

Tom Lantos Human Rights Commission

Hearing
Nagorno-Karabakh: update

September 6, 2023 - 1:00 p.m.
2360 Rayburn House Office Building

Statement of Luis Moreno Ocampo

Thank you co-chairs Smith and McGovern, as well as other members of the Tom Lantos Human Rights Commission and your staff, for having this important hearing today on the situation in Nagorno-Karabakh.

I appreciate the invitation to provide testimony before the Commission.

I will comment first on the US's international obligation to prevent genocide against Armenians as a state party of the Genocide Convention.

The International Court of Justice ruled that state parties should "not wait until the perpetration of Genocide commences." Prevention should be the priority. The genocide should be stopped while the 120,000 Armenians living in Nagorno-Karabakh are still alive, and the harm limited.

The first step toward this prevention is to *recognize* the genocidal situation. It is not necessary to expect a Court decision to act. To prevent genocide, the standard of evidence of "reasonable basis to believe" should suffice.

Secondly, I will analyze how the US could avoid being considered an accomplice of genocide. Any US assistance to President Aliyev or Azerbaijan, to "facilitate" the

blockade of the Lachin Corridor or other forms of genocide should be considered complicity in genocide.

To facilitate prevention and avoid the risk of complicity, this Commission shall alert the Executive branch that the blockade of the Lachin Corridor by Azerbaijan security forces is an ongoing genocide against 120,000 Armenians under Article II c) of the Genocide Convention and a clear risk that will cause bodily and mental harm against the same group of Armenians, as prescribed by the Convention Article II, b).

There is an opportunity to stop genocide II c) and to prevent II b).

The duty to prevent does not require the US to intervene militarily in Azerbaijan but rather to use all the available means as the circumstances permit to have a deterrent effect on those suspected of executing genocide.

I will suggest a simple measure to stop genocide immediately and prevent future harm. The US must make publicly clear that it does not allow, and will not allow, explicitly or implicitly, genocide. The US should openly inform the Azerbaijan government that without immediate and unconditional removal of the Lachin Corridor blockade, the US would consider Azerbaijan to be committing genocide.

1. The duty to prevent and complicity under the Genocide Convention.

By the jurisprudence of the International Court of Justice, the duty to prevent arises at the instant that a state party like the US “learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.” The violation of the duty of prevent genocide is an omission to act when there is a “serious danger that acts of genocide would be committed.”

In addition, if the US is fully aware that “genocide was about to be committed or was underway” and provides aid or assistance to Azerbaijan, it could be an accomplice of genocide. Complicity on genocide “requires that some positive action has been taking to furnish aid or assistance to the perpetrators of genocide.”

The US doesn't need to have the intention to destroy the group of Armenians living in Nagorno-Karabakh to be an accomplice of genocide. It would be enough for the US to

assist, knowing that Azerbaijan has such intention. “An accomplice must have given support in perpetrating the genocide with full knowledge of the facts.”

Any US assistance to President Aliyev and Azerbaijan to “enable or facilitate” the blockade of the Lachin Corridor or other form of genocide should be considered complicity in genocide. “Complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide.” The assistance could include the US pressuring Armenia to accept the genocide as the cost of negotiation with Azerbaijan or help Azerbaijan deny the genocide.

2. The blockade of the Lachin Corridor as genocide under Article II c) of the Genocide Convention.

“Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” is genocide under Article II, c) of the Genocide Convention and has already been committed.

There is a reasonable basis to believe that the blockade of the Lachin Corridor constitutes an ongoing genocide against 120,000 Armenians living in Nagorno-Karabakh.

There is no mass killing in Nagorno-Karabakh, but this type of genocide does not require actual destruction. The crime is executed when the conditions planned for physical destruction are created.

a) When did genocide started?

The starting moment of genocide under Article II c) could be established on December 12, 2022, when individuals without formal ties with the Azerbaijan state apparatus blocked the Lachin Corridor, affecting the provision of food, medicines, oil, and all other essentials to Nagorno-Karabakh.

