Vilnius University

Faculty of Law

International and European Law

International Law and Human Rights

Viktoriia Palahniuk,

II study year, International and European Law Programme Student

Master's Thesis

Cases under the Convention on the Prevention and Punishment of the Crime of Genocide before the International Court of Justice

Bylos pagal Konvenciją dėl kelio užkirtimo genocido nusikaltimui ir baudimo už jį Tarptautiniame Teisingumo Teisme

Supervisor: assoc. prof. dr. **Indrė Isokaitė-Valužė**

Reviewer: Lekt. dr. **Alaa Al Dakour Al Aridi**

Vilnius

2023

ABSTRACT AND KEY WORDS

This thesis looks thoroughly at cases involving genocide that the International Court of Justice has handled under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. The thesis advocates for the convention's definition to be expanded to specifically include cultural genocide. Through key cases that highlight difficulties and obstacles, the International Court of Justice's critical role in state accountability and individual criminal responsibility is examined. The research emphasizes the need for comprehensive peacebuilding initiatives that go beyond legal proceedings. The judgments of the ICJ are seen as essential to the advancement of international law and the promotion of justice in the fight against genocide. By examining particular instances heard by the ICJ — Croatia v. Serbia, Bosnia and Herzegovina v. Serbia and Montenegro, and Ukraine v. Russian Federation—this thesis focuses on the topic's continued significance in the modern day.

Keywords: Genocide Convention, genocide, International Criminal Court, cultural genocide, International Court of Justice, state responsibility, individual responsibility.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ICJ - International Court of Justice

UN General Assembly - United Nations General Assembly

UNSC - United Nations Security Council

UNESCO – United Nations Educational, Scientific and Cultural Organization

OSCE – Organization for Security and Cooperation in Europe

NATO- North Atlantic Treaty Organization

OHCHR- Office of the United Nations High Commissioner for Human Rights

ECHR - European Convention on the Protection of Human Rights and Fundamental Freedoms

ECtHR- European Court of Human Rights

Genocide Convention - Convention on the Prevention and Punishment of the Crime of Genocide

Rome Statute – Statute of International Criminal Court

ICC- International Criminal Court

ICTY- International Criminal Tribunal for the former Yugoslavia

ICTR - International Criminal Tribunal for Rwanda

PTC - Pre-Trial Chamber

Croatia v. Serbia case - Application of the Convention on the Prevention and Punishment of the Crime of Genocide case, ICJ

Bosnia and Herzegovina v. Serbia and Montenegro case - Application of the Convention on the Prevention and Punishment of the Crime of Genocide case, ICJ

Ukraine v. Russian Federation case - Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide case, ICJ

BIAs - bilateral immunity agreements

ISIS- the Islamic State

JCE 1 - Joint Criminal Enterprise 1

"DPR" - "Donetsk People`s Republic "

"LPR"- "Luhansk People`s Republic"

INTRODUCTION

The definition of ‘genocide’ is complex and covers legal, political, social, and historical aspects. The term ‘genocide’ is sometimes regarded as being too political; some even believe that it would be better to eliminate the term entirely due to its misuse. Professor of International Law William A. Schabas (Schabas, W. 2000) and Stanford University professor Norman Naimark (Naimark, N. M. 2017) refer to ‘genocide’ as “the most heinous of all crimes” and the “crime of crimes”.

Following the Second World War, the international community made a solemn vow to stop and punish genocide. The Convention on the Prevention and Punishment of the Crime of Genocide, a historic agreement that aimed to legalize and denounce crimes carried out with the intention of eliminating a national, ethnic, racial, or religious group in whole or in part, was adopted by the UN General Assembly in 1948. The Convention has been an expression of hope for the defense of human dignity and the avoidance of horrific crimes ever since it was established.

The International Court of Justice (ICJ), the main world court of the United Nations, plays a crucial role in the application and interpretation of the Convention. ICJ is a crucial body for resolving disputes and clarifying the legal principles regulating genocide and related international crimes, particularly as the world struggles with these atrocities.

Relevance of the topic

This thesis explores genocide cases heard by the International Court of Justice. Understanding how the International Court of Justice interprets and applies the Convention on the Prevention and Punishment of the Crime of Genocide is crucial for ensuring accountability for such grave crimes. This research adds to the knowledge on international law, namely regarding the definition, context, and essential elements associated with genocide, such as acts, intent, and protected groups. It contributes to the improvement of legal frameworks and interpretations and may establish precedents for future cases.

A crucial aspect of this research is the notion of state responsibility for genocide. Given the current armed conflicts, such as Israeli attacks on Gaza Strip, war in Ukraine, the topics this

research addresses are still relevant in contemporary society. It offers information that can help with present efforts to stop genocide and deal with its consequences.

Originality of the final thesis

This thesis provides a thorough examination of specific cases that have been heard by the International Court of Justice (ICJ), together with case law from the ICTY and ICTR. This in-depth analysis of real court cases brings a distinctive perspective to the current academic literature.

This thesis contributes a unique perspective by comparing the several cases— Croatia v. Serbia, Bosnia and Herzegovina v. Serbia and Montenegro, and Ukraine v. Russian Federation. Comparative approach of ICJ interpretations helps in understanding legal arguments in these cases. A particular and important focus is provided by the special chapter on the notion of state responsibility for genocide under international law.

The research demonstrates the current relevance and direct impact of the topics presented by examining situations that have happened relatively recently. This gives the field an up-to-date and relevant perspective. Originality also lies in examining these cases from approaches of jurisdiction and the merits.

One innovative addition to the Convention on the Prevention and Punishment of the Crime of Genocide is the proposal to define "cultural genocide." This offers a novel and potentially effective strategy for dealing with various types of genocide.

Aim and tasks of the thesis

The aim of this thesis is to provide a comprehensive analysis of international regulation on the prevention and punishment of genocide through a thorough research of the legal principles, precedents, and difficulties associated with the ICJ's adjudication of genocide cases.

In pursuance of the identified aim the following objectives are established:

1. to identify cases and establish general context in which ICJ jurisprudence on genocide has been developed, as well as the case law of the ICTY and ICTR.

2. to identify and evaluate the core legal concepts that the International Court of Justice has established in cases concerning genocide and critically analyze the interpretation and application of the Convention on the Prevention and Punishment of the Crime of Genocide in these cases.

3. to examine how international law interprets a relation between a State and individual responsibility. This entails comprehending the legal responsibilities and liabilities that states have in preventing and responding to genocide as well as how genocide cases heard by the International Court of Justice (ICJ) contributes to the larger conversation about state responsibility for international crimes and the protection of human rights.

4. to suggest adding a definition of "cultural genocide" to the Genocide Prevention and Punishment Convention. This seeks to address various types of genocide and provide a more thorough legal framework.

Research methodology

To achieve the aim of the thesis, the following methods were used:

- In order to obtain understanding of the evolution and application of international law related to ‘genocide’ definition and the drafting process of the Convention on the Prevention and Punishment of the Crime of Genocide, the historical method was used for the examination of historical events, judgments, and legal precedents.

- Using legal analysis method for the concept of crime of genocide, elements of genocide, and state accountability have all been the subject of a careful assessment of international legal instruments, treaties, and conventions. Thorough examination of legal documents, court judgments, and related materials from the selected ICJ cases (Croatia v. Serbia, Bosnia and Herzegovina v. Serbia and Montenegro, Ukraine v. Russian Federation) as well as case law of ICTY and ICTR to understand the legal arguments, interpretations, and conclusions drawn by the ICJ in each case.

- The basic summary of cases Croatia v. Serbia, Bosnia and Herzegovina v. Serbia and Montenegro, Ukraine v. Russian Federation before ICJ and its contextual background were provided using the description and comparison method as well as systematic analysis.

Additionally, it was used to ascertain the international community's opinion on the subject. It was used to define terms like genocide and cultural genocide.

- Legal texts and academic articles were clarified using a systematic approach. It is also used to evaluate and organize various information sources in order to identify the issues that are most relevant.

- When examining different approaches and tests for classifying disputes, comparative analysis was applied. It was used to compare the viewpoints of several scholars on the same topics and problems. To identify similarities and differences in the legal principles applied by the ICJ, examining the impact on the prevention and punishment of genocide. To obtain insight into legal requirements and evidence standards, compare and contrast events and outcomes.

- In order to comprehend the meaning of the legal ideas and their definitions, case law and the articles of the Convention on the Prevention and Punishment of the Crime of Genocide were interpreted using the methods for treaty interpretation set by Vienna Convention on the Law of Treaties in 1969.

Structure of the research

The thesis is divided into the following parts: introduction and three substantial parts that are divided into smaller sections, conclusions, recommendations, bibliography, summary.

Chapter 1 will provide general overview of the Convention on Genocide and its historical significance. Genocide convention as a basis for jurisdiction of ICJ. Review of relevant international law, case law of ICTY and ICTR. Definition and key concepts related to genocide, such as intent, acts, and protected groups. Proposal to include definition of “cultural genocide” in the Convention.

Chapter 2 will focus on the concept of state responsibility for genocide under international law. Convention as a ground for State and individual accountability.

Chapter 3 will critically examine the legal principles and precedents applied by the ICJ in genocide cases: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Application of the Convention on the Prevention and

Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation). Background information on the cases, including the parties involved and the timeline of events. The parties' legal arguments. The conclusions of the International Court of Justice, including interpretations of the Convention and applicable legal principles. The impact and implications of the International Court of Justice's judgements on the prevention and punishment of genocide. Similarities and differences among the cases. How the International Court of Justice's judgements in these cases assist to the advancement of international law concerning genocide. The ICJ's difficulties in adjudicating cases involving genocide.

Main sources

Academic articles on the history and evolution of the term "genocide" are reviewed in connection with relevant case law. A thorough historical overview of the origins of the concepts of "genocide" and "crimes against humanity" may be found in Philippe Sands' work "East West Street: on the origins of" genocide" and "crimes against humanity" (Sands, P. 2017). Sands explores the personal stories of those who were important in the formation of these concepts. "Axis Rule in Occupied Europe," by Raphael Lemkin (Lemkin, R. 1944), is a key work that helps one comprehend the legal implications of genocide. Lemkin was the one who first used the word "genocide" and offered a legal analysis of the crimes carried out during World War II. This source is essential because of its historical relevance and because it contains the first use of the term "genocide" .

William Schabas' work (Schabas, W. 2000) is noteworthy for its thorough investigation of the elements and difficulties involved in prosecuting cases of genocide, as well as its legal analysis. Antonio Cassese's work (Cassese, A. 2011) is an important resource for understanding international criminal law in a more in-depth way. This source is significant because it contributes to the practical understanding of international criminal law and includes relevant case law.

The concept of "cultural genocide" is discussed in contemporary scientific discourse in relation to the policies of former colonial states toward indigenous peoples, specifically in Indonesia, Canada, Iran, Palestine, and Iraq (E. Hudson, J. Bachman, H. Schreiber, M Hiebert, S. Totten, K. Anderson, T. Williams, S. Buckley-Ziestel, B. Harff, and T. Gurr). The devastation of culture

and cultural heritage because of acts of cultural genocide committed during contemporary armed conflicts (Davidavičiūtė, R. 2020). Scholars Sh. Mako, L. Bilski, R. Klagsbrun, E. Novich in particular discuss the necessity of strengthening international legal protection against cultural genocide.

1. OVERVIEW OF THE CONVENTION ON GENOCIDE AND ITS HISTORICAL SIGNIFICANCE

1.1. Definition of “genocide” after the Second World War

The word "genocide" has been attributed to Polish attorney Rafael Lemkin. The Armenian Genocide (1915–1917), which took over a million lives, and the Holodomor (1932–1933), a man-made famine that murdered millions of Ukrainians in the USSR, had a profound impact on his beliefs (Sands, P. 2017, p.141).

Before emigrating to the United States, R. Lemkin resided in Poland and Sweden, where he gathered evidence that the Nazis had an intentional attempt to exterminate the Jewish people. He described in detail the ways in which Nazi policies aimed to establish a system that categorized individuals based on how 'German' they were. R. Lemkin recorded every detail of how the Germans enforced laws and decrees that imposed Nazi culture on the invaded countries (Sands, P. 2017, p. 267).

Nazi genocide was founded on the hierarchy established by the Germans. Better treatment was given to "more German" nations. R. Lemkin documented the anti-Semitic legislation in the numerous occupied nations and areas. For instance, denying Jews salaries, making them wear insignia, and keeping their property (Sands, P. 2017, p. 270).

Therefore, R. Lemkin introduced the term "genocide" for the first time in his 1944 book “Axis Rule in Occupied Europe”: “generally speaking, unless it is carried out by the wholesale murder of a nation's entire population, genocide does not always imply the instant collapse of a nation. Instead, it is meant to represent a well-thought-out scheme of many acts meant to destroy the fundamental bases of national groups' existence in order to completely eradicate the organizations themselves. Genocide is committed against the national group as a whole, and the targets of the acts are the national group members rather than the people themselves.” (Lemkin, R. 1944, p. 79).

Eight elements of genocide have been identified by Rafael Lemkin: political, social, cultural, economic, biological, physical, racial discrimination in feeding and posing a health risk (Lemkin, R. 1944, p. 83).

R. Lemkin stood for the conceptual foundations of the word "genocide," emphasizing the legal, ethical, cultural, religious, political, economic, biological, and physical components of its implementation. Lemkin describes the Nazi attacks on nationality, emphasizing the aim of eradicating Jewish national forms of culture and the very notice of the example of their own culture (Lemkin, R. 1944, p. 85).

He also created the idea of "cultural genocide." Lemkin used his theory to investigate how national groups were destroyed in a non-biological or non-physical manner as a result of the Nazi occupation policy in Europe during World War II. Cultural genocide against a national group was a crucial component in his conception of the nature of genocide as an international crime (Nersessian, D. L. 2010, p.7).

