.C.J. Rules of Ct., *as amended* Dec. 21, 2020, art. 11, https://www.icj-cij.org/other-texts/resolution-concerning-judicial-practice.
[35] *Id.*
[36] *Id.*
[37] U.N. Charter art. 94(2).
[38] U.N. Security Council Report, *The Rule of Law: Can the Security Council make better use of the International Court of Justice?*, p. 6, (Dec. 20, 2016), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_5_rule_of_law_2016.pdf.
[39] Mischa Gureghian Hall, *Giving Covenants Swords: The UN Security Council's Competence to Enforce Provisional Measures of the ICJ*, VERFASSUNGSBLOG (July 10, 2024), https://verfassungsblog.de/giving-covenants-swords/. Other scholars argue that "judgments" as used in UN Charter Article 94(2) encompasses all binding decisions of the ICJ. *Id.* Neither the ICJ nor the Security Council have ever opined on 94(2)'s interpretation. *Id.*
[40] The passivity of Russian peacekeepers during the Lachin Corridor crisis could signal Russia's hesitancy to authorize military intervention in the region. *See Nagorno-Karabakh Conflict*, *supra* note 2.
[41] Permanent Security Council members have shut down enforcement actions when the action would harm the member's geopolitical interests. When the United States was deemed to have violated the ICJ's order to cease all uses of force in Nicaragua in the 1980's by arming the rebel Contras, the United States vetoed the resolution calling for Security Council enforcement, citing jurisdictional deficiencies. UN Security Council Report, *supra* note 38.
[42] International criminal law derives its sources from those enumerated in Article 38(1)(a)–(d) of the Statute of the International Court of Justice. These sources include treaty law, customary law, general principles of law, and, as a supplementary means for determining the law, judicial decisions and the writings of the most qualified publicists. Statute of the International Court of Justice, Apr. 18, 1946, 3 U.N.T.S. 993.
[43] There have been suggestions to include specific crimes like terrorist offenses, human trafficking, and individual acts of torture within the jurisdiction of the ICC, potentially categorizing them as international crimes. *See, e.g.,* PARLIAMENTARIANS FOR GLOB. ACTION, MODERNISING THE INTERNATIONAL CRIMINAL COURT: CRIMES AGAINST THE ENVIRONMENT, TRAFFICKING IN HUMAN BEINGS, HYBRID JUSTICE AND CORPORATE ACCOUNTABILITY 1-2

Beyond individual culpability, international crimes may feature elements of state involvement.[44] For instance, the crime of aggression inherently involves an act of aggression carried out by the state and facilitated by high-level state agents.[45] Additionally, an "international crime" can be defined as an offense created by international law itself, without the need for intervention by domestic law. In such instances, international law directly assigns criminal responsibility to individuals. The Nuremberg International Military Tribunal stated that "crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced."[46]

Ultimately, the prosecution focuses on the accountability of individuals regardless of whether they function as agents of a state. To secure any conviction for an international crime, the prosecutor must prove beyond a reasonable doubt that the individual had the requisite *mens rea* (culpable state of mind) at the time of committing the relevant *actus reus* (guilty act). This psychological element is necessary for conduct to be considered blameworthy and subject to punishment. For instance, Article 30 of the Rome Statute delineates two *mens rea* standards: intent and knowledge. Intent encompasses both direct intent, where one aims or desires a specific outcome, and indirect intent, where one is aware that a result will likely occur in the ordinary course of events.[47]

B. The Notion of Ethnic Cleansing

"Ethnic cleansing" is not specifically defined in the Rome Statute or the ICC Elements of Crimes. To fill this gap, the UN Security Council Resolution 827 established the ICTY in 1993 to combat the "continuing reports" of ethnic cleansing within the territory of the former Yugoslavia.[48] The next year, the Commission of Experts appointed by the Security Council defined ethnic cleansing as "a purposeful policy designed by one ethnic or religious group to remove, through violent and terror-inspiring means, the civilian population of another ethnic or religious group from certain geographic areas."[49] Significantly, the ICTY only has jurisdiction over "persons responsible for serious violations of international humanitarian law committed in the territory of

(Advocs. for Hum. Rts. Harv. L. Sch & Indep. Clinical Program Harv. L. Sch. eds., 2022) (suggesting an expansion of ICC subject-matter jurisdiction to include crimes against the environment and human trafficking).

[44] M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 5, 1 J. CONFLICT & SEC. L. 126, 126-130 (2000).

[45] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, art. 8, *entered into force* July 1, 2002, https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf [hereinafter Rome Statute].

[46] Memorandum from the U.N. Secretary-General, Charter and Judgment of the Nürnberg Tribunal – History and Analysis, 41, Int'l Law Comm'n, U.N. Doc. A/CN.4/5 (1949), https://digitallibrary.un.org/record/160809?ln=en&v=pdf.

[47] Rome Statute art. 30.

[48] S.C. Res. 827, ¶ 3 (May 25, 1993).

[49] U.N. Secretary-General, *Letter Dated 24 May 1994 from the Secretary General to the President of the Security Council*, ¶ 130, U.N. Doc. S/1994/674 (May 27, 1994), https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf.

the former Yugoslavia since 1991."[50] Therefore, crimes committed in Nagorno-Karabakh do not fall under the jurisdiction of the ICTY.[51] For those seeking to hold bad actors accountable for the forced exodus of Armenians from Nagorno-Karabakh, the lack of a clear definition of ethnic cleansing presents distinct challenges.

Nevertheless, the absence of a distinct "ethnic cleansing" crime does not create a legal cul-de-sac. Article 7(1)(d) of the Rome Statute categorizes deportation and forcible population transfer as crimes against humanity, including in "ethnic cleansing" scenarios.[52] Jurisprudence from cases such as Prosecutor v. Krstić demonstrates that the intent behind such acts—whether initially framed as population transfer or forced displacement—does not preclude their classification as crimes against humanity when such acts include elements of mass violence or destruction of a population.[53] In the Nagorno-Karabakh context, the systematic targeting and displacement of the Armenian population would fall within these parameters, ensuring a clear legal basis for prosecution under international law. Armenia's ratification of the Rome Statute and its recognition of ICC jurisdiction retroactive to May 10, 2021, strengthens the possibility of holding individuals accountable for these crimes under international law.[54]

C. Determining the Crime: Crimes Against Humanity

The factual situation in Nagorno-Karabakh suggests that Article 7 crimes against humanity are more directly applicable when compared to Article 8 war crimes. The ICC Elements of Crimes requires that the conduct be committed in the context of and associated with an armed conflict to constitute a war crime.[55] In the *Kunarac* Judgment, the ICTY Appeals Chamber emphasized that it is sufficient for the perpetrator to act in support of or under the auspices of the armed conflict.[56] Dragoljub Kunarac, the leader of a Serb reconnaissance unit during the conflict in the Bosnian Foča municipality from April 1992 to February 1993, was found guilty on eleven counts.[57] These included war crimes of torture and rape, as well as crimes against humanity of torture, rape,

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[50] *Mandate and Crimes under ICTY Jurisdiction*, U.N.: INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, https://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction.
[51] *What is the former Yugoslavia?*, U.N.: INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, https://www.icty.org/en/about/what-former-yugoslavia.
[52] Rome Statute art. 7(1)(d). As an example beyond the Rome Statute, the Nuremberg International Military Tribunal convicted multiple defendants of war crimes related to the forcible deportation of Jewish and other civilian populations from occupied territory. *See* Emma Brandon, *Grave Breaches and Justifications: The War Crime of Forcible Transfer or Deportation of Civilians and the Exception for Evacuations for Imperative Military Reasons*, 6 OLSO L. REV. 107, 111 (2019).
[53] Prosecutor v. Krstić, No. IT-98-33-T, Judgment, ¶ 622 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) [hereinafter Kunarac 2022 Judgment].
[54] Press Release, International Criminal Court, Armenia joins the ICC Rome Statute (Nov. 17, 2023), https://www.icc-cpi.int/news/armenia-joins-icc-rome-statute.
[55] International Criminal Court, *Elements of Crimes*, art. 8, *entered into force* Nov. 2, 2000, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf [hereinafter ICC Elements of Crimes].
[56] *Kunarac* 2022 Judgment, *supra* note 53, at ¶ 58.
[57] *Id.* at ¶¶ 687-745.

and enslavement in the campaign to "cleanse"[58] the Foča area of non-Serbs.[59] Article 8(2)(a)(vii) of the Rome Statute, which prohibits "[u]nlawful deportation or transfer or unlawful confinement," primarily addresses occupied territories and is mostly concerned with preventing the forced movement of protected persons within the territory or their forcible expulsion from it.[60] Hence, this provision is likely not a suitable legal basis in the context of Nagorno-Karabakh.

Conversely, Article 7(1)(d), addressing the crime against humanity of "[d]eportation or forcible transfer of population," excludes any nexus between crimes against humanity and armed conflict.[61] The term "forcibly" is not limited to physical force but also includes the use of threats or coercion, such as the instigation of fear of violence, coercion, detention, psychological oppression, abuse of power, or the exploitation of a coercive atmosphere against individuals.[62] PACE underscored the constant pressure placed by Azerbaijani authorities upon the Armenian people, recognizing the "genuine threat of physical extinction, a long-standing policy of hatred in Azerbaijan towards Armenians, and a lack of trust in their future treatment by the Azerbaijani authorities."[63] Indeed, Azerbaijan has long practiced systematic dehumanization[64] and incitement of hatred against Armenians.[65] In response, on December 7, 2021, the ICJ ordered Azerbaijan to "[t]ake all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin."[66] In its November 17, 2023 Order, the ICJ noted that Azerbaijan's operation in Nagorno-Karabakh occurred amid the longstanding vulnerability of the population.[67]

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[58] *See generally Bosnia and Hercegovina: "A Closed, Dark Place": Past and Present Human Rights Abuses in Foca*, HUM. RTS. WATCH (July 1, 1998), https://www.hrw.org/report/1998/07/01/closed-dark-place/past-and-present-human-rights-abuses-foca.

[59] *Kunarac* 2022 Judgment, *supra* note 53, at ¶ 2-9.

[60] THOMAS WEIGEND, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY 388-96 (Kai Ambos ed., 4th ed. 2022).

[61] Rome Statute art. 7(1)(d). "Deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law." *Id.* at (7)(2)(d).

[62] *See* ICC Elements of Crimes (referencing Article 7(1)(d)); Prosecutor v. Blagojević, No. IT-02-60-T, Judgment, ¶ 596 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Blagoje Simić, No. IT-95-9-T, Judgment, ¶ 125 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003); *see generally* Prosecutor v. Krnojelac, No. IT-97-25-T, Judgment, ¶¶ 217-225, 475 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002); Kunarac 2022 Judgment, *supra* note 53, at ¶ 529; Prosecutor v. Stakić, No. IT-97-24-A, Judgment, ¶ 281 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); *see generally* Kunarac 2001 Judgment, *supra* note 14.

[63] *See* PACE Resolution, *supra* note 6, at ¶ 11.

[64] Alexander Galitsky, *Azerbaijan's Dehumanization of Armenians Echoes Horrors of Holocaust*, TIMES ISR., (Jan. 30, 2021, 12:14 PM), https://blogs.timesofisrael.com/azerbaijans-dehumanization-of-armenians-echoes-horrors-of-holocaust/.

[65] Committee On the Elimination of Racial Discrimination, Concluding observations on the combined tenth to twelfth periodic reports of Azerbaijan, U.N. Doc. CERD/C/AZE/CO/10-12 (Aug. 16, 2022), https://digitallibrary.un.org/record/3988182?ln=en&v=pdf.

[66] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, 2021 I.C.J. 362, ¶¶ 92, 98 (Dec. 7).

[67] 2023 I.C.J. 2, *supra* note 24, at ¶ 55.

The "forcible" nature of a situation arises where the individual has no free or "genuine" choice to remain in the territory.[68] If a group flees to escape deliberate violence and persecution, they would not be exercising a genuine choice.[69] In light of the persistent threats of further escalations[70] and an atmosphere of increasing tension, instability, and insecurity, the exodus of Armenians can be unequivocally characterized as anything but a genuine choice.[71] Azerbaijan's assertion[72] that Armenians were voluntarily departing the region failed to convince the international community.[73] The EU Diplomat Service's condemnation of Azerbaijan's military operation warned that "military escalation should not be exploited as a pretext to compel the exodus of the local population."[74] The ICJ left little room for doubt regarding the involuntary and forced nature of the exodus, noting that civilians were compelled to abandon their residences due to fear of being targeted based on their Armenian ethnicity and nationality.[75]

The eventual opening of the Lachin Corridor can only be seen as the final step in Azerbaijan's ethnic cleansing campaign. Azerbaijan ignored the ICJ's February 2023 orders to open the Corridor and only did so after launching an intense military assault which created an unlivable environment for ethnic Armenians.[76] Many crossing the Corridor into Armenia expected never to return to their homes.[77] Armenia presented this stance before the ICJ when seeking provisional measures to address the humanitarian crisis, characterizing Azerbaijan's actions as "ethnic cleansing."[78]

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[68] Prosecutor v. Brđanin, No. IT-99-36-T, Judgment, ¶ 543 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004); Prosecutor v. Krnojelac, No. IT-97-25-A, Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia Sep. 7, 2003); Prosecutor v. Prlić, No. IT-04-74-A, Judgment, ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017); Prosecutor v. Naletilić, No. IT-98-34-T, ¶ 519 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003); Prosecutor v. Milošević, No. IT-98-29/1-T, Judgment, ¶ 75 (Int'l Crim. Trib. For the Former Yugoslavia (Dec. 12, 2007); Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment, ¶ 1056 (Jul. 8, 2019).

[69] Prosecutor v. Krstić, No. IT-98-33-T, Judgment, ¶ 530 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

[70] *Averting a New War between Armenia and Azerbaijan*, INT'L CRISIS GRP. (Jan. 30, 2023), https://www.crisisgroup.org/europe-central-asia/caucasus/nagorno-karabakh-conflict/266-averting-new-war-between-armenia-and-azerbaijan.

[71] 2023 I.C.J. 2, *supra* note 24, at ¶ 65-66.

[72] *Karabakh Separatists To Disband After Surrender To Azerbaijan*, FRANCE24 (Sept. 28, 2023), https://www.france24.com/en/live-news/20230928-nagorno-karabakh-to-dissolve-ending-independence-dream.

[73] OFF. OF SPOKESPERSON, US DEP'T OF STATE, CALL FOR END OF HOSTILITIES IN NAGORNO-KARABAKH, (Sept. 19, 2023), https://www.state.gov/call-for-end-of-hostilities-in-nagorno-karabakh/; *Azerbaijani military operation in Nagorno-Karabakh*, MINISTRY FOR EUR. & FOREIGN AFFS. OF FR. (Sept. 19, 2023), https://www.diplomatie.gouv.fr/en/country-files/armenia/news/article/azerbaijani-military-operation-in-nagorno-karabakh-19-sept-2023#; Tim Lister et al., *Azerbaijan launches operation against Armenian forces in Nagorno-Karabakh*, CNN (Sept. 20, 2023), https://edition.cnn.com/2023/09/19/asia/armenia-azerbaijan-nagorno-karabakh-bombardment-intl/index.html.

[74] Josep Borrell, *Azerbaijan: Statement by the High Representative on the military escalation*, The Diplomatic Service of the European Union, (Sept. 19, 2023), https://www.eeas.europa.eu/eeas/azerbaijan-statement-high-representative-military-escalation_en.

[75] 2023 I.C.J. 2, *supra* note 24, at ¶ 85.

[76] *Human Rights in Azerbaijan Since the Fall of Nagorno-Karabakh: Hearing Before the H. Foreign Affs. Comm.*, 118th Cong. 1-3 (2024) (statement of Rep. Schiff, Member, H. Foreign Affs. Comm.).

[77] *Responding to the Humanitarian Catastrophe in Nagorno-Karabakh*, INT'L CRISIS GRP. (Sept. 29, 2023), https://www.crisisgroup.org/europe-central-asia/caucasus/nagorno-karabakh-conflict/responding-humanitarian-catastrophe-nagorno.

[78] 2023 I.C.J. 2, *supra* note 24, at ¶ 34.

D. Comparing War Crimes, Genocide, and Crimes Against Humanity

War crimes are grave violations of international humanitarian law which give rise to individual criminal responsibility under international criminal law. The ICC Elements of Crimes requires that the conduct be committed in the context of and associated with an armed conflict to constitute a war crime.[79] The Rome Statute comprehensively enumerates fifty offenses classified as war crimes. This includes grave breaches of the Geneva Conventions, serious violations of Common Article 3,[80] and other significant infractions derived from diverse sources.

Crimes against humanity are not a creation of international law; rather, they are a timeless aspect of human history that international law seeks to codify and address. However, the prohibition of crimes against humanity in international law has surfaced in the last century. The earliest notable reference to "crimes against humanity" as a legal concept dates back to a joint declaration by France, Great Britain, and Russia in 1915 prompted by the ongoing genocide of the Armenians by the Ottoman Empire.[81] Under the Rome Statute, a crime against humanity involves the commission of inhumane acts like murder, torture, or rape, within the context of a widespread or systematic attack targeting a civilian population.[82]

War crimes and crimes against humanity often overlap. For instance, a mass killing of civilians in an armed conflict could be both. However, unlike war crimes, crimes against humanity can occur outside of armed conflicts, require widespread or systematic commission, and protect victims regardless of nationality or affiliation. In contrast, war crimes were initially based on reciprocal promises, focused on "enemy" nationals or affiliates, regulated conduct on the battlefield, and targeted military objectives. The law governing war crimes limits its jurisdiction to conduct occurring on the battlefield. In contrast, crimes against humanity pertains to actions primarily directed at civilian populations.

The crime of genocide is distinguished from war crimes and crimes against humanity by its distinctive *sine qua non* component: the special intention to annihilate a particular group of people.[83] This specific intent, or *dolus specialis,* of genocide makes it particularly challenging to prove the crime. Consequently, genocide stands as a more precise and narrowly defined offense compared to war crimes and crimes against humanity.[84] Unlike war crimes, crimes against

[79] ICC Elements of Crimes art. 8.
[80] *E.g.*, International Committee of the Red Cross, Convention (III) relative to the Treatment of Prisoners of War (1949), (IHL Databases) https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020.
[81] France, Great Britain, and Russia Joint Declaration, R.G. 59, 867.4016/67 (May 15, 1915), https://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html.
[82] Rome Statute art. 7.
[83] To sustain a finding of genocide, it must be proven that "[t]he perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group." ICC Elements of Crimes art. 6.
[84] Genocidal intent is inherently eliminatory, with the destruction specified in the Convention and Article 6 of the Rome Statute primarily focusing on physical or biological forms. Prosecutor v. Stakić, No. IT-97-24-A, Judgment, ¶ 52 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006). Customary international law, as clarified by the Trial Chamber in *Krstić* and affirmed by the ICJ in the *Bosnian Genocide* case, confines genocide to actions aimed at the physical or biological eradication of a group. Prosecutor v. Krstić, No. IT-98-33-T, Judgment, ¶ 580 (Int'l

humanity and genocide are not tied to armed conflict; they can occur during peacetime as well. While genocide is defined by the perpetrator's specific intent to destroy a particular group irrespective of the scale of the atrocities committed, crimes against humanity are characterized by their widespread or systematic nature regardless of the perpetrator's subjective intent towards a specific group.

During the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide, punishable acts were categorized into physical, biological, and cultural genocide.[85] Notably, an amendment proposed by Syria to include behavior akin to ethnic cleansing among the "acts constituting… genocide" was rejected. The amendment aimed to capture the "inten[t] to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment," underscoring the concerns of deficiency in coverage of international law during the drafting process.[86] It can be argued that such a conservative reading created an "impunity gap," allowing perpetrators of atrocities like ethnic cleansing to evade accountability. The *Blagojević* case, for example, found that the forcible transfer of individuals could lead to the material destruction of a group, thereby challenging this narrow understanding.[87] However, just as the crime of genocide emerged as a response to the limitations of crimes against humanity, the legal framework surrounding crimes against humanity has undergone significant development. Crimes against humanity now encompasses acts such as ethnic cleansing and cultural genocide. The perceived "impunity gap" has therefore been substantially addressed. Hence, Article 6 of the Rome Statute might not be the most suitable avenue for addressing the underlying acts of ethnic cleansing in Nagorno-Karabakh.

E. Elements of the Crime Against Humanity of Deportation or Forcible Transfer of Populations

There are five contextual elements of crimes against humanity: (i) an attack directed against any civilian population; (ii) a state or organizational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus between the individual act and the attack; and (v) knowledge of the attack.[88] As the Pre-Trial Chamber in *Situation in the Republic of Côte d'Ivoire* clarified, these

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Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro*)*, Judgment, 2007 I.C.J. 26, ¶ 344 (Feb. 26).

[85] William A. Schabas, *Drafting of the Genocide Convention: Introductory Note*, U.N.: AUDIOVISUAL LIB. INT'L L. (July 2008), https://legal.un.org/avl/ha/cppcg/cppcg.html.

[86] "That proposal was not accepted, on the ground that the act to which it referred did not fall within the definition of genocide." U.N. Econ. & Soc. Council, Comm. on Hum. Rts., Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, ¶ 93, UN Doc. A/C.6/234 (July 4, 1978).

[87] Prosecutor v. Blagojević*,* No. IT-02-60-T, Judgment, ¶ 666 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005).

[88] Rome Statute art. 7(1-2).

elements "derive from a combination of the chapeau of Article 7(1) of the Statute and the definition of 'attack' provided by Article 7(2) of the Statute."[89]

The expression "course of conduct" under Article 7(2)(a) indicates a "systemic aspect as it describes a series or overall flow of events, opposed to a mere aggregate of random acts."[90] The Elements of Crimes clarifies that this need not involve a military attack.[91] It can involve any mistreatment of the civilian population.[92]

1. The Term "Directed"

The existence of an attack in Nagorno-Karabakh is evident; the question is whether it was specifically aimed at the civilian population. The term "directed" pertains to the deliberate intent behind the attack, distinct from its physical outcomes.[93] If it is established that the perpetrator's primary intent was to inflict harm upon a civilian population, they could be deemed culpable of a crime against humanity even if the attack resulted in both military and civilian casualties.[94] Even if military objectives were more frequently or intensely targeted than civilians and civilian objectives, the inducement of civilian exodus may still satisfy the intent prong. The attack itself, rather than the acts of an individual perpetrator, must be "directed against" the civilian population.[95]

The evaluation of such circumstances is inherently context dependent. Yet, it was in the wake of the Armenian exodus that Azerbaijan regained full control over Nagorno-Karabakh,[96] a fact that could be indicative of the primary intent behind the attack. Furthermore, there is no need to show that the entire population of a geographic entity was targeted by the attack.[97] The toll

[89] 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", No. ICC-02/11, ¶ 28-29 (Nov. 15, 2011).
[90] Prosecutor v. Laurent Gbagbo, No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶ 209 (June 13, 2024).
[91] *See* ICC Elements of Crimes art. 7, ¶ 3; Prosecutor v. Germain Katanga, ICC-01/04-01/07-3436-tENG, Judgment Pursuant to Article 74 of the Statute, ¶ 1101 (Mar. 7, 2014); *Situation in the Republic of Kenya* , ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 80 (Mar. 31, 2010); *Kunarac* 2001 Judgment, *supra* note 14, at ¶ 86; Prosecutor v. Akayesu, No. ICTR-96-4-T, Judgment and Sentence, ¶ 581 (Sep. 2, 1998); *Tadić* Judgment, *supra* note 10, at ¶ 141-42; Prosecutor v. Taylor, No. SCSL-03-01-T, Judgment, ¶ 506 (May 18, 2012); Prosecutor v. Rutaganda, ICTR-96-3-T, Judgment and Sentence, ¶ 70 (Dec. 6, 1999); Prosecutor v. Musema, ICTR-96-13-T, Judgment and Sentence, ¶ 205 (Jan. 27, 2000).
[92] *Kunarac* 2001 Judgment, *supra* note 14, at ¶ 416; Prosecutor v. Stakić, No. IT-97-24-T, Judgment and Sentence, ¶ 623 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003); Prosecutor v. Kajelijeli, No. ICTR-98-44A-T, Judgment and Sentence, ¶ 868 (Dec. 1, 2003); Prosecutor v. Akayesu, No. ICTR-96-4-T, Judgment, ¶ 205 (Sept. 2, 1998); Prosecutor v. Semanza, No. ICTR-97-20-T, Judgment and Sentence, ¶ 327 (May 15, 2003); Prosecutor v. Katanga, No. ICC-01/04-01/07-3436, Judgment Pursuant to Article 74 of the Statute, ¶1101 (Mar. 7, 2014).
[93] Prosecutor v. Blaškić, No. IT-95-14-T, Judgment, ¶ 202 n. 373-75 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).
[94] *Id*. at ¶ 208.
[95] *Kunarac* 2001 Judgment, *supra* note 14, at ¶ 103.
[96] 2023 I.C.J. 2, *supra* note 24, at ¶ 56.
[97] Prosecutor v. Gombo, ICC-01/05-01/08-424, Decision, ¶ 77 (June 15, 2009); *Tadić* Judgment, *supra* note 10, at ¶ 644.

exceeding 200 casualties[98] and the significant destruction of civilian infrastructure[99] suffice to show that attacks were directed against civilians.[100]

2. "Widespread or Systematic" Attacks

"Widespread" refers to the large-scale nature of the attack as well as the number of victims.[101] This condition specifically rules out individual instances of inhumane acts carried out by perpetrators acting independently and targeting a sole victim. The test can also be satisfied by a singular act of exceptional magnitude. However, the assessment is not solely quantitative or geographical; rather, it must be conducted based on individual facts.[102] An attack over a small area that targets a large number of civilians is still considered widespread.[103] Undoubtedly, an attack affecting over 100,000 civilians meets the element of widespread as required under the ICC Statute.[104]

The term "systematic" pertains to the organized nature of the acts of violence.[105] In assessing whether the attack was systematic, the court checks for a political objective, a policy or plan guiding the attack, or a broadly defined ideology envisioning the destruction, persecution, or weakening of a community, while also considering the role of high-level political or military authorities.[106] In the context of the humanitarian crisis in Nagorno-Karabakh, PACE observed the

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[98] Tim Lister et al., *Azerbaijan launches operation against Armenian forces in Nagorno-Karabakh*, CNN (Sept. 20, 2023), https://edition.cnn.com/2023/09/19/asia/armenia-azerbaijan-nagorno-karabakh-bombardment-intl/index.html.

