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RUSSIAN AGGRESSION IN UKRAINE: VIOLATION OF INTERNATIONAL LAW, COVENANTS COURT DECISIONS (HOLODOMOR — GENOCIDE, WAR CRIMES & CRIMES AGAINST HUMANITY)

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Abstract

This article examines the legal framework surrounding the crime of genocide, tracing its evolution from the post-World War II era to modern international tribunals. It explores the role of the Nuremberg Tribunal in the formation of international humanitarian law and the subsequent development of the 1948 Genocide Convention. The application of the Convention's definition of genocide to historical events, particularly the Holodomor of 1932–33 in Ukraine, is also studied.

The article scrutinizes Russia's annexation of Crimea and its full-scale aggression against Ukraine, highlighting accusations of war crimes, crimes against humanity, and genocide. Ukraine's recourse to international legal mechanisms, such as the International Court of Justice and the International Criminal Court, in pursuit of justice for these crimes is considered. The discussion underscores the urgent need for international action to end the conflict in Ukraine and uphold the principles of justice, security, and freedom on a global scale.

Keywords*: genocide, Holodomor, war crimes, crimes against humanity, international humanitarian law, Genocide Convention, Nuremberg Tribunal, International Court of Justice, International Criminal Court.*

РОСІЙСЬКА АГРЕСІЯ В УКРАЇНІ: ПОРУШЕННЯ МІЖНАРОДНОГО ПРАВА, РІШЕННЯ СУДІВ (ГОЛОДОМОР — ГЕНОЦИД, ВІЙСЬКОВІ ЗЛОЧИНИ ТА ЗЛОЧИНИ ПРОТИ ЛЮДСТВА)

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Анотація

У цій статті розглядається правова база, що оточує злочин геноциду, простежується її еволюція від епохи після Другої світової війни до сучасних міжнародних трибуналів. Досліджується роль Нюрнберзького трибуналу у формуванні міжнародного

гуманітарного права та подальшому розвитку Конвенції про геноцид 1948 року. Також досліджується застосування визначення геноциду, що міститься в Конвенції, до історичних подій, зокрема до Голодомору 1932–33 років в Україні.

У статті ретельно аналізується анексія Криму Росією та її повномасштабна агресія проти України, висвітлюються звинувачення у воєнних злочинах, злочинах проти людяності та геноциді. Розглядається звернення України до міжнародних правових механізмів, таких як Міжнародний суд ООН та Міжнародний кримінальний суд, у пошуках справедливості за ці злочини. Дискусія підкреслює нагальну потребу в міжнародних діях, спрямованих на припинення конфлікту в Україні та підтримку принципів справедливості, безпеки і свободи в глобальному масштабі.

***Ключові слова**: геноцид, Голодомор, воєнні злочини, злочини проти людяності, міжнародне гуманітарне право, Конвенція про геноцид, Нюрнберзький трибунал, Міжнародний Суд ООН, Міжнародний Кримінальний Суд.*

The crime of genocide has become a familiar charge in both international and domestic tribunals over the last seventy-eight years, originating at the end of the Second World War. The International Military Tribunal at Nuremberg ("Nuremberg Tribunal") provided the framework for much of today's international humanitarian law and international tribunals. World War II "marked the transition of international law from a system dedicated to state sovereignty to one also devoted to the protection of human dignity."[1] The Nuremberg Tribunal, which was created in 1945, was the first international tribunal before which individuals were found criminally liable for violations of international humanitarian law or the law of war.[2] Significantly, the Charter of the Nuremberg Tribunal also provided the first formal definition of crimes against humanity: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the Jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."[3]

The final Judgment of the Nuremberg Tribunal, however, did not use the term "genocide." What the indictment framed as genocide — the extermination of racial and national groups — the judgment "conceptualized ... as a distinct and aggravated form of murder," but not as an offense separate from war crimes or crimes against humanity. The success of the Nuremberg Tribunal paved the way for the

[1] David J. Bederman & Christopher J. Borgen & David A. Martin, International Law: A Handbook for Judges 87 (The American Society of International Law, Foundation Press 2001).

