



“Ethnic cleansing” in relation to the persecution of Christians in Kenya



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February, 2016

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Introduction

The objective of this piece of work is to let readers appreciate the essence of *ethnic cleansing* and its presence in present day Kenya. The present writer puts forward his arguments in favor of the above assertion.

The paper is divided into two sections. In the first section, the origin and emergence of the notion of *ethnic cleansing*, its legal and historical interpretations and the characterization of the act of *ethnic cleansing* are discussed. An attempt is also made to show the correlation between *ethnic cleansing* and international humanitarian law, crimes against humanity and the law of genocide.

Section two is reserved for analysis of the existence of *ethnic cleansing* in present-day Kenya. The recent violence and attacks perpetuated against Christians in the country in general and in the northeastern part of the country in particular is examined in view of the established standards for determining the existence of *ethnic cleansing*. Finally, the points raised in the body of the paper will be presented in the form of a conclusion.

SECTION ONE

1. WHAT IS “ETHNIC CLEANSING”?

1.1 Short synopsis of “ethnic cleansing”

Though the term *ethnic cleansing* is commonly used in public international law, it is difficult to determine the exact origin of the term and to establish who first employed it, why, and in what particular context. The term *ethnic cleansing* came into wide usage in the 1990s, to describe the treatment suffered by particular ethnic groups during conflicts that erupted after the disintegration of the former Yugoslavia. After the republic of Bosnia-Herzegovina declared its independence in March 1992, Bosnian Serb forces waged a systematic campaign - including forced deportation, murder, torture and rape - to expel Bosniak (Bosnian Muslim) and Croatian civilians from territory in eastern Bosnia.

As military officers of the former Yugoslav People's Army had a preponderant role in all the above mentioned systematic campaigns, some scholars conclude that the expression *ethnic cleansing* could have its origin in military vocabulary.¹

The term *ethnic cleansing* constitutes a literal translation of the Serbo-Croatian expression *etničko čišćenje* (“cleansing of the region”).² The expression “to clean the

¹ Petrovic, Drazen, "Ethnic Cleansing - An Attempt at Methodology", European Journal of International Law. 5 (1994): 343.

² Ibid.

region/territory” is directed against enemies, and usually indicates the final phase of combat in which total control of the conquered territory is taken. The idiom “cis” – “clean” means “without any dirt” or “contamination”. The word “ethnic” has been added to the military term because the “enemies” are considered to be the other ethnic communities.³ It could be worth noting here that the term was initially used by journalists and politicians to refer to the situation witnessed in Bosnia but later on it has been adopted as part of the official vocabulary of UN Security Council documents and by other UN institutions and governmental and non-governmental international organizations.⁴

Despite the widespread use of the term by governments, international organizations and non-international organizations, it is at present difficult to give it a precise definition. It is a blanket term, and no specific action or inaction goes by that name. But the practice covers a wide range of criminal offenses. For the purpose of this paper, the following definition is adopted:

"(...) ethnic cleansing...[is] the expulsion of an 'undesirable' population from a given territory due to religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these."⁵ [Emphasis added]

1.2 Historical development and interpretation of “ethnic cleansing”

Although the use of the expression “cleansing” is a recent development under international criminal law, the practice of *ethnic cleansing* is not a recent phenomenon, and it has been carried out throughout human history. It could be said that it is as old as human history: the removal and transfer of an “undesirable” population from a certain region has been witnessed since the distant past. Historically, *ethnic cleansing* has taken on different forms. In his 1993 article “A Brief History of Ethnic cleansing,” published in the magazine “Foreign Affairs,” Andrew Bell-Fialkoff writes that the forced resettlement of a “politically unreliable” population, one that is conquered and incorporated into an empire yet still likely to rebel, was one form of *ethnic cleansing* and dates back to the eighth century B.C.⁶ This form of *ethnic cleansing* was undertaken by the Assyrian Empire when it forced millions of people in conquered lands to resettle between the ninth and seventh centuries B.C.⁷ There were other empire states that followed suit.⁸

During the Middle Ages, the pattern of *ethnic cleansing* changed drastically and it was now being applied to religious minorities as opposed to a conquered population as was previously the case in ancient times. The axiom and aim during the medieval period was to achieve greater religious homogeneity within states. This notion of

³ Ibid.

⁴ Ibid., p.342.

⁵ Bell-Fialkoff, “A Brief History of Ethnic Cleansing”, *Foreign Affairs*, Vol. 72, No. 3 (1993) 110.

⁶ Ibid., p.111.

⁷ Ibid.

⁸ The Babylonians, Greeks and Romans used to have this practice, though not always on such a large scale and often to procure slave labor.

religious purity was therefore achieved through the targeting and removal of minority “non-believers” whether Catholic, Protestant, Muslim or Jew.⁹

Despite the above examples of *ethnic cleansing* in the past, some scholars argue that *ethnic cleansing* in its strictest sense is a 20th century phenomenon. As opposed to the forced resettlement in the past, the 20th century brought with it a number of aspects of modernity that made *ethnic cleansing* more virulent, more complete, and more pervasive.¹⁰ Hence, it could be said that *ethnic cleansing* is a “crime” with a long historical tradition, the principal aim and target of which – political, religious, ethnic – has varied considerably over the centuries.