Lemkin was part of the American team that helped set up the Nuremberg trials. The Nuremberg International Military Tribunal at Nuremberg prosecuted 24 Nazi defendants between November 1945 and October 1946, although they were not charged with the crime of genocide; instead, they were accused with crimes against peace, crimes against humanity, and war crimes. "Deliberate and systematic genocide against the civilian population, through the extermination of racial and national groups, in order to destroy particular races and classes of people as well as national, racial, or religious groups, particularly Jews, Poles, or Roma people," according to the indictment (Mako, Sh. 2012, p.176). However, genocide was not mentioned in the final judgment, primarily because there was no legislation against genocide in place at the time.

For the first time, in 1946, the United Nations General Assembly adopted a Convention regarding prohibition of genocide under international law. “Any of the following acts committed with the intent to destroy, in whole or in part, any national, ethnic, racial, or religious group as such: a) killing members of such a group; b) causing serious bodily harm or mental disorder to members of such a group; c) deliberately creating such living conditions for the group, which are designed to physically destroy it in whole or in part; d) measures designed to prevent childbirth in the environment of such a group; e) forcible transfer of children from one human group to another” is defined as genocide under Article 2 of the 1948 (12 January 1951) of the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter, Genocide Convention).

The definition of genocide found in the second article of the Genocide Convention is the result of discussions between the UN Member States in 1948 during the creation of the Convention, as political killings were included in the original draft of the document. Genocide is defined in a way that is in line with the Convention by the Rome Statute of the International Criminal Court and the laws of other international jurisdictions. Many States now classify genocide as a criminal offense in national criminal codes (Mako, Sh. 2012).

Then, in the decades that followed, allegations of genocide were made in anti-colonial and postcolonial wars, including the Nigeria-Biafra War in the 1967–1970s and East Pakistan's 1971 independence to become Bangladesh. However, that idea wasn't used until the 1990s. In the cases of the International Criminal Tribunals for Rwanda (ICTR) and Yugoslavia (ICTY), the idea of genocide has returned. At the ICTR, Kambanda and Akayesu were the first two individuals to be declared guilty *(The Prosecutor v. Akayesu*, 1998). ICTR has concluded that the prohibition of genocide is regarded as a jus cogens norm and a component of international customary law *(The Prosecutor v. Kayishema and Ruzindana,* 1999).

1.2. Key concepts related to genocide

The International Criminal Court (ICTY) highlighted in the Karadzic (Karadžić, IT-95-5/18) and Mladic cases (Mladić, IT-09-92) that "genocide should not be diluted or belittled by too broad an interpretation in the interests of international justice." In fact, it ought to be saved for crimes of extraordinary severity and scope that shock people's consciences and, so, provide substance to the phrase "ultimate crime" when used to genocide. As a result, the broad concept of genocide is rejected by the Convention.

Genocide is a crime that may occur during both periods of peace and war. The idea of eliminating a group as such, in whole or in part, is fundamental to genocide (not discrimination, not forcing people to flee their homes or even their countries, not repressing their identity). "Convictions for genocide can be entered only where the specific intent has been unequivocally established," the ICTY declared in the Karadzic case (Karadžić, IT-95-5/18).

Genocide can result from a crime (such as persecution of a group's members due to national, ethnic, racial, or religious reasons) if the aim of eliminating out the group entirely or in part develops.

1.2.1. Protected groups under the Genocide Convention

There is also restriction on the list of protected groups. Only racial, ethnic, national, and religious groups are protected. What happens if someone targets a political group? (for instance, opposing party members). They are not protected under the Convention's definition of genocide. How about a social group? For instance, well-off farmers or a local community support organization. Also, the Convention does not apply to them. Journalists are not covered in the Genocide Convention. Sex-based groups are not protected under the Convention as well.

Nonetheless, a lot of States apply a broad interpretation of the national criminal codes' definition of "genocide" as a criminal offense. For instance, under Article 90 of the Estonian Penal Code, acts are considered genocide if they are intended to destroy, in whole or in part, any social group or a group resisting occupation; under Article 118 of the Polish Criminal Code, they are intended to destroy, in whole or in part, any political group or a group with a specific worldview; and under Article 211 1 of the French Penal Code, they are intended to destroy, in whole or in part, any group determined by any other arbitrary criterion, among other groups, Article 1 of Chapter 11 of the Criminal Code of the Republic of Finland states that actions taken with the intent to destroy any national, ethnic, racial, or religious group, or any group that is comparable, are prohibited. Article 264 of the Swiss Confederation's Criminal Code states that actions taken with the intent to destroy any group of people who are distinguished by social or political affiliation, among other factors. Article 100 of the Republic of Slovenia's Criminal Code states that actions taken with the intent to destroy any other group are prohibited. Article 127 of the Criminal Code of the Republic of Costa Rica states that actions taken with the intent to destroy, in whole or in part, groups of people based on factors such as age, sex, political status, or reasons pertaining to social, economic, or civil status are prohibited. Similarly, Article 19 of the Criminal Code of the Republic of Ecuador states that actions taken with the intent to destroy, in whole or in part, groups characterized by factors such as political status, sex, sexual orientation, age, health, or beliefs are prohibited in the Republic of Ecuador.[1]

[1] "Ruling on the compliance of certain provisions of the criminal code of the Republic of Lithuania that are related to criminal responsibility for genocide with the Constitution of the Republic of Lithuania." Accessed december 08, 2023. Https://lrkt.lt/en/court-acts/search/170/ta853/content

In this regard, case law is still ambiguous. Lithuanian case study stands out as an example at this point. The European Court of Human Rights heard the case **Vasiliauskas v. Lithuania** (Vasiliauskas v. Lithuania, 2005), which concerned the definition of "genocide" in connection to international law and the Lithuanian Criminal Code. The case concerned Mr. Vasiliauskas's 2004 conviction for the 1953 genocide of Lithuanian partisans who had rebelled against the Soviet government during World War II. Mr. Vasiliauskas was an official in the State security services of the Lithuanian Soviet Socialist Republic from 1952 until his retirement in 1975. Additionally, Mr. Vasiliauskas expressed his dissatisfaction with the wide definition of genocide used by Lithuanian courts, claiming that it was inconsistent with the wording used to define the crime under public international law. In particular, he said that the grounds for his conviction originated from Article 99 of the recently passed Lithuanian Criminal Code, which makes genocide a crime and names political groups as potential victims of genocide. The 1948 Genocide Convention on the Prevention and Punishment of the Crime of Genocide does not provide protection for political groups. Furthermore, the definition of genocide under customary international law was still unclear, and there was no mention of a "political group" in international treaty law.

Moreover, the Court was not convinced that the Lithuanian courts' interpretation of the crime of genocide in Mr. Vasiliauskas' case had been in line with the understanding of the concept of genocide as it stood in 1953, even though the courts rephrased Mr. Vasiliauskas' conviction to attribute Lithuanian partisans to "representatives of the Lithuanian nation," a national group that is protected under the Genocide Convention. Therefore, Mr. Vasiliauskas' conviction of genocide had been unjustified.

On the other hand, in the case of **Drėlingas v. Lithuania** (Drėlingas v. Lithuania, 2019), for instance, the Supreme Court of Lithuania gave a thorough justification, outlining both the components of the "nation" and the factors that contributed to the determination that the Lithuanian partisans constituted "a significant part of the Lithuanian nation as a national and ethnic group." The most prominent and active part of the Lithuanian people, as determined by nationality and ethnicity, was the subject of Soviet persecution. The obvious objective of those oppressive actions was to affect the demographic composition of the Lithuanian nation. As a national and ethnic group, the Lithuanian partisans, their representatives, and their supporters, who were part of the resistance, had represented a significant percentage of the country's population because the partisans had been crucial in preserving the nation's identity, culture,

and self-awareness. Because of these characteristics, the Supreme Court ruled that the partisans as a group had been a substantial component of a national and ethnic group that was protected, and that their elimination had thus qualified as genocide under the Genocide Convention. Therefore, the Supreme Court had resolved the problem that the ECtHR had pointed out in Vasiliauskas case.

Barbara Harff has developed the term "politicide" to enhance the term "genocide," pointing out that mass violence "with politically defined victims" is not covered by the Genocide Convention (Harff, B. 2017, p. 329).

"A collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties" is how the ICTR defined a national group in the Akayesu case *(The Prosecutor v. Akayesu*, 1998). It can be argued that this definition is not adequately descriptive. The idea of what constitutes a particular "social group" is theoretically the foundation of the concept of 'genocide'. This is particularly difficult in geographical areas where cultural identity does not correspond to national borders.

"A group based on the hereditary physical traits often associated with a geographic region, irrespective of linguistic, cultural, national or religious factors" is the definition of a racial group *(The Prosecutor v. Akayesu*, 1998) According to the ICTR, an ethnic group is "a group whose members share a common language or culture," while a religious group is "a group sharing common beliefs" in the context of Kayishema (Kayishema et al., ICTR-95-1). These definitions are inadequate because they exclude important features like skin color, culture, and connections to the region.

A crucial concern about the Genocide Convention's definition of genocide is the victim's membership in a "protected" group. Because there is overlap, applying the national, ethnic, racial, and religious grouping can be challenging at times.

Moreover, a combination of subjective and objective components is an issue with responsibility for committing genocide. Objective can be defined, whether the individual actually belong to a protected group. From the subjective perspective, whether the offender thought the victim belonged to a protected group or not. The prosecution must demonstrate beyond a reasonable

doubt that the offense in question is intended (or targeted) at members of the protected group in cases of genocide.

1.2.2. Prohibited acts under the Genocide Convention

Regarding the basic crimes that the Genocide Convention prohibits, these are often committed by subordinates like troops, police officials, secret intelligence operatives, etc., but they can also be committed by a general mobilized people (The Prosecutor v. Semanza, 2003):

1) **killing members of the group**
   - Killing means causing death[2] .
   - A perpetrator may cause the death of another person intentionally, recklessly or through a negligent act or omission.
   - With genocide the act causing the death must be committed with an intention to kill.
   - However, the act does not have to be premeditated.
   - An intention to cause serious harm is not sufficient.

2) **causing serious bodily harm or serious mental harm:**
   - This intentional act could be committed in the context of a war or civil unrest or suppression of civil liberties and in circumstance of enslavement, persecution, torture, deportation/ forced transfer, detention in camps etc.
   - But forced transfer in itself is insufficient as was stated in ICJ Bosnian genocide case[3]
   - Rape and sexual violence as acts cause serious bodily harm and serious mental harm and so are covered that was indicated in Akayesu case at ICTR *(The Prosecutor v. Akayesu*, 1998). However, this could be considered debatable as a proof of result is necessary, not mere assumption.

3) **deliberately inflicting conditions of life calculated to bring about the physical destruction of the group in whole or part:**

---

[2] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), ICJ

[3] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ

- The intentional acts might include deprivation of food, medical services, systemic expulsion from homes, excessive work or physical exertion.
- Intentional contamination of wells and water supply.
- This test looks at the act and the mental element of the act being calculated to achieve the physical destruction of the group in whole or part. The prosecution is not required to establish that the act did, in fact, achieve a result [4]

4) **imposing measures intended to prevent births forcibly transferring children** *(The Prosecutor v. Akayesu*, 1998):
   - Sexual mutilation
   - Sterilization
   - Forced birth control
   - Separation of the sexes
   - Prohibition of marriages

1.2.3. The mental component of "double" intent

The mental component of "double" intent is another essential component of the crime of genocide: intent to destroy ("dolus specialis") and intent to commit the prohibited act.

Both the underlying special intention to destroy the group, in whole or in part, and the intention to perform any banned act must be proven by the prosecution. For every accused, whether they are a top commander or an average soldier, the prosecution must demonstrate their special intent. The prosecution should establish that the ground-based soldier intended to destroy a protected social group as opposed to a purpose to obey commands or make sure the "mission" is completed.

When it comes to acts of genocide, the prosecution must demonstrate the following mental elements: that the accused carried out the act "with intent and knowledge" and "meant to engage" in the conduct; and that they "meant to cause the consequence or was aware that it would occur "in the ordinary course of events."[5] For example, the prosecution must prove that

[4] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ

[5] Article 30 of ICC Statute

the accused intended to commit the prohibited act (bombing a village and causing intentional death and serious injury).[6] However, in order to satisfy the extremely strict criteria under the definition of the crime of genocide, the prosecution must additionally demonstrate that there was a purpose to eliminate the protected group as such. [7]

What does "intent to destroy" include in terms of the particular intent? It implies that the perpetrator's primary objective must be to physically or biologically destroy the protected group. It's not always necessary to murder members of the protected group in order to accomplish the aim to destroy. It is insufficient to merely want to eliminate the sociological or cultural characteristics of the group *(The Prosecutor v. Krstić*, 2001).

Whether attacks against property associated with cultures and religions fall within that category is still up for debate and the "ethnic cleansing" issue as well. UNSC defined “ethnic cleansing” as process of making a region racially homogeneous via the use of violence or intimidation to drive members of particular groups out of the area.[8]

As for intent to destroy the group in whole or part to be proved, the prosecution neither must prove an intent to destroy all members of the protected group in the entire world, nor the prosecution must prove an intent to destroy all members of the group in the entire country where the prohibited acts are committed. A part of the group within a limited geographical zone, such as a region or a municipality may be sufficient.[9]

The intention to destroy "at least a substantial part of the group" must be proven by the prosecution. "The part targeted must be significant enough to have an impact on the group as

---

[6] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ

[7] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ

[8] UN Security Council: Final Report of the Commission of Experts established Pursuant to Security Council Resolution 780 (1992) https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf

[9] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ

a whole," as was declared in the ICJ Bosnian Genocide Case.[10] “If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial," the ICTY emphasized in the Krstic case.” *(The Prosecutor v. Krstić*, 2001).

Regarding the intention to destroy the group whole or in part, the crime of genocide is essentially discriminatory. The intended victims of the illegal conduct are retargeted (singled out) according to their membership in a protected category rather than their personal identification. The prosecution must demonstrate that those who commit the crimes (such as murdering or seriously injuring someone physically or mentally) did so with the intent to discriminate.[11]

The problem of using the terms "purpose," "aim," and "motive" at the same time is evident here. They are either considered as distinct ideas or as synonyms.