A more conservative approach will be to consider that the genocide started on April 23, 2023, when Azerbaijan installed a checkpoint over the Hakari River bridge using security forces. After that moment it is unequivocal that President Aliyev

authorized to block the Lachin corridor knowing the consequences for the lives of the Armenians living in Nagorno-Karabakh.

Since June 15, 2023, Azerbaijan security forces completely sealed off the Lachin Corridor, the lifeline of Nagorno-Karabakh. There should be no doubt that from that moment Azerbaijan is “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.”

b) Material elements

The material element of genocide could be proved without further investigations on the ground. The International Court of Justice decision and the statements by the International Committee of the Red Cross (ICRC) are enough evidence at this stage.

The International Court of Justice assessed the Lachin Corridor blockade at the request of Armenia in a case against Azerbaijan for alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination.

The Court, after hearing Armenia and Azerbaijan representatives, considered “plausible” that the December 2022 Lachin corridor blockade produced “a real and imminent risk” to the “health and life” of an ethnic group, “the Armenians living in Nagorno-Karabakh.”

Consequently, on February 22, 2023, the International Court of Justice unanimously ordered Azerbaijan to “take all measures at its disposal to ensure unimpeded movement of persons, vehicles, and cargo along the Lachin Corridor in both directions.”¹

Instead of complying with the International Court of Justice’s binding order, on April 23, 2023, Azerbaijan installed a checkpoint over the Hakari River bridge using security forces.

¹ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Order on Provisional Measures) February 22, 2023, paras 62, 67. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Order on Request for Modification of Provisional Measures) July 6, 2023, para 30.

Since June 2023, Azerbaijan security forces doubled down, strengthening the blockade, and sealing Nagorno-Karabakh off totally, preventing even the transfer of any food, medical supplies, and other life essentials.

Since then, the International Committee of the Red Cross (ICRC) and Russian peacekeeping forces have been banned from delivering humanitarian relief.

The International Committee of the Red Cross (ICRC) said on July 26, 2023, that despite their “persistent efforts,” they are currently unable “to bring humanitarian assistance to the civilian population through the Lachin corridor or through any other routes, including Aghdam.”

Analyzing the Srebrenica case, the International Court of Justice ruled that “deprivation of food, medical care, shelter or clothing” constitutes Genocide within the meaning of Article II(c) of the Genocide Convention.

According to the “Elements of the Crimes” adopted by the International Criminal Court, the term “conditions of life” calculated to bring about the physical destruction of a group “may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”²

c) Genocidal intention.

How to prove the intention to destroy a group required by the Genocide Convention?

The International Court of Justice did not analyze Azerbaijan or President Aliyev genocidal intention because the matter under consideration in the case presented by Armenia is the International Convention on the Elimination of All Forms of Racial Discrimination.

The International Court of Justice considered that the duty of prevention requires to act on those “reasonably suspected of harboring specific intent (*dolus specialis*).” Therefore, the standard of evidence to trigger a state party obligation to prevent a

² ICC Elements of Crimes (2013) art 6(c)(4), fn 4.

possible genocide is lower than the standard “beyond any doubt” required to establish individual criminal responsibility for genocide. The responsibility of the State could be established quite separately from the question of individual criminal responsibility.

But even in criminal cases, the International Criminal Tribunals for Rwanda and for the former Yugoslavia considered that intent “must usually be inferred.”³Therefore, Azerbaijan and President Aliyev's genocidal intention would be deduced “from relevant facts and circumstances.”⁴

There is a context of hatred and racist comments by Azerbaijan members of the government that should be taken into consideration. In September 2022, the UN Committee on the Elimination of Racial Discrimination articulated deep concern over Azerbaijan government officials expressing hatred and racist comments against persons of Armenian origin.

The following specific facts and circumstances of the Lachin Corridor blockade permit the deduction of President Aliyev's intention to destroy the Armenians living in Nagorno-Karabakh.