1.3 “Ethnic cleansing” as a legal notion

Since its coinage in the 1990s, the notion of *ethnic cleansing* has remained a grey area since it has NOT been formally and legally classified either by international tribunals or conventions. The initial focus and departure point for looking into *ethnic cleansing* as a legal notion of public international law are the resolutions of the United Nations (UN) Security Council (SC).

The first appearance of the expression *ethnic cleansing* as a public international law concept was in the UN SC Resolutions, eight of which made reference to the expression.¹¹ However, none of these resolutions gave an acceptable and working legal definition for the term. Neither did they qualify what *ethnic cleansing* means in legal parlance. In general terms, these resolutions merely condemned the act of *ethnic cleansing*, mentioning that those who commit or commission acts of *ethnic cleansing* are individually responsible and should be brought to justice, and that states are obliged to cooperate in eliminating all forms of *ethnic cleansing* and racial hatred. In sum, under these resolutions *ethnic cleansing* was addressed as a fact and not as a legal concept.

A major move towards legal recognition, however, came with the decision of the SC, in 1993, to create the International Criminal Tribunal for the former Yugoslavia (ICTY). In its resolutions affirming the necessity to create the tribunal, “the SC noted its grave alarm at [...] the continuance of the practice of *ethnic cleansing*”.¹² Besides its establishment, ICTY was also conferred with jurisdiction to judge such crimes. This

⁹ Supra, Note 5, p.111.

¹⁰ Naimark, Norman M., “Ethnic Cleansing”, Encyclopedia of Genocide and Crimes Against Humanity, ed. Dinah L. Shelton, Vol. 1, Detroit: Macmillan Reference USA, 2005, 301-304. World History in Context, web accessed on 19 May 2015.

¹¹ Security Council Resolution 771, 13 August 1992, UN Doc. S/RES/771, Security Council Resolution 780, 6 October 1992, UN Doc. S/RES/780, Security Council Resolution 787, 16 November 1992, UN Doc. S/RES/787, Security Council Resolution 808, 22 February 1993, UN Doc. S/RES/808, Security Council Resolution 819, 16 April 1993, UN Doc. S/RES/819, Security Council Resolution 827, 25 May 1993, UN Doc. S/RES/827, Security Council Resolution 836, 4 June 1993, UN Doc. S/RES/836, and Security Council Resolution 859, 24 August 1993, UN Doc. S/RES/859.

¹² Security Council Resolution 827, 25 May 1993, UN Doc. S/RES/827, and Security Council Resolution 808, 22 February 1993, UN Doc. S/RES/808.

was noted by the appeals chambers of ICTY in the case of *Prosecutor v. Milorad Knorjelac*¹³ as follows:

*"The Security Council was therefore particularly concerned about acts of ethnic cleansing and wished to confer jurisdiction on the tribunal to judge such crimes, regardless of whether they had been committed in an internal or an international armed conflict."*¹⁴

One point worth mentioning here is the question whether the resolutions passed by the UN SC have any binding effect on member states. This is a complex and controversial point but in general for a resolution to carry binding authority, it has to fulfill the primary task of the SC, namely the maintenance of international peace and security.¹⁵ The other consideration that has to be taken into account is the specific language used in the resolution¹⁶ - ie. whether the specific words within the resolution are of binding nature or merely recommendation.

Consequently, due to the fact that the resolutions have little impact in qualifying what *ethnic cleansing* is, international courts and tribunals, scholars and journalists all continue to interpret the term in various ways. Not only that, but also the specific conditions of the act have not yet been established and the term remains unclassified, meaning that there is no judicial organ, either international or internal, which can legally prosecute and condemn crimes under this heading, or even precisely determine the exact acts to be qualified as such. The consequence of all this is that a considerable amount of confusion remains as to what actions/inactions amount to *ethnic cleansing* and how its relationship to international crimes should be understood.

In the following paragraphs an attempt will be made to show the link between *ethnic cleansing* vis-à-vis international humanitarian law, crimes against humanity and genocide. By looking at the similarities and differences between *ethnic cleansing* on the one hand and the above mentioned groups of internationally recognized crimes on the other, it should be much easier to appreciate the concept of *ethnic cleansing*.

1.3.1 "Ethnic cleansing" and international humanitarian law

When the UN SC mentioned the word *ethnic cleansing* under Resolution 771 (1992) of 13 August 1992, it expressly stated that it [*ethnic cleansing*] violated international humanitarian law (IHL).¹⁷ IHL applies only in times of armed conflict, both international (between two or more nations) and non-international (internal to the territory of one nation). Once a conflict has begun then IHL applies equally to all

¹³ Prosecutor v. Milorad Knorjelac ("Foča"), Case N° IT-97-25-A, Judgment, Appeals Chamber, 17 September 2003, Para. 221.

¹⁴ Ibid.

¹⁵ Article I(1) of the United Nations Charter signed on 26 June 1945 at the San Francisco Conference.

¹⁶ Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", *The European Journal of International Law* Vol. 16 no.5, 2006 p.885.