Other acts of involvement may be classified as inchoate violations in accordance with Article 3 of the Genocide Convention:

- conspiracy (agreement) to commit genocide
- directly and publicly inciting others to commit genocide. 3 Rwandan media executives were convicted for their role in 1994 genocide *(The Prosecutor v. Akayesu*, 1998).
- attempting to commit genocide
- complicity (encouraging, assisting, aiding, abetting, planning, instigating, ordering) others to commit genocide; with complicity the prosecution must prove that the accused lent practical assistance, encouragement, or moral support to the principal offender, the act or omission had a substantial effect on the commission of the crime, the accused acted intentionally, or refrained from acting, with knowledge or awareness that his act or omission would lend assistance, encouragement, or moral support to the principal offender.

[10] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ

[11] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ

1.3. Genocide Convention as a basis for jurisdiction

1.3.1. Challenges associated with the creation of ad hoc tribunals

By UNSC Resolution, special criminal tribunals for Rwanda and Yugoslavia were formed in 1993 and 1994, respectively. The UN Charter's Chapter VII were interpreted in the way that the impunity was viewed as a danger to international peace and security, which, at that time, was an unusual measure. It was criticized as a biased and selective approach since Art. 41 of the UN Charter does not allow this kind of action. The comprehensive strategy refers to the problematic overlap between the two goals of justice and peace (Cassese, A. 2011, p. 523).

Only "core crimes" were covered by the subject matter jurisdiction of ICTY and ICTR, which respects the nullum crimen sin lege principle. All UN Members have an international duty to collaborate both before (in the case of turning over the accused and gathering evidence) and after (in the case of execution of punishments) (Cassese, A. 2011, p.525).

Ad hoc tribunals' primary benefits may be summarized as follows (Cassese, A. 2011, p. 526):
• multiple trials have been performed, demonstrating that they are effective
• criminal procedural standards were followed, ensuring that the criminal justice process was fair. The death penalty's absence was viewed as a significant benefit.
• the creation of new case law regarding genocide, including updated definitions of international crimes and standards for criminal process.

Their weaknesses with reference to post-Cold War realities were revealed (Cassese, A. 2011, p.528). There are many doubts about the likelihood of the UN Security Council creating new ad hoc tribunals nowadays.

The ICTY and ICTR were followed by an era for the preparation of International Criminal Court.The key elements of crimes were outlined during the Rome Conference, which also included the drafting process for the Rome Statute.

1.3.2. The ICC's establishment and role in the prosecution of genocide crime

After being ratified by 123 States, the ICC Statute came into force in 2002. The only body with the authority to create ad hoc International Criminal Tribunals (ICTY, ICTR) was the UN Security Council. Due to the possibility of authority overlap between the two institutions during

an armed conflict and the fact that the impacted regions are typically the same, it was necessary to manage the balance of power between two institutions (Cassese, A. 2011, p. 523).

Principle of complementarity implies that the ICC cannot take the place of national courts. The ICC may only become involved if a state is incapable or unwilling of prosecuting international crimes. The ICC Statute's Article 13 lists the trigger mechanism's reasons for activation. A State party's referral, the Security Council's referral, or the ICC Prosecutor's initiative (proprio motu) can all serve as trigger mechanisms (Cassese, A. 2011, p.524).

Because the UNSC refused to give up its authority and share some of its "sovereignty," the Statute's Article 16 was created. This article explains the necessity of regulating the connection between the UNSC and the ICC, or the power of suspension. Article 16 states that no investigation or prosecution under this Statute may begin or continue for a year following the Security Council's request to the Court for that purpose, made in a resolution adopted under Chapter VII of the United Nations Charter. The Security Council may renew this request under the same circumstances. Therefore, the UNSC can stop the ICC's investigation or prosecution process, but only for a period of 12 months. It is recommended that procedures be renewed after that time. Therefore, this establishes balance of powers between ICC and UNSC. Some may argue that this decision is excessively political and that the legal process shouldn't be based on the political preferences of the UNSC's five permanent members. However, for that period of time, it was the best option to negotiate about the Statute and ICC in a whole (Cassese, A. 2011, p.524).

Moreover, the United Nations General Assembly has the primary authority to determine what constitutes "aggression," so the UNSC also objected to the concept of "crime of aggression" in the International Criminal Court's Statute. Therefore, UNSC may submit the case of “crime of aggression” to the ICC. The issue of definition of ‘crime of aggression’ was postponed to Kampala Review Conference in 2010 and after that included in Rome Statute (Cassese, A. 2011, p.525).

Overall, despite the limitations outlined in the Statute, the ICC is a separate and autonomous court. However, the United States' strong opposition to the ICC presents difficulties for its mission. The US even used pressure and threats to decrease development assistance and opted for bilateral immunity agreements (BIAs) with States Parties to the Rome Statute (Chilton, A.

S. 2016, p. 614). Trump's sanctions against ICC officials could be an example of hostile attitude from the US side (Sterio, M. 2019, p. 201). Furthermore, merely drawing attention to international crimes committed in Africa, the ICC faced criticism, since it was perceived as a continuation of "western imperialism" in former African colonies (Schneider, L. 2020, p. 90).

Preliminary examinations are conducted in cases regarding atrocities in Colombia, Guinea, Iraq, Nigeria, Palestine, The Philippines, Ukraine, Venezuela, Bolivia by ICC. Situations that are under investigation include Uganda, DRC, Darfur (Sudan), CAR, Kenya, Libya, Cote d'Ivoire, Mali, Georgia, Burundi, Bangladesh, Myanmar, Afghanistan. As for now 28 cases are pending before ICC and there are 45 defendants.[12]

1.3.3. The Genocide Convention as a crucial basis for the jurisdiction of ICJ

The International Court of Justice (ICJ) has obligatory jurisdiction over issues relating to the interpretation, implementation, or compliance of the Genocide Convention, as specified in Article 9. This implies that any state party to the Genocide Convention can bring a complaint with the International Court of Justice (ICJ), and that other governments must recognize the court's jurisdiction (Cassese, A. 2011, p. 200).

States may choose to declare under Article 36(2) of the ICJ Statute that they accept the ICJ's jurisdiction in a wider range of disputes, including those that are not immediately linked to the Genocide Convention, even though Article 9 of the ICJ Statute specifies obligatory jurisdiction. However, because of the Genocide Convention's obligatory jurisdiction, claims related to genocide can be brought before the ICJ even in the absence of a general declaration from a state (Cassese, A. 2011, p. 201).

State-to-state conflicts may be submitted to the ICJ under the Genocide Convention. The affected state may file a complaint with the International Court of Justice (ICJ) to have the Convention violated if another state party claims that it has. The transnational scope of the duties outlined in the Convention is further highlighted by this mechanism (Cassese, A. 2011, p. 201).

[12] " International Criminal Court," December 08, 2023. https://www.icc-cpi.int

In particular, disagreements about how to interpret and implement the Genocide Convention fall under the jurisdiction of the International Court of Justice (ICJ). States may file an appeal with the ICJ to challenge an allegation that a different state has violated the Convention or to get clarity on the interpretation of particular articles (Cassese, A. 2011, p. 201).

In conclusion, the Genocide Convention strengthens the International Court of Justice's function as an enforcement tool by offering a legislative framework for preventing and prosecuting genocide. In order to discourage and prevent genocide on a global scale, states can use the ICJ to seek justice for alleged violations of the Convention.

1.4. Proposal to include definition of "cultural genocide" in the Convention

1.4.1. The notion of "cultural genocide" and how it relates to the Genocide Convention's definition of "genocide"

Although there is no universally accepted definition of "cultural genocide" in international law, the practice of applying this concept is significant to the study of oppressed people's past struggles, the challenges of eliminating culture and cultural heritage in the context of armed conflict, and the requirement to reinforce the international legal protection mechanisms of national groups against acts that destroy their cultural heritage.

It should be noted that the aim of "cultural genocide" is to destroy the 'identity' so that the group becomes indistinguishable from the dominant culture. However, more recent authors have stressed that destruction of identity is often a step towards physical genocide.

Cultural genocide is defined by E. Novich as "the systematic destruction of traditions, values, language, and other elements that distinguish one group of people from another", based on the theory of R. Lemkin (Novic, E. 2016, p.18). But it's crucial to stress that cultural genocide goes beyond just destroying cultures. The group's very material existence is also targeted by the mechanisms of culture destruction, which additionally interfere with the group's ability to create new groups and reproduce as a national-cultural community (Hiebert, M., Totten, S., Anderson, K., Bachman, J., Williams, T., Buckley-Zistel, S., Harff, B., & Gurr, T. 2019, p.73).

R. Lemkin distinguished two stages of cultural genocide in his book "Axis Rule in Occupied Europe": the first is the imposition of the oppressor's national model, and the second is the elimination of the national model of the oppressed group (Lemkin, R. 1944, p.83).

Lemkin cites as a notable example the consequences that resulted from the Soviet Union's colonial policy towards Ukraine, which he classified as genocide in 1944 (Lemkin, R. 2009, p. 208). Due to the international community's failure to acknowledge and denounce the Soviet Union's genocide against Ukraine, Russia has been actively pursuing revanchist policies aimed at retaining its colonial claims over the country's culture, identity, history, and land. Russia strongly opposed Ukrainian efforts to build and grow its own national culture and identity in all areas of public life, viewing Ukraine as a territory under its influence (Laruelle, M. 2021). This model was based on an instrumental approach to achieving the Russian's own goals, which consisted of maintaining its dominant influence in the post-Soviet space with the goal of restoring the Soviet Union.

The chapter on cultural genocide was left out of the draft convention, even though R. Lemkin contributed to its creation. But one feature of cultural genocide—the "forcible transfer of children from one group to another"—was included back into the article (transfer from one ethnic group to another). The goal of removing children from their families and sending them to special boarding schools was to alter their identity and disrupt national-cultural inheritance. While colonial powers resisted the inclusion of cultural genocide in the convention, representatives of indigenous people brought attention to the problem (Hudson, E. 2021, p.5).

R. Lemkin additionally illustrates how children might be deprived of their identity through the occupation authorities' educational system without having to be taken out of their families. Schools served to uphold and strengthen Nazism in the instance of the implementation of cultural genocide tactics during World War II (Lemkin, R. 1945, p. 39). This is a very important, and often overlooked, aspect. Many countries have brought in curricular changes which have eliminated minority languages from schools.

Therefore, there is another conceptual connection between the idea of genocide and the acts of cultural genocide. Genocide includes psychological harm to a group as a whole, making the group incapable of preserving its identity and culture.

Separate emphasis is given to the occupation authorities' control over the activities of artists and their persecution of prominent members of the community, particularly religious leaders and the intelligentsia—that is, the bearers and creators of national culture—in R. Lemkin's concept of cultural genocide. Lemkin claims that the goal of attacks on the intellectuals as a social group is to undermine the spiritual and national resources needed to organize resistance.

R. Davidavičiőtė, a researcher on cultural genocide, observes that in such activities, cultural elimination "trivially follows from the destruction of its source, i.e. the people who create and support these cultures because they participate in them" (Davidavičiūtė, R. 2020, p.602).

Furthermore, it is important to note that national courts, specifically the Supreme National Tribunal of Poland, have a history of considering cases involving crimes of cultural genocide in their legal proceedings (Lemkin, R. 1946, p. 227). The inclusion of expert testimony, a key procedural change from the Nuremberg Trials, allowed the court to assess crimes of cultural genocide against Nazi criminals who operated in Poland during the occupation (Bilsky, L. & Klagsbrun, R. 2018, p. 73). The expansive view of the Holocaust as "cultural genocide" aided in the 1940s fight for Jewish cultural restoration and, subsequently, the battle for indigenous peoples' rights.

1.4.2. Instances of indigenous people becoming the victims of cultural genocide

The issues surrounding international protection of national groups against cultural destruction were reexamined and brought to reality by the campaign for the rights of indigenous peoples and the practice of cultural genocide during armed conflicts during the 20th century.

Indigenous communities can face genocide across the globe. Indigenous people struggle to protect their land and culture all across the world. They are some of the world's poorest individuals. Although making up 5% of the global population, 15% of the extremely poor and one-third of the rural poor are indigenous people. They also suffer from poor mental health. According to a Statistics Canada study titled "Suicide among First Nations people, Métis and Inuit (2011-2016)," the suicide rate among Indigenous people in Canada is three times higher than that of non-Indigenous persons. It has been very tragic to find hundreds of Indigenous children's graves at abandoned boarding schools (Hopper, T. 2021).

Therefore, the origins of many issues today can be traced to the colonial period when indigenous people were killed, moved off their land and subjected to forced assimilation by colonial settlers. Colonization often followed a similar pattern: violent displacement, followed by loss of land; indigenous communities forcibly evicted onto marginal land, unsuited to their culture, impoverishment, high mortality rates, loss of intangible cultural heritage and interruption of intergenerational knowledge; forced assimilation – idea that indigenous people would naturally be assimilated into the “dominant culture” (Mako, Sh. 2012, p.178).

Nigerian author Chimamanda Adichie writes in her book "The Danger of a Single Story" about how colonization shaped her identity and challenges readers to consider how stories may shape stereotypes and change mindsets: “I wrote exactly the kinds of stories I was reading. All my characters were white and blue-eyed, they played in the snow, they ate apples, and they talked a lot about the weather, how lovely it was that the sun had come out. Now, this despite the fact that I lived in Nigeria. I had never been outside Nigeria. We didn't have snow, we ate mangoes, and we never talked about the weather, because there was no need to…” (Adichie, C. N. 2009).

Therefore, cultural genocide is implemented by change of multicultural landscape by forced migration and/or selective destruction of cultural property and force assimilation into the majority ethnicity – destruction of intangible cultural heritage and traditions (Azarov, D., Koval, D., Nuridzhanian, G., & Venher, V. 2023, p.236).