[2] International Law and Litigation for U.S. Judges: Federal Judicial Center 13 (The American Society of International Law).

[3] *See* Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 Ariz. J. Int'l & Comp. L. 415, 425 (1998).

Genocide Convention of 1948, the necessity of which was emphasized by the Nuremberg Judgment.

The U.N. General Assembly unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention")[4] on December 9, 1948 in Paris, France, with the purpose of preventing, criminalizing and punishing acts of genocide.[5] The Genocide Convention entered into force on January 12, 1951. It was ratified by the Presidium of the Supreme Council of the USSR on March 18, 1954, with the Ukrainian SSR ratifying on November 15, 1954, and the Russian SSR on May 3, 1954. Article 1 of the Convention addresses States responsibility, confirming that Contracting Parties will undertake to prevent and punish genocide, whether committed in time of peace or war. Article 2 of the Convention specifically defines genocide, as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

In international law, genocide is thus comprised of both a physical act, and a mental element. To establish the mental element, a party must show that the prohibited act is done with the intent (*dolus specialis*) to destroy members of a protected group, solely because of their affiliation with that group. This does not require evidence of motive or premeditation, but does require the evidence to be "fully conclusive."[6] Additionally, the Convention's enumeration of physical acts constituting genocide in Article 2 is intended to be restrictive rather than illustrative, in contrast to the broader conception of genocide advanced by Dr. Raphael Lemkin, the legal advisor to Robert Jackson, the U.S. Chief Prosecutor for the Nuremberg trials, and early advocate for a convention prohibiting genocide. Dr. Lemkin favored an increased scope of protection for racial, national, and religious groups whose cultural, political, social, or physical existence were imperiled.[7] The Convention does succeed, however, in providing expansive categories of criminal liability; these include genocide, conspiracy to commit genocide, direct and

[4] U.N. GAOR, 3rd Sess., Part I, at 174, U.N. Doc. A/810 (1948).

[5] Lippman, *supra* note 3, at 452.

[6] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro); Summary of the Judgment of 26 February 2007, No. 2007/2, at 11, *available at* www.icj-cij.org. *See also* Lippman, *supra* note 4, at 454–55.

[7] Lippman, *supra* note 3, at 424.

public incitement to genocide, attempted genocide, and complicity in genocide.[8] Dr. Lemkin is also credited with coining the term "genocide" from the Greek prefix *genos* meaning race and Latin suffix *cide* meaning killing.

Another important development in prosecution of genocide was the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity adopted by the U.N. on November 26, 1968.[9] The Convention on Statutory Limitations emphasizes and expands the scope of prosecutions for genocide under the Genocide Convention by eliminating any domestic barriers to such prosecutions. The Ukrainian SSR ratified the agreement on June 19, 1969, and the Russian SSR on April 22, 1969. The Council of Europe introduced the European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes in 1974.

The Convention on Statutory Limitations, taken together with the *jus cogens* ("compelling law") status of the prohibition of genocide, eliminates the argument that acts of genocide committed prior to the Genocide Convention are not subject to prosecution. The prohibition of genocide is now universally regarded as *jus cogens* (compelling law of preemptory nature), and the duty to punish genocide as an obligation *erga omnes* (against all — states and individuals).[10] Persons charged with genocide cannot "credibly contend that their prosecution for the contravention of a primary and pre-existing norm of international law constitutes retroactive punishment."[11] Thus, the Convention on Statutory Limitations eliminates any potential domestic restrictions on the prosecution of persons for acts of genocide as a crime against humanity.