¹⁷ Security Council Resolution 771, 13 August 1992, UN Doc. S/RES/771, Para. 2.

sides. One major purpose of IHL is, therefore, protection of people who are not or no longer taking part in the fighting, such as civilians, the wounded, the sick, prisoners of war, detainees, shipwrecked, and medical, religious and military personnel.

Not only does IHL apply during the period of hostilities, but also in its aftermath. This has been acknowledged in the *Tadic* case where it was stated that “International Humanitarian Law [...] extends beyond the duration of hostilities until a general conclusion of peace is reached.”¹⁸ This principle was reaffirmed under the *Kunarac et al* case, where it was mentioned that IHL would be applicable if the events occurring are committed in furtherance of or to take advantage of the situation created by the fighting.¹⁹

With the above background in mind, we can now take a look at some of the scenarios whereby *ethnic cleansing* has been identified during international and internal armed conflicts. The majority of *ethnic cleansing* policies in former Yugoslavia appear to have been conducted during the time of an armed conflict. The UN General Assembly in its resolution adopted in 1993 addressed the issue of *ethnic cleansing* in the territory of former Yugoslavia. It condemned the violation of IHL and stated that:

*“[the violations of IHL] are committed in connection with “ethnic cleansing” and [...] includes killings, torture, beatings, arbitrary searches, [...] disappearances, destruction of houses and other acts of threats of violence aimed at forcing individuals to leave their homes, as well as violation of human rights in connection with detention.”*¹²⁰

There are also cases where *ethnic cleansing* has been identified during non-international armed conflicts. A case in point could be the situations in Rwanda and Darfur. Some scholars argue for the existence of *ethnic cleansing* during the early stages of the Rwandan conflict.²¹ The same holds true for Darfur, as it was indicated in the UN SC report of the International Commission of Inquiry on Darfur to the United Nations Secretary General.²²

In conclusion, the situation of armed conflict as indicated in the examples of Yugoslavia, Rwanda and Darfur above, is a common characteristic and it could be said that *ethnic cleansing* can occur during armed conflicts whether international or

¹⁸ Prosecutor v. Duško Tadić (“Prijedor”), Case N° IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Para. 70.

¹⁹ Prosecutor v. Dragoljub Kunarac et al. (“Foča”), Cases N° IT-96-23-T and N° IT-96-23/1-T, Judgment, Trial Chamber II, 22 February 2001.

²⁰ UN General Assembly, Res. 48/153, 20 December 1993, §5; Res. 49/196, 23 December 1994, §6.

²¹ William A. Schabas, “Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide? (2000-2001)”, 35 New England Law Review 287-302, p.295.

²² United Nations, Security Council, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General pursuant to Security Council Resolution 1564 of 18 September 2005, Geneva 25 January 2005, paras.458, 459, 642, at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf, Human Rights Watch Report Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan May 2004, Vol. 16, No. 6 (a), at <http://www.hrw.org/reports/2004/sudan0504/sudan0504full.pdf>.

internal. However, it is arguable and is not yet settled conclusively whether crimes of *ethnic cleansing* committed under these conditions are regulated by IHL.

1.3.2 “Ethnic cleansing” and crimes against humanity

As in the case of *ethnic cleansing*, there is no comprehensive convention on crimes against humanity. For our purpose we can adopt the definition employed by the Rome statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute). Article 7(1) of the Rome Statute states that:

*“Crime against humanity means any of the following acts when committed as part of a **widespread** or **systematic attack** directed against any civilian population, **with knowledge of the attack**:*

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity **on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds** that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health²³ [Emphasis added]

From this definition it is clear that, similar to that of *ethnic cleansing*, the concept of crimes against humanity is a blanket term that refers to a set of crimes committed against civilians. There is a significant similarity between *ethnic cleansing* and crimes

²³ Rome Statute of the International Criminal Court (ICC), U.N. GAOR, 53d Sess., Art 7 (1), U.N. Doc. A/CONF. 183/9 (1998), available at http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 2 June 2015) [hereafter: The Rome Statute].

against humanity such as the existence of an “attack”, where the attack is systematic and undertaken with knowledge, and the attack is widespread in its nature.

It is important to note here that there is an accepted judicial link between *ethnic cleansing* and crimes against humanity. Not only international tribunals and judicial bodies but also scholars have identified a significant similarity between these two concepts. This similarity will be further elaborated under section two of this paper in relation to the analysis made about the persecution of Christians in present-day Kenya.

1.3.3 “Ethnic cleansing” and genocide

The core issue here is whether we can categorize *ethnic cleansing* as being another form of genocide. The genocide convention²⁴ defines genocide as the intentional destruction of a group, in whole or in part.²⁵ From this definition we can distinguish three elements to be applied to the specific situation: destruction, specific characteristics of a target group, and intention.

On the face of it, the above three points seem to be common characteristics of both *ethnic cleansing* and genocide. But a closer look reveals that the crucial difference lies in the condition of intent/*mens rea*. Genocide and *ethnic cleansing* are distinct acts specifically because they do not share the same *mens rea*.²⁶ The intent behind acts of *ethnic cleansing* is the forced displacement from a territory and not the intent to destroy the group. Although both crimes could possibly have the same consequences – the group displaced would cease to exist because it has lost all its religious, cultural, economic and political benchmarks – they do not share the same mental element, as genocide requires specific intent (*Dolus Specialis*).