Culture genocide could be conducted through enforced assimilation. For around 50,000 years, Australian aborigines lived there. When the British landed in Australia in 1770, the country was proclaimed "terra nullius," meaning the absence of all people. During that period, the Aboriginal population was not considered human. Australia was used by the British as a prison colony from 1770 to 1868. By 1901, white settlers had established a program for eliminating the Aboriginal people after treating them brutally (Mako, Sh. 2012, p.179).

Australia's First Conference of Commonwealth and State Aboriginal Authorities in 1937 presented the assimilation approach. The strategy of assimilation required Aboriginal people to abandon their reservations. They ended themselves living in poverty on the outskirts of towns and cities. The policy that resulted in the removal of Aboriginal children from their parents and their placement in institutions or adoption, thus the term “Stolen Generations” emerged in 1910-1970s. They were instructed to abandon Indigenous culture and adopt the "new culture." They were not allowed to speak in their own languages, and their names were frequently changed. Australia's "terra nullius" policy was ruled unconstitutional in 1992, and when a reconciliation motion was approved in 1998, the abuse of Aboriginal people was

acknowledged" (Mako, Sh. 2012, p.180). In 2008 Australia's Prime Minister, Kevin Rudd, apologized publicly to "stolen generations".[13]

European colonization spread over almost the whole world, but in many places the colonizers were in the minority and the local population remained the majority and did not lose their identity. Countries where white settlers emigrated "en masse" and became the majority had no room for an indigenous culture in their vision of the future. Their intention was to create a new Europe. Today these countries are the USA, Canada, Australia and New Zealand. " (Mako, Sh. 2012, p.183).

The Indian Removal Act of 1830 led to the compelled expulsion of American Indians from their native land. The "Trail of Tears," which resulted in the forcible relocation of about 60,000 Cherokee, Muscogee, Seminole, Chicksaw, and Choctaw people to the west, occurred between 1830 and 1850. Many died from illness, starvation, and cold. The concept of "wilderness" that early settlers associated with the western environment originated with European Romanticism. American Indians were forced to leave when National Parks were established. Relocation by force continued to the 1960s. Urbanized American Indians came together to create the American Indian Movement (AIM), participated in the generation's civil rights demonstrations, and ultimately helped pass the North American Graves Protection and Repatriation Act in 1990. It safeguarded the rights of federally recognized tribes on federal property or in federally funded development initiatives (Hudson, E. 2021, p.18).

As a result of the Indian Independence Act of 1947, India was divided, resulting in catastrophic examples of forced migration. After being raped, 75,000 women suffered from disability. Killing gangs destroyed entire villages with flames, executing elderly people, men, and children, and kidnapping young girls to be raped. The atrocities of Partition, according to several British troops and journalists who had visited the Nazi death camps, were worse. 1. There were 15 million displaced individuals and 2 million casualties. In only a few decades of the 20th century, Hindus and Muslims were so polarized that many on both sides thought it was

[13] ABC News. "Land Rights and Native Title Aren't the Same — and the Two Systems Could Spark Indigenous Conflict," November 18, 2018. https://www.abc.net.au/news/2018-11-16/heidi-norman-ticking-timebomb-for-indigenous-conflict-in-nsw/10376778

impossible for followers of the two religions to live peacefully together by the middle of the century." (Luck, E. C. 2018, p.18).

It is evident that Lemkin always saw "genocide" as a social and historical category, even if he initially suggested the term to establish it as a legal category. The idea of genocide as a social practice, as opposed to the legal definition, allows historians and sociologists to take a more flexible and expansive approach to the issues of accountability and causation. It is also helpful to distinguish genocide from other historical social processes of mass destruction, such as high rates of mortality among specific populations due to economic policies or the more or less intentional destruction of the environment, both of which have resulted in mass deaths (Luck, E. C. 2018, p.17).

The systematic mass killing and expulsion of the Armenian community by the Ottoman Empire during World War I is known as the Armenian Genocide, and it is another example of a socio-cultural effect. Between 1915 and 1923, there was a genocide that took the lives of almost 1.5 million Armenians. Many nations and experts together acknowledge the Armenian Genocide as a genocide. It had a significant and long-lasting effect on the Armenian people, resulting in an international Armenian diaspora, forced relocation, and the loss of cultural legacy (Nersessian, D. L. 2010, p.138).

Thus, evidence of cultural genocide has previously been presented as evidence of a group's intent to commit genocide in international tribunals. Genocide cases brought to justice in the former Yugoslavia established a global legal precedent. The International Tribunal's judgments state that "evidence of the intention to physically destroy a group" is what cultural genocide or destruction can be regarded as (Mako, Sh. 2012, p.185).

The term "ethnic cleansing," which encompasses the destruction of both people and cultural legacy, was first used during the Balkan Wars. "Ethnic cleansing" is distinguished from genocide since it involves both mass killing and expulsion. "Cultural cleansing" has been used in public comments, lectures, and interviews to raise awareness to the systematic and intentional attacks on cultural heritage and variety carried out by violent extremist organizations in Iraq and Syria, as recognized by UNESCO in 2015. The term "cultural cleansing" is not used in legislation.” (Luck, E. C. 2018, p.8).

The Balkan Wars of the 1990s are one instance of the deliberate destruction of cultural property. For example, the National Library in Sarajevo, which served as a repository for Bosnian culture, was destroyed by Bosnian Serbs in August 1992. In Karlovac, Croatia, Croatian soldiers buried mines that completely destroyed the St. Nicholas Serbian Orthodox church (Weiss, T. G., & Connelly, N. 2017).

In 21 century, the issue of cultural genocide is brought up in the media in reference to the events involving the Uyghurs and Tibetans in China, as well as the Hazaras in Afghanistan (Adams, S. 2022, p. 286).

The Taliban and the Hazaras. Adams, S. in his article "Cultural Cleansing and Mass Atrocities" discusses the Taliban's destruction of cultural heritage in the Bamiyan Valley, particularly the Buddhas, in 2001. Mullah Mohamed Omar, the Taliban leader, ordered the demolition of non-Islamic shrines, leading to international condemnation. The destruction was part of a broader campaign against the Hazara ethnic community, who were also cultural custodians of the ancient Buddhas. The Hazaras, a distinct Shia group, had a history of persecution and were integral to the resistance against the Taliban. The Taliban massacred thousands of Hazaras in various atrocities, including in Mazar i-Sharif and Yakaolang district. The destruction of Hazara homes, mosques, and cultural sites accompanied the capture of Bamiyan Valley, linking the atrocities to the Taliban's assault on Hazara identity (Adams, S. 2022, p.287).

The director-general of the UN Educational, Scientific and Cultural Organization (UNESCO), Koïchiro Matsuura, denounced "the cold and calculated destruction of cultural properties which were the heritage of the Afghan people, and, indeed, of the whole of humanity." He also welcomed the fact that the International Criminal Tribunal for the former Yugoslavia (ICTY) had included attacks on the World Heritage Site at Dubrovnik, Croatia, in recent indictments against suspected war criminals. Matsuura drew an explicit link with Bamiyan, arguing that the ICTY indictments "[show] the international community can take action to protect cultural property and apply sanctions for its protection." (Adams, S. 2022, p. 288).

Many Hazaras drew a link between these crimes and the destruction of the giant Buddhas. In the words of local midwife Marzia Mohammadi: "the "Buddhas had eyes like ours, and the Taliban destroyed them like they tried to destroy us. They wanted to kill our culture, erase us from this valley." (Adams, S. 2022, p. 288). But in 2001 there was no international tribunal for Afghanistan, and the ICC had not yet been established. Nor was there any international

consensus on how to confront non-state actors, like the Taliban, who were perpetrating atrocities.

The Islamic State and the Yezidis. Another example in the article of Adams, S. "Cultural Cleansing and Mass Atrocities" is the persecution of the Yezidis, an ethno-religious minority in Iraq, by the Islamic State (ISIS). ISIS considered the Yezidis polytheists, resulting in mass executions, enslavement of women and girls, forced religious conversion, and widespread cultural destruction. The international response included UN Security Council resolutions condemning the targeted destruction of cultural heritage by ISIS (Adams, S. 2022, p.288).

The corresponding cultural destruction inflicted by ISIS was also catastrophic. In the twin villages of Bashiqa–Bahzani all thirty-eight significant Yezidi shrines and temples were systematically destroyed using explosives and bulldozers. Ceremonies and rituals performed at all these shrines and temples, with elders transmitting traditions from one generation to the next, are essential to the survival of the Yezidi faith. ISIS's motivation, in the words of one Yezidi survivor, was "to erase everything that connected us to our culture and heritage." (Adams, S. 2022, p.290).

ISIS was not a formal part of the international system and lacked even the limited diplomatic recognition temporarily achieved by the Taliban, their "caliphate" was less susceptible to measures that did not involve the use of force, like sanctions or an arms embargo, than a normal state. However, ISIS did trade on the illicit fringes of the regional economy, relying on the sale of black-market oil and looted antiquities. International sanctions cut off 75 percent of ISIS's revenue, but the fact that the group proudly rejected the norms and laws of modern diplomacy and was committed to global military expansion meant that there were very few nonmilitary tools that could be deployed against them (Adams, S. 2022, p.291).

China and the Uyghurs. In the article of Adams, S. "Cultural Cleansing and Mass Atrocities" author discusses China's controversial policies in the Xinjiang Uyghur Autonomous Region (XUAR) and its treatment of the Uyghur population. The Chinese government's crackdown, initiated in response to intercommunal riots and terrorist attacks, involves pervasive surveillance, restrictions on religious practice, and coercive measures such as forced sterilization. Reports indicate the removal of Uyghur children from their families, placement in state-run boarding schools, and the alleged use of Uyghur labor under conditions resembling

forced labor. The authorities have also targeted Uyghur cultural heritage, with the destruction of religious sites (Adams, S. 2022, p. 291).

The People's Republic of China is a superpower with the second largest economy in the world, nuclear weapons, and a permanent seat on the UN Security Council. Given its position as a veto-wielding permanent member of the UN Security Council, it was always going to be difficult for states to diplomatically confront China about its treatment of the Uyghurs. Certainly, no one has proposed military intervention. The counterterrorism narrative has also been extremely useful for Beijing, garnering diplomatic support from a number of states that have used similar arguments to justify their own human rights abuses. The importance of Chinese trade and fear of diplomatic reprisals have also inhibited action (Adams, S. 2022, p.292).

In addition to deliberately targeting and killing minority groups whose very existence disturbed them, the Taliban and ISIS demolished sculptures and temples. In contrast, mass arrest and the gradual erasure of the Uyghurs' distinctive cultural legacy are the methods used by China in its continued persecution of the Uyghur people, rather than massacres. However, diplomatic efforts to restrain China are limited by international law. After the demolition of the Bamiyan Buddhas in 2001, the world may have made legal and normative progress, but it is still horribly inconsistent when it comes to stopping and preventing atrocity crimes, particularly when they are carried out by a major international power. However, there is a greater likelihood of a conflict if cultural cleansing is carried out by an insurgent group or a nonstate armed organization. However, states have to improve their ability to convert signals into action, particularly when attacks on cultural property might serve as a worrying indicator of future harm. It is important to carefully adapt diplomatic responses and policy tools to the details of every case (Adams, S. 2022, p. 294).

In conclusion, the proposal to include "cultural genocide" in the Genocide Convention is an important step toward addressing the serious and sometimes disregarded aspect of crimes against particular ethnic and cultural groups. The idea of "cultural genocide" is the deliberate elimination of beliefs, languages, and other characteristics that set one group apart from another. The historical cases discussed highlight the critical need for international legal frameworks to identify and stop cultural genocide. Communities all around the world have suffered permanently from the intentional destruction of cultural heritage, forced assimilation, and the elimination of individual identities.

2. GENOCIDE CONVENTION AS A GROUND FOR STATE AND INDIVIDUAL ACCOUNTABILITY

2.1. Genocide Convention as a ground for State responsibility

Raphael Lemkin's statement, "sovereignty cannot be conceived as the right to kill millions of people," captures his view that a state's ability to exercise its sovereignty shouldn't be used as a justification for carrying out atrocities (Lemkin, R. 1944, p.88).

States are required by the Genocide Convention to prevent and punish the crime of genocide. States that have ratified the treaty agree to take action to stop and punish genocide within their jurisdiction. Legislative actions and the creation of competent national tribunals that can prosecute those who are suspected of committing genocide are included in this (Cassese, A. 2011, p.229).

It is the duty of states that have ratified the Genocide Convention to take action to stop genocide within their own territory. This entails passing legislation, passing domestic legislation, and putting policies in place to discourage and stop acts of genocide. One of the main responsibilities of states under the convention is to take steps to prevent genocide (Cassese, A. 2011, p.229).

States are required under the Genocide Convention to prosecute individuals who commit genocide. This entails the trial and sentencing of those who are alleged to have committed genocide. To guarantee accountability, states are supposed to work with international criminal courts in specific situations or use their own legal systems to prosecute suspected offenders (Cassese, A. 2011, p.230).

States should use their national jurisdiction to conduct investigations into and prosecute genocide crimes. This idea, often known as "universal jurisdiction," permits nations to bring charges against individuals for the crime of genocide, irrespective of the accused's country or the location of the actions (Cassese, A. 2011, p.232).

It is required of states to work together as well as with international organizations to prevent and punish genocide. To guarantee that justice is done, this cooperation can entail exchanging

evidence, working with international criminal tribunals, and extraditing individuals (Cassese, A. 2011, p.234).

In a wide range of situations, the International Court of Justice (ICJ) has heard cases involving state responsibility. Although disputes between states are the main focus of the ICJ, several judgments have raised questions about state responsibility for genocide.