[99] *Azerbaijan Launches Offensive In Breakaway Nagorno-Karabakh, Children Among Casualties*, RADIO FREE EUR. / RADIO LIBERTY (Sept. 19, 2023), https://www.rferl.org/a/azerbaijan-armenia-karabakh-mine-explosions/32599318.html?fbclid=IwAR1LvOslFACUyJ6flBzRAKrD-myz7ZasUNF3H1IO15Tun9-4S-Bk_xREXPA.

[100] *See generally Responding to the Humanitarian Catastrophe in Nagorno-Karabakh*, INT'L CRISIS GRP. (Sept. 29, 2023), https://www.crisisgroup.org/europe-central-asia/caucasus/nagorno-karabakh-conflict/responding-humanitarian-catastrophe-nagorno?fbclid=IwAR2HEUnlj9DITElnIsnYxFQEyO7rBFhBtQ-1iPR4KftRsqmIjas4CggogSk.

[101] *See generally Tadić* Judgment*, supra* note 10, at ¶ 648; Prosecutor v. Bashir, ICC-02/05-01/09-3, ¶ 81 (Mar. 4, 2009); Prosecutor v. Katanga, Decision, ICC-01/04-01/07-717, ¶ 394-97 (Sept. 30, 2008); 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", ICC-02/11-14-Corr, ¶ 53 (Nov. 15, 2011); Prosecutor v. Kayishema, No. ICTR-95-1-T, Judgment, ¶ 123 (May 21, 1999).

[102] Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, ¶ 95 (Mar. 31, 2010); Prosecutor v. Blaškić, No. IT-95-14-T, Judgment, ¶ 206 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Prosecutor v. Gombo, ICC-01/05-01/08-3343, Judgment, ¶ 163, (Mar. 21, 2016).

[103] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06, ¶¶ 22, 24 (June 9, 2014); Prosecutor v. Gbagbo, ICC-02/11-01/11, Decision, ¶ 244 (June 13, 2014).

[104] UN News, UN Karabakh Mission Told 'Sudden' Exodus Means as Few as 50 Ethnic Armenians May Remain, (Oct. 2, 2023), https://news.un.org/en/story/2023/10/1141782.

[105] Decision on the Confirmation of Charge, ICC-01/04-01/07, ¶ 394-97 (Sept. 30, 2008); Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment, ¶ 692 (July 8, 2019).

[106] Prosecutor v. Blaškić, No. IT-95-14-T, Judgment, ¶ 203 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Prosecutor v. Bagilishema, No. ICTR-95-1A-T, Judgment, ¶ 77 (Int'l Crim. Trib. For Rwanda June 7, 2001); Prosecutor v. Katanga, No. ICC-01/04-01/07-717, Decision, ¶ 397 (Oct. 14, 2008).

combination of acute food and supply shortages for the population over months, followed by a military operation and the opening of the Corridor toward Armenia for departures in short succession, a plan which could be perceived as being designed to incite the civilian population to leave the country.[107]

The policy element only serves as an indicator of the systematic nature of the attack.[108] Such a policy need not be formally adopted, expressly declared, or even stated precisely.[109] As the Trial Chamber II in *Katanga* noted, usually there is no smoking gun by way of an explicit plan or pre-established design.[110] An implicit or de facto policy is sufficient.[111] Furthermore, the policy may evolve gradually through continuous refinement as actions are taken.[112] At any rate, Azerbaijan's attack in September 2023 was planned, officially announced,[113] and pledged to persist "until it reache[d] its aims,"[114] leaving no doubt that the assault was systematic and based on a state-backed policy.

The "widespread or systematic" test is disjunctive. If a Chamber is satisfied that the attack is widespread, it need not also consider whether it is systematic.[115] In *Ruto et al.*, the Pre-Trial Chamber II observed that deportation or forcible transfer of the population is an "open-conduct crime."[116] "In other words, the perpetrator may commit several different conducts which can amount to expulsion or other coercive acts."[117]

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[107] PACE Resolution, *supra* note 6, at ¶ 3.
[108] Prosecutor v. Gbagbo, ICC-02/11-01/11-656-Red, Decision on the confirmation of charges against Laurent Gbagbo, ¶ 216 (June 12, 2014); Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Decision, ¶ 1113 (Mar. 7, 2014); Prosecutor v. Blaškić, IT-95-14-A, Judgment, ¶ 100 (July 29, 2004); Prosecutor v. Brđanin, IT-99-36-T, Judgment, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).
[109] *See Tadić* Judgment*, supra* note 10, at ¶ 653; Prosecutor v. Katanga, ICC-01/04-01/07-717, Judgment, ¶ 396 (Mar. 7, 2014).
[110] Prosecutor v. Katanga, No. ICC-01/04-01/07-3436-tENG, Judgment, ¶ 1109 (Mar. 7, 2014).
[111] *See* Decision on the Confirmation of Charges, ICC-01/04-01/07, ¶ 396 (Sept. 30, 2008).
[112] Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Judgment, ¶ 1110 (Mar. 7, 2014); Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment, ¶ 674 (July 8, 2019); Prosecutor v. Ogwen, ICC-02/04-01/15-1762-Red, Judgment, ¶ 2674 (Feb. 4, 2021).
[113] Ministry of Def. of Republic of Azer., Statement by Azerbaijan's Ministry of Defense, (Sept. 19, 2023), https://mod.gov.az/en/news/statement-by-azerbaijan-s-ministry-of-defense-49363.html?fbclid=IwAR3rTCa1a3T7iff6c-1SQaaJ3PLI_FAf4jM_HJWel0wjp23-08RAnXxjrWU.
[114] *Official Baku declares readiness for meeting with representatives of Karabakh's Armenian origin residents in Yevlakh*, AZERBIJANI PRESS AGENCY (Sept. 19, 2023), https://apa.az/en/social/official-baku-declares-readiness-for-meeting-with-representatives-of-karabakhs-armenian-orign-residents-in-yevlakh-412179 (state controlled media).
[115] Prosecutor v. Gomba, ICC-01/05-01/08-3343, Judgment Pursuant to Article 74 of the Statute, ¶ 65 (Mar. 21, 2016) (explaining the alternative nature of "widespread" and "systematic" as it relates to Article 7).
[116] Prosecutor v. Ruto*,* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, ¶ 244 (Jan. 23, 2012).
[117] *Id*.; ICC-OTP, *Policy Paper On Case Selection And Prioritisation*, ¶ 41 (Sept. 15, 2016) (referring to Gravity of crimes(s), Office of the Prosecutor).

3. The Nexus Between the Attack and the Perpetrators

Concerning the accused individuals, it suffices that they committed a prohibited act within the broader attack and were aware of the context surrounding the attack.[118] The perpetrator need not be a leader or even a member of the organization responsible for the attack.[119] Furthermore, there is no requirement that the accused be directly involved in planning the attack, participating in policy formation, or being associated with any specific state, organization, or ideology linked to the attack.

The ICC Statute does not explicitly define the exact degree of nexus required. Nevertheless, this relationship can be ascertained through an "objective assessment of the characteristics, aims, nature, and/or consequences of the acts concerned."[120] The determination will hinge upon the factual circumstances unique to each case. The perpetrator's actions need not necessarily occur during the commission of the widespread or systematic attack.[121] The essential criterion is that these acts must not be detached from the attack, resembling isolated and arbitrary behavior of an individual acting independently. The *Tadić* Tribunal underscored that crimes against humanity are inherently collective in nature, excluding single or isolated acts that do not meet the threshold for the crime.[122]

4. The Knowledge Threshold

Apart from the necessary mental elements for specific offenses, the accused must also be aware of the "broader context" in which their actions took place, specifically, the attack targeting a civilian population. It is the backdrop of a widespread or systematic attack against civilians that elevates an act to a crime against humanity.[123] The perpetrator does not necessarily need to know all the specifics regarding the attack or the intricate details of the plan or policies of the state or organization behind it. It would suffice that they were aware of the general existence of the attack.[124] It is not required that the perpetrator aligns with the purpose or objectives of the

[118] Prosecutor v. Semanza, No. ICTR- 97-20-T, Judgment and Sentence, ¶ 326 (May 15, 2003); Prosecutor v. Tadić, No. IT-94-1-A, Appeals Chamber Judgment, ¶ 271 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); Prosecutor v. Kordić, No. IT-95-14/2-T, Judgment, ¶ 185 (Int'l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Tadić, No. IT-94-1-T, Opinion and Judgment, ¶ 653 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).
[119] Prosecutor v. Muthaura, No. ICC-01/09-02/11-382, Pretrial Decision, ¶ 223 (Jan. 23, 2012).
[120] Prosecutor v. Bemba, No. ICC-01/05-01/08-3343, Judgment, ¶ 165 (Mar. 21, 2016); Prosecutor v. Katanaga, No. ICC-01/04-01/07-3436, Judgment, ¶ 1124 (Mar. 7, 2014); Prosecutor v. Ntaganda, No. ICC-01/04-02/06-2359, Judgment, ¶ 696 (July 8, 2019).
[121] Prosecutor v. Tadić, No. IT-94-1/1-T, Opinion and Judgment, ¶ 632 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).
[122] *Id.* at ¶ 644.
[123] Prosecutor v. Tadić, No. IT-1-A, Appeals Chamber Judgment, ¶ 248 (Int'l Crim. Trib for the Former Yugoslavia July 15, 1999); Prosecutor v. Kupreškić, No. IT-95-16-T, Judgment, ¶ 134 (Int'l Crim. Trib for the Former Yugoslavia July 15, 1999); Prosecutor v. Tadić, No. IT-94-1-T, Opinion and Judgment, ¶ 656 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).
[124] *See* ICC Elements of Crimes art. 7, ¶ 2; Prosecutor v. Blaškić, No. IT-95-14-T, Judgment, ¶ 251 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); *Kunarac* 2001 Judgment, *supra* note 14, at ¶ 102; Prosecutor v. Taylor, No. SCSL-03-01-T, Judgment, ¶ 513-15 (May 18, 2012); Prosecutor v. Bemba, No. ICC-01/05-01/08-424, Pretrial

overarching attack.[125] The mental criterion pertains to understanding the context, not necessarily the motive.[126]

The knowledge requirement represents an additional mental element, i.e. a special intent for the specific crime (forced deportation) itself, distinct from the general *mens rea* requirement outlined in Article 30 (Mental Element), which reads:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.[127]

The knowledge requirement establishes the crucial link between the perpetrator's acts and the overall attack. It ensures that single, isolated acts, often termed "opportunistic acts," which merely happen to coincide with an ongoing attack, do not qualify as crimes against humanity and therefore cannot be prosecuted under Article 7.[128] In the context of Nagorno-Karabakh, the existence of a widespread or systematic attack would be notorious, and knowledge cannot credibly be denied.

Decision, ¶ 88 (Mar. 16, 2016); Prosecutor v. Katanga, No. ICC-01/04-01/07-717, Pretrial Decision, ¶ 401 (Sept. 30, 2008).

[125] *Kunarac* 2001 Judgment, *supra* note 14, at ¶ 103; Prosecutor v. Karadžić, No. IT-95-5/18-T, Judgment, ¶ 486 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016); Prosecutor v. Prlić, No. IT-04-74-T, Judgment, ¶ 45 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013); Prosecutor v. Kupreškić, No. IT-95-16-T, Judgment, ¶ 558 (Int'l Crim. Trib for the Former Yugoslavia July 15, 1999); Prosecutor v. Blaškić, No. IT-95-14-T, Judgment, ¶ 260 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Prosecutor v. Kordić, No. IT-95-14/2-T, Judgment, ¶ 186 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); Prosecutor v. Popović, No. IT-05-88-T, Judgment, ¶ 968 (Int'l Crim. Trib. for the Former Yugoslavia June 20, 2010); Prosecutor v. Tolimir, No. IT-05-88/2-T, Judgment, ¶ 849 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012); Prosecutor v. Muvunyi, No. ICTR-00-55A-T, Judgment, ¶ 514 (Feb. 11, 2011); Prosecutor v. Zigiranyirazo, No. ICTR-01-73-T, Judgment, ¶ 430 (Dec. 18, 2008); Prosecutor v. Gacumbitsi, No. ICYR-2001-64A, Appeal Judgment, ¶ 86 (July 7, 2006).

[126] Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Judgment, ¶ 1125 (Mar. 7, 2014); Prosecutor v. Tadić, No. IT-94-1-A, Judgment, ¶ 271-72 (Int'l Crim. Trib. For the Former Yugoslavia July 15, 1999).

[127] Rome Statute art. 30.

[128] Mariano Gaitán, *The Nexus Element in the Definition of Crimes Against Humanity: An Analysis of Argentine Jurisprudence*, 27 SW. J. INT'L L. 266, 299 (2021).

V. JURISDICTIONAL HURDLES OF BRINGING THE CASE BEFORE THE ICC

Notwithstanding a UNSC Resolution under Chapter VII, the ICC has the authority to exercise jurisdiction in cases involving genocide, crimes against humanity, or war crimes occurring on or after July 1, 2002, if:

1. The crimes were committed by a national of a State Party, within the territory of a State Party, or in a State that has accepted the jurisdiction of the Court.
2. The crimes were referred to the ICC Prosecutor by the United Nations Security Council through a resolution adopted under Chapter VII of the UN Charter.[129]

This tentatively poses a jurisdictional challenge to the court because the alleged crime was committed by the nationals of Azerbaijan, a state not party to the Statute, on its sovereign soil, Nagorno-Karabakh. However, such a challenge is not insurmountable because the alleged crime, while initiated on Azerbaijan's territory, was concluded on Armenian soil, a state party to the Statute.

A comparable scenario unfolded in the context of the forcible deportation of the Rohingya minority commencing in Myanmar, a state not party to the Statute, and concluding in Bangladesh, a state party to the Statute.[130] In that case, the Prosecutor submitted a Request under Article 19(3) of the Statute regarding the alleged deportation of the Rohingya minority from Myanmar to Bangladesh.[131] The Prosecutor argued that under the conduct requirement in Article 12(2)(a), at least one legal element of an Article 5 crime must take place on the territory of a state party.[132] According to the Prosecutor, Article 12(2)(b) and the Elements of Crimes acknowledge that certain offenses including deportation could be comprised of "multiple legal elements."[133] It was sufficient for one element of the crime to occur within the territory of the State.[134] On September 6, 2018, these legal arguments were affirmed by Pre-Trial Chamber I,[135] a body within the ICC responsible for addressing issues before trial begins. The Chamber emphasized that the "inherently transboundary nature of the crime of deportation further confirms this interpretation of Article 12(2)(a) of the Statute," which governs the jurisdiction of the ICC.[136] An element of the crime of "deportation is forced displacement across international borders, which means that the conduct related to this crime necessarily takes place on the territories of at least two States," a scope not

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[129] ICC, *How the Court Works*, ICC: ABOUT THE CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Nov. 1, 2024).
[130] 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, ICC-01/19-27, Pretrial Decision, ¶ 43 (Nov. 14, 2019).
[131] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, Request, ¶¶ 3-4 (Apr. 9, 2018).
[132] *Id.* at ¶ 28.
[133] *Id*. at ¶ 46.
[134] *Id*. at ¶ 49.
[135] Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute," ICC-RoC46(3)-01/18-37, Decision, ¶¶ 78-79 (Sept. 6, 2018).
[136] *Id.* at ¶ 71.

limited by the drafters of the Statute to states parties.[137] The Prosecutor requested authorization to commence an investigation for crimes against humanity partially committed in the territory of Bangladesh, specifically focusing on deportation under Article 7(1)(d),[138] which the Pre-Trial Chamber III granted.[139]

The same line of argumentation aligns *mutatis mutandis* with the situation in Nagorno-Karabakh, where the conclusive phase of the crime occurred on Armenian soil, as tens of thousands of ethnic Armenians were forced to cross the Lachin Corridor into Armenia.[140] Therefore, the ICC has prima facie jurisdiction over the alleged acts against Armenians in Nagorno-Karabakh.

VI. CONCLUSION: CLOSING THE GAPS IN INTERNATIONAL LAW

In culmination, these arguments form a robust foundation for Armenia or any ICC Member State to invoke Article 14 of the Rome Statute and present this case before the ICC Prosecutor. Also, under Article 15, the Prosecutor may initiate investigations *proprio motu* based on information on crimes within the jurisdiction of the court.[141] The process of gathering evidence is an intricate undertaking. The ICC Office of the Prosecutor will inevitably rely on a complex network of legal and evidentiary assessments, including numerous witness statements. This article contends that even a cursory examination of the events in Nagorno-Karabakh provides a solid basis to assert a case for a crime against humanity of forced deportation under the Rome Statute stemming from Azerbaijan's attack in September 2023.

The current provisions within the Rome Statute tackle ethnic cleansing only indirectly, potentially leaving gaps between the profound impact of such acts and the Statute's capacity to comprehensively address them. The need for a specific legal instrument addressing ethnic cleansing arises to establish a clear and comprehensive framework that imposes positive obligations on states and the international community, preventing the forcible displacement of human populations and punishing perpetrators.

Ethnic cleansing must be defined as *a distinct and standalone crime, occurring both in times of peace and conflict, with the deliberate intention of erasing human populations from a specific territory and carried out with knowledge in the fuller context of this intention*. Defining the act as a distinct crime is just the beginning; the subsequent crucial step is granting a court or tribunal jurisdiction over this new offense. As the ICC is the only permanent international criminal court, it naturally becomes the primary contender. To establish the act as a distinct crime, an article

[137] *Id.*
[138] Request for Authorisation of an Investigation Pursuant to Article 15, ICC-01/19-7, ¶¶ 87-88 (July 4, 2019).
[139] 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, ICC-01/19, ¶¶ 40-62 (Nov. 14, 2019) (referencing A. Jurisdiction *ratione loci*).
[140] *Human Rights in Azerbaijan Since the Fall of Nagorno-Karabakh*, *supra* note 76.
[141] Rome Statute art. 15.

within the Rome Statute must explicitly define it. Articles 121 and 123 address possible amendments to the Statute.[142]

Crimes must be clearly defined, prevented, and prosecuted for what they are. Take the heinous crime of rape, for instance: in earlier humanitarian law codifications, rape and other forms of sexual violence were not explicitly addressed and had to be classified under broad categories like "inhuman treatment" or "willfully causing great suffering or serious injury to body or health," alongside other non-specific war crimes.[143] However, these general offenses fail to acknowledge and may even downplay the specific physical and often severe long-term psychological and social damages caused by sexual violence.

Today, rape and other forms of sexual violence committed during armed conflicts constitute war crimes and grave breaches of international humanitarian law. In addition to Article 7(1)(g) and (2)(f), which recognize sexual violence crimes as crimes against humanity, the ICC can also exercise jurisdiction over such conduct when it is committed as war crimes under Article 8, as an act of genocide under Article 6, and as an underlying act for crimes against humanity like torture, persecution, or other inhumane acts.[144] International law should embrace this path as it relates to ethnic cleansing.

[142] Any State Party may propose an amendment to the Statute, triggering a vote. Adopted amendments enter into force one year following ratification. Rome Statute arts. 121, 123.

[143] ANGELA M. BANKS, SEXUAL VIOLENCE AND INTERNATIONAL CRIMINAL LAW: AN ANALYSIS OF THE AD HOC TRIBUNAL'S JURISPRUDENCE & THE INTERNATIONAL CRIMINAL COURT'S ELEMENTS OF CRIMES 32 (Wm. & Mary L. Sch. ed., 2004) (citing S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 28, U.N. Doc S/RES/827 at art. 2 (1993) (ICTY Statute)).

[144] Rome Statute arts. 6-8.

PROTECTING HUMAN RIGHTS IN NO MAN'S LAND: THE QUEST FOR JURISDICTION IN UNRECOGNIZED STATES

Dr. Eleni Micha[1]

Abstract

According to the fundamental principle of subsidiarity in international law, states are primarily responsible for protecting the basic human rights of individuals within their territory. However, conflicts often arise when multiple states claim jurisdiction over a case, frequently undermining the effective protection of vulnerable populations. This issue tends to become even more complex in the context of unrecognized or de facto states which cannot be parties to international human rights treaties. Consequently, domestic protection remains incomplete and fails to meet the minimum standards required by the international community. Such situations create a no man's land where it is unclear who holds jurisdiction over human rights violations in contested territories. Examples of such challenges include Nagorno-Karabakh in Azerbaijan, Transdniestria in Moldova, the autonomous republics of Abkhazia and South Ossetia in Georgia, and the self-proclaimed Turkish Republic of Northern Cyprus. These cases raise critical questions about which actors can claim jurisdiction and the extent of their rights or obligations to exercise it. The paper aims to explore the legal foundations for establishing jurisdiction in situations involving human rights violations in unrecognized states. In particular, the paper will focus on jurisdictional links to clarify the positive obligations of states under international human rights treaties with universal or regional scopes of protection.

To achieve this, the paper will first examine the role of the territoriality principle in international human rights law and the presumption of jurisdiction for the territorial state. It will then analyze the obligations of various actors, including the territorial state (the parent state), third states (the patron state) with special ties to the unrecognized entity (often based on nationality), or both. The analysis will rely on the case law of the judicial and quasi-judicial bodies responsible for enforcing those treaties. Special attention will be given to the European Court of Human Rights ("ECtHR") and its interpretation of state parties' obligations under the European Convention on Human Rights "to secure to everyone within their jurisdiction" the rights defined therein.

Using the Nagorno-Karabakh conflict as the primary case study, the paper will investigate how the ECtHR has addressed jurisdictional issues concerning the ethnic Armenian community in the region. Ultimately, the paper argues for adopting a "capacity to protect" criterion for establishing jurisdiction. This approach is more effective than strictly applying the territoriality principle in safeguarding fundamental human rights within unrecognized states.

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I. INTRODUCTION

A. Jurisdiction, the Reflection of State Sovereignty

Traditionally, international law places the primary obligation to protect basic human rights on states which in turn exercise territorial jurisdiction.[2] State authority is inherently linked to internationally recognized boundaries, and jurisdiction is predominately territorial,[3] subject to limits set by international law.[4] These limits aim to safeguard equality among sovereign states and prevent overlapping competencies.[5]

However, in today's interconnected global society, situations often arise where multiple states exercise jurisdiction over foreign territories.[6] These claims may be based on various jurisdictional links, such as nationality, the protection of individuals abroad, or universality.[7] Such situations are frequently characterized as chaotic, as they involve competing jurisdictional claims that often compromise the effective protection of vulnerable populations.[8] Yet, refusing to exercise jurisdiction in these cases risks creating a legal vacuum, leaving fundamental human rights unprotected.[9] A notable example is the deployment of national armed forces abroad during multinational operations, where jurisdictional conflicts between sending and receiving states arise in cases of alleged human rights violations by military personnel.[10]

B. Unrecognized States: Flawed Sovereignty, Inadequate Protection

Yet, the complexity intensifies when dealing with unrecognized states or de facto states.[11] These entities lacking de jure power cannot become parties to international human rights treaties.[12] Consequently, domestic protections established by state authorities are inherently incomplete and

[2] Territorial jurisdiction gives a state the power to regulate individuals and property within its borders. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 210 (Cambridge Univ. Press ed., 8th ed. 2017) (In public international law, such obligations derive either from international human rights treaties or customary international law. Violations trigger the law of state responsibility and the respective enforcement mechanisms of the treaties.).
[3] *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 18 (Oxford Univ. Press ed., 2d ed. 2015) (noting that jurisdiction is further defined by the territorial, temporal, and personal limits of the state's power to govern).
[4] SHAW, *supra* note 2.
[5] *See generally id.*
[6] *See* Stepan Podhrazsky, *Unrecognised State Entities-Evaluation of Emerging States in the 21st Century*, 48 ACTA UNIVERSITATIS PALACKIANAE OLOMUCENSIS – GEOGRAPHICA 61, 61-83 (2019).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id*. (Such is the case of the British armed forces which were found to have violated the European Convention on Human Rights when the U.K. operated in Iraq as an occupying power during Operation Iraqi Freedom in 2003.).
[11] *See also* NINA CASPERSEN, UNRECOGNIZED STATES: THE STRUGGLE FOR SOVEREIGNTY IN THE MODERN INTERNATIONAL SYSTEM 210 (Cambridge Polity Press ed., 2012). Terminology plays an important role to outline the scope of this paper. Thus, the terms unrecognized or partially recognized states, de facto states, or de facto regimes will be used interchangeably to describe those self-proclaimed entities that have established political independence from the territorial state for an extended period but still lack recognition by the international community. To this point, they have achieved internal sovereignty to a certain degree but not external sovereignty.
[12] *See id*.

fail to meet the minimum standards required by the international community.[13] In such cases, the effective protection of human rights may necessitate the intervention of third states. These third states, often linked to de facto states through territoriality, nationality, or protection grounds, may exercise aspects of sovereign authority over contested territories.[14] In many instances, both the parent state, the territorial state from which the de facto entity succeeded, and the patron state, which supports the de facto entity often on nationality grounds, claim authority.[15] The patron state usually provides military, economic, and administrative support to the de facto state.[16] However, the role of patron states often lacks transparency, and patron states may prioritize geopolitical influence over the protection of human rights within the unrecognized territory. As a result, unrecognized states become a no man's land where jurisdiction over human rights violations is ambiguous.[17] This ambiguity, combined with the fragile status quo in such territories, underscores the urgent need to address the human rights deficit.[18] Assessing jurisdiction based on a state's positive obligations, rather than discretionary claims, is essential for providing effective protection to affected individuals.