SECTION TWO

2. VIOLENCE AGAINST CHRISTIANS IN KENYA – “ETHNIC CLEANSING”?

In this section various forms of recent violence against Christians in present day Kenya will be examined. Analysis will be made with the facts on the ground in comparison with the concept of *ethnic cleansing* as discussed in the previous sections. The approach adopted in this section is to look at the recent attacks and other forms of hostilities against Christians in Kenya *vis-a-vis* established parameters and norms as developed by international organizations, scholars, judicial bodies and case laws with regards to the concept of *ethnic cleansing* and its constitutive elements.

²⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by the General Assembly of the United Nations (“The Genocide Convention”), Paris, on 9 December 1948.

²⁵ Ibid., Article II.

²⁶ Pégorier, Clotilde, “The Legal Qualification of Ethnic Cleansing”, thesis submitted to the University of Exeter for the degree of Doctor of Philosophy, 17 December 2010. P. 131.

First, we will look into the principle of *ethnic cleansing* with a particular emphasis on how it is manifested in the present day of the 21st century. Following that we will look into the recent violence against Christians in Kenya, the targeted killings of Christians, and its systematic nature and effects beyond killing. The constitutive elements of the concept of *ethnic cleansing* will be discussed in line with the facts in contemporary Kenya.

Derek H. Davis discusses in his article "Confronting Ethnic Cleansing in the Twenty-First Century" the causes of *ethnic cleansing* in the 20th century and beyond.²⁷ He qualified the modern-day *ethnic cleansing* as being an **ideological** *ethnic cleansing* as opposed to a **utilitarian** *ethnic cleansing* which existed during the pre-20th century period.²⁸ Modern-day *ethnic cleansing* tends to be ideological in the sense that the perpetrators proceed for reasons having to do with race, ethnicity, religion, politics, or some other ideological factor.²⁹ In general, modern-day *ethnic cleansing* advocates homogeneity over heterogeneity; likeness over difference; the exercise of institutional power to subdue or eliminate ethnic, racial or religious minorities over embracing them as a part of our common humanity.

There is an established significant similarity between the concepts of *ethnic cleansing* and crimes against humanity.³⁰ This is identified by cases that were presented to ICTY³¹ and also scholars like Andrew Bell-Fialkoff.³² Andrew Bell-Fialkoff defined *ethnic cleansing* as "[...] the expulsion of an undesirable population from a given territory due to religious or ethnic discrimination [...]".³³ The similarity between *ethnic cleansing* and crimes against humanity - specifically that of persecution - lies in the discrimination and specific targeting element. *Ethnic cleansing* is motivated by religious, ethnic, political, ideological and other similar factors. The same discriminatory motives hold true in the case of persecution as it is defined under Article 7 (1) (h) of the Rome statute.³⁴

Therefore, due to the lack of a comprehensive convention that specifically deals with the concept of *ethnic cleansing* and the notable similarity between crimes against humanity and *ethnic cleansing*, we are going to scrutinize the defining elements of crimes against humanity as a matrix for understanding the constitutive elements of the definition of *ethnic cleansing*. These elements are:

- The requirement of an "attack";

²⁷ Davis, Derek H., "Confronting Ethnic Cleansing in the Twenty-First Century", (2000): 693.

²⁸ Ibid.

²⁹ Ibid.

³⁰ See section 1.3 (b) above

³¹ Prosecutor v. Dragan Nikolić ("Sušica Camp"), Case N° IT-94-2-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber I, 20 October 1995, para. 27., Prosecutor v. Mitar Vasiljević ("Višegrad"), Case N° IT-98-32-T, Judgment, Trial Chamber II, 29 November 2002, para. 58. Prosecutor v. Radovan Karadžić and Ratko Mladić, Cases N° IT-95-5-R61 and N° IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rule of Procedures and Evidences, Trial Chamber I, 11 July 1996, p. 979, Paras 2-7.

³² Supra, Note 5, p.110

³³ Ibid.

³⁴ Refer Section 1.3 (b) here above.

- The attack must be "widespread or systematic";
- The attack must be undertaken "with knowledge".

The present writer puts forward his argument that the systematic nature of the widespread attacks against Christians in northeast Kenya does indeed make the crime *ethnic cleansing*!

2.1 Requirement of an "attack"

The definition of the term "attack" was formulated in the context of crimes against humanity and - given the fact that the distinction between *ethnic cleansing* and crimes against humanity is very minimal - it seems reasonable to apply it as a definitional element of *ethnic cleansing*.

"Attack" is a very broad term which is defined as any kind of mistreatment against a civilian population and it is not limited to the use of armed force.³⁵ It is also defined as a course of conduct involving the commission of acts of violence.³⁶ The writer wants to make it clear here that the reference to an "attack" is not solely associated with military or other forms of violent attacks. It can encompass various forms of action or inaction, assaults, mistreatment, ostracism, etc.