The International Court of Justice (ICJ) heard arguments about alleged genocide that resulted from the early 1990s conflict in Bosnia and Herzegovina. Bosnia and Herzegovina filed a legal complaint against Serbia and Montenegro, claiming that the two countries had failed to prevent and punish crimes of genocide in violation of the Genocide Convention.[14]

In a different case related to the Balkan wars, Croatia accused Serbia of violating the Genocide Convention. In its judgment, ICJ acknowledged the occurrence of genocide, especially in the early 1990s, but it rejected the notion that Serbia was responsible for the atrocities. The ICJ ruled that some actions taken by Serb troops qualified as genocide, but it could not identify a consistent pattern of behavior that could be linked to the state of Serbia overall.[15]

In conclusion, the state has obligation for both preventing and punishing such a serious offense when it comes to genocide. The Genocide Convention creates a framework for holding governments responsible for their acts or inactions connected to genocide.

2.2. Genocide Convention as a ground for individual responsibility

The Genocide Convention's recognition of each person's criminal responsibility for genocide is one of its main achievements. According to Article 4 of the Convention, everyone who commits or conspires to commit genocide will face consequences, regardless of their status as constitutionally liable leaders, public servants, or private citizens. Moreover, there is also in national criminal codes such corpus delicti as genocide. International criminal tribunals and court, like the International Criminal Court (ICC), have been formed to prosecute individuals for genocide in addition to national efforts. When nations are unable or unwilling to prosecute,

[14] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ
[15] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), ICJ

these tribunals and court offer a way to hold people accountable on a global scale (Cassese, A. 2011, p.323).

In the case of a conflict including an attack, it is important to consider the kind of individual criminals who might face charges of genocide. Genocide accusations are not limited to top military or political figures who organize the conflict. Charges of genocide may also be brought against ministries, military leaders, and intermediary politicians. Charges of genocide may even be brought against the troops who do the forbidden actions. However, there must always be proof of purpose on the part of the prosecution about any accused individual, leader or not.

"The majority of these crimes are manifestations of collective crime rather than the product of a single person's criminal propensity; they are frequently committed by groups or individuals acting in support of a common criminal design." (Cassese, A. 2011, p.323).

The classic accused person in international criminal law is a senior political or military leader who orders, plans, masterminds, directs, instigates, encourages, assists junior subordinates to commit international crimes. Courts have sometimes struggled, intellectually, with making the senior leader responsible for the crimes committed by the subordinate/s.

2.2.1. **Main challenges in proving the international crime**

First, the prosecution must prove “the material or objective elements”, which are:

- the conduct (actus reus) (for example, shooting with a firearm)
- the consequence (the death of an individual)
- a causal link between the conduct and the concrete consequence (the shooting caused the death)
- underlying circumstances or contextual elements.

Secondly, the prosecution must prove the mental or subjective (state of mind elements) such as intent or knowledge (awareness) that accompany the conduct and/or consequence.

Thirdly, the prosecution may have to establish that a defence is not available to an accused, such as disease of mind, intoxication, self-defence, duress, or necessity.

- **Commission/perpetration and complicity**

In customary international law the direct perpetrator (principal) of a crime was the individual, who carried out the conduct element of the crime. So, a soldier, who personally pulled the trigger of a firearm and killed a prisoner-of-war committed (perpetrated) the offense of unlawful killing/murder. Conduct covers both a positive act and, also, culpable omissions to do something (for example, failing to provide food or sanitation) (Cassese, A. 2011, p. 327).

Customary international law drew a distinction between: a direct perpetrator (principal), who undertook the conduct element of the base crime, and so, who had primary responsibility and an individual, who aided or abetted (assisted or encouraged) a principal (and so, had secondary or accessorial liability) by way of complicity in the crime.

The distinction between principals and accessories is needed. A principal is a person/s, who undertakes the conduct element of a crime – shooting a person with a firearm or stabbing a person with a knife, for example. An accessory is a person/s, who assists or encourages or otherwise "supports" the principal in the commission of the offense (by, for example, providing the knife before the stabbing, disposing the knife after the stabbing, encouraging the stabber/s etc).

- **Mental elements of crimes (mens rea/subjective)**

The prosecution will always have to prove that an accused had the necessary mental element to commit the crime. The mental element of an accused can relate to conduct and consequence. A person may mean to use a rifle to shoot a person in the head (the conduct) and, at the time of shooting mean to kill that person (the consequence). Intention (an accused has intention if s/he means to …). Also, notions of an act being deliberate/ non-accidental.

Knowledge - usually the same as awareness as to a circumstance or a consequence. There may be a requirement for an accused to be aware of the substantial likelihood that a crime will be committed or to be aware that a consequence will occur in the ordinary course of events (a virtual or practical certainty).

The mental element for the base or underlying crime and the additional mental elements giving rise to individual criminal responsibility (co-perpetration or aiding and abetting, for example) - the overarching mode of liability.

2.2.2. Tensions exist between the ICTY/ICTR law and the ICC law on modes of liability

The ICTY and ICTR reviewed customary law and conventions and ruled that a mode of liability known as Joint Criminal Enterprise 1 formed part of customary international law, but that a theory based on control of the crime was not part of customary law. Many commentators argue that the ICTY only reviewed a small and limited number of sources when making this determination and that a deeper review may have produced different results (Cassese, A. 2011, p.334).

The ICC Statute, which introduced a new Article 25, defining individual criminal responsibility, which purported to be determinative in declaring the state of customary international law and declared that the theory based on control of the crime was a mode of liability.

There is some tension as to what modes of liability reflect customary international law, but there are real similarities between the mode predominant at the ICTY and ICTR called Joint Criminal Enterprise (JCE 1) and some of the modes provided for in Article 25 (3) of the ICC Statute (Cassese, A. 2011, p.335).

According to JCE 1 doctrine, as applied at the ICTY and ICTR, the prosecution had to prove:

- a "plurality of persons" (but not necessarily within an organised political, military, or administrative structure);
- that there was a common criminal plan, design or purpose (normally a political/ ideological/administrative plan) which amounts to or necessarily involved the commission of crime/s provided for in the Statute;
- that the accused, whether a senior leader, mid-ranking supervisor or a soldier was a party to that plan (and so a member of the JCE);
- that each individual had a common shared intention to perpetrate certain crime/s that eventually took place;
- although in one case the court held that the direct perpetrators on the ground do not have to be party to the plan, so long as the crime/s they committed can be imputed to a person, who

was a member of the JCE, who was acting pursuant to the common criminal plan when s/he used the direct perpetrators to commit crimes;

- that the accused participated in the common plan by making a significant contribution/providing assistance to the execution to the plan, which was directed to furthering the common plan (but the participation does not have to involve the commission of a specific crime by that accused);
- that a direct perpetrator committed the crime/s with the necessary intent.

The mental element that needs to be proved for the base or underlying international crime according to Article 30 of the ICC Statute, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Intent relates to conduct and consequence. A person has intent where:

- in relation to conduct, that person means to engage in the conduct. Meaning that the conduct must be the result of a voluntary action on the part of the perpetrator.
- in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. So, it is not enough for the perpetrator merely to anticipate the possibility that his or her conduct would cause the consequence.

Knowledge relates only to a consequence/circumstance. ‘Knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

According to Article 25(3) (a) of the ICC Statute perpetration, a person shall be criminally responsible if that person:

- perpetrates or commits the crime as an individual (as an individual who physically carries out all elements of the offense) or
- co-perpetration or commission of the crime jointly with others
- vertical or indirect perpetration or commission of the crime through another person
- indirect co-perpetration (a mixture of the co-perpetration and indirect perpetration modes of liability)

The Accused can be convicted of only one form of Article 25(3)(a) commission for each incident or discrete type of criminal conduct.

- **Personally committing the crime (direct perpetration) according to article 25(3) (a) of the ICC Statute**

Direct perpetration involves those who physically carry out the objective elements of the offense. The direct perpetrator acts on his or her own without necessarily relying on or using another person.

- **Co-perpetration at the ICC according to Article 25 (3) (a) of the ICC Statute**

Co-perpetration involves joint control over the crime and is no longer included in the complicity concept, but rather is recognized as an autonomous form of perpetration. It is characterized by a functional division of the criminal tasks between the different (at least two) co-perpetrators, who are normally interrelated by a common plan or agreement. Every co-perpetrator fulfils a certain task which makes an essential contribution to the commission of the crime and without which the commission would not be possible. The common plan or agreement forms the basis of a reciprocal or mutual attribution of the different contributions holding every co-perpetrator responsible for the whole crime (Cassese, A. 2011, p. 353).

None of the participants has overall control over the offense because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task. The suspects must all be mutually aware and mutually accept that implementing their common plan may result in the realization of the objective elements of the crime and must all accept such a result by reconciling themselves to it or consenting to it. They must be aware of the factual circumstances enabling him or her to jointly control the crime (Cassese, A. 2011, p. 354).

Co-perpetration – the common plan and the joint control over the crime:

a) plan/ agreement
   - an agreement or common plan between the accused and at least one other co-perpetrator
   - it is sufficient for the common plan to involve "a critical element of criminality", i.e. that it is virtually certain that the implementation of the common plan will result in the commission of the relevant crime in the ordinary course of events (but it may also include non-criminal goals)
b) control over the crime

- It is not necessary that each co-perpetrator personally and directly carry out the offences, or that he or she be present at the scene of the offence, as long as he or she exercised, jointly with others, control over the criminal offence.

Co-perpetration - essential contribution:

- the accused provides an essential contribution to the common plan that resulted in the commission of the relevant crime (such that s/he could frustrate the commission of the crime by not undertaking her/his part or such that without it, the crime could not have been committed or would have been committed in a significantly different way);
- the essential contribution may take many forms and need not be "criminal" in nature;
- the contribution of a co-perpetrator which, on its face, is not directly to a specific crime, but to the implementation of the common plan more generally may still suffice;
- a co-perpetrator can make an essential contribution to the common plan at any stage, including the execution stage, the planning and preparation stage, and the stage when the common plan is conceived;
- designing the attack, supplying weapons and ammunitions, exercising the power to move previously recruited and trained troops to the fields and/or monitoring and coordinating the activities of those troops.

Co-perpetration- the subjective or mental element:

- that the accused meant to commit the relevant crime or he was aware that by implementing the common plan these consequences will occur in the ordinary course of events and
- that the accused was aware that he provided an essential contribution to the implementation of the common plan
- the "awareness that a consequence will occur in the ordinary course of events" means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. This prognosis involves consideration of the concepts of "possibility" and "probability", which are inherent to the notions of "risk" and "danger"
- at the time the co-perpetrators agree on a common plan and throughout its implementation, they must know the existence of a risk that the consequence will occur. As to the degree of risk, and pursuant to the wording of Article 30, it must be no less

than awareness on the part of the co-perpetrator that the consequence "will occur in the ordinary course of events". A low risk will not be sufficient.

- **Indirect perpetration at the ICC (commission of the crime through another person), according of Article 25(3) (a) of the ICC Statute:**

- referred to as "perpetration by means";
- the mastermind of an operation controls the will of those who directly commit the offence/ controls the apparatus/organisation to commit the crime, so the mastermind is taken to be a direct perpetrator/ primary offender, rather than a secondary party/accomplice;
- there must be a sufficient number of subordinates in the organization to guarantee that the superior's orders will be carried out, if not by one subordinate, then by another;
- the perpetrators' control of the action of another person or persons to such a degree that the will of that person or persons becomes irrelevant, and that their action must be attributed to the perpetrators as if it were their own;
- the leader's ability to obtain automatic compliance with his orders is the basis for his principal, rather than accessorial, liability;
- The direct perpetrator might be legally incompetent or acting under duress.

In the ICC case *Katanga and Ngudjolo Chui*, the Pre-Trial Chamber merged the concepts of co-perpetration and indirect perpetration to a form of indirect co-perpetration. It does not constitute a new (fourth) mode of attribution but is only the result of the 'factual coincidence of two recognized forms of perpetration (Cassese, A. 2011, p.360).

In the case at hand, the PTC found that the defendants had agreed, as commanders of their respective hierarchical organizations (paramilitary groups), on a common plan (the attack on a village) and both had made an essential contribution to the realization of this plan by way of their organizations (Cassese, A. 2011, p.360).

Thus, the PTC extended the criminal responsibility of each defendant, being indirect and co-perpetrator at the same time, to the crimes committed by the members of the other defendant's organization (Cassese, A. 2011, p.360).

- **Indirect co-perpetration**

Table 1. The example of the foreign minister and the defense minister

THE DEFENCE MINISTER	THE FOREIGN MINISTER
The Defence Minister is a participant in a common plan that will lead to the commission of war crimes	The Foreign Minister is also participant in a common plan that will lead to the commission of war crimes
The Defence Minister is in control of the armed forces	The Foreign Minister is not in control of the armed forces
The armed forces commit war crimes	The armed forces commit war crimes
The Defence Minister is criminally liable as an indirect perpetrator	The Foreign Minister is liable by way of indirect co-perpetration

Source: compiled by the author based on: Cassese, A. (2011). *International criminal law: cases and commentary*. Oxford University Press.

Indirect co- perpetration is a valid mode of liability at the ICC. Indirect co-perpetration is nothing more than a particular form of committing a crime 'jointly with another' under Article 25(3)(a). Indirect co-perpetration is a valid form of liability under Article 25(3)(a) regardless of decisions of the ad hoc tribunals that there is no basis for such a form of liability in customary international law. Article 25 (3) of the Statute has a different structure than the relevant provisions of the ICTY and ICTR Statutes and approaches to the interpretation and application of the latter therefore cannot easily be transposed to the former.

There are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime by executing direct control over it. Rather, through a combination of individual responsibility for committing crimes through other persons, together with the mutual attribution among the co-perpetrators at the senior level this constitutes a mode of liability recognized under the Statute. Co-perpetration through another person was an unwarranted and radical expansion of Article 25 (3)(a) and is a totally new mode of liability (Cassese, A. 2011, p.355).

Common purpose, according to Article 25(3)(d) of the ICC Statute. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or be made in the knowledge of the intention of the group to commit the crime.