Accordingly, there are compelling questions concerning the state actors that can claim jurisdiction over such situations as well as the extent of a state's right or duty to exercise jurisdiction. One may examine the following questions: How does territorial jurisdiction function in human rights cases involving unrecognized state entities? What criteria determine the scope of territorial jurisdiction? Does territoriality serve as a limit or an exception to jurisdiction? Most importantly, does it ensure effective legal protection?

Under current international law, sovereignty and jurisdiction are closely linked, as states hold supreme authority within their territory.[19] Jurisdiction is an attribute of sovereignty, not statehood.[20] Besides, "the scope of the principle of territorial integrity [and, accordingly, issues of statehood] is confined to the sphere of relations between States,"[21] whereas protection of human rights refers to the relationship between states and individuals. Therefore, this paper does not address issues of statehood or sovereignty claims over disputed territories. Rather, it focuses on

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[13] *Id*.
[14] *See* Stepan Podhrazsky, *supra* note 6.
[15] *Id*.
[16] *See* Angely Martinez, As a Matter De Facto: State Capacity Dynamics and Their Role in Shaping Sovereignty for Unrecognized States, 2-3 (May 2021) (Ph.D. dissertation, Syracuse Univ.) (discussing how the relations between the de facto state, the parent state, and the patron state are forged).
[17] *See generally* James Deutsch, *The Legend of What Actually Lived in the "No Man's Land" Between World War I's Trenches*, SMITHSONIAN MAG. (Sept. 8, 2014), https://www.smithsonianmag.com/history/legends-what-actually-lived-no-mans-land-between-world-war-i-trenches-180952513/ (highlighting the history and usage of the term "no man's land").
[18] *See* Samantha Besson, *Sovereignty*, MAX PLANCK ENCYCS. PUB. INT'L L., ¶ 70 (Oxford Public International Law 2011), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472?prd=MPIL (noting the history and relationship between sovereignty and the protection of human rights).
[19] *Id.*
[20] *See generally id*. ¶¶ 74-78.
[21] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 12, ¶ 80 (July 22).

identifying the entities responsible for human rights obligations in unrecognized territories and assessing jurisdiction over human rights violations.

Accordingly, the first section of this paper examines the scope, function, and limits of the territoriality principle in international human rights law. It also explores how the extraterritoriality principle addresses gaps in the protection of fundamental human rights. This analysis relies on the case law of international human rights courts and other United Nations ("UN") treaty bodies, with a focus on the UN International Committee for Civil and Political Rights ("ICCPR"), the European Court of Human Rights ("ECtHR") and the American Convention on Human Rights.

The second section analyses which states exercise jurisdiction over unrecognized territories. It addresses whether actions occur within the parent state's territory or outside its borders and examines the jurisdictional links that determine the extent of a state's positive obligations. These obligations may rest with the parent state, the patron state, or a third state.

The third section of the paper focuses on Nagorno-Karabakh, the Artsakh Republic, as a case study. It examines the ongoing Armenia-Azerbaijan conflict and how the ECtHR has addressed jurisdictional challenges arising from the human rights violations in this contested territory.

In conclusion, the paper argues that under the doctrine of prescriptive jurisdiction, states party to international human rights treaties are obligated to exercise jurisdictional authority over all natural persons within their reach to fulfil their treaty obligations. This analysis introduces an alternative criterion for establishing jurisdiction, emphasizing that a strictly formalistic application of the territoriality principle cannot effectively address all cases. Adopting a more flexible approach is essential for safeguarding fundamental human rights in unrecognized states.

II. THE EXERCISE OF JURISDICTION IN INTERNATIONAL HUMAN RIGHTS LAW: THE PRINCIPLE OF TERRITORIALITY AND ITS LIMITS

A. The Two-fold Function of Jurisdiction in International Law

In international law, jurisdiction is arguably "the most versatile term."[22] While it serves as the foundation for applying international treaties, the term varies across contexts.[23] Generally, jurisdiction in international law encompasses three aspects: prescriptive, judicial, and enforcement.[24] States may regulate persons and property through domestic legislation, court decisions, or execution of judgments abroad.[25] However, domestic matters often carry

[22] Xiaodong Yang, *Jurisdiction* (2012), OXFORD BIBLIOGRAPHIES IN INT'L L., https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0030.xml.
[23] *See generally* R. Y. Jennings, *The Limits of State Jurisdiction*, 32 NORDISK J. INT'L L. 209 (1962).
[24] Am. Soc'y Int'l L., *Benchbook on International Law* § II.A (Diane Marie Amann ed., 2014), www.asil.org/benchbook/jurisdiction.pdf (noting that this division is also valid in transnational cases within a private international law context and in a criminal law context).
[25] *Id.*

international implications, and the exercise of jurisdiction "is limited by rules of international law," particularly when conflicts arise between states' obligations under international law. [26]

Within public international law, jurisdiction serves both distributive and restrictive functions; thus, a state asserts jurisdiction over its territory and its nationals abroad, even outside state borders.[27] As it has been successfully noted, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[28] In parallel, state power is restricted to its territory or its nationals abroad. However, in human rights law, jurisdiction reflects a protective function based on states' positive obligations derived from the jurisprudence of both universal and regional human rights courts and committees.[29] In this context, jurisdiction is not based upon discretionary power of the state but rather stems from the obligation to address human rights violations.[30] These obligations bind states that have signed and ratified human rights treaties with universal or regional applicability, such as International Covenant for Civil and Political Rights of 1966 ("ICCPR") and the European Convention on Human Rights of 1950 ("1950 Convention").[31]

Territorial jurisdiction plays a dual role: it determines the obligations of state parties and the *ratione loci* jurisdiction of the treaty. Under the 1950 Convention, for example, a state party to the Convention exercises jurisdiction throughout its territory.[32] The ECtHR in the key case of *N.D. and N.T. v. Spain* addressed the prohibition of collective expulsion of aliens.[33] The Court ruled that Article 1 of the 1950 Convention presumes jurisdictional competence, limited "only in exceptional circumstances."[34] Acknowledging that the border fences at the Melilla enclave in Morocco were Spanish territory, the Court examined whether any "constraining de facto situation[s]" or "objective facts" could limit Spain, a state party to the Convention, from exercising full authority and jurisdiction at the Melilla border under Article 1 of the Convention.[35] The Court

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[26] *See* U.N. HCR, Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco, 1923, P.C.I.J. (ser. B) at 23-24.
[27] CEDRIC RYNGAERT, THE CONCEPT OF JURISDICTION IN INTERNATIONAL LAW 1-5 (Utrecht Univ. ed., 2014).
[28] *See* Schooner Exch. v. McFaddon, 11 U.S. 116 (1812).
[29] *See* Philipp Janig, *Extraterritorial Application of Human Rights,* 2 ELGAR ENCYC. HUM. RTS. 180, 180-191 (2021).
[30] RYNGAERT, *supra* note 27, at 4.
[31] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (providing that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 (stating that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in… this Convention"); Org. Am. States, Am. Conv. H.R., Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms…"); G.A. Res. 2106 (XX) (Dec. 21, 1965) (adopting a similar approach); Convention for the Suppression of Unlawful Seizure of Aircraft, Mar. 8, 1973, U.N.T.S. (providing for the establishment of criminal jurisdiction by member states concerning grave criminal activities such as torture or the suppression of acts of terrorism).
[32] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, art. 1, 213 U.N.T.S. 221 [hereinafter 1950 Convention].
[33] N.D & N.T. v. Spain, App. Nos. 8675/15 & 8697/15, ¶ 3, Eur. Ct. H.R. (Feb. 13, 2020), https://hudoc.echr.coe.int/fre?i=001-201353.
[34] *Id.* ¶ 103.
[35] *Id*. ¶ 108 (emphasis removed).

rejected Spain's attempt to exclude the Melilla border region from the Convention's protections, emphasizing that such exclusions would constitute an "artificial reduction" of the *ratione loci* jurisdiction and render the protection awarded by the Convention "meaningless."[36]

In the case of the American Convention on Human Rights, a similar risk of a selective application arises, especially for member states organized as federations.[37] The Inter-American Court of Human Rights clarified that the federal structure of a state party to the American Convention cannot justify noncompliance with international obligations.[38] Therefore, "the States Parties must *respect and ensure all the rights* recognized in the American Convention *to all persons subject to their jurisdiction*, without any limitations or exceptions based on their internal organization."[39]

B. The Topography of Jurisdiction: The British Indian Ocean Territory

While territoriality forms the primary jurisdictional basis for applying fundamental human rights treaties, states cannot automatically assume jurisdiction and possibly incur responsibility for human rights violations affecting persons in other contracting states. For instance, the 1950 Convention's colonial clause in Article 56 allows states to extend the Convention's application to dependent territories through notification to the Council of Europe.[40] In the case of *Chagos Islanders v. U.K.*, the United Kingdom did not extend the 1950 Convention's application to all its overseas territories, including the Chagos Islands.[41] Despite arguments that Article 56 should be interpreted in light of contemporary developments,[42] the ECtHR ruled that the Chagos Islands were not part of the United Kingdom's metropolitan territory.[43] Since the United Kingdom has not submitted a declaration under Article 56 to extend the right of individual application to the Chagos

[36] *Id*. ¶ 110.
[37] Org. of Am. States, Am. Conv. H.R., Pact of San Jose, Costa Rica (Nov. 22, 1969), https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf (containing a "federal clause" providing that "[w]here a state-party is constituted as a federal state… the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfilment of this Convention").
[38] Women Victims of Sexual Torture in Atenco v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 371, ¶ 55 (Nov. 28, 2018) (citing Garrido v. Arg., Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 46 (Aug. 27, 1998); Garibaldi v. Braz., Preliminary objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 203, ¶ 146 (Sept. 23, 2009)); *see also* LaGrand Case (Ger. v. U.S.), Provisional Measures, 1999 I.C.J. 9 (Mar. 3).
[39] *See* Women Victims of Sexual Torture in Atenco v. Mex., Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 371, (Nov. 28, 2018) (emphasis added).
[40] 1950 Convention, *supra* note 32, art. 56, ¶ 1, 4 (Nov. 4, 1950) ("Any state *may… declare* by notification… that the present Convention shall extend to all or any of the territories for whose international relations it is responsible…. Any state which has made a declaration… *may at any time thereafter declare* on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive [individual] applications as provided by Article 34 of the Convention.") (emphasis added).
[41] Chagos Islanders v. U.K., App. No. 35622/04, Eur. Ct. H.R. (Dec. 11, 2012), https://hudoc.echr.coe.int/fre?i=001-115714.
[42] *Id*. ¶¶ 69-73.
[43] *Id*. ¶¶ 48, 64.

Islands, the Court ruled against the applicants' claim to apply Article 1 of the 1950 Convention on an extra-territorial basis.[44] The Court emphasized that Article 56 cannot be used to expand the *ratione loci* jurisdiction of the Convention merely to address "perceived… injustice[s]" of the past.[45] Article 56 therefore remains applicable only to states that chose to extend the Convention to their dependent territories for which they bear international responsibility. As the Court recently clarified, declarations under Article 56 regarding dependent territories constitute the sole lawful territorial exclusion from the presumption of territorial jurisdiction established by Article 1 of the Convention.[46]

Despite this jurisprudence, the relationship between Article 1 and 56 of the Convention continues to generate significant debate. Most scholars advocate for a teleological, or even evolutive, interpretation of the state parties' positive obligations under Article 1 to apply the Convention.[47] This interpretative approach aligns with the argument presented by the Chagossian applicants, which contended that the United Kingdom exercised de facto control over the Chagos Islands.[48] According to this reasoning, the dependent territory would fall under the United Kingdom's jurisdiction as defined by Article 1.[49] The central question in this debate concerns whether the 1950 Convention can apply outside a state party's metropolitan territory. If a dependent territory is deemed part of the metropolitan state, the Convention applies only when the contracting state submits a declaration under Article 56. Otherwise, the Convention's applicability hinges on whether the state party exercises effective control over the territory in question.[50] Cases such as *Chagos Islanders*, where human rights violations occurred outside the territorial boundaries of a state party to the Convention, highlight critical issues in assessing the *ratione loci* jurisdiction of international human rights treaties.

[44] *Id*. ¶¶ 69-73.
[45] *Id*. ¶ 74 (The Court did not examine whether the UK had any power over the territory in question, since the application was found inadmissible for lack of victim status.).
[46] N.D. & N.T., *supra* note 33, ¶106 (citing Matthews v. U.S., App No. 24833/94, ¶ 29, Eur. Ct. H.R. (Feb. 18. 1999); Assanidze v. Geor., App No. 71503/01, ¶¶ 137-39, Eur. Ct. H.R. (Apr. 8, 2004)).
[47] Steven Wheatley, *Interpreting the ECHR in Light of the Increasingly High Standards Being Required by Human Rights*, 24 HUM. RTS. L. REV. 1, 1-9 (2024) (detailing the evolutive approach and criticizing the political and naturalistic approaches).
[48] Milanovic argued that the issue does not pertain to the exercise of jurisdiction but rather to the acts and omissions of the British state organs, since there is no self-governance of the depopulated Chagos Islands. In other words, Milanovic shifts the discussion from the exercise of jurisdiction to the attribution of the acts of its organs upon the state, triggering the UK's international responsibilities under the Convention. Although it is difficult to distinguish in practice, the attribution of individual acts to the state for purposes of state responsibility is not to be confused with performing the same task for purposes of establishing territorial jurisdiction. *See* Marko Milanovic, *Update in the Extraterritorial Application of Human Rights Treaties*, EJIL TALK! (May 21, 2013), https://www.ejiltalk.org/update-on-the-extraterritorial-application-of-human-rights-treaties.
[49] *But see* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. (Feb. 25) (demonstrating that the question tends to become moot especially after the advisory opinion issued by the International Court of Justice in 2019 on the process of decolonization of Mauritius, the detachment of the Chagos Archipelago from the former, and whether the process in question was lawfully completed under public international law).
[50] *Id*.

C. The Extraterritorial Application of Human Rights Treaties

The doctrine and corresponding jurisprudence have recognized the extraterritorial application of human rights treaties, thereby extending the scope of the protection initially afforded only to the contracting states.[51] However, the precise nature of this application remains widely debated due to the inherently political nature of the disputes, which may trigger riots, internal strives, violent armed conflicts, and even secessions from the parent state.[52] Not all human rights treaties support *expressis verbis*, the extraterritorial application of treaty provisions.[53] For instance, the 1950 Convention and the American Convention on Human Rights contain general clauses permitting such application, whereas the ICCPR does not make any reference.[54] The absence of express language could undermine the effective implementation of the ICCPR and diminish the protection owed to individuals under a state's territorial control.[55]

The International Court of Justice addressed this interpretative challenge regarding the ICCPR's application in the Occupied Palestinian Territories.[56] The ICJ, relying on the object and purpose of the ICCPR, interpreted Article 2(1) disjunctively to expand its territorial scope and facilitate the exercise of jurisdiction by the state parties.[57] In contrast, the ECtHR did not encounter similar interpretative gaps. Instead, the challenge for the Court involved delimiting the Convention's territorial reach.[58] From the outset, it was clear that the Court could apply beyond state borders when state organs acted extra-territorially.[59] In the next three sub-sections of the analysis, the paper examines the various stages of interpreting Article 1 of the 1950 Convention.

1. The Loizidou Case: Setting the Foundations for the Extra-territorial Application of the Convention

In the landmark case of *Loizidou v. Turkey*, the ECtHR established that state parties to the Convention could exercise effective control over areas outside their national territories as a result

[51] *See generally* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (Vaughan Lowe QC et al. eds., 2011).
[52] *Id*.
[53] *See id*. at 7.
[54] *See id*. at 12.
[55] *Id*.
[56] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 110-11 (July 9).
[57] *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...."); *see also* Simon Mateus, *Investigating the Extraterritorial Application of the International Covenant for Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights*, 2021 DE JURE L. REV. J. 70, 90 (2021) (overview of the International Covenants application).
[58] *See* Drozd v. Fr., App. No. 12747/87, ¶ 91, Eur. Ct. H.R. (June 26, 1992), https://hudoc.echr.coe.int/eng?i=001-57774.
[59] *Id.*

of military action.[60] The Court explained, "[t]he obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from… such *control* whether exercised directly, through its armed forces, or a subordinate local administration."[61] Since Turkey occupied the northern part of Cyprus, it exercised effective control over the area; thus, Turkey's actions and omissions, specifically its refusal to grant access to the properties of individual applicants, fell within its jurisdiction under Article 1 of the Convention.[62] The Court carefully distinguished between establishing jurisdiction and establishing state responsibility for alleged violations of Convention rights.[63]

The Court emphasized that the exercise of effective control over territory outside national borders constitutes a factual determination.[64] To assess this, the Court considers two key criteria: (1) the number of soldiers deployed in the area and (2) the extent of influence and control exerted over local subordinate authorities through military, economic, and political support.[65] The element of control plays a pivotal role in determining both the jurisdiction of the respondent state and the Court's *ratione loci* jurisdiction.[66] To ensure effective protection, the Court adopted a more flexible approach to the effective control test compared to the ICJ. Rather than applying a rigid framework, the Court assessed overall control of the area where the alleged violations occurred, as well as the authority and control exercised over individuals acting within that area.[67]

2. *The Al-Skeini Judgment: The "Divided and Tailored" Approach to Extra-territorial Application of the 1950 Convention*

The 2003 occupation of Iraq by the United States and the United Kingdom presented an ideal opportunity for the European Court of Human Rights to address the territorial jurisdiction of contracting parties engaged in military activities beyond their national borders. In *Al-Skeini and Others v. United Kingdom,* the Court demonstrated reluctance to impose strict limits on the full-scale territorial application of the Convention outside member states' national borders.[68] While it acknowledged that circumstances warranting the exercise of jurisdiction by a Contracting State

[60] Loizidou v. Turk., App. No. 15318/89, ¶ 62, Eur. Ct. H.R. (Mar. 23, 1995), https://hudoc.echr.coe.int/fre?i=001-57920 (alteration in original) (emphasis added).
[61] *Id.*
[62] *See id*. ¶ 64.
[63] *See generally* JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART (James Crawford & John S. Bell eds., 2013) (emphasizing that the court can hear the merits of the case and then apply intenrational law to determine whether the state is responsible); *see also* Ukr. v. Russ., App. Nos. 20958/14 & 38334/18, ¶ 266, Eur. Ct. H.R. (June 25, 2024) (highlighting a distinction between state responsibility and jurisdiction assessment); s*ee also* Lucius Caflisch, *Attribution, Responsibility and Jurisdiction in International Human Rights Law*, 10 ANUARIO COLOMBIANO DE DERECHO INTERNACIONAL 161, 161-203 (2017).
[64] Loizidou, *supra* note 60, ¶ 61.
[65] *See id.* ¶ 62. For a more recent application of the 'effective control' test by the Court, *see* Ukr. v. Russ. App. Nos. 20958/14 & 38334/18, ¶¶ 31-104, Eur. Ct. H.R. (Dec. 16, 2020), https://hudoc.echr.coe.int/ukr?i=001-207622.
[66] *Id*. ¶¶ 55-64.
[67] *Id.*
[68] *See* Al-Skeini v. U.K., App. No. 55721/07, ¶¶ 131-132, Eur. Ct. H.R. (July 7, 2011), https://hudoc.echr.coe.int/fre?i=001-105606.

beyond its own territorial boundaries are exceptional, the Court rejected the *Bankovic* approach adopted by the Grand Chamber a decade earlier, which had curtailed the territorial jurisdiction of the state parties.[69] The Court also dismissed the United Kingdom's argument that the Convention applies only within "an essentially regional context and notably in the legal space (*espace juridique*) of the contracting states."[70] Drawing on the principle of belligerent occupation as established in international jurisprudence, the Court held that the deaths of the applicants' relatives during a British security operation in Iraq fell under the jurisdiction of the United Kingdom.[71] As the occupying power, the United Kingdom bore responsibility for human rights violations within the occupied Iraqi territory.[72] To rule otherwise, the Court reasoned, "would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in *a* '*vacuum*' *of protection within the* '*legal space of the Convention.*'"[73]

The Court's reasoning in *Al-Skeini* significantly expanded the territorial jurisdiction of state parties to the 1950 Convention and clarified the extent of their positive obligations under Article 1 of the Convention.[74] By rejecting the restrictive view established in *Bankovic*, the Court distinguished two models of extraterritorial application of the Convention. First is the spatial model, when a state party to the Convention exerts effective control over foreign territory through its armed forces or a subordinate local administration.[75] Second is the personal model, when a state party exercises authority and control over individuals residing in foreign territory through its state agents.[76] The Court emphasized that either of these jurisdictional links, spatial or personal, could establish a state party's obligation to apply the Convention extraterritorially.[77] It further stressed that jurisdiction requires physical control over individuals, irrespective of whether the activities occur on land, sea, or air.[78]

Although the spatial and personal models serve different functions, they operate complementarily. For instance, when state agents use lethal force outside their borders, whether during military operations or otherwise, they act on an extraterritorial basis and simultaneously infringe upon the human rights of affected individuals.[79] Violations such as loss of life, inhumane treatment, or arbitrary detention fall under the jurisdiction of the state party, irrespective of the specific location of these actions.[80] Consequently, the state party must secure the human rights of

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[69] *See id.* ("Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases.").
[70] *Id.* ¶ 85 (quoting Bankovic v. Belg., App. No. 52207/99, ¶ 78, Eur. Ct. H.R. (Dec. 12, 2001), https://hudoc.echr.coe.int/eng?i=001-22099).
[71] Al-Skeini, *supra* note 68, ¶¶ 133-38.
[72] *Id.* ¶¶ 168-77.
[73] *Id.* ¶ 142.
[74] *Id.* ¶¶ 133-50.
[75] *Id.* ¶¶ 134-37.
[76] *Id.* ¶¶ 138-40.
[77] *Id.* ¶¶ 133-50.
[78] *Id.* ¶ 136.
[79] *See id.* ¶¶ 134-37.
[80] In the cases of Medvedyev v. France and Carter v. Russia, the European Court accepted that acts of detention abroad a foreign registered ship in the high seas and extrajudicial killings abroad were within the jurisdiction of the contracting states respectively. Accordingly, the Court itself had *ratione loci* jurisdiction in those cases. *See, e.g.,*

the affected individuals in a manner that aligns with the facts of each case.[81] The Court introduced the principle of "divided and tailored" rights to emphasize the context-specific nature of human rights obligations.[82] After *Al-Skeini*, the Court applied this approach in politically sensitive cases, including the armed conflicts in Georgia and Ukraine.[83] Yet, there have been intriguing developments in the Court's jurisprudence regarding the establishment of extraterritorial jurisdiction depending upon the specific context of the rights that have been allegedly violated.

3. The H.F. and Duarte Agostinho Judgments: Entering New Areas of Human Rights Protection in the Extra-territorial Application of the Convention?

In *H.F. v. France*, the Court examined whether the right to enter one's territory, protected under the Fourth Additional Protocol,[84] depended on the "jurisdictional link" of nationality when the affected individuals were outside the state's borders.[85] The case involved women and children detained in Kurdish-run camps after the fall of the Islamic State.[86] The Court ruled in favor of the applicants, citing their vulnerability and the unique "special features" of their situation.[87] Conversely, in *Duarte Agostinho and Others v. Portugal*, the Court addressed claims by a group of young Portuguese applicants alleging harm caused by climate change.[88] The applicants argued that the Convention's extraterritorial jurisdiction should apply to protect broader interests allegedly enshrined within the Convention.[89] However, the Court rejected this argument as "artificial and difficult to satisfy," emphasizing that extending jurisdiction without identifiable limits would undermine the Convention's legal certainty and practical applicability.[90]

These cases marked the first time the Court scrutinized these issues, testing the validity of previous decisions and challenging whether established case law on the extraterritoriality of the

Medvedyev v. Fr., App. No. 3394/03, ¶¶ 62-64, 67, Eur. Ct. H.R. (Mar. 29, 2010), https://hudoc.echr.coe.int/?i=001-97979; Carter v. Russ., App. No. 20914/07, ¶¶ 123-24, 126, Eur. Ct. H.R. (Feb. 28, 2022), https://hudoc.echr.coe.int/?i=001-211972.

[81] Al Skeini, *supra* note 68, ¶ 137. In Iraq, the rights at stake were those safeguarding the life, personal liberty, and security of Iraqi nationals (Article 2 and 5ECHR respectively), since most applications dealt with the allegations of arbitrary detention to prisons and other premises under the supervision of the British armed forces. *Id.* ¶¶ 76-77.

[82] *Id.*

[83] *See id.*; *see, e.g.,* Geor. v. Russ. (II), App. No. 38263/08, ¶¶ 21-23, Eur. Ct. H.R. (Apr. 28, 2023), https://hudoc.echr.coe.int/?i=001-224629; Ukr. v. Russ., App. Nos. 8019/16, 43800/14, & 28525/20, ¶¶ 383-84, Eur. Ct. H.R. (Nov. 30, 2022), https://hudoc.echr.coe.int/?i=001-222889; Ukr. v. Russ., App. Nos. 20958/14 & 38334/18, ¶¶ 862-64, Eur. Ct. H.R. (June 25, 2024), https://hudoc.echr.coe.int/?i=001-235139.