The Genocide Convention was examined by the International Court of Justice ("ICJ") at the Hague when Bosnia and Herzegovina brought suit against Serbia and Montenegro alleging violations of the Genocide Convention.[12] The ICJ issued its opinion of February 26, 2007.[13] The decision is significant in that it recognized an affirmative obligation to prevent genocide, thus showing that state responsibility is a corollary to a State's obligation to prevent genocide under Article 1. The Court articulated that "responsibility is not incurred simply because genocide occurs, but rather if the State manifestly failed to take all measures to prevent genocide which

[8] Lippman, *supra* note 3, at 458.

[9] U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968).

[10] *See* Orna Ben-Naftali & Miri Sharon, *What the ICJ Did Not Say About the Duty To Punish Genocide*, 5 J. Int'l Crim. Just. 859, 869 (2007).

[11] Lippman, *supra* note 3, at 471–72.

[12] Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro); Summary of the Judgment of 26 Feb. 2007, No. 2007/2, *available at* www.icj-cij.org.

[13] International Court of Justice, Press Release 2007/8, February 26, 2007, *available at* www.icj.cij.org.

were within its power, and which might have contributed to preventing genocide."[14] The Court found by a fourteen to one vote that Serbia had violated its obligation to prevent genocide, but stated that the acts of those who committed the genocide at Srebrenica could not be attributed to Serbia.[15]

In light of the evolution of both the definition of "genocide" under the Genocide Convention and prosecutions for acts of genocide before various international and domestic tribunals, the Famine-Holodomor of 1932–33 in Ukraine meets the international definition of genocide, and should be recognized as such.[16]

The Judicial Branch in Ukraine applied the U.N. Convention's genocide definition to the Holodomor. On January 13, 2010, the Appellate Court of Kyiv deliberated and issued a decision concerning a criminal case filed by the Secret Service of Ukraine (SBU) per (Article I (1) Criminal Code of Procedure) charging Stalin, Molotov, Kaganovych, Postushev, Kosior, Chubar and Khatevych with Genocide in Ukraine in 1932–33.[17] Thanks to the opening of the archives of the SBU, many documents that had been previously unavailable were now present to establish the Genocide Convention's intent requirement. The Court ruled that the mass extermination by famine of millions of Ukrainians, orchestrated by the Soviet totalitarian regime, in fact, was genocide in accordance with the U.N. Convention on the Prevention and Punishment of the Crime of Genocide (1948), and the U.N. Convention of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968). The individuals charged were found guilty of the crime of genocide, however, since they were all deceased and therefore, in accordance with Article 6 (8.1) of the Criminal Code of Procedure, further prosecution against them was moot. In accordance with the documents submitted to the Court of Appeals, the Court determined the cumulative losses of Ukraine amounted to 10,063,000 Ukrainians as a result of the Holodomor-Genocide committed by Stalin in 1932–1933.

Now, concerning Ukraine's present endurance against Russian aggression...

Unfortunately, the successful Revolution of Dignity in 2014 — which forced President Yanukovych to flee the country — also had negative implications for Ukraine in that the Russian government began to retaliate against it cruelly and intensively for striving towards the West. This marked the start of the process that is presently before us.

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[14] International Court of Justice, Press Release 2007/8, February 26, 2007, *available at* www.icj.cij.org.

[15] *Id.*

[16] "International Legal Responsibility for the Genocide: Justice in the Courts" Bohdan A. Futey, conference materials, the Holodomor, Sept. 25–26, 2008, Kyiv Ukraine.

[17] *SBU v. Stalin et al.*, Appellate Court of Kyiv (January 13, 2010).

Russian soldiers (so-called "little green men") moved to occupy and control Crimea and Russian political operatives worked on its annexation to the Russian Federation by designing and conducting a purported referendum, to be supervised by columns of tanks and the FSB.