Complicity-aiding, abetting, ordering, instigating, soliciting, inducing, inciting, planning, preparing, attempting. It may often be easier for a prosecutor to prove beyond reasonable doubt that an accused has, for instance, assisted or encouraged (aided or abetted) the commission of a crime by others, rather than proving that s/he was a co-perpetrator. An accused may be indicted with a crime as a co-perpetrator (the main charge) and as an assister/encourager (in the alternative), so the judges must consider both modes of liability. There are different subjective (mental) requirements. Prosecutors often wish to pursue the main charge, as a conviction for co-perpetration will ordinarily result in a higher sentence than a conviction for assisting or encouraging (Cassese, A. 2011, p. 357).

- **Aiding / abetting (assisting/ encouraging) at the ICTY/ICTR**

The ICTY and ICTR Statutes criminalised aiding and abetting the planning, preparation, or execution of an international crime (Cassese, A. 2011, p.381).

The prosecution had to prove that the aider and abettor:

- carried out acts (which do not themselves need to be criminal) specifically directed (the specific direction standard)
- to assist, encourage or lend moral support to
- the preparation of a certain specific crime and
- this support had a direct and substantial effect upon the perpetration of the crime and
- the requisite mental element is that the accused:

a. Intended to facilitate the commission of a crime or
b. Where there is a range of crimes rather than a specific crime, that has knowledge that the acts performed assist the commission of a specific crime committed by the principal or awareness that a number of crimes will probably be committed and that one of those crimes is in fact committed.

Aiding and abetting under Articles 25 (3) (c) ICC Statute, the conduct of aiding, abetting or otherwise assisting in the commission of a crime (or attempted commission), including providing the means for its commission with the purpose of facilitating the commission (mental element) of such a crime. This is a higher requirement than the ICTY requirement of knowledge/awareness. The conduct of the accessory needs to have a causal effect on the offense.

The Statutes of the ICTY/ICTR and ICC all treat ordering as a separate form of liability. At ICTY/ICTR ordering covered a situation where a person in a position of authority used it to compel/convince/order another to commit an offense following such an order. Requirements: a superior/subordinate relationship; the transmission of an order and he order substantially contributed to the commission of the crime; the accused was aware of the substantial likelihood that a crime will be committed in the execution of the order. An intermediate go-between may be liable for passing an order on down a chain of command. Article 25(3) (b) of the ICC Statute criminalizes ordering, soliciting, or inducing the commission of a crime which in fact occurs or is attempted (Cassese, A. 2011, p.390).

The notion of "soliciting", within the meaning of Article 25(3)(b), characterizes criminal conduct falling within the category of instigation. Solicitation means that the perpetrator asks or urges or advises, or commands, or otherwise incites the physical perpetrator to commit the criminal act. What matters is that there is a causal relationship between the act of instigation and the commission of the crime, in the sense that the accused person's actions prompted the principal perpetrator to commit the crime or offense. An act of instigation does not need to be performed directly on the principal perpetrator, but maybe committed through intermediaries (Cassese, A. 2011, p.392).

Instigating meant prompting, urging, influencing, encouraging another to commit a crime. It included both acts and omissions. The instigation must have been a substantially contributing factor to the commission of the offence by another. The accused being aware of the substantial likelihood that a crime will be committed in the execution of that instigation. Instigating is the same as soliciting or inducing in Article 25 (3) (b) of the ICC Statute and also overlap between instigation and abetting (encouraging).

The crime of incitement was made out where:

- (the actus reus) - the accused made a direct call for criminal action to a number of individuals in a public place (through speeches, shouting at a public gathering/meeting) or to the general public at large (in words transmitted on radio or television or any other means of audio-visual communication or through public displays of placards or posters) and
- (the mens rea) – an intent directly to prompt or provoke.

The crime of planning required that:

- one or more persons design the criminal conduct constituting a crime/s under the statute that are later perpetrated (by a direct perpetrator);
- the plan had a substantial effect on /made a substantial contribution to the commission of the crime;
- the accused was aware of the substantial likelihood that a crime will be committed in the execution of that plan

The criminal liability of a person attempting to commit a crime is part of customary international law. At the ICTR/ICTY attempted murder was not used as a charge Article 25(3)(f) of the ICC Statute criminalizes attempts. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose. The attempted commission of a crime requires that the perpetrator's conduct reaches a more definite and concrete stage going beyond mere preparatory acts (Cassese, A. 2011, p.393).

This is a mode of liability based on omitting to do an act, rather than doing an act. A military commander or civilian superior (e.g. a minister of defence), who has command and control/effective authority and control over subordinates who commit international crimes may become responsible for those crimes (i.e. have the crimes imputed to him/her) for failing to exercise control properly in the event that the commander/superior:

- failed to take all necessary and reasonable measures within his power to prevent or repress their commission

- failed to take all necessary and reasonable measures within his power to submit the matter to the competent authorities for investigation and prosecution and
- (the military commander) knew that the forces were committing or about to commit such crimes or should have known that the forces were committing or about to commit such crimes
- (the civilian superior) knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes.

3. ANALYSIS OF THE LEGAL PRINCIPLES AND PRECEDENTS APPLIED BY THE ICJ IN GENOCIDE CASES

3.1. **Croatia v. Serbia case**[16]

The International Court of Justice (ICJ) case of Croatia v. Serbia resulted from Yugoslavia's violent breakup in the early 1990s. Armed conflicts and tensions between different communities—Serbs, Croats, and Bosniaks in particular—were features of the conflict. Serbia was charged by Croatia with genocide throughout the conflict, mainly focused on what happened in Vukovar and Eastern Slavonia. The Croatian War of Independence, which lasted from 1991 to 1995, was characterized by intense fighting between Serbian militias and Croatian forces.

Main Arguments by Croatia. Croatia claimed that Serbia had committed acts of genocide by supporting ethnic Serbs living in Croatia. Particular events, like the siege of Vukovar, were emphasized as proof that Serbia intended to exterminate the Croat people.

Serbia's principal arguments. Serbia maintained that it had no authority over the local Serb groups that were being charged of crimes against humanity and denied any direct involvement in the massacre. Serbia said that the war was not a deliberate attempt to exterminate a specific group, but rather the product of internal struggle inside the former Yugoslavia.

In its 2015 decision, the International Court of Justice found that neither Croatia nor Serbia had carried out genocide. The Court recognized that crimes, such as ethnic cleansing and killings, had taken place, but it concluded that there was not enough proof to prove the particular purpose needed for genocide in accordance with the Convention.

The court's decision highlighted the legal requirements, such as proof of particular intent to eliminate a national, ethnic, racial, or religious group, that must be met in order to establish genocide under the Genocide Convention. The International Court of Justice made it clear that a state cannot be found guilty of genocide without strong proof.

[16] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), ICJ

The case demonstrated that merely acts of violence or atrocities may not be sufficient to prove genocide, underscoring the significance of a high evidence threshold.

The International Court of Justice (ICJ) clarified the distinction between personal criminal liability and state liability, emphasizing that the state cannot be held liable for non-state actors' actions unless they can be linked back to it. Under the Genocide Convention States are responsible for failure to prevent the crime of genocide or to punish this crime, to transfer these cases to ICC. The ruling affected the understanding of the legal criteria and thresholds under the Genocide Convention and established a precedent for instances involving charges of genocide in the future.

To sum up, the legal understanding of genocide under international law was greatly influenced by the Croatia v. Serbia decision. The International Court of Justice's judgment underscored the difficulties in proving state involvement for genocide and the need to satisfy a strict threshold of proof.

3.2. **Bosnia and Herzegovina v. Serbia and Montenegro case** [17]

The violent dissolution of Yugoslavia in the early 1990s also had an impact on the Bosnia and Herzegovina v. Serbia and Montenegro case that was heard by the International Court of Justice (ICJ) in 2001. Allegations of genocide during the Bosnian War (1992–1995) were the subject of the particular case. Due to their backing of Bosnian Serb troops and participation in incidents such as the Srebrenica massacre, Serbia and Montenegro were accused of perpetrating genocide by Bosnia and Herzegovina. The Bosnian War, which lasted from 1992 to 1995, caused extensive crimes, ethnic cleansing, and displacement. Bosnian Serb soldiers killed thousands of Bosniak (Bosnian Muslim) men and boys in the Srebrenica massacre in 1995.

Main Arguments made by Bosnia and Herzegovina. Bosnia claimed that Serbia and Montenegro had supported Bosnian Serb troops militarily and financially, thereby making them accountable for the genocide. Particular events, like as the massacre at Srebrenica, were emphasized as proof of genocide.

[17] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ

Key Arguments made by Serbia and Montenegro. They argued that they lacked effective control over the Bosnian Serb troops and denied any direct involvement in the genocide. They argued that any crimes were not the product of a systematic plan, but rather the acts of separate groups.

In its 2007 decision, the International Court of Justice (ICJ) concluded that Serbia had failed to uphold its duty to prevent genocide, but it discharged Serbia of direct responsibility for the atrocity. The Court came to the conclusion that Serbia had not planned to carry out genocide, emphasizing the necessity of clear purpose under the Genocide Convention. But it blamed Serbia for not intervening to stop the atrocity in Srebrenica.

The ruling emphasized the necessity of taking decisive action to stop the crimes of genocide and reaffirmed governments' obligations to prevent genocide. The International Court of Justice (ICJ) reaffirmed the high burden of proof needed to prove genocide, highlighting the necessity of proving a deliberate plan to exterminate a national, ethnic, racial, or religious group. The case emphasized the need for the international community to step in and take preventative action.

Although the International Court of Justice (ICJ) did not hold Serbia liable for genocide, its decision highlighted the potential for individual criminal liability for those who carried out genocide.

In conclusion, by stressing the need to prevent genocide, restating the specific intent requirement, and highlighting the international community's responsibility in cases of mass atrocities, the Bosnia and Herzegovina v. Serbia and Montenegro case advanced international law. The ruling affirmed the significance of holding nations responsible for preventing and bringing an end to crimes of genocide and has implications for instances that included comparable allegations in the future.

3.3. **Ukraine v. Russian Federation case**[18]

The ICJ is currently examining this case. Since 2014, the year of Ukraine's Revolution of Dignity and its nonviolent protests against Russian interference in its internal affairs, Russia

[18] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), ICJ

has deliberately stated that Ukraine and Ukrainian officials have attempted to exterminate the Russian-speaking population in the Donbas region of eastern Ukraine in violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. With these allegations of genocide serving as a justification for a full-scale invasion of Ukraine in February 2022, the Russian Federation initiated a new phase of its military attack against Ukraine. Atrocities against thousands of civil Ukrainians, mass displacement of millions more people, and tens of billions of dollars' worth of devastation in Ukraine's towns, cities and villages. Thus, Ukraine brought this issue before the ICJ about false allegations of genocide. Analyzing the principal legal arguments made by each party in that case is essential.

3.3.1. Russian main arguments

Several Western nations backed the Revolution of Dignity, which sparked a wave of protests in Kyiv towards the end of 2013 and the beginning of 2014, according to materials from the Russian Federation Memorial in the case "Allegations of genocide under the convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation)". Russia argues that Ukraine has no real choice except to go forward with the Russian Federation. That wrong decision tore the nation apart. Moreover, Russia claims that president Yanukovych was removed in violation of the constitution, and the winners established a new government. President Yanukovych was forcibly removed from office by the Ukrainian parliament, and the leader of the Maidan was named acting president of the country.[19]

Russian language suppression as well as Russian persecution in eastern Ukraine was mentioned in that Memorial. The new Ukrainian parliament removed the official status of Russian from half of the country's regions as one of its first actions. A lustration legislation was passed in October 2014, giving the new government the explicit right to repress any resistance to their policy. Russia argues that eastern Ukraine's majority Russian-speaking population wanted to maintain its historical, commercial and cultural links to the Russian Federation. A significant percentage of the population opposed the nationalist takeover, particularly in the eastern parts of Ukraine that have long had strong links to Russia.[20]

[19] The Russian Federation Memorial in the case "Allegations of genocide under the convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation)", par. 8, 9, 13.
[20] Ibid, par. 14, 15.