[84] Council of Europe, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, ¶ 2, Sept. 16, 1963, E.T.S. No. 046 (stating that "[n]o one shall be deprived of the right to enter the territory of the state of which he is a national").

[85] H.F. v. Fr., App. Nos. 24384/19 & 44234/20, ¶¶ 159-60, Eur. Ct. H.R. (Sept. 14, 2022), https://hudoc.echr.coe.int/?i=001-219333.

[86] *Id.*

[87] *Id.*

[88] Agostinho v. Port., App. No. 39371/20, ¶ 12, Eur. Ct. H.R. (Apr. 9, 2024), https://hudoc.echr.coe.int/?i=001-233261.

[89] *Id*. ¶ 207.

[90] *Id.* ¶ 206.

Convention should evolve to address new areas of human rights protection, such as environmental issues.[91] The *Agostinho* Court adopted a cautious approach, showing reluctance to extend beyond the specific facts of each case.[92] Emphasizing the control criterion, the Court clarified that the protection of human rights abroad must be practical and effective, rather than merely theoretical or illusory.[93] In contrast to *Agostinho*, the *H.F.* Court adopted a teleological interpretation of France's extraterritorial jurisdiction in *H.F. v. France*, concerning the right to enter one's territory as safeguarded by the Fourth Additional Protocol.[94] Rather than addressing rights in the abstract, the *H.F.* Court focused on protecting specific rights of the victims in connection with the concrete obligations of the allegedly responsible state.[95]

Although the Court reached different outcomes in these cases, its methodology remained consistent. It carefully examined the unique characteristics of each situation to determine the scope of the rights at stake, aligning them with the specific circumstances of each case.[96] This "divided and tailored" approach ensures that rights are not applied in abstraction but rather in relation to the concrete duties of the state in question.[97] The Court's reliance on the "special features" of each case delineates the limits of extending state jurisdiction under Article 1 of the Convention.[98] While this technique ensures practical and effective human rights protection, excessive reliance on the approach risks undermining the legal certainty vital to the Convention. As the Court itself cautioned, overextension of this approach could lead to an "untenable level of uncertainty for the states."[99]

These challenges become even more pronounced when addressing cases involving unrecognize states. In such cases, the uncertain sovereignty status of these entitles often hinders their ability to protect human rights effectively.

III. EXERCISING JURISDICTION BEYOND STATE BORDERS: UNRECOGNIZED STATES

The jurisprudential rulings of international human rights courts have consistently demonstrated that the territoriality principle dominates international law.[100] Consequently, the presumption of jurisdiction in favor of the territorial state is an inevitable feature of human rights litigation. This principle applies in ordinary circumstances where sovereign states exercise full

[91] *Id.* ¶ 190.
[92] *Id.* ¶¶ 205-09.
[93] *Id.*
[94] H.F., *supra* note 85, ¶ 187.
[95] *See generally id.* ¶ 213 (holding that France exercised jurisdiction due to the jurisdictional link between the applicants and France for purposes of safeguarding the applicants' right to enter their national territory, where such link was rejected with respect to the prohibition of inhumane treatment inflicted upon the applicants in the Kurdish-run camps due to the lack of control by the French authorities).
[96] *Id.* ¶ 62.
[97] *Id.* ¶¶ 189-90.
[98] *See id.* ¶ 213.
[99] Agostinho, *supra* note 88, ¶ 208.
[100] RYNGAERT, *supra* note 3, at 42-84.

jurisdiction over their territory without any external interference.[101] However, sovereignty is not a *sine qua non* for the exercise of jurisdiction.[102] States may assert jurisdiction beyond their sovereign borders, as reaffirmed recently by the ECtHR in its admissibility ruling on the inter-state application concerning the downing of flight MH17.[103]

In contrast, the exercise of jurisdiction in unrecognized or de facto states with diminished sovereignty raises significant challenges. In such cases, the authority over persons, objects, or situations is often tenuous, if not entirely illusory.[104] These entities are highly susceptible to geopolitical shifts due to their fragile institutional structures and are frequently tied to the parent state, with or without consent.[105] At the same time, unrecognized states often maintain close ties to patron states, relying on financial and logistical support. In these complex situations, the central question regarding territorial jurisdiction under the Convention is which state party exercises control over the contested territory.

As established in the case law of both the ECtHR and the Human Rights Committee, the determination of jurisdiction is inherently fact-dependent and requires a nuanced assessment of the specific circumstances surrounding the exercise of authority by the states involved.[106] Both human rights bodies consider the particular conditions on the ground, including geographical area where the relevant acts occurred and the time period during which those acts took place.[107] In this context, the outbreak of armed conflict plays a critical role in assessing state jurisdiction, particularly when such conflicts result in the emergence of a new state entity.

A. Absence of Control over Contested Territory: The Puzzle of an Armed Conflict

For the ECtHR, armed conflict in a specific geographical area can significantly hinder the assessment of jurisdiction due to the lack of effective territorial control by the belligerent parties. The principle was evident in the Court's ruling on the five-day war between Georgia and Russia in August 2008 over the autonomous republics of Abkhazia and South Ossetia, which had declared

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[101] *See id.*
[102] *See* Ukr. & Neth. v. Russ., App. Nos. 8019/16, 43800/14, & 28525/20, ¶¶ 553-55, Eur. Ct. H.R. (Jan. 25, 2023), https://hudoc.echr.coe.int/fre?i=001-222889.
[103] *Id.*
[104] The institutional structure of unrecognized states is a matter of great importance for the safeguarding of fundamental human rights and the rule of law for the territory's inhabitants. Since democratic governance is necessary for effective human rights protection, the shaping of international standards is a prerequisite for the recognition of de facto states. The case of Kosovo was characteristic to the extent that the 'standards before status' policy had a strong impact on other unrecognized states and their struggle for international recognition. Although this quest did not have the desired results, international standard-setting for effective governance is still meaningful insofar as it strengthens the application of human rights in the contested territory and builds strong relations with the parent state. *See generally* Nina Caspersen, *Standards Before Status– Still Relevant?*, ANALYTICON (Mar. 2012), https://theanalyticon.com/en/%d0%bd%d0%be%d0%b2%d0%be%d1%81%d1%82%d0%b8-en/standards-before-status-still-relevant-2/.
[105] *See id.*
[106] See Section II.
[107] *Id.*

independence from Georgia.[108] The Court appeared hesitant to interfere amidst the ongoing hostiles and the territorial dispute.[109] According to the Court's reasoning, armed conflict inherently generates chaos, particularly during active confrontations, precluding the establishment of "effective control over an area" or "any form of state agent authority and control."[110]

The Court's reasoning highlights two key points relevant to unrecognized states burdened with armed conflict. First, the parameter of time plays a decisive role in determining the duration of "active armed confrontations."[111] According to the Court's analysis, international armed conflicts can be divided into two distinct time periods: (1) the "active phase of hostilities," characterized by ongoing military engagements, and (2) the period following the cessation of hostilities, during which one of the belligerent parties establishes effective control over the contested territory.[112] This control may be exercised as an occupying power or as an administrator, in the case of a multinational military operation.[113] By distinguishing between these two time-periods, the Court concluded that its *ratione loci* jurisdiction applied only during the second time-period, after active hostilities have ended.[114] The second significant point concerns the concept of the "active phase of hostilities" and the Court's interpretation of this term.[115] The treatment of active hostilities, which serves as a basis to exclude the assessment of state jurisdiction over a foreign territory, remains ambiguous within the framework of the Convention, creating potential confusion in practical application.[116]

To illustrate the challenges posed by this approach, consider the following hypothetical scenario: intense fighting occurs between two neighboring states, both parties to the Convention, in a wider area near their shared border. During the conflict, heavy shelling targets an area near a small village. Simultaneously, a platoon of soldiers from the state that ordered the shelling enters the village, kills numerous civilians, and loots property. If these actions are deemed part of the active phase of hostilities, then the state does not have jurisdiction over the territory, as it lacks effective control. Consequently, the ECtHR would lack the authority to rule on the soldiers' actions as potential violations of the Convention.[117] Conversely, if these acts are considered separate from the active hostilities, the state would be deemed to have jurisdiction over the territory.[118] This

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[108] Geor. v. Russ. (II), App. No. 38263/08, ¶ 160 Eur. Ct. H.R. (Jan. 21, 2021), https://hudoc.echr.coe.int/fre?i=001-207757.
[109] *Id*.
[110] *Id*. ¶ 137.
[111] *Id*. ¶¶ 137-38.
[112] *See generally id.*
[113] *Id.*
[114] *Id*. ¶ 18.
[115] *Id*. ¶¶ 82-84.
[116] *See* Qetevan Qistauri, *Legal Uncertainty Regarding the Applicability of the ECHR in International Armed Conflict in the Active Phase of the Hostilities*, OPINOJURIS (Dec. 2, 2021), http://opiniojuris.org/2021/02/12/legal-uncertainty-regarding-the-applicability-of-the-echr-in-international-armed-conflict-in-the-active-phase-of-the-hostilities/ (commenting on the Court's ruling in Georgia v. Russia (II)).
[117] *See* Geor., *supra* note 108, ¶ 156 (stating how the Court recognizes the IHL as the only body of law applicable in these situations).
[118] *Id.*

ambiguity underscores the need for greater precision in defining the scope and limits of jurisdiction during periods of armed conflict to ensure consistent application of the Convention.

Active armed confrontations do not always align with the Court's definition of chaos as wholly ungoverned situations.[119] Hostilities during armed conflict are generally conducted according to rules of engagement, which establish the conditions under which a state's armed forces engage in combat.[120] Military operations typically consist of active and dormant phases of confrontation.[121] However, the *Georgia v. Russia (II)* Court seemed to bypass these distinctions entirely.[122] This approach resulted in an unfortunate ruling regarding jurisdiction during the active phase of conflict: the Court declined to apply either the spatial model of jurisdiction (control over territory) or the personal model (control over the victim by a state agent) to any of the alleged violations of Article 2 committed in that period.[123] It faced sharp criticism from the minority of six Court judges and numerous scholars who argued that it represented a retreat from the principles established in the *Al-Skeini* judgment.[124] Despite this criticism, the Court upheld its reasoning on the "active phase" element of armed conflict in its subsequent decision concerning the downing of flight MH17.[125] However, in that decision, the Court adopted a different perspective on chaos during armed conflict compared to its stance in *Ukraine and the Netherlands v. Russia*.[126] The Court recognized that "a specific temporal phase of an international armed conflict [like the one of an air strike] that occurs while active hostilities are taking place *cannot be excluded* from a State's Article 1 jurisdiction."[127]

The Court's reasoning seems to rest on probabilities: a strike, whether aerial or ground-based, may or may not cause chaos. Consequently, the chaotic nature of active hostilities is not *in abstracto* decisive in assessing jurisdiction.[128] Instead, it depends on factors such as the degree of control exercised over individuals and property and the available evidence supporting the circumstances.[129] By adopting a more flexible approach to jurisdiction, the Court attempted to

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[119] *Id*. ¶ 126

[120] Melissa Petruzzello, *Rules of Engagement*, ENCYC. BRITANNICA (2023), https://www.britannica.com/topic/rules-of-engagement-military-directives.

[121] *See* Geor., *supra* note 108, ¶ 141 (noting the Court's submission that active armed confrontations are "predominantly regulated by legal norms other than those of the Convention," meaning international humanitarian law); *but see* Hassan v. U.K, App. No. 29750/09, ¶ 76, Eur. Ct. H.R. (Sept. 16, 2014), https://hudoc.echr.coe.int/fre?i=001-146501; *see also* U.N. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 (demonstrating how Article 31 promotes the complementary application of both bodies of law and how the court's conclusion runs counter to the principle of systemic integration).

[122] *See* Marko Milanovic, *Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos,* EJIL TALK! (Jan. 25, 2021), https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/.

[123] *Id.*

[124] *See* Marko Milanovic, *Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos,* EJIL TALK! (Jan. 25, 2021), https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/.

[125] *Id*.

[126] Ukr., *supra* note 102, ¶ 558.

[127] *Id.*

[128] *Id*.

[129] *Id.*

address the realities on the ground, tailoring its judgments to the specific features of each case.[130] However, this adaptability comes at the expense of the foreseeability requirement.[131]

B. The "Active" Behavior of States over a Contested Territory

From the Court's case law under Article 1 of Convention, states claim jurisdiction through one of two relationships with human rights abuses: active personality and passive personality.[132] Active states (claiming active personality) seek to regulate the treatment or behavior of its nationals beyond its borders.[133] Passive states (claiming passive personality) seek to hold foreign nationals accountable for offenses committed against its own citizens.[134] In both scenarios, states conduct operations in unrecognized states through agents, who in turn exercise control either over the territory of the de facto state entity or over the individuals affected by alleged violations. The initial step in establishing jurisdiction is to analyze state behavior within this framework.[135]

There are multiple ways in which an active state may behave within the territory of unrecognized states. First, an active state may establish authority through the creation or support of a separatist regime or secessionist movement, often in the form of an unrecognized state entity.[136] Second, an active state may partially or entirely occupy a third state's territory.[137] Third, the active state may support a third state during a civil war.[138] In contrast, the passive state is subjected to these activities. In either scenario, both states may possess jurisdiction over alleged human rights violations and may share obligations to protect human rights. These obligations include refraining from actions that violate human rights and ensuring the fulfilment of positive duties, such as prohibiting indefinite detention or investigating deaths occurring under state control.[139]

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[130] *See* H.F., *supra* note 85, ¶ 185 (establishing the "special features" criterion as analyzed in the Section II of the paper).
[131] *Id.*
[132] *Benchbook on International Law, supra* note 24, at II.A-3. It is interesting to note that in such cases of intra-state jurisdiction, the Court usually recognizes the concurrent jurisdiction of the territorial state and the state which exercises effective control over the unrecognized state, the parent and the patron state of the de facto entity.
[133] *Id.* Active personality is also referred to as nationality.
[134] *Id.*
[135] There are two other criteria for establishing jurisdiction, the 'exceptional circumstances' and the 'special features' jurisdictional link. The present analysis does not focus on these criteria, since there is no case law related to unrecognized states. *See generally* Carter v. Russ., App. No. 20914/07, ¶¶ 124, 132, Eur. Ct. H.R. (Sept. 21, 2021), https://hudoc.echr.coe.int/fre?i=001-211972.
[136] *See, e.g.,* Ilascu v. Mold. & Russ., App. No. 48787/99, Eur. Ct. H.R. (July 8, 2004), https://hudoc.echr.coe.int/fre?i=001-61886.
[137] *See, e.g.,* Cyprus v. Turk., App. No. 25781/94, ¶¶ 77-81, Eur. Ct. H.R. (Oct. 5, 2001), https://hudoc.echr.coe.int/Eng?i=001-59454.
[138] *See, e.g.,* Geor., *supra* note 108.
[139] *See* Al-Jedda v. U.K., App. No. 27021/08, ¶ 74, Eur. Ct. H.R. (July 7, 2011), https://hudoc.echr.coe.int/fre?i=001-105612; Hassan v. U.K., App. No. 29750/09, ¶ 62, Eur. Ct. H.R. (Sept. 16, 2014), https://hudoc.echr.coe.int/fre?i=001-146501.

In the *Ilascu* case[140] decided two decades ago, the Court ruled that a state's positive obligations remain intact even if it loses part of its territory and retains only limited authority over the area.[141] While the Court recognized that passive states maintain jurisdiction over temporarily lost territory, it noted that such jurisdiction is reduced in recognition of the unique circumstances, with the aim of protecting "persons in [their] territory."[142] This framework of state behavior guides the analysis in the following section, which examines whether and to what extent the case of Nagorno-Karabakh fits within this model. It will also explore the implications for the effective protection of human rights in the region, including the rights of those who fled during the September 2023 conflict.

IV. THE RIGHT TO ENTER ONE'S OWN TERRITORY, THE ACQUISITION OF CITIZENSHIP, AND THE SITUATION IN NAGORNO-KARABAKH

A. The Case of NKAO: a Question of Lawfare?

The dissolution of the state apparatus in Nagorno-Karabakh in January of 2024 coincided with the exodus of its last native Armenian inhabitants.[143] This mass displacement saw nearly 100,000 people, including Azerbaijani Kurds, flee the region following the end of hostilities in September 2023.[144] The large-scale movement of people from the former Nagorno-Karabakh Autonomous Oblast ("NKAO") territory presents significant challenges to safeguarding the human rights of those forced to leave their homeland, most of whom have sought refuge in Armenia.[145]

Allegations of individual human rights violations, including infringements on the right to life, family and private life, freedom from arbitrary detention, and protection from torture, as well as violations of property rights and fair trial guarantees, from only part of the complex issues that must be addressed.[146] In longstanding conflicts rooted in territorial disputes such as the one between Azerbaijan and Armenia, allegations of widespread human rights violations pose formidable challenges due to their collective character. These challenges often include evidentiary difficulties in substantiating claims, the establishment of reparation mechanisms for victims, transitional justice measures such as the right to return and the right to truth, and the selection of appropriate litigation forums.[147] A particularly contentious issue in such cases is whether the use

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[140] The Court dealt with the separation of Transdniestria from Moldova with Russian support. The separatist entity later declared its independence as the Moldovan Republic of Transnistria. *See generally* Ilascu, *supra* note 136.
[141] *Id*.
[142] *Id*. ¶ 333.
[143] *Nagorno-Karabakh Conflict*, CTR. FOR PREVENTATIVE ACTION (Mar. 20, 2024), https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict.
[144] *Id.*
[145] *Id.*
[146] *Human Rights in Azerbaijan Since the Fall of Nagorno-Karabakh: Hearing Before the H. Foreign Affs. Comm.*, 118th Cong. 1-3 (2024) (statement of Rep. Schiff, Member, H. Foreign Affs. Comm.).
[147] Shoko Noda, *How can we protect human rights while global conflict rages?*, U.N. DEV. PROGRAMME: BLOG (Dec. 9, 2024), https://www.undp.org/blog/how-can-we-protect-human-rights-while-global-conflict-rages.

of multiple litigation forums, both domestic and international, to secure favorable rulings against alleged human rights violations constitutes lawfare, or the use of "law as a weapon of war."[148] In the case of Nagorno-Karabakh, both Armenia as the patron state and Azerbaijan as the parent state submitted parallel applications to the ECtHR and the ICJ.[149] The applications by Armenia alleged numerous violations of the 1950 Convention and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), accusing Azerbaijani authorities of discriminatory treatment towards NKAO's Armenian population.[150]

Earlier this year, Armenia issued an official statement suggesting it might withdraw from pursuing these inter-state applications if a peace treaty with Azerbaijan was finalized.[151] Such strategic legal maneuvering reflects a broader trend of states using international human rights law to advance state interests while potentially compromising the protection of human rights.[152] This highlights the critical importance of jurisdiction in safeguarding human rights, as it enables international courts to address the legal aspects of disputes without overstepping into their political dimensions.

International courts including the ICJ are tasked with determining whether a legal dispute genuinely exists between the parties and whether the parties are willing to resolve it.[153] This remains true even when states adopt litigation strategies aimed at securing outcomes favorable to their interests, particularly when the disputes in question also involve political considerations. The

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[148] The instrumentalization of the law is an old idea, although it gained traction after Charles Dunlap Jr. coined the term lawfare. Viewing the said strategy through the lens of political science and particular geopolitics, we refer to the "juridification of war" as an effort to shift the method of ending a war and settling the respective disputes to litigation strategies, rather than diplomatic means. *See generally* Craig A. Jones, *Lawfare and the juridification of late modern war*, 40 PROGRESS HUM. GEOGRAPHY 221, 221-39 (2016). For the purposes of the present study, the author adopts the following explanation for "lawfare" as analyzed in "Le Monde" of 2 October 2019: "The strategic use of the law by international actors aiming to promoting a certain cause or gaining an advantage over their opponents." (translation belongs to the author). Gaïdz Minassian, *The "lawfare" strategy*, LE MONDE (Oct. 2, 2019), https://www.lemonde.fr/idees/article/2019/10/02/la-strategie-du-lawfare_6013861_3232.html.

[149] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, 2023 I.C.J. 1 (Nov. 17), https://www.icj-cij.org/sites/default/files/case-related/180/180-20231117-ord-01-00-en.pdf (The applications submitted on 1-2-2021 and 1-9-2021 from Armenia and Azerbaijan before the ECHR and on 1-9-2021 and 23-9-2021 before the ICJ. All four applications are currently pending before both Courts. Both judicial organs have issued orders for provisional measures in accordance with their own rules of procedure.); *see also* Press Release, European Court decides to indicate interim measures in the "Lachin Corridor" 401 Eur. Ct. H.R. (2022).

[149] *See generally* Christian Edwards, *Armenia to withdraw from Russia-led military alliance, accusing members of plotting war*, CNN WORLD (June 13, 2024), https://www.cnn.com/2024/06/13/europe/armenia-withdraw-russia-alliance-azerbaijan-intl/index.html.

[150] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, 2023 I.C.J. 1 (Nov. 17), https://www.icj-cij.org/sites/default/files/case-related/180/180-20231117-ord-01-00-en.pdf.

[151] *RA Prime Minister Nikol Pashinyan's statement regarding the withdrawal of complaints filed against Azerbaijan in international courts, in the event of signing a peace agreement, may lead to the impossibility of protecting the rights of people forcibly displaced from Nagorno-Karabakh*, ARMENIAN LAWS. ASS'N (Mar. 22, 2024, 1:07 PM), https://armla.am/en/8294.html.

[152] *See generally* Seung-Whan Choi et al., *Human rights institutionalization and US humanitarian military intervention*, 45 INT'L INTERACTIONS 1 (2020).

[153] *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 37 (May 24).

ICJ emphasized this distinction in its *Hostages* case ruling, stating, "[we] should [not] decline to resolve for the parties the legal questions at issue between them… because a legal dispute submitted to the Court is only one aspect of a political dispute."[154]

In its recent decision on Armenia's request for provisional measures, the ICJ evaluated whether Armenia had "prima facie… genuinely attempted to engage in negotiations with Azerbaijan, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under CERD…."[155] Thus, the Court, implicitly rejected Azerbaijan's argument that "Armenia's case before the Court is indeed not concerned with the protection of rights under CERD but instead reflects *a strategy "to use the Court as a platform* to broadcast [Armenia's] grievances against Azerbaijan."[156] The strategic use of law, particularly in the field of human rights remains a complex issue influenced by numerous factors. Among these, jurisdiction is arguably the most critical, and can act as a safeguard against the abusive use of litigation before international courts.

B. Adopting a Shared Obligations-based Approach Before the Convention

The submission of applications regarding NKAO raised significant jurisdictional challenges under the Convention.[157] Even before the war in 2020, the ECtHR had already identified a protection gap for the people of NKAO.[158] In its extensive case-law, the Court consistently differentiates between spatial and personal jurisdiction, applying the respective criteria of effective control over territory and the authority or overall control over the individuals. Relying on this framework, the Court upheld its precedent and found both Armenia and Azerbaijan responsible for human rights violations in the contested region.[159] On one hand, Armenia was determined to exercise effective extra-territorial control over NKAO and its surrounding areas due to its "significant and decisive influence" through military, political, and financial support.[160] The Court concluded that Armenia and NKAO were "highly integrated in virtually all important matters," bringing NKAO under Armenia's jurisdiction for the purposes of

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[154] *Id.*

[155] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, 2021 I.C.J. 361, ¶ 33 (Dec. 7).

[156] *Id*. ¶ 24 (emphasis added).

[157] Council of Europe, The humanitarian situation in Nagorno-Karabakh, Res. 2517 (2023), https://pace.coe.int/en/files/33145 (reviewing the dire situation in Nagorno-Karabakh and of those forced to flee the territory, as well as the obligations of Azerbaijan according to international law).

[158] *Id.*

[159] *See id*.

[160] The Court did not label Armenia an occupying power since there was no physical presence of the Armenian armed forces, as in *Loizidou* in occupied Northern Cyprus. In other words, if there are no boots on the ground, the Court will not accept the status of occupation for the state whose jurisdiction is questioned within the framework of Article 1 of the 1950 Convention. Chiragov and Others v. Arm., App. No. 13216/05, ¶¶ 169-86, Eur. Ct. H.R. (June 16, 2015), https://hudoc.echr.coe.int/fre?i=001-155353; *see also* Marko Milanovic, *European Court Decides that Israel is not occupying Gaza*, EJIL TALK! (June 17, 2015), https://www.ejiltalk.org/european-court-decides-that-israel-is-not-occupying-gaza.

Article 1 of the Convention.[161] Azerbaijan, as the state that had lost control over part of its territory, retained positive obligations over NKAO under the presumption of jurisdiction.[162] The Court did not recognize any reduction in Azerbaijan's jurisdiction over the area but instead reaffirmed its full authority.[163] This conclusion was based on the absence of control by either NKAO forces or Armenia over the disputed territory at that time.[164] To avoid any legal vacuum in the Convention's protection framework, the Court determined that the area, as part of Azerbaijan's sovereign territory, remained under its jurisdiction for the purposes of Article 1 of the Convention.[165] While this reasoning appeared to diverge from the *Ilascu* judgment which found reduced jurisdiction of a territorial state that had lost control, the Court's interpretation did not reject the earlier precedent.[166] Instead, it complimented *Ilascu* by affirming that no gap in legal protection can exist, even if the territorial state has temporarily lost control over part of its territory.[167]

However, the Court has left unresolved questions about the scope of positive obligations for territorial states under such circumstances. Specifically, it is unclear whether a state that has maintained control over part of its territory must take specific measures in line with international law to fulfil its positive obligations or whether it can satisfy these obligations through minimal efforts adapted to the circumstances.[168] The Court's approach suggests that the answer depends on the facts of each case and the nature of the violated rights.[169] For instance in *Ilascu*, the Court ordered the release of applicants who had been arbitrarily detained, while in *Sargsyan* it awarded compensation for the loss of access to property due to forced displacement during the war of 1992-1994.[170]

The Court's recent admissibility decision in the case of the downing of Flight MH17[171] further illustrates its fact-sensitive approach. The Court held Russia accountable for failing to protect the individuals onboard while it exercised effective control over the Donbas area of Eastern Ukraine.[172] The Court emphasized that Russia bore this obligation "in exactly the same way as it

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[161] The "highly integrated" criterion that binds the patron state with the non-recognized state entity in cases where a traditional case of occupation is missing, functions as the connecting link between the assessment of jurisdiction and the attribution of acts of individuals providing substantial assistance to the patron state. To this point, the "highly integrated" criterion, having a broad content, can be stretched enough to cover other ambiguous cases where essential support cannot be easily detected. Chiragov and Others v. Arm., App. No. 13216/05, ¶¶ 180, 186, Eur. Ct. H.R. (June 16, 2015), https://hudoc.echr.coe.int/fre?i=001-155353.

