

## **Legal Recognition of the Holodomor as Genocide International Covenants, Agreements, and Court Decisions**

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Thank you for the honor of speaking at this event, in remembrance of the Holodomor Genocide. Between 1932 and 1933, millions were starved to death in one of the gravest man-made tragedies inflicted on the Ukrainian people and nation. My remarks today will concentrate on the legal basis for calling this tragedy a genocide in accordance with international law, conventions, and standards established for war crimes and crimes against humanity.

The crime of genocide has become a familiar charge in both international and domestic tribunals over the last seventy-five 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.”<sup>1</sup> 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.<sup>2</sup> 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,

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<sup>1</sup> DAVID J. BEDERMAN & CHRISTOPHER J. BORGES & DAVID A. MARTIN, INTERNATIONAL LAW: A HANDBOOK FOR JUDGES 87 (The American Society of International Law, Foundation Press 2001).

<sup>2</sup> INTERNATIONAL LAW AND LITIGATION FOR U.S. JUDGES: FEDERAL JUDICIAL CENTER 13 (The American Society of International Law).

whether or not in violation of the domestic law of the country where perpetrated.”<sup>3</sup>

The 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 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”)<sup>4</sup> on December 9, 1948 in Paris, France, with the purpose of preventing, criminalizing and punishing acts of genocide.<sup>5</sup> 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

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<sup>3</sup> 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).

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

<sup>5</sup> Lippman, *supra* note 3, at 452.

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.”<sup>6</sup> 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 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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

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<sup>6</sup> 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](http://www.icj-cij.org). See also Lippman, *supra* note 4, at 454-55.

<sup>7</sup> Lippman, *supra* note 3, at 424.

<sup>8</sup> *Id.* at 458.

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

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).<sup>10</sup> 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.”<sup>11</sup> 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.<sup>12</sup> The ICJ issued its opinion of February 26, 2007.<sup>13</sup> 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.”<sup>14</sup> The Court found by a fourteen to one vote that Serbia had violated its obligation to prevent genocide, but

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<sup>10</sup> 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).

<sup>11</sup> Lippman, *supra* note 3, at 471-72.

<sup>12</sup> 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](http://www.icj-cij.org).

<sup>13</sup> International Court of Justice, Press Release 2007/8, February 26, 2007, available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>14</sup> *Id.*

stated that the acts of those who committed the genocide at Srebrenica could not be attributed to Serbia.<sup>15</sup>

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.<sup>16</sup>

The Holodomor of 1932-1933 was first recognized in Ukraine on the national level as genocide by the Resolution of the Parliament of Ukraine on May 14, 2003 on the Commemoration of the Victims of the Holodomor of 1932-1933. On November 28, 2006, by the Law of Ukraine “On the Holodomor of 1932-1933 in Ukraine,” the Holodomor was recognized by the Parliament as genocide in accord with the Convention of 1948 on the Prevention and Punishment of the Crime of Genocide, and the legislation was signed by the President.

The Executive branch arrived at the same conclusion, when on May 16, 2008, the National Commission for Strengthening Democracy and the Rule of Law, appointed by the Ukrainian President, adopted a Conclusion regarding the Juridical characterization of the Holodomor as genocide in accordance with the definition formulated by the Genocide Convention. Chairman of the Commission and Minister of Justice Mykola Onishchuk signed the Conclusion on September 4, 2008.

The Judicial Branch similarly 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

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<sup>15</sup> *Id.*

<sup>16</sup> “International Legal Responsibility for the Genocide: Justice in the Courts” Bohdan A. Futey, conference materials, the Holodomor, Sept. 25-26, 2008, Kyiv Ukraine.

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 1932-1933.<sup>17</sup> Thanks to the opening of the archives of the SBU, many documents that had 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 (approximately 4,000,000 dead and 6,000,000 unborn) as a result of the Holodomor-Genocide committed in 1932-1933.

As articulated by Raphael Lemkin, “[t]his was not simply a case of mass murder. It is a case of genocide, of the destruction, not of individuals only, but of a culture and a nation. Were it possible to do this even without suffering, we would still be driven to condemn it, for the family of minds, the unity of ideas, of language and of customs that form what we call a nation constitutes one of the most important of all our means of civilization and of progress.”

In 1988, Dr. James Mace, director of the Commission on the Ukraine Famine reported to the United States Congress that “Joseph Stalin and those around him committed genocide against

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<sup>17</sup> *SBU v. Stalin et al.*, Appellate Court of Kyiv (January 13, 2010).

Ukrainians in 1932-33.”<sup>18</sup> On January 25, 2006, the Parliamentary Assembly of the Council of Europe issued Resolution 1481, condemning the intentional acts of the Soviet government and crimes of the totalitarian communist regime as “massive human rights violations.” On October 23, 2008, the European Parliament also adopted a resolution on the commemoration of the Holodomor, recognizing it as crime against humanity.<sup>19</sup>

In addition, during the 75<sup>th</sup> Anniversary Commemorative events of the Holodomor-Genocide, governments of sixteen countries adopted resolutions recognizing Holodomor as genocide. The government of Ukraine also turned to the United Nations for support requesting a resolution to designate the Famine-Holodomor as genocide. The U.N. unfortunately, for one reason or another, probably objections at the Security Council, failed to schedule a debate on this matter. On this, the 80<sup>th</sup> Anniversary of the Holodomor, it is extremely important that the current Ukrainian government persist with its efforts for such recognition at the U.N. The crimes against humanity by the Soviet Communist regime must be condemned, adherence to international covenants must be preserved and tribute paid to the millions of victims.

The slogan is very appropriate:

**Ukraine honors and the world recognizes.**

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<sup>18</sup> COMMISSION ON THE UKRAINE FAMINE, REPORT TO CONGRESS, at *vii* (U.S. Gov’t Prtg. Office, 1988) (Dr. James E. Mace, Staff Director).

<sup>19</sup> Resolution on Commemoration of the Holodomor, the Artificial Famine in Ukraine (1932-1933), EUR. PARL. DOC. P6 TA 0523 (2008).

the Working Group on Ukraine's Constitution, adopted June 28, 1996. Judge Futey is a professor at the Ukrainian Free University in Munich, Germany, and a lecturer at Kyiv-Mohyla University School of Law.