2014 was the start of the Donbass civil conflict, and there have been further claims that Ukraine committed war crimes there by Russian side. The blockade, which comprised not only a trade embargo but also the complete cessation of all social payments, including retirement benefits, and the suspension of financial services, was an additional aspect of the unlawful treatment of the Donbass by the Ukrainian government.[21]

Russia's recognition of the "LPR" and "DPR". Following a referendum on May 11, 2014, the so-called “DPR” and “LPR” formally proclaimed their independence. In light of this, the Russian Federation agreed to recognize the “DPR” and “LPR” as separate, sovereign states on February 21, 2022. Ukraine declared the so-called Anti-Terrorist Measures in Donbass on April 7, 2014. The Donetsk assembly declared the creation of the “People's Council of Donetsk” in reaction to this security danger, and it subsequently passed an Act of state independence and a Declaration on “DPR” sovereignty. Similarly, the sovereignty of the recently established “LPR” was also proclaimed during a gathering held in Lugansk on April 27, 2014. These proclamations were subsequently approved in the “referendums” held in May 2014, which are illegal under international law. [22]

The Russian Federation claimed its mediational role. The Russian Federation served as an intermediary at the time, promoting direct communication between Kyiv and the “DPR” and “LPR”. The Minsk accords, which were signed by representatives of Kiev, the DPR, and the LPR with assistance from the Russian Federation and the OSCE, were another effort to bring about peace in Eastern Ukraine that the Russian Federation backed. The leaders of the so-called "Normandy format," which included Germany, France, Ukraine, and the Russian Federation, as well as the OSCE, approved the Minsk accords.[23]

“Special military operation” and preemptive “collective self-defence”. On February 21, 2022, the Russian Federation made the decision to recognize the DPR and LPR as independent, sovereign states. The necessary Decrees of the President of the Russian Federation provided the following explanation of the criteria for recognition: "Considering the desire of the people of the People's Republic of Donetsk/Luhansk and Ukraine's unwillingness to settle the conflict

[21] Ibid, par. 18, 21

[22] Ibid, par. 16, 23

[23] Ibid, par. 26, 39

peacefully in line with the Minsk Agreements."The Russian Federation signed the "Friendship Treaties"—a treaty of friendship, cooperation, and mutual aid—with the “DPR” and “LPR” on February 22, 2022. In accordance with Articles 3 and 4 of the Friendship Treaties, the “DPR” and “LPR” formally requested military support from the Russian Federation on February 22, 2022.[24]

The Russian Federation's President declared the beginning of a “special military operation” on February 24, 2022, and provided the following justification for the action's legality: "The people's republics of Donbass have asked Russia for help." In this regard, I decided to conduct a special military operation in compliance with Article 51 (Chapter VII) of the UN Charter, with approval from the Russian Federation Council, and in carrying out the friendship and mutual assistance treaties with the Donetsk People's Republic and the Lugansk People's Republic, which were approved by the Federal Assembly on February 22.[25]

NATO expansion and "war games". Russia also mentioned that frequent NATO war games held on Ukrainian soil and the flow of weapons from Western nations had made the situation in Ukraine much worse. In this regard, the Russian president also brought up the rising danger that comes with NATO's expansion into Ukraine and the impossibility of reaching a deal with them: “It is a reality that we have been assiduously working with the key NATO nations over the last 30 years to get a consensus on the principles of equal and indivisible security in Europe. We consistently encountered efforts at pressure and blackmail, or cynical deception and lies, in response to our suggestions, while the North Atlantic alliance continued to expand despite our protests and concerns. Its military machine is moving.”[26]

Russia accused Ukraine in war on Russian territory. In addition, Kyiv began conducting secret operations against citizens throughout the Russian Federation, the DPR, the LPR, and other regions. Additionally, Ukraine has consistently and randomly targeted the Russian Federation's own civil infrastructure.[27]

[24] Ibid, par. 37, 42,43

[25] Ibid, par. 44

[26] Ibid, par. 40,45

[27] Ibid, par. 56,57

3.3.2. Ukrainian main arguments

Ukrainian Declaration of Independence. When the Ukrainian people voted firmly in favor of independence in December 1991, 83 percent of the population in the largely Russian-speaking oblasts of Donetsk and Luhansk backed the decision to declare independence. The Revolution of Dignity in Ukraine was a nonviolent protest against Russian interference in its internal affairs.[28]

No discrimination against Russian ethnicity. Furthermore, discrimination against individuals who identify as ethnic Russians has not occurred in Ukraine, according to a January 2015 report released by the U.N. Special Rapporteur on minority problems, Mr. Rybak, a city councilor from Horlivka, was kidnapped, tortured, and killed in the DPR-controlled area of Donetsk for the crime of flying the Ukrainian flag. The unlawful invasion and occupation of Crimea by Russia was justified by President Putin's false claim that "the Russian-speaking population was threatened." In cities with significant concentrations of Russian speakers, Russia started, coordinated, and provided funding for anti-government demonstrations in February and March 2014. The Russian government even paid and took individuals to participate in the demonstrations and incite violence.[29]

Russian assistance to armed organizations. According to a report by the U.N. human rights monitoring mission from 2014, "the total breakdown in law and order and the violence and fighting in the eastern regions" was "fuelled by the cross-border inflow of heavy and sophisticated weaponry as well as foreign fighters, including from the Russian Federation." This indicated that Russia was supporting the “DPR” and “LPR”.[30]

Anti-terrorist operation. All 298 civilians on board Flight MH17 were killed when the DPR shot down the passenger aircraft when it was over eastern Ukraine and operating in civilian airspace. In response to these unlawful armed organizations in the Donbas region killing civilians and launching a terror campaign against common Ukrainians, the Ukrainian

[28] Memorial of Ukraine in case “Allegations of genocide under the convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation)”, par. 2, 24

[29] Ibid, par. 25, 26, 29

[30] Ibid, par. 30, 26, 27, 32

government initiated an anti-terrorist operation aimed at re-establishing law and order as well as respect for human rights in the area. Ukraine has been falsely accused of genocide by the Russian Federation. Russia utilized this claim of genocide in February 2022 as justification for recognizing the DPR and LPR as independent nations and for starting a second military invasion of Ukraine. There is no proof that the Ukrainian government is committing acts of genocide against ethnic Russians or Russian-speaking people in eastern Ukraine. Reports from the OSCE, UN High Commissioner for Human Rights, and Council of Europe all testify to this.[31]

Full-scale invasion/"special military operation". A claimed "special military operation" was declared by President Putin against Ukraine in February 2022. It soon became clear that this was, in fact, a massive and indiscriminate military attack across the entire country of Ukraine, using multiple-launch rocket systems, tanks, missiles, airstrikes, and other weapons to destroy and attack cities, target civilians, kidnap and remove local political leaders. Russia has carried out crimes, causing devastation and suffering enormous losses.[32]

The UN reports that there were almost as many civilian deaths in Ukraine within the first six days of Russia's invasion as there were throughout the final five years of the conflict in the Donbas area. 9614 is the total number of civilian deaths in Ukraine from February 24, 2022, to September 10, 2023, as confirmed by OHCHR. Eighty to ninety percent of the residential structures in Mariupol were destroyed by Russian artillery. The OSCE stated that the town of Izyum "has been nearly completely destroyed by constant Russian bombardments."

Other atrocities committed by Russia include rape and forced deportations According to reports from the OSCE, Human Rights Watch, Amnesty International, and the UN, Russian forces regularly sexually assaulted people in Ukraine throughout the invasion. In April 2022, the OSCE estimated that around 500,000 citizens from regions under Russian occupation were forcefully displaced to Russia, where they were placed in filtration camps. In Ukraine, Russia has also employed hypersonic missiles, vacuum bombs, and thermobaric weapons.[33]

[31] Ibid, par. 29, 30
[32] Ibid, par. 42,43, 44
[33] Ibid, par.66

Mass displacement of Ukrainians. As of mid-june 2022, over 5 million refugees from Ukraine have fled to other European countries. Internally, the conflict has displaced over 8 million people.[34]

Extreme environmental harm. Russian troops entered the Chornobyl protected zone, tearing up radioactive soil and increasing the background level of radiation in the area twentyfold. Russia has also attacked numerous fuel depots, releasing toxic smoke into the air. Damage from missiles has scorched the earth and contaminated soil with heavy metals.[35]

The Russian Federation has stated its defiant noncompliance with the ICJ's order and has continued causing death and destruction in and against Ukraine. On 16 March 2022, the ICJ ordered Russia to immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine" and to "ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to... above."

At the same time the ICJ was issuing its Order, Russian forces destroyed a theater in the center of Mariupol in on airstrike. The theater was marked as housing children and sheltered many civilians who had taken refuge. Evidence indicates close to 600 people were killed, with many more injured. In the following weeks, Russian forces continuously bombarded Mariupol, reducing the city to rubble. The mayor of Mariupol reports more than 22,000 residents died in the siege. On 8 April 2022. Russia bombed a railway station in Kramatorsk, killing over 50 people waiting for evacuation trains and injuring over 100 others.[36]

3.4. The ICJ's difficulties in adjudicating cases involving genocide

It is a difficult and demanding duty for the International Court of Justice (ICJ) to decide cases concerning genocide. A high threshold of proof is needed to prove genocide, and this proof frequently entails proving a deliberate plan to exterminate a national, ethnic, racial, or religious

[34] Ibid, par.59
[35] Ibid, par.7,39
[36] Ibid, par.64, 65

group.Both sides must submit material for the ICJ to carefully consider, and the burden of proof rests with the party making the genocide claim.

Genocide trials are extremely sensitive because they sometimes entail deeply rooted political and historical issues. The International Court of Justice (ICJ) has obstacles in its geopolitical environment, since nations may apply political pressure and the court needs to move carefully in international relations.

It can be difficult to attribute responsibility for acts of genocide to a specific state, particularly when non-state actors are involved. It can be difficult to establish a clear connection between official activity and actions of genocidal intent and to evaluate the level of influence a state is said to have over the accused offenders.

States may be unwilling to submit to the ICJ's authority or may express doubts about the Genocide Convention if they believe the court will not have jurisdiction over genocide cases. This may restrict the ICJ's effectiveness in resolving claims of genocide and make it more difficult for the court to decide a case entirely.

Enforcing an International Court of Justice (ICJ) ruling that declares genocide has occurred might be difficult.Because the court does not have its own enforcement mechanism, it may be difficult to rely on governments' desire to comply with judgments.

It is challenging to look into and decide on genocide cases in real time since they frequently take place in the context of military conflicts or internal conflicts. A postponed decision might have an impact on the credibility and accessibility of the evidence.

Genocide trials entail horrific crimes and human suffering, which may affect the parties to the judicial processes on an emotional and psychological level. There are more difficulties in striking a balance between the seriousness of the charges and the requirement for a fair trial.

International collaboration is frequently necessary for effective adjudication in order to facilitate information exchange, support investigations, and guarantee the protection of witnesses. The International Court of Justice's capacity to collect evidence and deliver a just decision may be hindered by the parties' obstructionist behavior or lack of cooperation.

The ICJ's examination into crimes against cultural heritage is also desperately needed. “The goal of the Russian invasion was "a gradual destruction of a whole cultural life," not just the annexation of territory. One of the justifications of the war is that Ukrainians don’t have a distinct cultural identity” stated Alexandra Xanthaki, United Nations special rapporteur for cultural rights.[37] Examples of how Ukrainian tangible cultural property has been destroyed include the cathedral in Volnovakha, Donetsk; the local history museum in Okhytyrka was destroyed; and Russian forces stole Scythian gold from the museum in Melitopol. As the Russians use their direct ancestry from the Scythians to support their territorial claims. Russian military took the whole collection of coins from the museum in Melitopol.[38]

"Data from the Ministry of Culture indicates that as of mid-December 2022, 1,132 items of cultural property were experiencing damage, with 403 of those being totally destroyed. These consist of educational institutions, museums, schools, universities, and cultural centers. According to statistics published by the Institute for War and Peace, Donetsk has been the heaviest struck, with 80% of its cultural infrastructure having been devastated. The affected regions are Kyiv, Kharkiv, Luhansk, Mykolaiv, Zaporizhzhia, Sumy, and Kherson.[39]

There were instances of destruction of intangible cultural heritage, such as library at Sievierodonetsk in Luhansk. Several literature museums as well as at least 24 libraries have been destroyed in areas controlled by Russia. The number of damaged volumes exceeded 170,000. A significant library of books written in the Ukrainian language was the Sievierodonetsk Library. It hosted events for Ukrainian modernist poet Lesya Ukrainka's 150th birthday in February 2021. In the Donetsk area, the Kramatorsk Library was also damaged. In addition to Tsarist Russia's 19th-century repression of the Ukrainian language, Soviet writers who wrote in Ukrainian faced persecution and execution under Stalin in the 1930s. Putin now regards Ukrainian as a regional version of Russian and rejects it as a separate language.

[37] Farago, Jason, Haley Willis, Sarah Kerr, and Ainara Tiefenthäler. “Calculating the Toll of Russia’s War on Ukrainian Culture.” The New York Times, September 26, 2023. https://www.nytimes.com/interactive/2022/12/19/arts/design/ukraine-cultural-heritage-war-impacts.html

[38] Ibid

[39] Ibid

Government representatives and librarians claim that Russians have purged libraries of Ukrainian-language volumes and histories of Ukraine in occupied regions.[40]

Due to their recognition as autonomous from the Russian Orthodox church in 2018 by the Patriarch of Constantinople, Ukrainian Orthodox sites were specifically targeted. Just a few weeks after the war started, churches were frequently bombarded. As an illustration, focus on the Sviatohirsk Monastery of the Caves in the Donetsk destruction. The Mariupol theatre that served as the region's cultural center was also bombed by Russian troops.[41]

The involvement of 32 countries in the Ukraine-Russia ICJ case may also be a problem, given the case's importance and its effects on international relations. These intervening states have expressed their interest in the case supporting Ukraine's position and presenting arguments against Russia. The involvement of many states in the litigation may give rise to questions regarding the parties' equality. When there is a significant disparity in the parties' financial means, legal knowledge, or diplomatic influence, it becomes imperative to guarantee a fair trial.

Does “dark past” stop more positive local identities from existing? At this point Nuremberg serves as a case study. Hitler called Nuremberg the "city of the Nazi party rallies" and the city was well-known for its Nazi party rally grounds. Then, from November 1945 to October 1946, the Nuremberg trials were held there. Nowadays Nuremberg is mostly associated by Germans with cozy, traditional Bavarian culture, including the Christmas market, but by foreigners with the Nazi regime (Barrientos, J. C. 2017, p.3).

World War II memories were brought back by concentration camps and "ethnic cleansing" during the Balkan Wars. The Balkan Wars caused 2 million people to be displaced and 100,000 to 250,000 people to die. In 1995, the leaders of Bosnia, Croatia, and Serbia signed an agreement at the Air Force Base close to Dayton, Ohio. There were delegations from the US, UK, EU, France, Germany, and Italy. To commemorate criminal justice, a special International Criminal Tribunal was formed, and cases were presented before the ICJ. These brought to the end of the conflict but not peace (Hopkins, V. 2015).

[40] Ibid
[41] Ibid

The prominent is example of town Mostar. Mostar before the Balkan wars was a prosperous multicultural society with strong tourism, where almost equal proportions of Croats, Muslims and Serbs lived together. Minorities lived in majority areas without problems, many marriages were outside the ethnic group. In 1992 the situation changed overnight. Mostar was the most heavily bombed area in the Balkans. By the end of the war, it was in ruins (Surk, B. 2018).

"We are laying the groundwork for the next conflict: War wounds are still visible in Bosnia," says a recent report on post-Balkan life in Mostar. Mostar is still split along ethnic lines: most Bosnian Croats live and work in West Mostar, while Bosniak Muslims are concentrated in East Mostar. In school, kids follow different curricula with different accounts of what happened during the war. “Curricula and textbooks are ethnically coloured, and include the victimisation of one constituent people and the exclusion or even villainization of the other”, according to a report published by the OSCE (Borges, A. 2020).