[162] Sargsyan v. Azer., App. No. 40167/06, ¶¶ 132-51, Eur. Ct. H.R. (June 16, 2015), https://hudoc.echr.coe.int/fre?i=001-155662. It is interesting to note the concurring opinion of Judge G. Serghides in the case of Georgia v. Russia (II) that argued the territorial state bears not only positive obligations but also negative ones, thus rejecting the idea of "reduced jurisdiction." Geor., *supra* note 108 (J. Serghides, concurring in part).

[163] Sargsyan, *supra* note 162.

[164] *Id.* ¶ 148.

[165] *Id*. ¶¶ 148-51.

[166] *Id*. ¶¶ 139-49.

[167] *Id*.

[168] *Id.* ¶ 150.

[169] *Id.*

[170] *Id.* ¶¶ 56-57.

[171] *See generally* Ukr., *supra* note 102.

[172] *Id.* ¶¶ 695-97, 904-05.

would in a purely territorial context."[173] This decision underscores the Court's position that a state exercising full authority and control over a territory beyond its borders bears responsibilities equivalent to those of a territorial state.[174]

The Human Rights Committee has also addressed extra-territorial jurisdiction, emphasizing effective control as the decisive criterion for state responsibility.[175] In a landmark case involving search and rescue operations at sea against Italy and Malta, however, the Committee expanded the scope of jurisdiction by introducing "a special relationship of dependency" between the individuals in need and the respondent state.[176] This dependency criterion was applied even when another state had already been identified as the primary duty-bearer.[177] Critics of the Committee's decision argue that it distorts the United Nations Convention on the Law of the Sea, which is not a human rights treaty but rather aims to safeguard the rights of coastal states and protect navigation freedoms.[178] By applying the dependency criterion, the Committee imposed additional burdens on state parties to the ICCPR, which some view as exceeding the treaty's intended scope.[179] Whether this interpretative approach to jurisdiction will extend beyond search and rescue cases remains uncertain, particularly given the Committee's acknowledgement of the unique circumstances of extraterritorial application at sea.[180]

The shift of power and the rebalancing of security interests in a region and its surroundings play a critical role in determining state jurisdiction over contested territories.[181] This is particularly evident in NKAO, which came under Azerbaijan's complete control following the war of 2020 and the two-day armed hostilities in November 2023.[182]

In the cases of *Aliyev* and *Ohanyan*, the Court examined whether the four-day war in April 2016 fell under Armenia's extra-territorial jurisdiction or Azerbaijan's territorial control.[183] In its 2023 rulings, the Court concluded that neither state exercised jurisdiction over NKAO at the time of the events.[184] It determined that neither Armenia nor Azerbaijan demonstrated effective control over the disputed territory or authority over individuals during the armed hostilities.[185] The Court's reasoning, based on its Article 1 jurisprudence, acknowledged that "*specific temporal phase*[*s*] of

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[173] *Id.* ¶ 561.
[174] *See* Marko Milanovic, *Grand Chamber declares admissible the case of Ukraine v. Russia*, EJIL TALK! (Jan. 15, 2021), https://www.ejiltalk.org/ecthr-grand-chamber-declares-admissible-the-case-of-ukraine-v-russia-re-crimea/.
[175] U.N. HRC, 80th Sess. U.N. Doc. CCPR/C/21/Rev.1/Add. General Comment No. 13 (May 26, 2004).
[176] International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/130/D/3042/2017 (Nov. 4, 2020); International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/128/D/3043/2017 (Mar. 13, 2020).
[177] *Id*.
[178] *See generally id.*
[179] *Id*. (J. Shany, J. Heyns, and J. Pazartzis, dissenting); International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/128/D/3043/2017 (Mar. 13, 2020) (J. Zimmerman, dissenting).
[180] *Id*.
[181] *Id*.
[182] *See generally The Nagorno-Karabakh Conflict: A Visual Explainer*, INT'L CRISIS GRP. https://www.crisisgroup.org/content/nagorno-karabakh-conflict-visual-explainer (last updated Sept. 16, 2023).
[183] Aliyev v. Arm., App. No. 25589/16, ¶ 28, Eur. Ct. H.R. (Oct. 5, 2023), https://hudoc.echr.coe.int/fre?i=001-228142; Ohanyan v. Azer., App. No. 74508/16, ¶ 36, Eur. Ct. H.R. (Oct. 5, 2023), https://hudoc.echr.coe.int/fre?i=001-228144.
[184] *See Nagorno-Karabakh Conflict*, *supra* note 182.
[185] *Id*.

an international armed conflict" could theoretically fall under a state's jurisdiction.[186] However, the facts did not support the exercise of either spatial or personal jurisdiction by the respondent states.[187]

The Court's reluctance to address ongoing armed hostilities reflects its focus on legal rather military or political assessments.[188] This limitation became apparent in its differing approaches to the downing of flight MH17 and *Georgia v. Russia (II).* In the former, the Court assessed evidence to establish jurisdiction by recognizing the effective control exercised by separatists under Russian authority.[189] However, in the latter case, the Court referenced *"*the context of chaos" during armed hostilities to avoid asserting jurisdiction over the case.[190] This inconsistency raises questions about the Court's criteria for assessing jurisdiction in conflict zones. If evidence plays a decisive role in determining effective control as demonstrated in the MH17 case, the Court should clarify this point for the sake of precision and foreseeability.[191]

C. Alternative to Territoriality: The Nationality Criterion

The territoriality criterion, while fundamental, cannot address every jurisdictional scenario, potentially leading to gaps in human rights protection. In certain cases, the jurisdictional link of nationality may fill these gaps, as seen in the case of women detained with their children in Kurdish-ran camps in Syria who sought repatriation to France.[192] Although the Court stated that "the nationality link… criterion does not suffice to constitute a special feature capable of triggering an extraterritorial jurisdictional link," it ruled that exceptional circumstances imposed positive obligations on France to guarantee the right to enter their own territory under Article 3, paragraph 2 of the Fourth Additional Protocol to the 1950 Convention.[193] This decision represents a bold step in establishing protective mechanisms for vulnerable individuals lacking strong jurisdictional links such as territoriality.[194]

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[186] Aliyev v. Arm., App. No. 25589/16, ¶ 28, Eur. Ct. H.R. (Oct. 5, 2023), https://hudoc.echr.coe.int/fre?i=001-228142.
[187] *Id*.
[188] The comment of the Court's former Registrar Erik Fribergh that "the Court is… not equipped to deal with large scale abuses of human rights" is particularly revealing of the Court's hesitancy to tackle acts of genocide and ethnic cleansing. Philip Leach, *Thawing the Frozen Conflict? The European Court's Nagorno-Karabakh Judgements*, EJIL: TALK! (July 6, 2015), https://www.ejiltalk.org/thawing-the-frozen-conflict-the-european-courts-nagorno-karabakh-judgments/.
[189] Ukr., *supra* note 102, ¶¶ 695-97, 904-05.
[190] Geor., *supra* note 108, ¶¶ 125-37.
[191] *See* Marko Milanovic, *The European Court's Admissibility Decision in Ukraine and the Netherlands v. Russian: The Good, the Bad, and the Ugly- Part II*, EJIL: TALK! (Jan. 26, 2023), https://www.ejiltalk.org/the-european-courts-admissibility-decision-in-ukraine-and-the-netherlands-v-russia-the-good-the-bad-and-the-ugly-part-ii/.
[192] The fact that children and infants were kept in the camps along with their mothers significantly impacted the Court's admissibility decision. The Court also considered the decisions of the UN Committee on the Rights of the Child when it considered France's power and capacity over children, which were inferred from the institutional power that a state holds over its nationals. H.F., *supra* note 85, ¶¶ 199, 261.
[193] *Id*.
[194] *See id*. ¶¶ 103, 182, 212.

A parallel can be drawn with the situation of Nagorno-Karabakh's displaced population following the September 2023 clashes.[195] Many residents fled to Armenia, which granted them temporary refugee status.[196] However, their legal status remains uncertain because most are not Armenian citizens. Without applying for citizenship under Armenian law, these individuals risk statelessness.[197] For the few who remained in NKAO, their future is unclear.[198] Despite Azerbaijan's assurances of protection for both those who stayed and those wishing to return, the requirement to apply for Azerbaijani citizenship severs the connection to their Armenian identity. Azerbaijan's call for NKAO residents to return appears futile and lacks practical effect.[199]

The ECtHR's admissibility decision on Crimea offers guidance in addressing such situations. The Court ruled that "an arbitrary denial of citizenship *might in certain circumstances* raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual."[200] Although the Convention does not explicitly enshrine a right to nationality, the Court introduced positive obligations for the respondent state to prevent statelessness within the framework of respecting private life.[201] Similarly, the Human Rights Committee recently adopted a broader perspective when evaluating the transfer of Ukrainian detainees from Crimea to Russia to serve their sentences.[202] It found that such transfers violated detainees' rights to enter and remain in their own country.[203] Furthermore, the forced imposition of Russian citizenship breached their right to private life.[204]

These conclusions from the ECtHR and the Committee have significant implications for NKAO refugees and those who remain in the territory now under Azerbaijani control. For those choosing Armenian citizenship, there should be no adverse consequences, such as the loss of social benefits. For NKAO residents subjected to the forced imposition of Azerbaijani citizenship, the

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[195] Over 100,000 people left the country under extremely difficult conditions after the Lachin Corridor, the only way into Armenia, was blocked for over nine months. *See* Amnesty Int'l, Azerbaijan: As Azerbaijani Forces Assume Full Control over Nagorno-Karabakh, It Must Respect and Protect the Rights of Local Ethnic Armenians 1, 2 (2023), https://www.amnesty.org/ar/wp-content/uploads/2023/10/EUR5572542023ENGLISH.pdf.
[196] *See id*. at 1.
[197] *See generally id.* Leaving an individual stateless also raises international alarm bells. As seen in the keystone case of Kuric and Others v. Slovenia, the refusal of the Slovenian authorities to regulate the status of citizens coming from the republics of former Yugoslavia, in contradiction to other foreigners, constituted a discriminatory treatment against the right to respect their private lives according to Articles 8 and 14 respectively. *See generally* Kuric & Others v. Slovn., App. No. 26828/06, Eur. Ct. H.R. (June 26, 2012), https://hudoc.echr.coe.int/fre?i=001-111634.
[198] *See generally* Amnesty Int'l, *supra* note 195.
[199] *See id.*; *see also* Davit Khachatryan, *Complete Defeat and the End of the Non-Recognized State of Nagorno-Karabakh,* LIEBER INST.: W. POINT (Sept. 16, 2024), https://lieber.westpoint.edu/complete-defeat-end-non-recognized-state-nagorno-karabakh/.
[200] *See, e.g.,* Genovese v. Malta, App. No. 53124/09, ¶ 30, Eur. Ct. H.R., https://hudoc.echr.coe.int/eng?i=001-106785 (emphasis added).
[201] *Id*. As the PCIJ affirmed in its advisory opinion regarding the nationality decrees, "nationality []is not []… regulated by international law, the right of a State… is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law." Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J., p. 24 (Feb. 7).
[202] International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/140/D/3022/2017 (May 23, 2024).
[203] *Id.* ¶ 5.11
[204] *Id.* ¶ 8.10

practice constitutes a violation of their right to private life, particularly given the centrality of Armenian nationality to their identity. Whether the ECtHR will adopt a similar rationale in its forthcoming judgments on the pending inter-state applications remains to be seen.

V. CONCLUSION

The defunct state entity of Nagorno-Karabakh exposed the limitations of a state-centric approach to international law, along with the obstacles to ensuring effective human rights protection for populations in unrecognized states. International judicial bodies have attempted to address these challenges by establishing jurisdiction for contracting states to international human rights treaties, both universal and regional. The rationale was straightforward: since unrecognized states do not exist in the eyes of the international community, third states, parties to human rights treaties with special territorial, national, or other links to these entities, must bear responsibility for acts or omissions that violate treaty obligations.[205] From an analysis of relevant case-law, two key points emerge: First, judicial bodies such as the ECtHR and ICCPR consistently limit their conclusions on territorial jurisdiction to the specific circumstances of individual cases. Both institutions avoid drawing general principles, and the ECtHR has explicitly acknowledged its reluctance to do so. The Court justifies this approach by asserting that future cases may involve "a number of special features capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries," which cannot yet be anticipated.[206] Critics including NGOs and academics argue that this approach undermines the fundamental principle of legal certainty.[207] However, the author disagrees and defends this flexible approach as essential for tailoring judicial decisions to the unique demands of each case. Second, while human rights bodies have shown caution in broadening the scope of territorial jurisdiction for contracting states, the broader discussion on jurisdiction has shifted. It now focuses not on limiting state jurisdiction but on expanding the scope of positive obligations to protect human rights by extending territorial jurisdiction. In this context, states must meet their treaty obligations while employing all appropriate safeguards to prevent arbitrariness.

With these considerations in mind, the author proposes rethinking jurisdiction not merely as a matter of territorial or personal control but as a question of access to justice. Specifically, the proposal involves adopting a "capacity to protect" criterion for determining state jurisdiction in each case, tailored to its specific features. The "capacity to protect" criterion combines the ECtHR's "divided and tailored" approach[208] to positive obligations with the "capacity-impact" model of jurisdiction employed by UN treaty bodies.[209] The logic underlying this approach is that

[205] *See, e.g.*, Ilascu, *supra* note 136, ¶¶ 376-94.
[206] H.F., *supra* note 85, ¶ 90.
[207] Conall Mallory, *A second coming of extraterritorial jurisdiction at the European Court of Human Rights*?, 82 QUESTIONS INT'L L. 31, 46 (2021).
[208] Al Skeini, *supra* note 68, ¶ 137.
[209] *See generally* Alice Ollino, *The 'capacity-impact' model of jurisdiction and its implications for States' positive human rights obligations*, 82 QUESTIONS INT'L L. 81 (2021).

states with prescriptive jurisdiction over their nationals wield the power to affect the exercise of rights and the fulfilment of human rights obligations. This principle also applies when state power extends outside the legal space of the applicable treaty, provided favorable circumstances exist. Given the current geopolitical rivalries and the pressing need to resolve disputes, international judicial bodies must adopt a functional approach to jurisdiction. Such an approach would not only enhance the protection of human rights but also respect the principle of state sovereignty.

INDIGENOUS DISPLACEMENT: LEGAL PATHWAYS FOR NAGORNO-KARABAKH ARMENIANS AND DISPLACED INDIGENOUS COMMUNITIES

Talin Hitik[1] and Andrew Devedjian[2]

Abstract

International law has long recognized both the rights of indigenous peoples and the protections afforded to refugees, yet it fails to account for the unique legal vulnerabilities of indigenous groups facing forced displacement. This gap is particularly evident in the case of the Nagorno-Karabakh Armenians, whose mass expulsion in 2023 has left them without formal recognition as either indigenous peoples or refugees under existing legal frameworks. As a result, their right to self-determination—fundamental to indigenous identity and survival—remains unprotected, limiting their ability to claim legal status, territorial rights, and the protections guaranteed to other displaced populations.

This article examines the legal limbo in which displaced indigenous communities find themselves, using the Nagorno-Karabakh Armenians as a case study to illustrate the consequences of this deficiency in international law. It argues that the absence of a legal framework addressing indigenous refugeehood erodes their ability to assert territorial and cultural claims, ultimately undermining their right to self-determination. By analyzing the historical presence of Armenians in Nagorno-Karabakh, the criteria for indigeneity under international law, and the inadequacies of refugee protections in non-colonial contexts, this article advocates for a legal paradigm shift. It calls for the creation of a specialized framework that explicitly recognizes indigenous refugees, ensuring they receive the legal protections necessary to claim their right to return, to self-determination, and to preserve their cultural identities in the face of forced displacement. By integrating and overlapping these legal concepts, this article seeks to provide a foundation for more robust and inclusive protections for communities facing similar challenges worldwide.

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I. INTRODUCTION

Themes of dispossession and resilience frequently characterize the historical narratives and ongoing struggles of indigenous peoples. However, the circumstances of indigenous refugees, exemplified by the Nagorno-Karabakh Armenians, present distinct challenges that necessitate a reevaluation of the effectiveness of international law in ensuring adequate protection of the refugees.[2] This reevaluation is particularly critical when an indigenous group is displaced from their land outside of the colonial context.

The historical context of the Nagorno-Karabakh Armenians, a people deeply intertwined with the landscapes of the South Caucasus, reflects a complex tapestry of cultural richness and geopolitical conflict.[3] For centuries, Nagorno-Karabakh, also known as Artsakh, has held historical and cultural significance for the ethnic Armenian people inhabiting the region.[4]

This review examines the enduring connection of the Nagorno-Karabakh Armenians to their ancestral lands, exploring the historical continuities and disruptions that have influenced their current realities in the Caucasus.[5] The dissolution of the Soviet Union, which precipitated a series of conflicts between Armenia and Azerbaijan, intensified disputes over the territory, leading to full-scale wars and intermittent skirmishes that resulted in widespread displacement and humanitarian crises.[6] The recent forced displacement has further aggravated the plight of the Nagorno-Karabakh Armenians, drawing international attention to their struggle.[7]

In 2023, the entire population of ethnic Armenians in Nagorno-Karabakh was forcibly displaced from their homeland as the neighboring Azerbaijan government asserted control over the region.[8] This upheaval not only impacted the population but also raised urgent questions about the rights of indigenous people to their ancestral lands, their right to self-determination and statehood, and the role of refugee status in international law. This context provides the foundation for a detailed legal analysis of the indigeneity of the Nagorno-Karabakh Armenians, a critical aspect that this review aims to explore.

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[2] *See* Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, HUM. RTS. & IMMIGR., COLLECTED COURSES ACAD. EUR. L. 19, 157 (2014).
[3] Mathieu Droin et al., *A Renewed Nagorno-Karabakh Conflict: Reading Between Front Lines*, CTR. STRATEGIC & INT'L STUD. (Sept. 22, 2023), https://www.csis.org/analysis/renewed-nagorno-karabakh-conflict-reading-between-front-lines.
[4] *See Republic of Nagorno-Karabakh: Process of State Building at the Crossroad of Centuries,* INST. POL. RSCH. SNCO (Nov. 11, 2009) http://www.armeniaforeignministry.com/fr/nk/nk.pdf [https://web.archive.org/web/20111111023430/http:/www.armeniaforeignministry.com/fr/nk/nk.pdf].
[5] *Id.*
[6] Bernhard Knoll-Tudor & Daniel Mueller, *At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh*, EJIL: TALK! (Nov. 17, 2020), https://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/.
[7] *Scorched Earth: Ethnic Armenians Destroy Homes, Infrastructures Before Fleeing Azerbaijani Regions*, RADIO FREE EUR./ RADIO LIBERTY (Nov. 16, 2020, 9:35 AM), https://www.rferl.org/a/scorched-earth-as-ethnic-armenians-burn-homes-before-handover-of-territory-to-azerbaijan-control/30952511.html.
[8] David J. Scheffer, *Ethnic Cleansing is Happening in Nagorno-Karabakh. How Can the World Respond?*" COUNCIL ON FOREIGN RELS, https://www.cfr.org/article/ethnic-cleansing-happening-nagorno-karabakh-how-can-world-respond (last visited Apr. 20, 2024).

The concept of indigeneity, typically characterized by historical continuity, cultural connection, and self-identification, becomes contentious in regions like Nagorno-Karabakh, where geopolitical interests and nationalistic sentiments intersect with complex historical claims of an unrecognized state.[9] By examining the specific criteria and definitions established by international law to identify indigenous peoples and refugees, this review seeks to ascertain how the Nagorno-Karabakh Armenians can be formally recognized as such. This recognition is crucial for affirming their rights to their ancestral lands and ensuring protection under international legal frameworks, thus providing a foundation for their claims and a pathway toward resolving their ongoing challenges.[10]

The primary objective of this article is to advocate for a specialized legal framework tailored to address the unique challenges faced by displaced indigenous peoples outside of the typical colonial context, with a specific focus on Nagorno-Karabakh Armenians. This community's struggle for self-determination and the right to return to their ancestral lands exemplifies the broader issues confronting indigenous populations globally.[11] The proposed framework aims to go beyond general international human rights protections by incorporating provisions that recognize and safeguard indigenous peoples' distinct cultural, historical, and territorial connections with their lands. It seeks to provide a robust legal basis for these communities to claim and regain their rights in the face of displacement and cultural erasure, ensuring that their voices are heard and their rights are preserved in international law.

Central to this advocacy is the definition of "indigenous refugees" within international law, which significantly influences their rights and global recognition. This paper will begin by defining "indigenous peoples" and "refugees" through the lenses of international law. This exploration assesses the applicability of these definitions to the ethnic Nagorno-Karabakh Armenians, arguing for their recognition based on historical ties, distinct cultural practices, and enduring connections to their lands amidst challenges of non-recognition and displacement. By clearly defining who qualifies as indigenous and a refugee, the legal frameworks can better ensure that the rights of these groups are recognized and actively protected. These two legal concepts often exist in separate spheres rather than complementary ones, preventing the full acknowledgement of shared legal realities.[12] Therefore, the proposed legal framework serves not only as a bridge between these two legal concepts but also as a tool for empowerment, enabling displaced indigenous populations to navigate and challenging geopolitical forces that threaten their identity and land rights.

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[9] *See* Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy. American Journal of International Law,* 92 AM. J. INT'L L. 414, 442 n. 3 (1998).
[10] *Id.*
[11] *See generally* Francesca Eibel, *For Three Decades Nagorno-Karabakh Sought Statehood. The Quest is Dead*, WASH. POST (Sept. 28, 2023), https://www.washingtonpost.com/world/2023/09/28/nagorno-karabakh-dissolved-azerbaijan-armenia/.
[12] *See generally* Guy S. Goodwin-Gill, *The Dynamic of International Refugee Law*, 25 INT'L J. REFUGEE L. 651, 655 (2013), https://doi.org/10.1093/ijrl/eeu003.

II. REFUGEES UNDER INTERNATIONAL LAW: PREEXISTING FRAMEWORKS

The comprehensive international legal framework for refugee protection includes a detailed array of treaties and conventions outlining the rights[13] of refugees and the obligations of states towards them. At its core, the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol establish fundamental criteria for the recognition of refugees and the scope of protection they are entitled to.[14] According to the 1951 Convention, a "refugee" is defined as an individual who:

> [has a] well-founded fear of persecution based on race, religion, nationality, membership in a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail of the protection of that country; or who, not having a nationality and being outside the country of former habitual residence, is unable or, owing to such fear, is unable to return to it.[15]

Sixteen years after the initial Convention, the 1967 Protocol Relating to the Status of Refugees broadened the 1951 Convention by eliminating geographical and temporal limitations.[16] This expansion significantly extended the Refugee Convention's applicability, ensuring relevance to contemporary circumstances beyond the post-World War II era.[17]

The 1967 Protocol is further complemented by other significant human rights treaties. Notably, Article 12 of the International Covenant on Civil and Political Rights (ICCPR) plays a crucial role in safeguarding individual refugee rights by explicitly enshrining the freedom of movement.[18] The relevant text states, "everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence."[19]

Article 12 of the ICCPR provides a critical legal foundation for bolstering the dignity and rights of refugees. It compels Member states to recognize these rights and facilitate their practical implementation, ensuring refugees can exercise the right to safety without fear of unlawful restrictions or penalties.[20] It should be noted, however, that the term "lawfully within" as articulated in Article 12 has not been clearly defined or adjudicated in the context of refugees, who often cannot enter a host state through regular legal channels due to their urgent flight from

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[13] *Refugee Definition*, U.N. HIGH COMM'R FOR REFUGEES, EMERGENCY HANDBOOK, https://emergency.unhcr.org/protection/legal-framework/refugee-definition (last updated Mar. 1, 2019).
[14] *Id.*
[15] Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (July 28, 1951), https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention.
[16] Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (Jan. 31, 1967), https://www.unhcr.org/ph/wp-content/uploads/sites/28/2017/03/3.3-1967-Protocol-relating-to-the-status-of-refugees.pdf.
[17] WILLIAM MALEY, WHAT IS A REFUGEE? 232 (Oxford Univ. Press ed., 2016).
[18] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR].
[19] *Id.*
[20] *See* Michael Sullivan, *A limited defence of public health exit restrictions*, 00 INT'L MIGRATION 1, 4 (2022).

persecution.[21] The U.N. Human Rights Committee has clarified that migrants who entered a state illegally but whose status has since been regulated must be considered lawfully within the territory for Article 12 to apply.[22] Once a person is lawfully within a state, any restrictions or differential treatment must comply with Article 12 conditions.[23] This legal framework underscores the value of individual liberty and safety for refugees, emphasizing the responsibilities of states under international law.

