

UNITED NATIONS CONVENTION ON GENOCIDE AND COURT DECISIONS

International Conference

Thank you for the opportunity to speak at this conference in remembrance of the Holodomor-Genocide in 1932-1933 when millions of Ukrainians were starved to death by Stalin's regime and comment on the Russian aggression, war crimes, crimes against humanity and genocide committed in Ukraine since February 24, 2022.

The crime of genocide has become a familiar charge in both international and domestic tribunals over the last seventy-seven 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 Nurem-

berg Tribunal paved the way for the 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») on December 9, 1948 in Paris, France, with the purpose of preventing, criminalizing and punishing acts of genocide.⁴ 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. In order 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,

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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 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 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 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 1932-1933 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, Kossior, Chubar and Khatevych with Genocide in Ukraine in 1932-1933.¹⁷ 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 mil-

lions 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, things in 2014, after the successful revolution of Dignity, that forced President Yanukovich to flee the country, had some negative implications for Ukraine which started the process that is presently before us.

Russian soldiers «so called green soldiers» moved to occupy and control Crimea and the Russian politicians worked on its annexation to the Russian Federation designing and conducting a referendum.

The Crimean referendum to join Russia on March 16, 2014, violates Ukraine's Constitution, domestic laws, the constitution of the Republic of Crimea, and general principles of international law. Countless international organizations and most countries around the world have already stated that under no circumstances is the Crimean Referendum legitimate; therefore, its results will not be accepted and recognized by the international community. Most notably, it bears reminding that, under the 1994 Budapest memorandum on Security Assurances, the United States, Great Britain, and Russia have all undertaken a commitment to provide guarantees against threats or use of force against the territorial integrity or 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 failed to adhere to their obligations.

After the annexation of Crimea, Russian soldiers helped the separatist to invade and control areas in Donbas and Luhansk. This process lasted several years. This year in February 2022 the Russian Federation recognized these illegally occupied territories as separate republics. Again, in violation of international law.

Then on February 24, 2022, the army of the Russian Federation under orders of President Putin commenced its invasion, war action and aggression against Ukraine. By order of President Putin, they moved with the intent to «eliminate, destroy and exterminate Ukraine and Ukrainians.» The name Ukraine must disappear. Calling it denazification. A denial of the existence of Ukrainians, as a group, its history and identity.

Acts include: Performance of mass killings, bombardment of residential areas, deliberate attacks on shelter areas, on evacuation routes, on humanitarian corridors and health care, rape and forceful transfer of Ukrainians to Russia, including thousands of children.

Bucha and Mariupol are classic examples of such atrocities.

Ukraine's complaint against Russia requesting interpretation of the Genocide Convention filed on February 27, 2022, with the International Court of Justice at the Hague, an institution of the United Nations, was partially granted on March

16, 2022. The ruling clearly and unequivocally ordered Russia to immediately suspend the military operation in Ukraine that Russia commenced on February 24, 2022. The retribution claims are still pending.

The decision was rendered by Joan Donaghue, Chief Judge. The International Court of Justice issued this significant ruling in Ukraine's case against Russian Federation under the Convention on the Prevention and Punishment of the Crime of Genocide.

The Court also observed that it did not possess any evidence substantiating Russia's claims that genocide had been committed by Ukraine in the Donbas region as Russia had claimed when invading Ukraine.

This decision is similar and in line with 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.» Here the state, Russia, is promoting genocide. A clear violation of the Genocide Convention.

The Court's decision was issued but not observed by Russia. Also, it was not implemented by the United Nations.

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

On February 28, 2022, ICC Prosecutors 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, and I saw him on TV visiting Bucha and commenting on the investigation. He formed a committee of investigators from Poland, Lithuania and Ukraine.

Similar complaints have been filed with the International Criminal Court by 43 countries.

Now we are waiting for a decision. Hopefully, it will be issued promptly! In addition, a special tribunal in Ukraine started trials of Russian soldiers for war crimes.

The evidence is overwhelming!

Foreign leaders and scholars are calling these acts genocide. Genocide against Ukrainians must be stopped. The United Nations Court, ICJ, issued an order to stop the war. But Russia is not obeying, and the UN is not implementing its own decision. The present international system is at risk. The stakes are very high. Security and freedom depends on Justice in Ukraine. The same can be said about Europe and the Free World! It is a dilemma for all of us!

Do we need a new world order?

That is a topic for another time!

Slava Ukraini! Glory to Ukraine!

References

¹ DAVID J. BEDERMAN & CHRISTOPHER J. BORGAN & 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).

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.

⁸ *Id.* 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.

¹⁴ *Id.*

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).

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