As elaborated by the trial chamber in the *Kunarac et al* case, the chamber was convinced that there was an extensive attack by the Serb forces targeting the Muslim civilian population.³⁷ The chamber further enumerated some of the findings that made up the element of an attack. These attacks included the removal of Muslim civilians from their social and professional lives, the curtailment of the freedom to move and to gather, the systematic burning down of Muslim houses and apartments, the rounding up or capturing of Muslim villagers (sometimes including their beating or killing) and the separating and detaining of men and women.³⁸ Hence, it goes without saying that the finding of an attack in the above scenarios is not for the reason that there was a violent military assault but because these actions were aimed at creating pressure within the Muslim civilian population forcing them to leave their villages which, in the long run, has the same effect and result as that of a violent attack.

It is not mandatory that all acts targeting a specific group must be committed during the same attack. They could be committed either before or after the main assault. It is also not mandatory that the attacks be demonstrated through force and violence.³⁹ Hence, due to this broad definition of an "attack", it could be said that an attack should be understood to mean any kind of violent or non-violent action that targets a specific group, and the crime of *ethnic cleansing* could be committed within the context of an attack.

³⁵ Supra Note 19, *Kunarac et al* case, Para. 581.

³⁶ Prosecutor v. Mladen naletilic, aka "tuta" and vinko martinovic, aka "stela", Case No.IT-98-34-T, Trial Judgment, 31 March 2003, Para. 233.

³⁷ Prosecutor v. Dragoljub Kunarac, RadomirKkovic and Zoran Vukovic, Case No T-96-23-T& IT-96-23/1-T, Trial Judgment, 22 February 2001, Para. 570.

³⁸ Ibid., Para. 571 – 573.

³⁹ Ibid.

According to the 2014 International Religious Freedom Report for Kenya of the Bureau of Democracy, Human Rights and Labor of the U.S. Department of State, the total population of Kenya is “estimated at 45 million (July 2014 estimate), of which approximately 82 percent is Christian and 11 percent Muslim.”⁴⁰ Most of the Muslim population lives in the northeast and coastal regions, where religion and ethnicity are often inextricably linked.⁴¹

In recent times high levels of violence and attacks against Christians have taken place in different parts of the country. The northeastern part bordered by Somalia has been the focal point. Christians and their places of worship are the targets of such attacks. The details of such attacks aimed only against Christians and their places of worship are listed under the **Appendix**. What is common among these attacks is that they all targeted Christians only. Christians were attacked for their belief and just for the mere fact of being a Christian. They were singled out from a crowd and shot dead and their places of worships destroyed. According to a World Watch Monitor report, during the period 1 November 2013 - 31 October 2014 there were 119 Christians targeted and killed for faith-related matters and 9 churches attacked in Kenya.⁴² In the period 1 November 2014 – 31 October 2015 the news agency reported 225 Christians killed for faith related matters.⁴³

Islamic radicalism has also increased in recent times in the northeastern and coastal areas of Kenya with the agenda of expelling Christians out of the region. Attacks as listed under the Appendix targeting Christians are not the only forms of violence against them. People that leave Islam and become Christians are also targets in quite a number of attacks. Other non-violent means with the purpose of expelling Christians from the region are also employed. Muslim politicians, representing Muslim dominated constituencies are setting their agenda to eliminate the church from their constituencies – in particular in the northeastern and coastal region.

According to Tadeusz Mazowiecki who was the Special Rapporteur of the Commission for Human Rights, *ethnic cleansing* in Bosnia-Herzegovina implemented against Bosnia Muslims by Serbs included many kinds of violations of human rights and international humanitarian law. He went on to list some of the attacks and crimes committed and it includes (but is not limited to) acts such as harassment, rape, deliberate killings and torturing of leading citizens (i.e. religious and political leaders), discrimination, summary executions, detention, forced displacements, threats, destruction of property, burning and bombing of homes, destruction of cultural and religious buildings.⁴⁴

⁴⁰ <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper> accessed on 26 October 2015.

⁴¹ Ibid.

⁴² Retrieved from <https://www.worldwatchmonitor.org/research/WWL15Violence.pdf>.

⁴³ <https://www.worldwatchmonitor.org/news/4195287/4195294/4227325>, assessed on 29 January 2016.

⁴⁴ Mazowiecki has submitted two series of reports: i) a series of four reports pursuant to the Commission Resolution 1992/S-I/I of 16 August 1992, and ii) a series of six reports pursuant to paragraph 32 of Commission Resolution 1993/7 of 23 February 1993.

Hence, as it has been witnessed in Kenya over the past few years (especially from the year 2012 onwards), especially in the northeastern and coastal region, Christians have been targeted and killed, churches bombed and burned down, discriminatory measures against Christians taken for merely faith related reasons. These patterns of violent and non-violent targeting of Christians qualify as an attack, as indicated here above.

2.2 Requirement of "widespread or systematic" attack

As indicated by the Trial Chamber I in the case of *Naletilic and Martinovic*, for the existence of crimes against humanity, the attack must be "widespread or systematic".⁴⁵ The qualification of the attacks as "widespread" and "systematic" seems to be a quantitative and qualitative one.⁴⁶ However, there is no legal instrument that specifically points out how widespread or systematic an attack needs to be.