III. LEGAL DEFINITIONS AND CRITERIA

While various legal frameworks have emerged to understand and analyze refugeehood, the core elements of defining a refugee have remained consistent with the 1951 Convention.[24] Each of these elements has developed to encompass specific legal realities that aid in applying these legal definitions to different groups experiencing displacement.

A. Well-Founded Fear of Persecution

Determining refugee status often hinges on the "well-founded fear of persecution."[25] This persecution must emanate from state actors or entities wielding state-like authority, excluding individuals fleeing purely personal disputes or non-state aggressors, unless such actors act with the state's implicit or explicit approval.[26]

This element embodies both subjective and objective criteria: the refugee must genuinely fear persecution, and this fear must be deemed reasonable by an objective standard.[27] The persecution must be based on one of the five grounds specified in the Convention: race, religion, nationality, membership in a particular social group, or political opinion.[28]

Under international law, assessing a "well-founded fear of persecution" involves examining the circumstances that gave rise to the fear, the likelihood of the fear being realized, and whether the fear aligns with the five targeted grounds mentioned above.[29] Courts and tribunals have developed various tests to determine the reasonableness of this fear, considering past persecution and the risk of future persecution.[30] The standard does not necessitate that the feared

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[21] Marina Sharpe, *The 1951 Refugee Convention's Contingent Rights Framework and Article 26 of the ICCPR: A Fundamental Incompatibility?*, 30 REFUGE: CAN.'S J. ON REFUGEES 5, 13 (2014).
[22] U.N. Off. of High Comm'r for Hum. Rts., CCPR General Comment No. 27: Article 12 (Freedom of Movement), U.N. Refugee Agency (Nov. 2, 1999), https://www.refworld.org/legal/general/hrc/1999/en/46752.
[23] *See* Scheffer, *supra* note 8.
[24] *See* Chetail, *supra* note 2, at 20.
[25] *Asylum & the Rights of Refugees*, INT'L JUST. RES. CTR., https://ijrcenter.org/refugee-law/#Who_Is_a_Refugee (last visited Sept. 18, 2024).
[26] SERENA PAREKH, NO REFUGE 32 (Oxford Univ. Press ed., 2020).
[27] JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 108 (Cambridge Univ. Press ed., 2d ed. 2014).
[28] *See* Droin et al., *supra* note 3.
[29] HATHAWAY & FOSTER, *supra* note 27, at 91.
[30] See *id*. at 109.

persecution be almost certain; instead, the standard is a reasonable likelihood or a significant risk of persecution suffices.[31]

The challenge of defining "persecution" adds complexity to the evaluation of refugee status, as the 1951 Refugee Convention lacks a detailed definition.[32] Legal interpretations integrate the principle of "serious harm" into evaluating persecution, signifying that the harm inflicted on the group in question must severely violate fundamental human rights.[33] Persecution itself is understood as harm imposed by the state[34] without legitimate justification.[35] Standard international crimes, such as crimes against humanity, are widely regarded as a form of severe persecution carrying such legal and moral implications for the perpetrators. However, there has been no exhaustive list of what is and is not persecution.[36] Guidelines like the UNHCR's Handbook and the European Union's Qualification Directive emphasize that persecution entails significant violations of fundamental human rights, adopting a human rights-based perspective.[37] This methodology signifies a transition towards incorporating considerations of the objective severity of harm and the subjective fear of the individual to further evaluate the threats individual groups face.[38]

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[31] *Id*.
[32] *Id*. at 35.
[33] *See generally id*. at 182.
[34] A note on stateless individuals: While these elements refer to "state' actions, the Convention clearly establishes that stateless individuals may qualify for refugee status because they cannot return to their state of origin. *See* Droin et al., *supra* note 3. Although not the primary focus of this paper, it is important to note that statelessness occurs when an individual is not recognized as a citizen by any state. This lack of nationality deprives them of legal protections and rights associated with citizenship. *See generally* U.N. High Comm'r for Refugees, *About Statelessness*, https://www.unhcr.org/ibelong/about-statelessness/ (last visited Apr. 21, 2024) (discussing individuals who are not recognized as nationals under state law). Stateless individuals often face precarious conditions, as stateless persons are denied fundamental rights such as access to education, healthcare, employment, and their inherent freedom of movement may be abridged. *See generally* Neha Jain, *Manufacturing Statelessness*, 116 AM. J. INT'L L. 237, 284 (2022). The causes of statelessness vary and include the dissolution of nations, redrawing of national boundaries, discriminatory nationality laws, and administrative practices. *See generally* U.N. High Comm'r for Refugees. *Ending Statelessness*, https://www.unhcr.org/ending-statelessness.html (last visited May 1, 2024) (indicating that UNHCR identifies several different causes not exhausted above but provide base of understanding for such causes).
[35] HATHAWAY & FOSTER, *supra* note 27, at 186 (citing Nagoulko v. I.N.S., 333 F.3d 1012, 1015 (2003)).
[36] *Id*.
[37] *See* U.N. High Comm'r for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Refugees Agency 38, 200 (Dec. 2011), https://www.refworld.org/policy/legalguidance/unhcr/2011/en/84592; *see also* Hugo Storey, *The Human Rights Approach to the Refugee Definition: Rising Sun or Falling Star?*, 33 INT'L J. REFUGEE L. 379, 382-87 (2021).
[38] HATHAWAY & FOSTER, *supra* note 27, at 193.

B. Based on Race, Religion, Nationality, Membership in a Particular Social Group, or Political Opinion

The requirement to establish persecution on these specific grounds ensures clarity in claims of refugee status.[39] Race, religion, and nationality represent inherent or acquired characteristics that can subject individuals to systemic or individualized persecution.[40] Membership in a particular social group is a nuanced concept, encompassing those who share immutable characteristics or traits so fundamental to their identity that they should not be compelled to change, such as sexual orientation or gender identity.[41]

Moreover, the Convention's recognition of political opinion has been analyzed through various perspectives, highlighting the international commitment to protecting human rights and preserving the dignity of individuals at risk due to deeply held beliefs.[42] Notably, some tribunals and countries have interpreted this protection to mean that "political opinion" does not require actively expressing beliefs through participation in political activities.[43] This distinction between holding an opinion and acting on it acknowledges the dangers or impossibility of dissent in oppressive regimes.[44] As a result, individuals may face persecution for perceived opposition or previous affiliations, regardless of their active engagement in political actions.

C. Leading Individuals Outside their State of Nationality

The third element of the Refugee Convention requires migration into a state other than their own nationality, distinguishing refugees from internally displaced persons.[45] Nationality refers to the legal relationship between an individual and a state, characterized by mutual rights and obligations.[46] It grants individuals certain protections, responsibilities, and a sense of belonging within the state's jurisdiction.[47] While citizenship often denotes a specific legal status within a state including political rights such as voting, nationality fundamentally represents an individual's

[39] JOHN VRACHNAS ET AL., MIGRATION AND REFUGEE LAW: PRINCIPLES AND PRACTICES IN AUSTRALIA 196 (Cambridge Univ. Press ed., 2005).
[40] *Id.*
[41] *Id.* at 200.
[42] *Id.* at 201.
[43] *See Araya, Re*, 1977 CarswellNat 556 (1977).
[44] HATHAWAY & FOSTER, *supra* note 27, at 203.
[45] U.N. Off. High Comm'r for Hum. Rts., *About Internally Displaced Persons*, U.N. Refugees Agency https://www.ohchr.org/en/special-procedures/sr-internally-displaced-persons/about-internally-displaced-persons (last visited May 6, 2024).
[46] *See* U.N. Off. High Comm'r for Refugees, *Expert Meeting: The Concept of Stateless Persons Under International Law, Summary Conclusions*, U.N. Refugees Agency 2 (May 27-28, 2010), https://www.unhcr.org/us/media/expert-meeting-concept-stateless-persons-under-international-law-summary-conclusions ("National" refers to the legal link between the individual and a particular state).
[47] *See generally* U.N. Off. High Comm'r for Hum. Rts*, OHCHR and the Right to a Nationality*, https://www.ohchr.org/en/nationality-and-statelessness (last updated June 12, 2020).

connection to a state.[48] From a human rights perspective, nationality is considered an inalienable right; international conventions aim to prevent statelessness and ensure that every person has a genuine link to a state.[49]

D. Unable or Unwilling to Seek the Protection of their State

Setting aside the issue of statelessness, the protection clause has been subject to varying interpretations, particularly regarding scenarios where a government is unable or unwilling to protect its nationals.[50] Some legal theorists and courts argue that the Convention's protection applies only when a claimant cannot obtain protection directly from their government.[51] In contrast, others assert that the Convention's terms are satisfied when a state has disintegrated to such an extent that no governmental body exists to prevent persecution by private entities or groups.[52]

In many ways, the protection clause codifies the fears of those fleeing persecution rather than narrowly interpreting government obligations.[53] This broader understanding expands the scope of government responsibility to address a wider range of threats that refugees may encounter.[54] It also ensures that refugees' perspectives remain central to determining their well-founded fear of persecution, particularly when their "unwillingness" to return to their state of origin is grounded in such fears.[55]

IV. THE ARMENIANS OF NAGORNO KARABAKH AS REFUGEES

A. History of Nagorno-Karabakh Displacement

The situation of the ethnic Armenians from Nagorno-Karabakh exemplifies the complexities of applying international legal frameworks to refugee status. Following a nine-month blockade orchestrated by the Azerbaijani government, an offensive launched by Azerbaijani armed forces on September 19, 2023, led to Azerbaijani gaining control over Nagorno-Karabakh.[56]

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[48] *The Situation of Stateless Persons in the Middle East and North Africa*, U.N. OFF. HIGH COMM'R FOR REFUGEES 22 (Oct. 2010), https://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4ce63e079&query=syria%20decree%20no%2093.

[49] *See* HATHAWAY & FOSTER, *supra* note 27, at 91.

[50] Hugo Storey, *The Meaning of "Protection" Within the Refugee Definition*, 35 REFUGEE SURV. Q. 1, 2 (2016).

[51] Ben Olbourne, *Refugees and Internal Armed Conflicts*, 60 CAMBRIDGE L. J. 446, 448 (2001).

[52] *Id.*

[53] *See also An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL (2022), https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy.

[54] *See generally* Brid Ni Ghrainne, *UNHCR's Involvement with IDPs 'Protection of That Country' for the Purposes of Precluding Refugee Status?,* 26 INT'L J. REFUGEE L. 536, 554 (2014).

[55] *See* Story, *supra* note 50, at 5.

[56] *See* WALTER LANDGRAF & NAREG SEFERIAN, A "FROZEN CONFLICT" BOILS OVER: NAGORNO-KARABAKH IN 2023 AND FUTURE IMPLICATIONS 14 (2024).

Nearly the entire ethnic Armenian population of the region was forced to flee within a week, seeking refuge in Armenia.[57]

The roots of this mass displacement trace back to the escalation of hostilities in 2020, when a renewed conflict erupted between Armenia and Azerbaijan over the disputed Nagorno-Karabakh region.[58] This 44-day war, characterized by intense military confrontations and advanced weaponry, displaced 91,000 ethnic Nagorno-Karabakh Armenians to Armenia.[59] Approximately 88% of those displaced were women, children, and the elderly.[60] This first major wave of displacement occurred as ethnic Armenians fled their homes for fear of persecution and the lack of security within Nagorno-Karabakh.[61] Despite the urgency of the situation, the United Nations High Commissioner for Refugees (UNHCR) categorized the displaced Nagorno-Karabakh Armenians as being in a "refugee-like" situation rather than granting them full refugee status.[62]

The conflict concluded with a Russia-brokered ceasefire agreement on November 10, 2020, which allowed Azerbaijan gain territories surrounding Nagorno-Karabakh and a portion of the region itself.[63] Following the November agreement, efforts began on November 14, 2020, to facilitate the gradual return of displaced Armenians to Nagorno-Karabakh.[64]

The subsequent years that followed were marked by a tense stalemate, occasionally broken by sporadic clashes. However, in December of 2022, a humanitarian crisis began when the Azerbaijani government blockaded the Lachin Corridor, the sole road connecting Nagorno-Karabakh with Armenia.[65] This blockade severely restricted the flow of essential goods, medical supplies, and humanitarian aid, creating critical shortages for the enclave's residents.[66] The situation reached a tipping point in September 2023 when Azerbaijan launched a military offensive, effectively bringing Nagorno-Karabakh under Azerbaijani control.[67] The swift and decisive nature of the attack forced a much larger exodus of ethnic Armenians, many of whom had already endured displacement and loss during the 2020 conflict.[68]

Unlike in 2020, the Azerbaijani government failed to create a pathway for ethnic Armenians to return to Nagorno-Karabakh.[69] Within just one week, over 100,000 ethnic Nagorno-

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[57] *Id.* at 14-15.
[58] *See* Druin et al., *supra* note 3.
[59] *Persons in a Refugee-Like Situation*, U.N. HIGH COMM'R FOR REFUGEES, https://www.unhcr.org/am/en/persons-in-refugee-like-situation (last visited Apr. 18, 2024).
[60] *Id.*
[61] Cory Welt, CONG. RSCH. SERV., *Azerbaijan's Retaking of Nagorno-Karabakh and the Displacement of Karabakh Armenians* 3 (Oct. 18, 2023), https://crsreports.congress.gov/product/pdf/IN/IN12265/2.
[62] *Persons in a Refugee-Like Situation, supra* note 59.
[63] *Nagorno-Karabakh Conflict*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict (last updated Mar. 20, 2024).
[64] *Persons in a Refugee-Like Situation, supra* note 59.
[65] Press Release, Off. U.N. High Comm'r for Hum. Rts., UN Experts Urge Azerbaijan to Lift Lachin Corridor Blockade and End Humanitarian Crisis in Nagorno-Karabakh (Aug. 7, 2023), https://www.ohchr.org/en/press-releases/2023/08/un-experts-urge-azerbaijan-lift-lachin-corridor-blockade-and-end.
[66] *See id.*
[67] Welt, *supra* note 61, at 1.
[68] *See id.*
[69] *Armenia Refugee Response Plan,* U.N. COMM'R FOR HUM. RTS 5, https://data.unhcr.org/en/documents/details/103868 (last visited Sept. 29, 2024).

Karabakh Armenians, including 30,000 children, arrived in Armenia.[70] This displaced population constituted nearly 3% of Armenia's total population,[71] placing immense strain on the country's resources and compounding challenges for those already displaced within Armenia.[72]

In the aftermath of the 2023 forced displacement of Nagorno-Karabakh Armenians, the UNHCR intensified its efforts in Armenia, coordinating a comprehensive response to address the urgent and diverse needs of Nagorno-Karabakh Armenians.[73] By early October of 2023, organizations like the UNHCR[74] officially began referring to the displaced Armenians as "refugees."[75] The UNHCR, in conjunction with Armenia and other UN agencies, launched an emergency response plan to assist approximately 136,000 displaced individuals.[76]

B. The Armenians of Nagorno-Karabakh as Refugees

Designating Nagorno-Karabakh Armenians as refugees is more than a matter of categorization; it affirms their refugee status under international law, based on established definitions and criteria.

1. *Well-founded Fear of Persecution*

The Nagorno-Karabakh Armenians' well-founded fear of persecution stems from a sustained campaign of violence and coercion which led to hundreds of deaths and the forced displacement of the entire population by the Azerbaijani government.[77] Crucially, the actions taken against Nagorno-Karabakh Armenians originated from the Azerbaijani state, including its military, satisfying the requirement of state action.[78] The well-founded fear of further persecution is supported by documented abuses committed by Azerbaijani forces, including torture, ill-treatment,

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[70] *See UN Karabakh Mission Told 'Sudden' Exodus Means as Few as 50 Ethnic Armenians May Remain*, U.N. NEWS (Oct. 2, 2023), https://news.un.org/en/story/2023/10/1141782#:~:text=arrived%20in%20Armenia.-,UN%20Karabakh%20mission%20told%20'sudden'%20exodus%20means%20as%20few%20as,50%20ethnic%20Armenians%20may%20remain&text=As%20few%20as%2050%20to,30%20years%20reported%20on%20Monday.

[71] *Id.*

[72] *See id.*

[73] *See generally Armenia Refugee Response Plan, supra* note 69*,* at 1.

[74] *See generally* Press Release, U.N. High Comm'r for Refugees, UN and Partners Appeal for US$97 Million to Respond to Urgent Needs of Refugees and Their Hosts in Armenia (Oct. 7, 2023), https://www.unhcr.org/us/news/press-releases/un-and-partners-appeal-us-97-million-respond-urgent-needs-refugees-and-their#:~:text=GENEVA%20%2D%20UNHCR%2C%20the%20UN%20Refugee,of%20the%20government%2Dled%20response.

[75] *See* Kirill Krivosheev, *What the Dissolution of Nagorno-Karabakh Means for the South Caucasus*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 29, 2023), https://carnegieendowment.org/russia-eurasia/politika/2023/09/what-the-dissolution-of-nagorno-karabakh-means-for-the-south-caucasus?lang=en.

[76] *Id.*

[77] *See* Ben Olbourne*, supra* note 51.

[78] UN Experts Urge Azerbaijan to Lift Lachin Corridor Blockade and End Humanitarian Crisis in Nagorno-Karabakh, *supra* note 65.

extrajudicial killings, and severe violence such as beheadings and mutilations.[79] These atrocities were often recorded and disseminated without fear of accountability.[80] The UN Committee Against Torture has reported the use of extreme measures such as electric shocks and sexual violence against detainees in Azerbaijan, also highlighting Azerbaijan's consistent failure to conduct independent investigations into these abuses.[81] Furthermore, high-level Azerbaijani officials have made discriminatory statements that foster a climate of violence against Armenians.[82] The Azerbaijani government's failure to protect human rights defenders and journalists from harassment and arbitrary detention further exacerbates this environment.[83] Similarly, the UN Committee on the Elimination of Racial Discrimination has emphasized similar systemic racial discrimination, including hate speech and policies that marginalize and dehumanize Armenians in Azerbaijan.[84] Combined with Azerbaijan's inadequate legal framework, which neither fully safeguards against torture nor provides sufficient remedies for victims, these factors intensify the Armenians' legitimate concerns for their safety and human rights under Azerbaijani rule.[85]

Beyond this well-founded fear, the persecution faced by Nagorno-Karabakh Armenians also meets the threshold of "serious harm."[86] During the evacuation, Azerbaijani forces orchestrated widespread destruction of Armenian cultural and religious sites.[87] This destruction violated the right to freely practice religion and preserve cultural heritage.[88] Moreover, hundreds of Armenians were killed during the 2023 mass displacement, and the nine-month Azerbaijani blockade left residents with little access to essential resources as they fled toward Armenia.[89] The Azerbaijani government's repeated and systemic intimidation of the local Armenian population highlights the severity and persistence of this persecution.[90] Combined with the blockade, physical violence, and lack of humanitarian aid, these actions demonstrate the objective reality of persecution.[91]

It is also essential to consider the broader implications and labels attributed to these events. For instance, some experts have described the September 2023 violence and destruction as ethnic

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[79] *Concluding observations on the fifth periodic report of Azerbaijan*, U. N. COMM. AGAINST TORTURE 8 (June 5, 2024), https://www.ohchr.org/en/documents/concluding-observations/catcazeco5-concluding-observations-fifth-periodic-report.
[80] *Id.*
[81] *Id*. at 5-6.
[82] *Id.*
[83] *Id*. at 9.
[84] U.N. CERD, 107th Sess., 2904th mtg. at 2-3, U.N. Doc. C/SR.2904 (Aug. 16, 2022).
[85] *Concluding observations on the fifth periodic report of Azerbaijan*, *supra* note 79.
[86] HATHAWAY & FOSTER, *supra* note 27, at 181-85.
[87] *See* Amos Chapple, *Church, Entire Village 'Erased' in Azerbaijan's Recaptured Nagorno-Karabakh*, RADIO FREE EUR./RADIO LIBERTY (Apr. 24, 2024), https://www.rferl.org/a/azerbaijan-armenia-nagorno-karabakh-heritage-destruction-karintak-dasalti/32918998.html.
[88] *Id.*
[89] Avet Demourian, *Azerbaijan Arrests the Former Head of Separatist Government After Recapturing Nagorno-Karabakh*, A.P. NEWS (Sept. 27, 2023, 2:17 PM), https://apnews.com/article/nagorno-karabakh-azerbaijan-armenia-troops-killed-offensive-1d13668014fac4e44a76c04b54378268.
[90] *Id.*
[91] HATHAWAY & FOSTER, *supra* note 27, at 108; UN Experts Urge Azerbaijan to Lift Lachin Corridor Blockade and End Humanitarian Crisis in Nagorno-Karabakh, *supra* note 65.

cleansing, pointing to a systematic attempt to eradicate the ethnic Armenian population of Nagorno-Karabakh.[92] Before the mass displacement, Former Prosecutor of the International Criminal Court Luis Moreno Ocampo asserted that the blockade itself could amount to genocide, as the Azerbaijani government deliberately starved the population of Nagorno-Karabakh.[93] These assessments underscore the gravity and targeted nature of the harm inflicted, aligning with the international definition of refugee persecution.

The subjective experiences of fear and coercion endured by the Nagorno-Karabakh Armenians align with the objective reality of their circumstances.[94] This fear, grounded in the loss of life, homes, and livelihoods, is both genuine and reasonable, given the evidence of targeted violence and systemic abuses against the ethnic Armenians of the region.[95] The plight of Nagorno-Karabakh Armenians therefore satisfies the legal standard of a "well-founded fear of persecution," as it reflects the interplay between their subjective fears and objective danger they face.[96]

2. *Based on Race, Religion, Nationality, Membership in a Particular Social Group, or Political Opinion*

The requirement to establish persecution based on race, religion, nationality, membership in a particular social group, or political opinion can be readily satisfied in the case of Nagorno-Karabakh Armenians.[97] Importantly, ethnic Armenians likely meet this criterion under multiple categories relevant to refugee law. The Armenians of Nagorno-Karabakh are primarily targeted due to their ethnic identity and the associated nationality.[98] This persecution intersects race and ethnicity, as their inherent characteristics—ethnicity and their derived identity as residents of Nagorno-Karabakh— form the basis for their systematic targeting.[99] These factors place them squarely within the protections of the 1951 Refugee Convention.[100]

In addition to persecution based on ethnicity, the political dimensions of the Nagorno-Karabakh conflict introduce political opinion as another relevant factor.[101] For decades, Nagorno-Karabakh Armenians have sought international recognition of their autonomy, which Azerbaijan perceives as opposition to its claims of territorial control.[102] Under refugee law, persecution does

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[92] Scheffer, *supra* note 8.
[93] Abby Sewell, *Armenians Face Genocide in Azerbaijan, Former International Criminal Court Prosecutor Warns*, A.P. NEWS (Aug. 9, 2023), https://apnews.com/article/armenia-azerbaijan-nagorno-karabakh-blockade-2a9fb9852534ab38656a99b435f0ba86.
[94] HATHAWAY & FOSTER, *supra* note 27, at 108.
[95] *See Persons in a Refugee-Like Situation, supra* note 59.
[96] *Asylum & the Rights of Refugees, supra* note 25.
[97] *Id.*
[98] Scheffer, *supra* note 8.
[99] *Id.*
[100] *Id*.
[101] VRACHNAS, *supra* note 39, at 201.
[102] *See generally* Vladimir Solovyov, *Azerbaijani Control of Nagorno-Karabakh Will Not Stop Conflict in the South Caucasus*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 28, 2023), https://carnegieendowment.org/russia-eurasia/politika/2023/09/azerbaijani-control-of-nagorno-karabakh-will-not-stop-conflict-in-the-south-caucasus?lang=en.

not require the overt expression of political beliefs; rather, the mere perception or attribution of such beliefs by the persecuting state can constitute persecution.[103] This perception is evident in Azerbaijan's systematic labeling of all Nagorno-Karabakh Armenians as "separatists," a political designation that stigmatizes the entire community.[104] Thus, Nagorno-Karabakh Armenians are targeted not only for their ethnic identity but also for their perceived political opposition to Azerbaijan's territorial claims.[105]

3. *Leading Armenians Outside their State of Nationality*

The principle of nationality becomes particularly complex in the context of the Nagorno-Karabakh Armenians. Despite their deep ethnic and historical ties to the region, the international community has never recognized Nagorno-Karabakh as an independent, sovereign state separate from Azerbaijan.[106] Consequently, this has left the ethnic Armenians of Nagorno-Karabakh in a form of legal limbo—belonging to a territory that claimed independence and self-determination but lacked international recognition.[107]

While Nagorno-Karabakh's statehood may remain ambiguous, the 2023 forced displacement can be assessed in isolation as a defining element of the refugee experience—being outside the state of nationality.[108] Ethnic Armenians from Nagorno-Karabakh were not only forced from their homes but also displaced from a territory that effectively served as their de facto state of nationality in terms of identity and belonging. The ethnic Nagorno-Karabakh Armenians fled to Armenia, a state with which they share ethnic identity but not formal nationality.[109]

Some scholars argue that Nagorno-Karabakh Armenians were nationals or citizens of Armenia, pointing to the possession of Armenian passports by many Nagorno-Karabakh residents and the Armenian government's economic investments in the region as evidence of such a link.[110] However, this argument does not withstand scrutiny. The nationality of the Nagorno-Karabakh Armenians would be the same as those in Armenia, precluding them from the rights of refugeehood. The passports issued to Nagorno-Karabakh residents did not confer citizenship rights, such as voting or access to state protection, which are fundamental elements of citizenship.[111] In fact, the Armenian government has repeatedly clarified that the passports it issued

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[103] VRACHNAS, *supra* note 39, at 201.
[104] *Nagorno-Karabakh: Azerbaijan's Aliyev Says Operation over*, DEUTSCHE WELLE (Sept. 20, 2023), https://www.dw.com/en/nagorno-karabakh-azerbaijan-aliyev-declares-operation-over/live-66870362.
[105] VRACHNAS, *supra* note 39, at 201.
[106] *See generally* Francesca Ebel, *For Three Decades, Nagorno-Karabakh Sought Statehood. That Quest Is Dead.*, WASH. POST (Sept. 28, 2023, 6:53 PM), https://www.washingtonpost.com/world/2023/09/28/nagorno-karabakh-dissolved-azerbaijan-armenia/.
[107] *Id.*
[108] HATHAWAY & FOSTER, *supra* note 27, at 35.
[109] *See* Lilit Shahverdyan, *Armenia to Offer Refugee Status to Displaced Karabakhis*, EURASIANET (Oct. 30, 2023), https://eurasianet.org/armenia-to-offer-refugee-status-to-displaced-karabakhis.
[110] Bernhard Knoll-Tudor & Daniel Mueller, *At Daggers Drawn: International Legal Issues Surrounding the Conflict In and Around Nagorno-Karabakh*, EJIL: TALK! (Nov. 17, 2020), https://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/.
[111] Shahverdyan, *supra* note 109.

to Nagorno-Karabakh citizens were solely for international travel and did not grant citizenship.[112] Furthermore, Nagorno-Karabakh itself was never recognized as a province of Armenia, as it operated independently with its own flag[113] and government operations distinct from Armenia.[114] Although Nagorno-Karabakh lacked international recognition, its territorial and administrative independence from Armenia supports the argument that its residents qualify for refugee status rather than being classified as internally displaced persons.[115]

Despite the Armenian government's position that Nagorno-Karabakh residents were not Armenian citizens,[116] some may still invoke the concept of "effective nationality" to argue otherwise. The doctrine of effective nationality, established in the International Court of Justice's *Nottebohm* case, emphasizes the importance of genuine and substantial connections to a state—such as habitual residence, family ties, and public life engagement—when determining nationality.[117] Although the *Nottebohm* case emerged four years after the 1951 Refugee Convention, applying the doctrine of effective nationality remains relevant in assessing any claim of shared nationality between Armenia and Nagorno-Karabakh.[118]

While Nagorno-Karabakh Armenians share certain ethnic characteristics with Armenians, these connections remain superficial and do not constitute substantial ties that justify shared nationality.[119] The Nagorno-Karabakh Armenians developed a distinct identity shaped by their prolonged experience of conflict and their historical connection to the territory.[120] Their daily lives were deeply intertwined with the cultural and geographical landscape of Nagorno-Karabakh rather than Armenia itself.[121] For example, residents of Nagorno-Karabakh established strong communal and economic ties within cities like Stepanakert, building markets, schools, and government institutions, rather than engaging in public life in Yerevan, Armenia's capital.[122] The distinct identity of Nagorno-Karabakh Armenians was also reflected in their cultural practices and language. They maintained strong ties to their land through agriculture, local craftsmanship, and religious observances.[123] Notably, the Nagorno-Karabakh dialect, documented as early as the 12th century, remains difficult for many Armenians to understand, highlighting the community's unique

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[112] Ani Avetisyan, *Confusion over the Legal Status of Karabakh Refugees*, CIVILNET (Nov. 6, 2023, 2:04 PM), https://www.civilnet.am/en/news/755981/confusion-over-the-legal-status-of-karabakh-refugees/ ("The government's position has always been that the people living there are not Armenian citizens. Now, if they are not citizens, then they must have some status. In this case, it is refugee status.").