The Crimean referendum to join the Russian Federation, held on March 16, 2014, violated Ukraine's Constitution and domestic laws thereunder, the Constitution of the Republic of Crimea, and bedrock principles of international law. Countless international organizations and most countries around the world have already concluded that under no circumstances is the Crimean referendum legitimate. Therefore, its results have not been accepted or recognized by the vast majority of powers constituting the international community. Most notably, it bears reminding that, under the 1994 Budapest Memorandum on Security Assurances, the United States, Great Britain, and the Russian Federation have undertaken a commitment to provide guarantees against threats or use of force against the territorial integrity and political independence of Ukraine, in exchange for Ukraine's accession to the Treaty on the Non-Proliferation of nuclear weapons and giving up the world's third largest nuclear arsenal. Ukraine has complied with its end of the agreement, but the other signatories have failed to adhere to their obligations.

After the annexation of Crimea, Russian soldiers extensively helped so-called separatists violently seize control of large areas in the Donbas, a region in eastern Ukraine straddling Luhansk and Donetsk oblasts. This process lasted several years. In February of 2022, the Russian Federation recognized these illegally occupied territories as separate republics, again, in flagrant violation of international law.

Then, on February 24, 2022, the Armed Forces of the Russian Federation, under orders of President Putin, commenced its full-scale invasion of Ukraine, aided by the Wagner Group and other paramilitaries. I will not discuss the atrocities being committed in macabre detail, these were covered in newspapers and on TV. What the Russians have done at Bucha, Mariupol, Irpin, and the Kakhovka Dam, amounts to numerous, classic examples of such atrocities, with those atrocities amounting to war crimes, crimes against humanity, and genocide.

Ukraine's complaint, filed with the International Court of Justice (ICJ) at the Hague, an institution of the United Nations, was partially granted on March 16, 2022. The ruling clearly and unequivocally ordered the Russian Federation to immediately suspend the military operation in Ukraine.

The decision was rendered by Joan Donaghue, Chief Judge. The ICJ issued this significant ruling in Ukraine's case against the Russian Federation under the Convention on the Prevention and Punishment of the Crime of Genocide (The Convention was held in Paris in 1948). The Court also observed that it did not possess any evidence substantiating the Russian Federation's claims that genocide had been committed by Ukraine in the Donbas region, as it had claimed when invading Ukraine. The Court's decision was issued but not observed by the Russian govern-

ment. Doubtless owing to the structure of the UN Security Council, some concrete implementation of the ruling through the UN is unlikely for now. This decision is similar to the ICJ decision on Bosnia and Herzegovina against Serbia and Montenegro in 2007. "It is the State's responsibility to prevent genocide under Article 1 of the Convention."

My final comments concern the case filed by Ukraine with the International Criminal Court (ICC) at the Hague. Ukraine has filed a case alleging war crimes, crimes against humanity, aggression, and genocide being committed by Russian forces.

On February 28, 2022, ICC Prosecutor Karim A. A. Kahn QC, stated: "Today, I wish to announce that I have decided to proceed with opening an investigation into the situation in Ukraine, as rapidly as possible." He sent investigators to Ukraine. He himself personally visited Bucha and commented on TV on the investigation. He also formed a committee of investigators from Poland, Lithuania, and Ukraine. Similar complaints have been filed with the ICC by 43 countries.

Also, most recently, a warrant of arrest has been issued by the ICC against Putin for the unlawful transfer of children from one group (Ukraine) to another (the Russian Federation) to subject them to lingual and cultural "Russification," which constitutes a form of genocide in accordance with the Genocide Convention of 1948. Now we are waiting for a decision.

Foreign leaders and scholars are calling the ghoulish bloodshed all over Ukraine as well as acts such as the russification of kidnapped Ukrainian children genocide. This genocide against Ukrainians needs to be stopped. The UN's International Court of Justice has issued an order to stop the war, but the Russian Federation is not obeying it and scoffs at the UN, which is powerless to meaningfully implement its own decision. The present international system is at risk. The situation begs the question--do we need a new world order? The stakes are definitely very high. Security and freedom depend on justice for Ukraine. The same can be said of Europe's security and freedom, as well as that of the rest of the free world. It is a crisis for all of us.