The *Kunarac* tribunal Trial Chamber I addressed this issue and stated that the "widespread or systematic" requirement has to be decided on a case by case basis. The Trial Chamber under paragraph 430 specifically stated that:

*"The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon this population, ascertain whether the attack was indeed widespread or systematic."*⁴⁷

As we have seen in the different definitions of *ethnic cleansing* employed by various scholars, the elements of "widespread" and "systematic" have been used and recognized. Furthermore, there are also judicial recognitions of the requirements of "widespread" and "systematic" as applied to the case of *ethnic cleansing*.⁴⁸ Patterns of crimes that are the non-accidental repetition of similar criminal conduct on a regular basis are a common expression of a systematic occurrence.⁴⁹ The systematic element can also be understood from the organized nature of the actions and the improbability of their random occurrence.⁵⁰ The "widespread" characteristic refers to

⁴⁵ Prosecutor v. Mladen Naletilic and Vinko Martinovic ("Tuta and Štela"), Case N° IT-98-34-T, Judgment, Trial Chamber I, 31 March 2003, Para. 236.

⁴⁶ Widespread and systematic are quantitative and qualitative factors employed to define the scale and nature of the attack element of crimes against humanity. See Supra Note 26 p.182.

⁴⁷ Supra, Note 31, Para. 430.

⁴⁸ In the case of Prosecutor v. Radovan Karadzic and Ratko Mladic, Cases N° IT-95-5-R61 and N° IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rule of Procedures and Evidences, Trial Chamber I, 11 July 1996, p. 954 para. 22., it was indicated "a deliberate and systematic line of conduct called 'ethnic cleansing' has been substantiated". The "widespread" element was also recognized under para. 27 in the case of Prosecutor v. Dragan Nikolic ("Sušica Camp"), Case N° IT-94-2-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber I, 20 October 1995: "The implementation of that discriminatory policy, commonly referred to as 'ethnic cleansing', over the region of Vlasenica alone seems to have been so wide-spread as to fall within the Tribunal's jurisdiction under Article 5."

⁴⁹ Supra, Note 31, Para. 94.

⁵⁰ Supra, Note 39.

the scale of the acts perpetrated and to the number of victims.⁵¹ An attack may be widespread or committed on a large scale by the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.⁵²

With regards to *ethnic cleansing*, the requirement of "widespread or systematic" has already found precedent in the case law.⁵³ In the *Vasiljević* case it was stated that

*[...] the attack took many forms, starting with the Serb take-over of the town and the systematic and large-scale criminal campaign of murders, rapes and mistreatment of the non-Serb population of this municipality, particularly the Muslims, which eventually culminated in one of the most comprehensive and ruthless campaigns of ethnic cleansing in the Bosnian conflict. [...].*⁵⁴

In the case of Kenya, we will take the two major recent attacks which were targeted against Christians as an example. One is the Westgate Mall shooting on 21 September 2013 which claimed the lives of 67 people and left over 175 people injured.⁵⁵ Al-Shabaab claimed responsibility for the attack and the gunmen inside the mall were heard shouting "Muslims, get out of here!" which made it clear that their targets were non-Muslims.⁵⁶ According to one of the survivors of this horror, people were asked to name the mother of the prophet and/or cite some scripts from the Quran. Those who were not able to do so were shot dead.⁵⁷ The second major attack, a relatively recent and extremely horrific one, occurred on 2 April 2015 at Garissa University in the northeastern part of Kenya. At least 147 people (mostly students) were killed and 79 or more were injured by the attack.⁵⁸ According to witnesses, the militants singled out Christians and shot them.⁵⁹ Al-Shabaab claimed responsibility for this attack as well.

Beside the list of attacks in the Appendix, the total number of fatalities in these two attacks **alone** is more than 200 non-Muslim individuals.

The nature of all these attacks is atrocious and they bear the same pattern. This mass killing of Christians has reached a level that has never been seen before in Kenya.

⁵¹ Prosecutor v. Tihomir Blaškić ("Lašva Valley"), Case N° IT-95-14-T, Judgment, Trial Chamber I, 3rd March 2000, para. 244., Para. 206.

⁵² Prosecutor v. Dario Kordić and Mario Čerkez ("Lašva Valley"), Case N° IT-95-14/2-T, Judgment, Trial Chamber III, 26 February 2001, para. 179.

⁵³ Prosecutor v. Mitar Vasiljević ("Višegrad"), Case N° IT-98-32-T, Judgment, Trial Chamber II, 29 November 2002.

⁵⁴ Ibid, Para. 58.

⁵⁵ Terror in Westgate mall: the full story of the attacks that devastated Kenya, the guardian, (4 October 2013) <http://www.theguardian.com/world/interactive/2013/oct/04/westgate-mall-attacks-kenya-terror#undefined>.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Kenya attack: 147 dead in Garissa University assault, 3 April 2015, <http://www.bbc.com/news/world-africa-32169080>.

⁵⁹ Ibid.