[113] *Nagorno-Karabakh Raised Flag at UN, Briefly*, RADIOFREEEUROPE/RADIOLIBERTY (Oct. 7, 2010), https://www.rferl.org/a/NagornoKarabakh_Flag_Raised_At_UN_Briefly/2183393.html.

[114] LANDGRAF & SEFERIAN, *supra* note 56.

[115] *About Internally Displaced Persons, supra* note 45.

[116] Avetisyan, *supra* note 112.

[117] Abraham U. Kannof, *Dueling Nationalities: Dual Citizenship, Dominant and Effective Nationality, and the Case of Anwar al-Aulaqi*, 25 EMORY INT'L L. REV. 1371, 1387 (2011).

[118] *Id*.

[119] *See generally* Philip Gamaghelyan, *Rethinking the Nagorno-Karabakh Conflict: Identity, Politics, Scholarship*, 15 INT'L NEGOT. 33, 40-43 (2010).

[120] *Id.*

[121] *Republic of Nagorno-Karabakh: Process of State Building at the Crossroad of Centuries*, *supra* note 3, at 4-5.

[122] Ani Mejlumyan, *Dispatch from Stepanakert: Karabakh's Armenians await uncertain future*, EURASIANET (Mar. 11, 2021), https://eurasianet.org/dispatch-from-stepanakert-karabakhs-armenians-await-uncertain-future.

[123] Chapple, *supra* note 87.

linguistic heritage.[124] These pre-conflict experiences and the enduring connection to their homeland demonstrate that Nagorno-Karabakh Armenians are best characterized as nationals of Nagorno-Karabakh itself, not as possessing an effective nationality with the Armenian state.

4. *Unable or Unwilling to Seek Protection from the State*

The inability or unwillingness of Nagorno-Karabakh Armenians to return to their former habitual residences stems from their well-founded fear of persecution.[125] However, the protection clause must be analyzed from the perspectives of both the Azerbaijani government and the former government of Nagorno-Karabakh.

Regarding the Azerbaijani government, while the Armenians of Nagorno-Karabakh were never citizens of Azerbaijan, Azerbaijan now exercises effective control over the territory. [126] The Armenians of Nagorno-Karabakh have legitimate reasons to believe that the Azerbaijani government will continue its campaign of fear and coercion against them.[127] This belief is reinforced by Azerbaijani's failure to present any plan for the return or reintegration of the over 120,000 displaced residents of the region.[128]

The former state of the Nagorno-Karabakh Armenians, Nagorno-Karabakh itself, no longer provides protection for Armenians.[129] Following the military attack on September 19, 2023, officials from Nagorno-Karabakh and Azerbaijan, under Russian mediation and the threat of further military action, agreed to a ceasefire on September 21.[130] A key condition of this ceasefire was the unilateral disbandment and disarmament of Nagorno-Karabakh's armed forces, the Artsakh Defense Army.[131] The situation further deteriorated on September 28, 2023, when Samvel Shahramanyan, president of Nagorno-Karabakh, signed a decree to dissolve all state institutions of the Artsakh Republic by January 1, 2024.[132] Although Shahramanyan later recanted, stating that "[n]o document can lead to the dissolution of the republic," the government's functionality appears

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[124] Emil Sanamyan, *Karabakh Dialect, From Sea to Sea*, USC DORNSIFE (Apr. 6, 2017), https://armenian.usc.edu/karabakh-dialect-from-sea-to-sea/.
[125] Storey, *supra* note 50, at 3.
[126] Amnesty Int'l, *Azerbaijan: As Azerbaijani Forces Assume Full Control over Nagorno-Karabakh, It Must Respect and Protect the Rights of Local Ethnic Armenians* (Sept. 29, 2023), https://www.amnesty.org/en/documents/eur55/7254/2023/en/.
[127] *See Asylum & the Rights of Refugees, supra* note 25.
[128] Hum. Rts. Watch., *Guarantee Right to Return to Nagorno Karabakh* (Oct. 5, 2023), https://www.hrw.org/news/2023/10/05/guarantee-right-return-nagorno-karabakh.
[129] *What We Know About the Azerbaijan Offensive in Nagorno-Karabakh*, AL JAZEERA (Sept. 19, 2023), https://www.aljazeera.com/news/2023/9/19/explainer-what-we-know-about-the-azerbaijan-offensive-in-nagorno-karabakh.
[130] *Azerbaijani, Nagorno-Karabakh Sides to Meet Again After Inconclusive 'Integration' Talks*, RADIOFREEEUROPE RADIOLIBERTY (Sept. 21, 2023), https://www.rferl.org/a/karabakh-azerbaijan-offensive-un-calls-halt/32600704.html.
[131] *Id.*
[132] Ebel, *supra* note 106.

dormant.[133] Whether or not Nagorno-Karabakh continues to exist legally, the reality remains that without a functioning government or military, its citizens lack any meaningful protection against further Azerbaijani aggression.

This fluid and deteriorating situation underscores the complexity of applying refugee protection to the Nagorno-Karabakh Armenians. When a state apparatus disintegrates or becomes a direct persecutor, the conventional expectation of state protection collapses.[134] For Nagorno-Karabakh Armenians, the idea of returning to their former habitual residence is at present untenable.[135] They cannot rely on protection from either their now-defunct former government or the Azerbaijani government, which currently controls the territory. Regardless of the Armenians' desire to return, they face a complete absence of state protection, leaving them no viable option but to seek refugee protection under international law.

5. *Implications of Refugee Classification*

The realities of the Artsakh Armenians highlight the urgent need to reevaluate refugee protection through a human rights lens, requiring a nuanced understanding that transcends traditional legal definitions. Recognizing Nagorno-Karabakh Armenians as refugees demands a proactive approach to safeguard their right and uphold their dignity in the face of displacement and conflict.[136] The focus must now center on the rights of ethnic Nagorno-Karabakh Armenians, emphasizing the principle of non-refoulement and exploring pathways for a sustainable return.

C. Right to Return after Forced Displacement

1. *Right to Return: Legal Definitions*

The principle of the right to return for refugees reflects a global commitment to addressing the challenges faced by individuals displaced by conflict or persecution. While the 1951 Refugee Convention and its 1967 Protocol do not explicitly articulate the right of return, they emphasize voluntary repatriation as a pivotal, durable solution to displacement.[137] The 1951 Convention explicitly enshrines the principle of non-refoulement, a foundational right that prohibits the forced return of refugees to states where their lives or freedoms would be at risk.[138] This principle ensures that refugees cannot be expelled or returned to territories where persecution or other severe threats

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[133] *Nagorno-Karabakh dissolution not valid, says Armenian separatist leaders*, FRANCE24 (Dec. 22, 2023), https://www.france24.com/en/asia-pacific/20231222-nagorno-karabakh-dissolution-not-valid-says-armenian-separatist-leader.
[134] *See* Olbourne, *supra* note 51.
[135] *Id.*
[136] *See* Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, *in* HUMAN RIGHTS & IMMIGRATION, COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW (Ruth Rubio-Marín ed., Oxford Acad. 2014).
[137] Anna Macdonald & Holly Porter, *The Politics of Return: Understanding Trajectories of Displacement and the Complex Dynamics of 'Return' in Central and East Africa*, 33 J. REFUGEE STUD. 639, 646 (2020).
[138] U.N. Refugee Agency, Access to Territory and Non-Refoulement (Mar. 6, 2025), https://emergency.unhcr.org/protection/legal-framework/access-territory-and-non-refoulement.

jeopardize their safety.[139] This foundational right also established a clear distinction between refugees, who must cross international borders for safety, and internally displaced persons (IDPs), who remain within their state's boundaries.[140]

The right to return is further reinforced by international human rights instruments, particularly the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). UDHR Article 13(2) states, "Everyone has the right to leave any country, including his own, and to return to his country."[141] This provision codifies the right to return as a fundamental human right, safeguarding individuals' autonomy in choosing their place of residence and guaranteeing their ability to return to their country.[142] This framework implies that the return process must respect the individual's autonomy and rights, underscoring the importance of voluntary and dignified repatriation while taking into account the specific reintegration needs of refugees and displaced persons.

ICCPR Article 12(4) further affirms, "No one shall be arbitrarily deprived of the right to enter his own country."[143] This provision protects individuals from unjust barriers that prevent them from returning to their homeland, thereby supporting the broader framework of human rights protection and promoting stability in the lives of displaced persons. In this context, the right to return is not merely a logistical matter; it embodies a moral and legal recognition of refugee rights.[144] It underscores the importance of safe, voluntary, and dignified repatriation, while enabling displaced individuals to freely decide whether to return to their homelands or settle elsewhere.[145]

The right to return also extends to subsequent generations of refugees, even those who may have never visited their ancestral lands,[146] thereby addressing the enduring consequences of prolonged displacement. International efforts of organizations like UNHCR play a central role in facilitating informed return decisions and supporting sustainable reintegration.[147] This comprehensive approach reflects a coordinated international commitment to making the right to return a practical reality.[148]

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[139] Ellen F. D' Angelo, *Non-Refoulement: The Search for a Consistent Interpretation of Article 33*, 42 VAND. J. TRANSNAT'L L. 279, 298 (2009).
[140] *About Internally Displaced Persons*, *supra* note 45.
[141] G.A. Res. 217A (III), Universal Declaration of Human Rights, U.N. Doc. A/810 at 71 (Dec. 10, 1948).
[142] *Id.*
[143] ICCPR, *supra* note 18.
[144] Andy Lamey, *Can There Be a Right of Return?,* 34 J. REFUGEE STUD. 1829, 1830-31 (2021).
[145] *Id*. at 1831.
[146] Hum. Rts. Watch, *Human Rights Watch Policy on the Right to Return*, https://www.hrw.org/legacy/campaigns/israel/return/. This right extends to subsequent generations so long as they maintain a "genuine and effective link" with the relevant territory. Hum. Rts. Watch, *Human Rights Watch Policy on the Right to Return: Relevant Background*, https://www.hrw.org/legacy/campaigns/israel/return/hrc-gen-cmt-rtr.htm#ft2 (citing Nottebohm Case, (Liech. v. Guat.) Second Phase, Judgment, I.C.J. Reports 1955, Rep 4).
[147] U.N. Refugee Agency, Who We Protect: Returnees, https://www.unhcr.org/us/about-unhcr/who-we-protect/returnees (last visited Mar. 5, 2025).
[148] HOWARD ADELMAN & ELAZAR BARKAN, NO RETURN, NO REFUGE: RITES AND RIGHTS IN MINORITY REPATRIATION 211 (2011).

Integrating the situation of the ethnic Armenians of Nagorno-Karabakh into the broader legal discourse highlights the unique challenges and necessary considerations within international law. The status of the Nagorno-Karabakh Armenians unequivocally affirms their entitlement to the right to return as refugees. Recognizing their right to return is essential not only as a universal refugee right but also in light of their specific circumstances of displacement and the severe conditions they have fled.[149]

2. *Gaps in the Current Legal Framework in Applying the Current Status of the Right to Return*

For Nagorno-Karabakh Armenians, realizing their right to return requires concrete guarantees of safety, the preservation of their rights, and the restitution of their properties and livelihoods, all in alignment with the principle of non-refoulement.[150] Yet, Azerbaijan's pursuit of dominance over Nagorno-Karabakh raises significant concerns about the feasibility of safe return.[151] The deeply entrenched, state-sponsored animosity toward ethnic Armenians makes return untenable under current conditions.[152]

The International Court of Justice (ICJ) case initiated by Armenia against Azerbaijan for racial discrimination highlights both the legal and moral challenges involved.[153] Armenia argues that Azerbaijan's systematic actions violate international law and render the safe return of Armenian refugees impossible.[154] These challenges are further compounded by a public atmosphere of hostility within Azerbaijan.[155] Azerbaijani President Ilham Aliyev has repeatedly demonstrated this antagonism, most notably through public gestures, such as stepping on the Nagorno-Karabakh flag[156] and overseeing the demolition of the region's parliamentary building.[157] These acts are part of a broader state-sponsored narrative of hatred and territorial ambition.[158] Azerbaijan's claims over Armenian territories and demands for corridors through

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[149] Roger Zetter, *Refugees and Their Return Home: Unsettling Matters*, 34 J. REFUGEE STUD. 8, 9 (2021).
[150] *Access to Territory and Non-Refoulement*, *supra* note 138.
[151] Amnesty Int'l, *Azerbaijan: As Azerbaijani Forces Assume Full Control over Nagorno-Karabakh, It Must Respect and Protect the Rights of Local Ethnic Armenians* (Sept. 29, 2023), https://www.amnesty.org/en/documents/eur55/7254/2023/en/.
[152] *See* U.S. EMBASSY IN ARM., 2023 HUMAN RIGHTS REPORT ON ARMENIA (Apr. 23, 2024).
[153] *Statement of the MFA of Armenia on the ICJ Order of November 17*, MINISTRY FOREIGN AFFS. ARM., (Nov. 18, 2023), https://www.mfa.am/en/interviews-articles-and-comments/2023/11/18/mfa_statement/12346.
[154] *Id.*
[155] Joshua Kucera, *After Winning Back Nagorno-Karabakh, What Will Azerbaijan's Authoritarian Leader Do Next?*, RADIOFREEEUROPE RADIOLIBERTY (Nov. 11, 2023, 2:09 PM), https://www.rferl.org/a/azerbaijan-karabakh-regained-what-next-aliyev-armenia/32680561.html.
[156] *Azerbaijani President Visits Karabakh's Abandoned Main Town*, EURASIANET (Oct. 16, 2023), https://eurasianet.org/azerbaijani-president-visits-karabakhs-abandoned-main-town.
[157] *Azerbaijan Demolishes Former Karabakh Armenian Parliament Building*, REUTERS (Mar. 5, 2024, 6:18 PM), https://www.reuters.com/world/asia-pacific/azerbaijan-demolishes-former-karabakh-armenian-parliament-building-2024-03-05/.
[158] *See Azerbaijani President Visits Karabakh's Abandoned Main Town, supra* note 156.

Armenia[159] reflect a political posture that exacerbates tensions. This rhetoric and behavior foster an environment where Armenians are treated with hostility, contradicting international peacebuilding efforts and violating the principles of non-refoulement.[160] Such an atmosphere makes the safe, dignified return of Nagorno-Karabakh Armenians virtually impossible in the current moment.[161]

3. *Comparative Right to Return*

The historical experience of the Biharis in South Asia offers a comparative perspective that underscores the legal and social challenges by displaced populations, particularly in cases of statelessness.[162]

The Biharis, originally from Bihar and other regions of India, are an ethnic and linguistic minority predominantly composed of Urdu-speaking Muslims.[163] Their history is deeply intertwined with the partition of India in 1947, which forced many to migrate to East Pakistan, present day Bangladesh.[164] After the Bangladesh Liberation War in 1971, Biharis faced severe persecution and marginalization due to their perceived allegiance to Pakistan, a stance viewed as a threat to the Bengali majority.[165] As a result, they were rendered stateless and endured harsh conditions in refugee camps.[166] Since 1971, the Biharis have lived in a limbo of statelessness as they attempt to integrate into societies vastly different from their cultural and historical roots.[167] Although some Biharis in Bangladesh have gained citizenship, significant questions remain about their potential return to their original homeland and whether that opportunity has effectively passed.[168]

This situation parallels the broader challenges faced by indigenous refugee groups as they navigate the intricacies of identity, belonging, and citizenship within the frameworks of modern states. For Nagorno-Karabakh Armenians, returning to Azerbaijani rule requires reconciling with a government and population with whom they share a contentious history.[169] Similarly, the Biharis have struggled to secure the right to return to Pakistan while facing diminishing rights in Bangladesh, where they are still viewed through the lens of historical allegiances.[170] These

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[159] Anna Ohanyan, *Azerbaijan's Armenian 'Corridor' is a Challenge to the Global Rules-Based Order*, FOREIGN POL'Y MAG. (Nov. 2, 2023, 6:04 PM), https://foreignpolicy.com/2023/11/02/azerbaijan-armenia-zangezur-corridor/.
[160] *See* Mike Corder, *Armenia Insists Top UN Court Has Jurisdiction to Hear Case Accusing Azerbaijan of Racial Hatred*, AP (Apr. 16, 2024, 6:28 AM), https://apnews.com/article/armenia-azerbaijan-nagorno-karabakh-icj-court-ee3d60fb254b0a4a0e06d5c9c32f49eb.
[161] *Id.*
[162] Minority Rts. Grp., *Biharis in Bangladesh* (July 2018), https://minorityrights.org/communities/biharis/#:~:text=The%20Bihari%20minority%20%E2%80%93%20Urdu%2Dspeaking,live%20in%20Pakistan%20and%20India.
[163] *Id.*
[164] *Id.*
[165] *Id*.
[166] *Id*.
[167] *Id.*
[168] *Id*.
[169] *Nagorno-Karabakh Conflict*, *supra* note 63.
[170] *Biharis in Bangladesh*, *supra* note 162.

dynamics underscore the complexity of implementing a right to return under current geopolitical realities.

The feasibility of such a return depends on whether states like Azerbaijan, Pakistan, and Bangladesh acknowledge and address the gravity of these rights.[171] While Nagorno-Karabakh Armenians may share cultural ties with Armenia, just as the Biharis share traits with Bangladeshis, these similarities do not justify forcing these groups to abandon the right to return. However, the practicality of exercising the right diminishes when the state fails to recognize and support the legitimacy of such claims.

Given these geopolitical realties, addressing these challenges of indigenous refugee groups requires a tailored approach that extends beyond the theoretical right to return. For the Nagorno-Karabakh Armenians, this means balancing their distinct cultural and legal rights within the realities of Azerbaijani occupation.[172] Preserving indigenous culture and heritage is crucial to understand legal claims to ancestral lands amid ongoing conflict and displacement.

Facilitating the return of the Nagorno-Karabakh Armenians is not only essential for resolving the conflict but also vital for restoring their dignity. Through this lens, this process transforms the right to return from an abstract concept into a tangible reality, allowing displaced populations to their heritage and rebuild their lives within their ancestral lands.[173] However, the unique circumstances of their displacement require careful consideration to ensure this right is implemented effectively. To address these challenges, international legal frameworks governing the right to return must evolve. Specifically, it should establish solutions that genuinely respect the dignity and aspirations of displaced indigenous communities. This refinement must align the right to return with the unique challenges and needs of these groups, ensuring their cultural, historical, and political identities are preserved while facilitating their return in a just and meaningful manner.

V. INDIGENOUS PEOPLES UNDER INTERNATIONAL LAW: PREEXISTING FRAMEWORKS

A. Indigenous Peoples: Definition

The international community has not adopted a universal definition of indigenous peoples.[174] Instead, the prevailing view is that a formal definition is unnecessary for recognizing and protecting indigenous rights.[175] The UN Declaration on the Rights of Indigenous Peoples

[171] *See* Christina Maranci, *What Cultural Genocide Looks Like for Armenians in Nagorno-Karabakh*, TIME (Oct. 12, 2023, 7:00 AM), https://time.com/6322574/cultural-genocide-armenia-nagorno-karabakh-essay/.
[172] *Nagorno-Karabakh Conflict*, *supra* note 63.
[173] *Indigenous Peoples and the United Nations Human Rights System*, UNCHR (2013), https://www.ohchr.org/sites/default/files/Documents/Publications/fs9Rev.2.pdf.
[174] *See generally Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*, INT'L LAB. ORG. 9 (Dec. 12, 2009), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcomm/%40publ/documents/publication/wcms_171810.pdf.
[175] *Id.*

(UNDRIP), adopted in 2007, uses the term "indigenous."[176] Meanwhile, the ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169) and its 1957 predecessor (Convention No. 107) use the terminology "indigenous and tribal."[177] Although these terms are considered to have similar coverage internationally, not all governments agree on their application.

In 1989, the International Labour Organization (ILO) adopted Convention No. 169, or the Indigenous and Tribal Peoples Convention, a key instrument addressing the rights of indigenous and tribal peoples in independent states.[178] The Convention recognizes indigenous and tribal peoples' aspirations "to exercise control over their own institutions, ways of life, and economic development" and emphasizes the importance of respecting indigenous cultural identity.[179] It covers various aspects such as land rights, consultation and participation, education, and social and economic development.[180] Rather than providing a strict definition of indigenous or tribal peoples, Article 1 of the Convention describes the groups it aims to protect as:

> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[181]

The present analysis focuses on subsection (b), which ties indigenous status to a presence in the region before certain historical events occurred. Understanding the phrase "at the time of conquest or colonization"[182] is critical in determining the application of the Convention. This phrase refers to historical points when indigenous populations face domination and control through military force, colonization, or similar means.[183] These events fundamentally alter their socio-political and cultural landscapes, making them central to identifying indigenous peoples and their rights.

Legally, "conquest" refers to the acquisition of sovereignty over a territory through force, involving subjugation of its inhabitants.[184] Conquest typically includes military invasion and

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[176] Joshua Castellino & Cathal Doyle, *Who Are Indigenous Peoples? An Examination of Concepts Concerning Group Membership in the UNDRIP, in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY (Jessie Hohmann & Marc Weller ed., 2018).
[177] *Id.*
[178] *Indigenous and Tribal Peoples Convention (No. 69)*, INT'L LAB. ORG. (1989), https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] Marcelo G. Kohen, *Conquest*, *in* MAX PLANCK ENCYCLOPEDIA INT'L L. (Oxford Univ. Press ed., 2023).

occupation, the imposition of foreign laws and governance structures, exploitation of natural and human resources, and the suppression or displacement of existing cultural and social systems.[185] The Permanent Court of International Justice ('PCIJ'), the predecessor to the ICJ, elaborated on conquest in the *Legal Status of Eastern Greenland* case (*Denmark v. Norway*).[186] The Court defined conquest as "a cause of loss of sovereignty when there is war between two states and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious state."[187] Conquest is therefore a derivative method of acquiring territorial sovereignty through war, where sovereignty transfers from the defeated state to the victorious state.[188] The *Eastern Greenland* case, though not directly addressing indigenous sovereignty, reflects a broader legal framework in which territorial ownership was historically defined by state conflict rather than by pre-existing indigenous presence. This omission underscores the limitations of early international law in recognizing indigenous peoples as rightful sovereigns over their lands and reinforces the need for contemporary legal frameworks that acknowledge and protect indigenous territorial rights outside the paradigm of conquest.