As a result, following such terrible crimes as genocide, peacebuilding efforts may require more than just judicial proceedings. In that regard, locations of atrocities can encourage greater compassion and healing. They support the narrative of "never again," correct historical errors, honor courageous fighters or noteworthy historical events, inspire resistance, assist in healing, and help people move on. Particularly significant for survivors, their children, and community members—including those living abroad—who identify as the victims.

The Tuol Sleng Genocide Museum in Phnom Penh, Cambodia, is one example. After the Khmer Rouge came to power in 1975, 1.7 million people—roughly 21% of the population—were murdered in the country's genocide. Famines that followed claimed an additional 300,000 lives. The Khmer Rouge used a former secondary school as a security prison from 1975 to 1979. 20,000 people were detained in one of the 150–196 facilities used for death and torture. 2010 saw the chief of the jail found guilty by Cambodian courts of crimes against humanity and serious violations of the 1949 Geneva Conventions, which included a life sentence (Lischer, S. K. 2019, p. 805).

Following the genocide in Rwanda, the Kigali Genocide Memorial was constructed. During a civil conflict, the Rwandan genocide took place from April 7 to July 15, 1994. Tutsi were murdered by armed Hutu militias, 500,000–662,000 Tutsi casualties are estimated. Also, a memorial was built in honor of the kids who died during the 1992 Sarajevo siege. Jerusalem's Yad Vashem Holocaust Memorial and Museum was founded in 1953 and contributed to raising

awareness of the Holocaust in society. There are almost 200 Holocaust museums and memorials in Berlin, York, Miami Beach, and Budapest etc (Lischer, S. K. 2019, p. 820).

Notwithstanding these obstacles, the ICJ is vital to the advancement of international law regarding genocide. Its judgments set legal precedents, aid in the creation of norms, and emphasize the commitment of the world community to preventing and prosecuting genocide.

CONCLUSIONS AND PROPOSALS

1. A comprehensive understanding of historical events and judicial precedents that have influenced the international regulation on genocide may be seen in the examination of the ICJ's jurisprudence on genocide cases, including those of the ICTY and ICTR. The legal cases of Bosnia and Herzegovina v. Serbia and Montenegro, Ukraine v. Russian Federation, and Croatia v. Serbia offer a variety of contexts in which to examine the complexities of allegations of genocide and the difficulties encountered by the international community in responding to them.
2. An understanding of the fundamental legal concepts of acts, intent, and protected groups is necessary in order to comprehend the nuanced nature of the Convention on the Prevention and Punishment of the Crime of Genocide. Legal principles regulating the prevention and punishment of genocide are developed partially by the International Court of Justice's (ICJ) interpretations and application of these concepts in particular cases.
3. The International Court of Justice highlights how difficult it is to establish state involvement in genocide. The legal threshold highlights the necessity of presenting substantial and solid proof to demonstrate the deliberate elimination of a specific group of people. The court decisions support the vital distinction that the Genocide Convention establishes between violent acts and the required intent for genocide.
4. Examining the relationship between individual and state responsibility clarifies the important role that states play in both preventing and responding to genocide. The importance of responsibility at both the state and individual levels is highlighted by the ICJ's contribution to the debate on state responsibility for international crimes and the protection of human rights.
5. The proposal to include "cultural genocide" in the Genocide Convention is an important step toward addressing the serious and sometimes disregarded aspect of crimes against particular ethnic and cultural groups. As it is used in modern discourse, the idea of cultural genocide is the deliberate eradication of customs, values, languages, and other characteristics that set one group apart from another.

LIST OF REFERENCES

LEGAL ACTS

1. Convention on the Prevention and Punishment of the Crime of Genocide, UN General Assembly, 09.12.1948
2. Rome Statute of the International Criminal Court of 17 July 1998, United Nations, Treaty Series, vol. 2187, No. 38544. https://www.icc-cpi.int/resourcelibrary/official-journal/rome- statute.aspx.

SCIENTIFIC LITERATURE

1. Adams, S. (2022). Cultural Cleansing and Mass Atrocities.
2. Adichie, C. N. (2009). The danger of a single story.
3. Azarov, D., Koval, D., Nuridzhanian, G., & Venher, V. (2023). Understanding Russia's Actions in Ukraine as the Crime of Genocide. *Journal of International Criminal Justice*, mqad018.
4. Barrientos, J. C. Analysis of a Difficult Heritage from an Ideology of Violence Case Study: the Nazi Party Rally Grounds in Nuremberg.
5. Bilsky, L. & Klagsbrun, R. (2018). The Return of Cultural Genocide? *European Journal of International Law*. Vol. 29, Issue 2, p. 73–396. https://doi.org/10.1093/ejil/chy025
6. Davidavičiūtė, R. (2020). Cultural Heritage, Genocide, and Normative Agency. *Journal of Applied Philosophy*. Vol. 38, No. 4. https://www.researchgate.net/publication/346147357_Cultural_Heritage_Genocide_and_Normative_Agency
7. Harff, B. (2017). No lessons learned from the Holocaust? Assessing risks of genocide and political mass murder since 1955. In *Genocide and Human Rights* (pp. 329-345). Routledge.
8. Hiebert, M., Totten, S., Anderson, K., Bachman, J., Williams, T., Buckley-Zistel, S., Harff, B., & Gurr, T. (2019). *Cultural Genocide Law, Politics, and Global Manifestations.* Edited by Jeffrey S. Bachman. Canada, University of British Columbia in Kelowna. https://library.oapen.org/bitstream/id/78091ce3-9084-4246-ae65-785f5d3ab315/9781351214094.pdf

9. Hudson, E. (2021). The Cultural Genocide of the Indigenous People of North America. *Native American Genocides*. https://www.academia.edu/48889198/Indigenous_Cultural_Genocide
10. Laruelle, M. (2021). Russia's niche soft power. *Sources, targets and channels*.
11. Lemkin, R. (1944). *Axis Rule in Occupied Europe: Laws of Occupation. Analysis of Government – Proposals for Redress*. Washington, D.C.: Carnegie Endowment for International Peace, pp. 79–95. http://www.preventgenocide.org/lemkin/AxisRule1944-1.htm
12. Lemkin, R. (1945). Genocide – A Modern Crime. *Free World*. Vol. 4, pp. 39–43. http://www.preventgenocide.org/ lemkin/freeworld1945.htm
13. Lemkin, R. (1946). Genocide. *American Scholar*. Vol. 15, No. 2, pp. 227–230. http://www.preventgenocide.org/ lemkin/americanscholar1946.htm
14. Lemkin, R. (2009). *Soviet Genocide in Ukraine*. Ed. R. Serbyn, compil. O. Stasiuk. Kyiv: Maisternia knyhy, 208 p. https:// holodomormuseum.org.ua/publikacija/radyanskiy-genocid-v-ukraini/ [in Ukrainian].
15. Luck, E. C. (2018). *Cultural Genocide and the Protection of Cultural Heritage*. Los Angeles. Published by Getty Publications, No. 2. https://www.getty.edu/publications/occasional-papers-2/
16. Lischer, S. K. (2019). Narrating atrocity: Genocide memorials, dark tourism, and the politics of memory. *Review of International Studies*, *45*(5), 805-827.
17. Mako, Sh. (2012). Cultural Genocide and Key International Instruments: Framing the Indigenous Experience. *International Journal on Minority and Group Rights*. https://ssrn.com/abstract=2087175
18. Novic, E. (2016). *The concept of cultural genocide: an international law perspective.* Oxford : Oxford University Press (Cultural Heritage Law and Policy). http://hdl.handle.net/1814/43864
19. Weiss, T. G., & Connelly, N. (2017). *Mass Atrocities Protecting Cultural Heritage in Armed Conflict Zones*. Los Angeles J. Paul Getty Trust. No. 1. https://www.getty.edu/publications/pdfs/CulturalCleansing_Weiss_Connelly.pdf
20. Nersessian, D. L. (2010). *Genocide and political groups*. Oxford University Press, USA.
21. Sands, P. (2017). *East West Street: on the origins of" genocide" and" crimes against humanity"*. Vintage.
22. Schabas, W. (2000). *Genocide in international law: the crimes of crimes*. Cambridge University Press.

23. Naimark, N. M. (2017). *Genocide: a world history*. Oxford University Press.
24. Cassese, A. (2011). *International criminal law: cases and commentary*. Oxford University Press.
25. Chilton, A. S. (2016). The political motivations of the United States' bilateral investment treaty program. *Review of International Political Economy*, *23*(4), 614-642.
26. Sterio, M. (2019). The Trump Administration and the International Criminal Court: A Misguided New Policy. *Case W. Res. J. Int'l L.*, *51*, 201.
27. Schneider, L. (2020). The International Criminal Court (ICC)–A Postcolonial Tool for Western States to Control Africa?. *Journal of International Criminal Law (JICL)*, *1*(1), 90-109.

CASE LAW

1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), ICJ
2. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ
3. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), ICJ
4. "Karadžić (IT-95-5/18) | International Criminal Tribunal for the Former Yugoslavia," https://www.icty.org/en/case/karadzic
5. "Mladić (IT-09-92) | International Criminal Tribunal for the Former Yugoslavia," https://www.icty.org/en/case/mladic
6. The Prosecutor v. Krstić (case No. IT-98-33), 2 August 2001
7. The Prosecutor v. Akayesu (case No. ICTR-96-4-T), 2 September 1998
8. The Prosecutor v. Semanza (case No. ICTR-97-20), 15 May 2003
9. The Prosecutor v. Kamuhanda (case No. ICTR-95-54A-T), 22 January 2004
10. The Prosecutor v. Kayishema and Ruzindana, case No. ICTR-95-1-T, 21 May 1999
11. Vasiliauskas v. Lithuania, Application no.35343/05, the ECtHR, 30 July 2005
12. Drėlingas v. Lithuania, Application no.28859/16, ECtHR, 09 September 2019
13. "Ruling on the compliance of certain provisions of the criminal code of the Republic of Lithuania that are related to criminal responsibility for genocide with the Constitution of

the Republic of Lithuania." Accessed December 08, 2023. Https://lrkt.lt/en/court-acts/search/170/ta853/content

OTHER DOCUMENTS

1. UN Security Council: Final Report of the Commission of Experts established Pursuant to Security Council Resolution 780 (1992) https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdfhttps://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf
2. Memorial of the Russian Federation in the case "Allegations of genocide under the convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation)".
3. Memorial of Ukraine in the case "Allegations of genocide under the convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation)".

ARTICLES FROM THE INTERNET

1. Hopper, Tristin. "How Canada Forgot about More than 1,308 Graves at Former Residential Schools." Ottawa citizen, July 13, 2021. https://ottawacitizen.com/news/canada/how-canada-forgot-about-more-than-1308-graves-at-former-residential-schools/wcm/18d376d7-7abc-42b6-a459-d964dc7ca844

2. ABC News. "Land Rights and Native Title Aren't the Same — and the Two Systems Could Spark Indigenous Conflict," November 18, 2018. https://www.abc.net.au/news/2018-11-16/heidi-norman-ticking-timebomb-for-indigenous-conflict-in-nsw/10376778

3. Farago, Jason, Haley Willis, Sarah Kerr, and Ainara Tiefenthäler. "Calculating the Toll of Russia's War on Ukrainian Culture." The New York Times, September 26, 2023. https://www.nytimes.com/interactive/2022/12/19/arts/design/ukraine-cultural-heritage-war-impacts.html

4. Hopkins, Valerie. "The Town Dayton Turned Into a Garbage Dump." Foreign Policy, November 21, 2015. https://foreignpolicy.com/2015/11/21/the-town-dayton-turned-into-a-garbage-dump-bosnia-mostar-anniversary/

5. Surk, Barbara. “In a Divided Bosnia, Segregated Schools Persist.” The New York Times, December 2, 2018. https://www.nytimes.com/2018/12/01/world/europe/bosnia-schools-segregated-ethnic.html

6. Borges, Anelise. “‘We Are Building Foundations for the next Conflict’: Scars of War Still Present in Bosnia.” euronews, February 17, 2020. https://www.euronews.com/2020/02/17/we-are-building-foundations-for-the-next-conflict-scars-of-war-still-present-in-bosnia

7. “International Criminal Court,” December 08, 2023. https://www.icc-cpi.int

SUMMARY

“Cases under the Convention on the Prevention and Punishment of the Crime of Genocide before the International Court of Justice”

Viktoriia Palahniuk

The Convention on the Prevention and Punishment of the Crime of Genocide is thoroughly examined in this master's thesis, along with its historical foundations, legal implications, and practical and interpretation difficulties.

In light of its critical role in preventing atrocities in the future, the thesis promotes amending the Convention to specifically include prohibition of cultural genocide. The historical cases discussed, which include the experiences of Uyghurs in China, Hazaras in Afghanistan, and indigenous people in Australia, highlight the critical need for international legal frameworks to identify and stop cultural genocide. Communities all around the world have suffered permanently from the intentional loss of cultural heritage, forced assimilation, and the elimination of their distinct identities.

States that ratify the Genocide Convention commit to preventing and punishing genocide that occurs within their own jurisdiction. This duty includes the adoption of national laws, the creation of effective national courts, and, if required, cooperation with foreign criminal tribunals. The International Court of Justice has played a crucial role in resolving state responsibility cases, highlighting the difficulties in assigning responsibility for genocide to specific states. When states are unable or unwilling to prosecute individuals, the International Criminal Court is essential in bringing charges against individuals.

Three genocide cases that have been noticed—"Croatia v. Serbia," "Bosnia and Herzegovina v. Serbia and Montenegro," and the current case "Ukraine v. Russian Federation" before ICJ provide insight into the difficult legal issues and developing precedents that are involved in dealing with the most serious crimes under international law.

The ICJ's decision-making in genocide cases is an essential component of the advancement of international law and the maintenance of criminal justice. The standards that are being developed as a result of the legal precedents set in these instances support the global community's commitment to preventing and dealing with genocide.