These are not random attacks but well-planned and organized mass killings. Murdering Christians in such high numbers is being witnessed in different parts of the country and it is clear that these attacks are designed systematically and executed with a view to killing a large number of Christians. Attacks of this nature are being witnessed on a regular basis. This has instilled fear among the Christians and whenever they gather for worship, the hiring of private security or asking police to escort them has become the new trend. As a consequence of these attacks, large numbers of Christians are frightened that they could be the next target. They are becoming more cautious than ever and nervous of what is going on around them. This is all the result of the attacks by internal/external forces and pressure that is being exerted on Christians by the local authorities.

2.3 Requirement that the attack must be undertaken “with knowledge”

As has been indicated above, *ethnic cleansing* is not a legal concept and therefore the specific “knowledge” element can only be derived from studying the underlying actions. For *ethnic cleansing*, as a close relative to crimes against humanity, the acts committed must be carried out “as part of a widespread or systematic attack directed against any civilian population (which in the case of *ethnic cleansing* would be against a specific ethnic or religious group), with knowledge of the attack.”⁶⁰

To have knowledge, the perpetrator does not necessarily have to know he acted inhumanely,⁶¹ but he “must know of the broader context in which his act occurred.”⁶² The Appellate Chamber in the case of *Tadic* also reaffirmed the Trial Chamber's position stating “The Trial Chamber correctly recognized that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related.”

In the *Blaškić* case,⁶³ it was indicated that knowledge is demonstrated when the perpetrator “knowingly took the risk of participating in the implementation of the ideology, plan or policy.”⁶⁴ The perpetrator thus does not necessarily need to support the policy or plan behind the acts committed: he or she needs only be responsible for actual implementation, and be aware of his or her involvement in a scheme that will cause great suffering to the targeted individuals.

In the Kenyan case, as indicated above, many of the violent attacks that claimed the lives of hundreds of Christians were undertaken by the militant group al-Shabaab. The policy adopted by al-Shabaab is the removal of Christians from the region and the attackers involved in the actual implementation have been heard clearly stating

⁶⁰ Supra Note 23, Rome Statute, Art 7 (1).

⁶¹ Prosecutor v. Duško Tadić (“Prijeedor”), Case N° IT-94-1-T, Judgment, Trial Chamber II, 7 May 1997, Para. 656 - 657.

⁶² Ibid.

⁶³ Prosecutor v. Tihomir Blaškić (“Lašva Valley”), Case N° IT-95-14-T, Judgment, Trial Chamber I, 3 March 2000.

⁶⁴ Ibid, Para. 255.

what their plan was. Singling out Christians from a crowd, shouting out before the attack for Muslims to leave the scene and other similar actions all make it clear that the attackers were fully aware of their involvement in the policy of "cleansing" the region from Christians.

SECTION THREE

3. CONCLUSION

At present, there is a widespread fear in Kenya among Christians - a fear of being targeted and attacked, which breeds hatred towards the Muslims. From a case study at St. Polycarp Anglican Church, one of the respondents has described the status quo after several attacks that targeted Christians as follows:

"When this thing happened [referring to the attacks], I hated them. I didn't want to see anyone of them. Even in the matatu (public transport vehicles) when I see they have come in I get out. I feared them [...] These people they don't like Christians. Even the (common) Muslims comment badly about Christians. They don't see us as human beings. (Respondent E)."⁶⁵ (Emphasis added)

Another respondent narrated how her son also fears his classmates who are Muslims to a point of sometimes avoiding playing with them.⁶⁶ Most of the attacks carried out against Christians as listed in the Appendix have been undertaken by the radical Islamic group al-Shabaab which is based right next-door to Kenya in Somalia. The policy adopted by al-Shabaab, as voiced on various occasions, is the killing and terrorizing of non-Muslims.

In one of the recent attacks at the Garissa University, the militants made a claim on the northeastern territory of Kenya saying non-Muslims should vacate what they described as "colonized land". This is not a statement without a goal. This is a clear policy adopted by the group aimed at the removal of Christians from the region. Creating fear among Christians is the product of the attacks. The attacks have instilled fear among the Christian community and leaving the area before further attacks take place seems to be the only option left for the Christians. Large numbers have fled from the northeastern part of the country fearing for their lives, and civil servants and government employees are not an exception. Recently an estimated 2,000 teachers have fled from this area due to the fear of another round of deadly attacks.⁶⁷ This has negatively affected the educational system in the area: schools

⁶⁵ The response of the church in Nairobi to the Al-Shabaab terror attacks: A case study of St. Polycarp Anglican Church Juja Road Pangani and God's House of Miracles International Nairobi. Paul Atina Omayio, p.80.

⁶⁶ Ibid., p.81.

⁶⁷ Kenya: Education crisis looms near border with Somalia as 2,000 teachers flee due to al-Shabaab attacks, 10 June 2015, International Business Times, <http://www.ibtimes.co.uk/kenya-education-crisis-looms-near-border-somalia-2000-teachers-flee-due-al-shabaab-attacks-1505262>.

have been closed down and only students from wealthy families are able to continue their education after moving to other areas.⁶⁸

Being detected with any kind of religious materials by radicals has become life-threatening. There was an incident in July 2014 whereby a 12 year old carrying a bible was murdered by radical Muslims.⁶⁹ As a "solution", people are trying to avoid being found in possession of any form of religious material. These are only a few examples of the forms of fear that the attacks have created among the Christian community. In a nut shell, Christians as a community and/or as individuals are facing various forms of pressure in their daily lives.