Another foundational codification of indigenous rights is UNDRIP, which underscores the historical injustices faced by indigenous peoples, including conquest and colonization.[189] UNDRIP highlights the importance of historical context in recognizing indigenous rights and emphasizes self-identification as a critical legal principle.[190] This principle affirms that indigenous status is primarily determined by the individuals and communities themselves, not by external criteria or government acknowledgment.[191] The emphasis on self-identification ensures that indigenous peoples have the agency to define their identity according to their own understanding and cultural context.[192]

Self-identification, articulated in Article 1(2) of ILO Convention No. 169, is a cornerstone of the Convention's application.[193] It ensures that indigenous peoples define their identity based on their cultural and historical understanding. By prioritizing self-identification, the Convention upholds indigenous autonomy and aligns with broader international human rights standards promoting self-determination and cultural preservation.[194]

This principle is essential for protecting indigenous rights, particularly in contexts where governments or other entities may hesitate to acknowledge indigenous status. Recognizing self-identification allows indigenous peoples to access rights and protections without requiring external validation, reinforcing dignity and agency throughout the process.

[185] *Id.*
[186] Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 47 (Apr. 5).
[187] *Id.*
[188] Kohen, *supra* note 184.
[189] *See generally* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).
[190] *Id.*
[191] *Id.*
[192] LEE SWEPSTON, BASIC POLICY & LAND RIGHTS 99-106 (2015).
[193] *Indigenous and Tribal Peoples Convention*, *supra* note 178.
[194] MATTIAS ÅHRÉN, INDIGENOUS PEOPLES' STATUS IN THE INTERNATIONAL LEGAL SYSTEM 59-60 (2016).

B. The Rights of Indigenous Peoples

1. *The Right to Self-Determination*

The principle of self-determination holds an "exalted status" in international law.[195] It is a fundamental right codified in various legal instruments.[196] Article 1, Paragraph 2 of the UN Charter states that, in part, the U.N. exists "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace…."[197] Similarly, Common Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) declares: "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[198]

For indigenous peoples, self-determination can take diverse forms including but not limited to "guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and other forms that ensure the free expression and protection of collective identity in dignity."[199]

ILO Convention No. 169 affirms the right of indigenous peoples to self-determination, including the right to participate in decision-making that affect their rights and interests. Regional instruments such as the African Charter on Human and Peoples' Rights and the American Declaration on the Rights of Indigenous Peoples also recognize indigenous peoples' rights to choose their political status and to pursue economic and social development.[200] UNDRIP represents a significant evolution in the recognition of indigenous rights.[201] While non-binding, it holds substantial persuasive authority in international human rights law and serves as a benchmark for cooperation and mutual respect.[202] Key provisions of the UNDRIP that directly support self-determination of indigenous peoples include Article 3, outlining that "[i]ndigenous peoples have the right to self-determination," including the right to freely determine their political status and

[195] S. James Anaya, *Self-Determination as a Collective Human Right Under Contemporary International Law*, *in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 3 (Pekka Aikio & Martin Scheinin eds., 2000).
[196] John B. Henriksen, *The Right of Self Determination: Indigenous Peoples Versus States, in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 132 (Pekka Aikio & Martin Scheinin eds., 2000).
[197] U.N. Charter art. 1, ¶ 2.
[198] ICCPR, *supra* note 18; International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (Dec. 16, 1966).
[199] Henriksen, *supra* note 196, at 133-34; WALT VAN PRAAG, MICHAEL C. VAN & ONNO SEROO, THE IMPLEMENTATION OF THE RIGHT TO SELF DETERMINATION AS A CONTRIBUTION TO CONFLICT PREVENTION 19 (1999).
[200] Org. of Am. States, African Charter on Human and Peoples Rights (Banjul Charter) art. XIX-XXIV, O.A.S.T.S. No. 58 (June 27, 1981).
[201] United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 189.
[202] *See generally* ERICA-IRENE DAES, THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: BACKGROUND AND APPRAISAL, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Stephen Allen & Alexandra Xanthaki eds., 2011).

pursue their economic, social, and cultural development.[203] Articles 11-13 affirm the right "to practice and revitalize their cultural traditions and customs," including the protection of their cultural heritage, traditional knowledge, and intellectual property over such heritage and knowledge.[204]

2. *The Right to Autonomy*

The concepts of autonomy and self-government are inextricably interlinked with the concept of self-determination. [205] Articles 18 and 19 of UNDRIP affirm that indigenous peoples have the right to participate in decision-making on matters affecting their rights. [206] This participation must occur through representatives chosen by indigenous people, according to their own procedures.[207] Furthermore, states are required to consult and cooperate in good faith with indigenous peoples, through their representative institutions, to obtain their free, prior, and informed consent before adopting or implementing legislative or administrative measures that may impact them.[208]

Article 31 of UNDRIP provides the most comprehensive codification of this principle: Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.[209]

While there is not a universally accepted definition of self-governance or autonomy that exists in international law, James Crawford characterizes an autonomous area as:

> regions of a state, usually possessing some ethnic or cultural distributiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the state of which they are a part. For such status to be of present interest, it must be in some way internationally binding upon the central authorities. Given such guarantees, the local entity may have a certain status, although… it is necessarily limited.[210]

[203] United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 189.
[204] *Id.*
[205] Henriksen, *supra* note 196, at 140.
[206] United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 189.
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 211 (Oxford UK: Clarendon Press ed., 1979).

VI. THE ARMENIANS OF NAGORNO-KARABAKH AS INDIGENOUS PEOPLES

The history of Nagorno-Karabakh is both complex and contested, with various groups having lived in and claimed the region over the millennia.[211] Discourse among political and legal scholars have predominantly focused on the contested nature of the territory itself, rather than on the people inhabiting it. Consequently, while ethnic Armenians have maintained a continuous presence in Nagorno-Karabakh since pre-antiquity,[212] their indigenous status is often overlooked. It is therefore valuable to examine the ethnic Armenians of Nagorno-Karabakh through the lens of the legal criteria for indigenous peoples, an inquiry that remains largely unexplored.

The ILO Convention No. 169 Application Guide explains that the criteria for identifying indigenous peoples involve both objective and subjective elements. Objective elements include: "(i) … societies that descend from groups that preceded conquest or colonization; (ii) territorial connection, in the sense that their ancestors inhabited that country or region; and (iii) distinctive and specific social, economic, cultural and political institutions, which are their own and are totally or partially retained."[213] The subjective element corresponds to collective self-identification as an indigenous people.[214] The Convention combines both sets of elements to arrive at a determination of indigenous classification.[215]

A. Descendants of Groups that Preceded Conquest or Colonization

Historians trace the Armenian presence in Nagorno-Karabakh to the pre-classical antiquity Urartu period (9^{th}-6^{th} centuries BCE).[216] The name *Artsakh*, the ancient Armenian term for Nagorno-Karabakh, first appeared in Urartian inscriptions as the province of *Urtekhe* or *Urtekhini*, which stretched from the right bank of the Kur River to the left bank of the Arax River.[217] During this period, Urartian kings expanded their kingdom's frontiers from their capital in western Armenia, Van, to Transcaucasian Armenia.[218] The term *Urtekhe* is regarded as the prototype of the Armenian name *Artsakh*.[219]

The continuous presence of Armenians in Artsakh province was acknowledged in the ancient manuscripts of many historians, confirming that the provinces north of the Kura River

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[211] Murad Gassanly, *Nagorno-Karabakh: Contested narratives*, AL JAZEERA (Apr. 6, 2016), https://www.aljazeera.com/opinions/2016/4/6/nagorno-karabakh-contested-narratives.
[212] YEREVAN INST. POL. RSCH., REPUBLIC OF NAGORNO-KARABAKH: PROCESS OF STATE BUILDING AT THE CROSSROAD OF CENTURIES 5 (Avetisian et al. eds., 2009).
[213] Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter American Human Rights System, Inter-Am. Comm'n H.R., Doc. 56/09, OEA/Ser.L/V/II, at 10 (Dec. 30, 2009).
[214] *Id.*
[215] *Id.*
[216] OHANNES GEUKJIAN, ETHNICITY, NATIONALISM AND CONFLICT IN THE SOUTH CAUCASUS 29 (Neil Robinson ed., Routledge 2011).
[217] *Id.* at 30.
[218] CHRISTOPHER J. WALKER, ARMENIA AND KARABAKH: THE STRUGGLE FOR UNITY 73 (1991).
[219] *Id.*

were part of historical Armenia.[220] This fact has been confirmed by classical writers such as Strabo, Plini the Elder, Plutarch, Ptolemy, Dio Cassius, and others.[221] After the fall of Urartu, the region came under the domination of the Medes and Achamenian Persians in the 6th century BCE, marking the first conquest since its original settlement.[222] This benchmark demonstrates that Armenians inhabited Nagorno-Karabakh prior to conquest or colonization, thus satisfying the ILO's first objective criteria for indigenous peoples.

B. Territorial Connection through Ancestors Inhabiting the Region

The Armenian presence in Nagorno-Karabakh has been consistently documented since at least the 9th century BCE.[223] Geographically, the region encompasses both the highlands and lowlands of the Caucasus Minor mountainous chain, defined by Lake Sevan in the east and the Arax River to the south. The medieval historian Movses Khorenatsi noted that the province of Utik, with Artsakh adjacent to it to the south, was part of the Armenian kingdom of Ervandunis (Orontids) during the 4th to 2nd centuries BCE. In the early medieval period, Nagorno-Karabakh became part of various Armenian principalities and kingdoms, including the Kingdom of Artsakh. Historian Ohannes Guekjian notes:

> Artsakh was mentioned in the seventh century AD Armenian atlas 'Ashkharatsuits' as the tenth province of greater Armenia, and Utik as the twelfth. Artsakh and Utik adopted Christianity in the fourth century [CE] and remained part of the Armenian kingdom until its fall in 428 [CE]. According to Greco-Roman and Armenian sources, the Kur River was the boundary between Armenia and Caucasian Albania, while Artsakh and Utik, which fell on its right bank, were parts of Armenia.[224]

Throughout the medieval period, Nagorno-Karabakh was renowned for its numerous Armenian monasteries and cultural sites.[225] During the 19th century, the region was incorporated into the Russian Empire following the Russo-Persian Wars.[226] Despite demographic changes, Armenians remained a significant population within the region.[227] Their continuous and uninterrupted presence supports the conclusion that modern ethnic Armenians of Nagorno-Karabakh descend from the original society that inhabited the region prior to conquest, fulfilling the ILO's second objective criteria for indigenous status.

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[220] YEREVAN INST. POL. RSCH., *supra* note 212.
[221] *Id.*
[222] GEUKJIAN, *supra* note 216, at 30.
[223] *Id.*
[224] *Id.*
[225] Christina Maranci, *The medieval Armenian monuments in Nagorno-Karabakh must be protected*, APOLLO MAG. (Dec. 9, 2020), https://www.apollo-magazine.com/medieval-armenian-monuments-nagorno-karabakh/.
[226] GEUKJIAN, *supra* note 216, at 30.
[227] Patrick Donabedian, *The History of Karabakh from Antiquity to the Twentieth Century*, *in* THE CAUCASIAN KNOT: THE HISTORY AND GEOPOLITICS OF NAGORNO-KARABAKH 53, 77 (Levon Chorbajian et al. eds., 1994).

C. Distinctive and Specific Social, Economic, Cultural and Political Institutions

On December 10, 1991, the people of Nagorno-Karabakh overwhelmingly voted for independence.[228] Since then, the Nagorno-Karabakh Republic, also called the Artsakh Republic, has remained a distinctive constitutional democracy, consisting of an executive (President), legislative (National Assembly), and judicial branch, consisting of a court of general jurisdiction, a court of appeals, and a supreme court.[229]

The Centre for East European and International Studies examined the challenges faced by Nagorno-Karabakh Armenians forcibly displaced to Armenia following the onslaught in September 2023.[230] A multi-national team of researchers in 2011 and 2020 explored the impact of displacement on the political and cultural identity of Nagorno-Karabakh Armenians.[231] Despite the opportunity to apply for Armenian citizenship, a significant number have chosen not to, reflecting a desire to maintain their distinct Nagorno-Karabakh identity.[232] Indeed, the entire premise of the study is that Nagorno-Karabakh have a wholly distinct social and cultural identity.

D. Collective Self-Identification

The final subjective ILO criteria for indigenous identification hinges on the self-identification of the group as indigenous.[233] This means that for a group to be recognized as indigenous, they must see themselves as distinct from other groups, a perception also referred to as "group consciousness."[234] This criterion allows for complexity within indigenous identity and is satisfied not by external recognition but rather by the group's own understanding of its history and heritage. In the case of the Armenians of Nagorno-Karabakh, their self-perception is key to understanding their indigenous status. They view themselves as a distinct people, with a unique culture and tradition that differentiates them from other Armenians, particularly those living in the Republic of Armenia.[235] They see their culture, language, and way of life as tied to the land they have inhabited for centuries, which is a key element of indigeneity. However, despite this deep connection to the region, the concept of indigeneity has not always been accessible or widely used

[228] YEREVAN INST. POL. RSCH., *supra* note 212, at 15.
[229] Constitution of the Nagorno Karabakh Republic Sept. 2, 1991, arts. 61, 76, 109.
[230] Ivaylo Dinev & Nadja Douglas, *The Political and Cultural Fate of Karabakh Armenians in Armenia*, CTR. E. EUR. & INT'L STUDS. (Apr. 9, 2024), https://www.zois-berlin.de/en/publications/zois-spotlight/the-political-and-cultural-fate-of-karabakh-armenians-in-armenia.
[231] *Id.*
[232] *Id.*
[233] Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter American Human Rights System, Inter-Am. Comm'n H.R., Doc. 56/09, OEA/Ser.L/V/II, at 10 (Dec. 30, 2009).
[234] Jose R. Martinez Cobo, Study of the Problem of Discrimination against Indigenous Populations, UN Sub.2/1986/21/Add.4, July 14, 1983, ¶ 179.
[235] Dinev & Douglas, *supra* note 230.

by the population of Nagorno-Karabakh.[236] The concept as understood in global human rights and international legal contexts often carries connotations tied to colonialism, state formation, and the struggles of marginalized groups to maintain their cultural integrity and land rights.[237] In the case of Nagorno-Karabakh, the Armenians have historically framed their identity through the lens of their ancient presence and cultural heritage rather than explicitly framing themselves as indigenous in the modern sense of the term. This lack of widespread use of the term indigenous in Nagorno-Karabakh can be attributed to several factors. First, the term itself has become more commonly associated with groups that have been historically oppressed or displaced, and the Armenians of Nagorno-Karabakh may not have embraced the term due to their perceived status as a historically established and culturally advanced people.[238] Additionally, the legal and political frameworks through which indigenous status is often recognized—such as in international law or by national governments—may not have been accessible to the general population of Nagorno-Karabakh, or they may not have seen the need to adopt this specific language in their struggle for recognition.

The aforementioned research study of the Centre for East European and International Studies underscored that Nagorno-Karabakh Armenians strongly self-identify as a distinct group separate from the broader Armenian population.[239] This self-identification is evident in their reluctance to apply for Armenian citizenship, despite having the opportunity to do so.[240] Rather than simply integrating into Armenian society, many Karabakh Armenians view themselves as a people with a unique historical and political identity that extends beyond their recent displacement. The study further highlights concerns that without formal recognition of their distinct identity, Karabakh Armenians risk assimilation into Armenian society, leading to the loss of their unique political and cultural heritage.[241] The granting of minority status, a distinction triggering defined international legal protections,[242] would work to safeguard their self-identification and ensure that their voice remains distinct within Armenia.

E. Exploring Self-Determination

The intersection of indigenous rights of self-determination, autonomy, and sovereignty with the principle of territorial integrity presents an undeniable tension. For the Armenians of Nagorno-Karabakh, this challenge is compounded by the fact that, although the right of self-

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[236] Minority Rts. Grp., *Armenia and Karabagh: the struggle for unity* (Dec. 31, 1991), https://minorityrights.org/resources/armenia-and-karabagh-the-struggle-for-unity/ (noting that in 1991, most residents of Nagorno-Karabakh still considered themselves Armenian).

[237] *See generally* Marjo Lindroth, *Colonialism invigorated? The manufacture of resilient indigeneity*, 7 INT'L POL'YS, PRACS. & DISCOURSES 240 (2019).

[238] *See* Manvir Singh, *It's Time to Rethink the Idea of the "Indigenous,"* NEW YORKER (Feb. 20, 2023), https://www.newyorker.com/magazine/2023/02/27/its-time-to-rethink-the-idea-of-the-indigenous for a discussion of the prevailing perceptions of the "indigenous" label and how those perceptions affect self-identification.

[239] Dinev & Douglas, *supra* note 230.

[240] *Id.*

[241] *Id.* (noting that failures of the Armenian government to safeguard the culture of Nagorno-Karabakh Armenians increases the likelihood of assimilation).

[242] Right to Educ. Initiative, *Minorities and Indigenous Peoples*, https://www.right-to-education.org/issue-page/marginalised-groups/minorities-and-indigenous-peoples.

determination has been a "cardinal principle of the United Nations…, dating from [up to now] the organization has been reluctant to recognize any further extension of this right beyond the traditional decolonization context."[243] In fact, whether international law recognizes the right to external self-determination outside decolonization remains a deeply contested issue to this day.[244] States often resist meaningful expressions of self-determination, arguing that such assertions can lead to secession, which they claim undermines the post-war emphasis on sovereignty and territorial integrity.[245] States argue that the U.N. Charter prioritizes these principles. [246] This perspective was reiterated in the General Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations, which states that "any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country or at its political independence is incompatible with the purposes and principles of the Charter."[247]

The contemporary indigenous legal framework offers a different and more inclusive perspective.[248] In fact, one of the U.N. Human Rights Council's earliest actions was to approve UNDRIP and forward it to the General Assembly in 2006.[249] Article 3 of UNDRIP explicitly recognizes: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.."[250] Articles 25-32 of UNDRIP further affirm that indigenous peoples have the right to the lands, territories, and resources they have traditionally owned, occupied, or otherwise used or acquired.[251] States are obligated to provide legal recognition and protection to these lands and resources, respecting the customs, traditions, and land tenure systems of the indigenous communities.[252] This framework also incorporates the principle of free, prior, and informed consent before approving any projects that may impact indigenous lands, territories, or other resources.[253]

For most indigenous peoples worldwide, the issue of land and resource rights are critical. Indigenous peoples regard these rights as inseparable from the broader right to self-determination.[254] Excluding land and resource rights from the concept of self-determination is seen as incompatible with existing international law.[255] Erica-Irene Daes, former UN Special Rapporteur on *Indigenous Peoples and Their Relationship to Land*, emphasized the urgency of

[243] Henriksen, *supra* note 196, at 135.
[244] *Id.*
[245] Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self-Determination*, 31 AM. INDIAN L. REV. 341, 342 (2012).
[246] *Id.*
[247] G.A. Res. 25/2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations, U.N. Doc. A/8028 (Dec. 15, 1970).
[248] Miller, s*upra* note 245.
[249] *Id.*
[250] Declaration on the Rights of Indigenous Peoples, *supra* note 189.
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] Henriksen, *supra* note 196, at 136.
[255] *Id.*

understanding the spiritual, social, cultural, economic, and political significance of land and resources for the survival of vitality of indigenous societies.[256]

The Armenians of Nagorno-Karabakh, as an indigenous people with a distinct historical, cultural, and political identity, possess a legitimate right to self-determination that transcends the narrow confines of the decolonization paradigm. While states frequently invoke territorial integrity to justify the suppression of secessionist movements, this argument cannot be applied indiscriminately to indigenous peoples whose historical presence predates the formation of modern state boundaries. International law, as reflected in UNDRIP, recognizes that indigenous self-determination includes not only cultural and economic autonomy but also the right to determine their political status. The principle of remedial secession—an emerging doctrine in international law—further supports this claim, asserting that when a people is subject to systematic discrimination, human rights violations, or existential threats, they may invoke external self-determination as a last resort.[257] The Armenians of Nagorno-Karabakh have endured decades of existential threats, including forced displacement and cultural erasure, which strengthen their claim to self-determination.

Furthermore, regarding external self-determination, the international community has recognized self-determination in cases that extend beyond classical decolonization, including Kosovo[258] and South Sudan,[259] where systemic oppression and the denial of fundamental rights justified new political arrangements. The situation in Nagorno-Karabakh similarly warrants an approach that prioritizes justice over rigid adherence to state sovereignty. The principle *of uti possidetis juris*, often cited to preserve existing borders, cannot override the right of a people to preserve their identity and existence, particularly in cases where territorial integrity has been wielded as a tool of subjugation rather than stability.[260] Without recognition of their right to self-determination, Armenians of Nagorno-Karabakh face not only legal disenfranchisement but also the permanent loss of homeland and culture. Thus, international law must evolve to reconcile the right to self-determination with the realities of indigenous displacement, ensuring that territorial integrity does not become a shield for impunity.

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[256] U.N. Comm'n on H.R., Final paper from the Special Rapporteur on Indigenous Peoples and their Relationship to Land (June 20, 1997), https://www.refworld.org/reference/themreport/unsubcom/2001/en/91793.

[257] *See generally* Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST. ANTONY'S INT'L REV. 37 (2010).

[258] Christopher J. Borgen, *Is Kosovo a Precedent? Secession, Self-Determination, and Conflict Resolution*, WILSON CTR. (July 7, 2011), https://www.wilsoncenter.org/publication/350-kosovo-precedent-secession-self-determination-and-conflict-resolution (acknowledging that the "serious human rights abuses" by the Serbs against the Kosovars and the likelihood of further abuse could justify the exercise of the right to self-determination and secession).

[259] "[T]he Southern Sudan epochal scenario demonstrates that human rights are intrinsically linked to and significantly larger than self determination, because the former explicitly recognizes that groups may form and seek exit from states for other ethno-national reasons…" Dejo Olowu, *Southern Sudan beyond Self-Determination: Lessons, Challenges and Prospects* 67 INDIA Q. 291, 295 (2011).

[260] *See* Aman Kumar, *A relook at the principle of uti possidetis in the context of the Indo-Nepal border dispute*, 12 JINDAL GLOB. L. REV. 95, 108-12 (2021) (discussing how the principle of *uti possidetis juris* is often used by dominant states to justify colonial policy).

VII. CONCLUSION

The mass displacement of the Nagorno-Karabakh Armenians exposes a profound lacuna in international law: the absence of a coherent doctrinal framework that addresses the intersection of indigenous identity, territorial dispossession, and refugeehood. The prevailing international legal regime, bifurcated between the refugee protection system and the corpus of indigenous rights, fails to account for the unique vulnerabilities of indigenous communities subjected to forced displacement. The 1951 Refugee Convention and its 1967 Protocol, while indispensable in safeguarding individuals fleeing persecution, remain ill-equipped to redress the collective harms endured by indigenous peoples whose forced removal constitutes not merely a humanitarian crisis but an existential assault on their historical continuity, cultural integrity, and political self-determination. Conversely, international instruments such as UNDRIP affirm indigenous territorial and self-governance rights but lack enforceable mechanisms to remedy displacement beyond the colonial paradigm. This doctrinal gap leaves communities such as the Nagorno-Karabakh Armenians in a state of legal ambiguity, neither fully recognized as refugees nor afforded the protections commensurate with their indigeneity.

This article has advanced the argument for a specialized legal framework that synthesizes refugee law with indigenous rights, thereby constructing an integrated paradigm that ensures displaced indigenous groups are not relegated to a permanent state of juridical obscurity. Such a framework is imperative for multiple reasons. First, it would codify the concept of "indigenous refugeehood," thereby establishing explicit recognition of the sui generis status of displaced indigenous peoples and ensuring that their legal protections extend beyond the generic asylum regime. Second, it would enshrine the right to return as an operative legal entitlement, acknowledging that for indigenous communities, displacement entails more than a loss of domicile—it constitutes an irrevocable rupture from ancestral lands inextricably linked to their cultural survival and identity. Third, it would impose affirmative obligations on both host states and the international community to facilitate territorial restitution and safeguard indigenous self-determination, precluding states from exploiting legal ambiguities to perpetuate the erasure of displaced indigenous groups.

The plight of the Nagorno-Karabakh Armenians epitomizes the exigency of such a framework. Their displacement was neither incidental nor collateral; it was the culmination of a systematic policy designed to effectuate their removal and sever the connection to their historical homeland. The existing international legal order, predicated on rigid categorizations that treat indigeneity and refugeehood as mutually exclusive, is fundamentally ill-equipped to address their predicament. Absent formal legal recognition of their indigenous status, these refugees risk being permanently severed from their territorial claims as their cultural identity is subsumed through assimilation and their legal entitlements are rendered non-justiciable in international fora. The right to return, enshrined in international human rights law but inconsistently applied, must be fortified through binding legal mechanisms that compel compliance.

If international law is to function as a meaningful arbiter of justice rather than a passive observer to geopolitical expediency, it must evolve to redress the systemic exclusion of displaced

indigenous peoples. The case of the Nagorno-Karabakh Armenians is not an aberration but a harbinger, signaling the urgent necessity of doctrinal recalibration. The perpetuation of legal invisibility for displaced indigenous communities emboldens state actors to engage in similar campaigns of forced removal with impunity, convincing states that international law lacks the requisite instruments to prevent or remediate such violations.

Accordingly, the development of a specialized legal framework is not merely a normative aspiration, but an imperative dictated by the exigencies of contemporary displacement crises. The failure to act will not only condemn displaced indigenous peoples to a perpetual state of juridical nonexistence but will also undermine the credibility of the international legal order itself. It is incumbent upon the international legal community to bridge the chasm between recognition and enforcement, ensuring that the rights of displaced indigenous peoples are not relegated to the realm of abstract principles but are instead upheld as enforceable entitlements under international law.