- 1) President Aliyev voluntarily authorized Azerbaijan security forces to block the Lachin Corridor.
- 2) President Aliyev knows the consequences of the blockade. Having been placed on notice by the International Court of Justice regarding the “real and imminent risk” to the “health and life” of an ethnic group, “the Armenians living in Nagorno-Karabakh” produced by the blockade of the Lachin Corridor by non-state actors, the Azerbaijan President authorized security forces to consolidate the blockade establishing a checkpoint with cement blocks.

³ *Prosecutor v. Gacumbitsi* (Appeal Judgment) ICTR-2001-64-A (July 7, 2006) para 40.

⁴ *Prosecutor v. Rutaganda* (Trial Judgment) ICTR-97-20-T (December 6, 1999) para 525.

- 3) President Aliyev wants the consequence of the blockade. He authorized security forces to seal off the Lachin Corridor worsening the conditions. Genocidal intent refers to the person's state of mind at the time of committing the crime. ⁵
- 4) President Aliyev wants the consequence of the blockade. He willingly refused to comply the International Court of Justice's binding orders.
- 5) President Aliyev wants the consequence of the blockade. He ignored calls from the UN Secretary-General, the France President, and the US Secretary of State to comply with the Court's order.

To safeguard my accuracy and impartiality, before producing my August 7, 2023, expert analysis, I wrote to President Aliyev explaining the consequences of the blockade and offering him an opportunity to clarify his position. My letter also put President Aliyev on notice of the commission of genocide. I received no answer, and the blockade continued.

President Aliyev has voluntarily, knowingly, and willingly blockaded the Lachin Corridor, "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction."

President Aliyev, in a fair trial, would have the opportunity to provide a different interpretation of the indicia. In the meantime, there is a reasonable basis to believe that he has the intention to destroy the group of Armenians living in Nagorno-Karabakh.

The physical or biological destruction of a group is not limited only to the ultimate death of group members. Indeed, the destruction of the group could also be conceived through the purposeful eradication of its culture and identity, resulting in the extinction of the group as an entity distinct from the remainder of the community. The physical or biological destruction of the group, therefore, might also encompass other acts distinct from those causing death, extending, for instance, to forced displacement

⁵ <https://www.icj.org/wp-content/uploads/2018/08/Universal-Genocide-Q-A-FINAL-Advocacy-analysis-brief-2018-ENG.pdf>

or sexual violence, where the acts lead to the material destruction of the group, since the group ceases to exist as a group.⁶

In the words of the International Court of Justice, President Aliyev denies “the right of existence of entire human groups.”⁷

3. **The risk of genocide under Article II b) of the Genocide Convention.**

The Lachin Corridor blockade could cause Armenians living in Nagorno-Karabakh “serious bodily or mental harm,” a different genocidal method established by Art II b).

Juan Mendez, the first UN Adviser on Genocide, issued a report this month determining that there were “early warnings” of the commission of this type of genocide. Indeed, there are already reported cases of bodily and mental harm. Starvation is the invisible genocide weapon.

On February 1, 2023, the International Association of Genocide Scholars Executive and Advisory Boards stated: “Significant genocide risk factors exist in the Nagorno-Karabakh situation concerning the Armenian population.”⁸

On February 24, 2023, Genocide Watch issued a Genocide Emergency for Azerbaijan’s ongoing blockade against the Armenian populated region of Artsakh.⁹

On June 22, 2023, the Lemkin Institute for Genocide prevention issued a Red Flag Alert for Genocide,¹⁰

⁶ <https://www.icj.org/wp-content/uploads/2018/08/Universal-Genocide-Q-A-FINAL-Advocacy-analysis-brief-2018-ENG.pdf>

⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* (1951) ICJ Reports, p.23.

⁸ Available at: <https://genocidescholars.org/wp-content/uploads/2023/02/IAGS-EB-AB-Statement-on-Azeri-Blockade-of-Artsakh.pdf>.

⁹ <https://www.genocidewatch.com/single-post/genocide-emergency-azerbaijan-s-blockade-of-artsakh>

¹⁰ see Lemkin Institute for Genocide, ‘Azerbaijan Update #8’ (June 22, 2023), https://www.lemkininstitute.com/_files/ugd/391abe_2bdcf33e1e0d4acf95e82292efed03c8.pdf.