It is clear that these are the effects of a pattern of systematically devised attacks against Christians. They are deliberate actions with a goal – namely to terrorize and coerce Christians into leaving the area for fear of further attacks. Considering the nature of these attacks, the level of violence and their effect beyond the killings, it is a clear case of *ethnic cleansing* in violation of international law.

⁶⁸ Ibid.

⁶⁹ Listed under "Islamic Terror Attacks on Christians (since 9/11)", TROP, accessed on 21 June 2015: <http://www.thereligionofpeace.com/Pages/ChristianAttacks.htm>.

Appendix - Selection of recent major attacks against Christians in Kenya

- **2015, December:** Two people were shot dead and three others injured when gunmen, believed to be part of al-Shabaab, attacked a bus travelling from the town of Mandera to Nairobi. (“Kenyan Muslims shield Christians in Mandera bus attack”, BBC News, 21 December 2015, <http://www.bbc.com/news/world-africa-35151967>.)
- **2015, July:** Al-Shabaab militants killed at least 14 civilians and wounded more than 11 (mainly Christians) in Mandera. (“Attackers kill 14 in Mandera; al-Shabaab claims responsibility”, CNN, 7 July 2015, <http://www.cnn.com/2015/07/07/africa/kenya-attack/>.)
- **2015, April:** At least 147 people, mostly students, were killed in an assault by al-Shabaab militants on a university in Garissa in northeastern Kenya. According to an eye-witness, the attackers singled out Christians and shot them. (“Kenya attack: 147 dead in Garissa University assault”, BBC News, 3 April 2015, <http://www.bbc.com/news/world-africa-32169080>.)
- **2014, December:** Al-Shabaab militants raided a quarry in Kenya, separated non-Muslim workers from their Muslim counterparts and executed them. 36 people were killed. (“Al-Shabaab separates non-Muslims from Muslims, kills 36 in quarry attack”, CNN, 2 December 2014, <http://www.cnn.com/2014/12/02/world/africa/kenya-attack/>.)
- **2014, November:** Near Mandera, Kenya's border-region with Somalia in the north-east, members of al-Shabaab hijacked a bus and killed 28 non-Muslims after singling them out from the rest of the passengers. (“Al-Shabaab massacred 28 Kenyan bus passengers”, Aljazeera, 23 November 2014, <http://www.aljazeera.com/news/africa/2014/11/killed-kenya-bus-attack-201411226446296802.html>.)
- **2014, June:** Islamists identified and killed 48 Christians in the town of Mpeketoni. (“‘My husband told them we were Christians and they shot him in the head’: How al-Shabaab militia went from door to door killing non-Muslims as Kenyan village watched World Cup”, Daily Mail Online, 16 June 2014, <http://www.dailymail.co.uk/news/article-2658751/Red-Cross-34-die-militant-attack-Kenya-town.html#ixzz3yiyngAEY>.)
- **2013, September:** A coordinated slaughter at the Westgate mall in Nairobi which had been planned for months; a small band of al-Shabaab militants, perhaps as few as eight, killed at least 67 people in what became an 80-hour siege. An eyewitness stated that the attackers were picking their targets and shouting “Muslim get out of here!”; Christians were the target. (“Terror in Westgate mall: the full story of the attacks that devastated Kenya”, The Guardian, 4 October

2013, <http://www.theguardian.com/world/interactive/2013/oct/04/westgate-mall-attacks-kenya-terror#undefined>.)

- **2013, June:** Seven people were injured when attackers threw a grenade into a group of people gathered for prayer and worship outside a church in Mombasa. (“At least 7 injured in crusade blast in Kenya’s Mombasa”, XINHUA, 6 June 2013, http://news.xinhuanet.com/english/africa/2013-06/10/c_132444861.htm.)
- **2012, September:** The Sunday school of St Polycarp's church in Nairobi was attacked with grenades. According to newspaper reports, one child was killed. Kenyan police blamed the attack on al-Shabaab sympathizers. (“Kenyan children hurt in church grenade attack”, BBC News, 30 September 2012, <http://www.bbc.co.uk/news/world-africa-19776747>.)
- **2012, July:** At the town of Garissa, on Sunday, 1 July 2012, 15 people were killed and 40 people severely wounded as a result of two "coordinated" attacks at a church. Gunmen shot two policemen outside one of the churches, and grenades were then thrown inside. According to police, the congregation panicked and as the Christians rushed to escape, gunmen fired on them. At least 10 people died. In the second - apparently coordinated attack at a Catholic church, two grenades were thrown inside the church. One failed to go off, but police say three people were injured by the other one. (“Kenya church attacks ‘kill 15’ in Garissa”, BBC News, 1 July 2012, <http://www.bbc.com/news/world-18662975>.)
- **2012, April:** A grenade was thrown into a church in Nairobi which killed one person and injured 15 others. (“Nairobi church struck in grenade attack”, BBC News, 29 April 2012, <http://www.bbc.com/news/world-africa-17885476>.)