



**Advisory Committee
on Public International Law**

International legal issues surrounding the characterisation of the Holodomor as genocide

Advisory report 42, 28 June 2023



Members of the Advisory Committee on Issues of Public International Law



Chair	Professor Cedric Ryngaert
Vice-chair	Dr Rosanne van Alebeek
Members	Professor Daniëlla Dam-de Jong Dr Guido den Dekker Dr Bibi van Ginkel Dr André de Hoogh Dr Rutsel Martha Annebeth Rosenboom LLM Professor Elies van Sliedregt Professor Jan Wouters
Executive secretary	Kirsten van Loo LLM

P.O. Box 20061
2500 EB The Hague
Tel. +31 (0)70 348 5011
Email: cavv@minbuza.nl



Contents



Introduction	4
— 1	
Terminology	5
— 2	
Recognition of the Holodomor as genocide by other parliaments	5
— 3	
On the existence of genocide and crimes against humanity as violations of international law at the time of the Holodomor	5
— 4	
Recognition of the Holodomor by the House of Representatives	7
— 5	
International procedures	8
Conclusion and recommendations	10
Endnotes	11
List of abbreviations	15



Introduction



contents

On 28 March 2023, the House of Representatives of the States General asked the Advisory Committee on Issues of Public International Law (CAVV) to draw up an advisory report on the considerations surrounding the recognition of the Holodomor as genocide.¹ The Holodomor, which occurred in 1932 and 1933 on the territory of Ukraine, then part of the Soviet Union, was a man-made famine that resulted in the deaths of millions of people.² Famines also occurred in other parts of the Soviet Unions.³ It is widely believed that these famines were caused by the collectivisation of agriculture and grain requisitions by the Soviet Union under the leadership of Joseph Stalin.⁴

It should be noted at the outset that the CAVV has no fact-finding mandate. In other words, it does not examine whether the events of 1932-1933 can be characterised as genocide. The House of Representatives asked the CAVV to investigate the temporal aspect, with a focus on the law applicable at the time of the Holodomor, given the fact that the Genocide Convention was only adopted in 1948. The House of Representatives further asked the CAVV to examine what steps the Netherlands could take if it wished to pursue international procedures relating to the investigation of this issue.

The CAVV recalls that in 2017, together with the External Adviser on Public International Law (EVA), it published an advisory report on the scope for and the significance and desirability of the use of the term 'genocide' by politicians.⁵ In this report the CAVV noted, inter alia, that governments and parliaments are at liberty to speak out about genocide and crimes against humanity but that restraint is in order.⁶ The 2017 report related only to contemporary events: the CAVV regards a determination that genocide or crimes against humanity have been or are being committed as a necessary first step in activating obligations, such as the obligation to prevent.⁷ The report did not examine questions relating to historical events.

In the present advisory report, the CAVV first defines the terms 'genocide' and 'crimes against humanity' (section 1). It then points out that a number of parliaments have characterised the Holodomor as genocide (section 2). Next, it examines whether acts of genocide and crimes against humanity already existed as violations of international law at the time of the Holodomor. The CAVV is of the opinion that this has not been conclusively established (section 3). However, that does not prevent the House of Representatives from recognising the Holodomor as genocide *by contemporary standards* (section 4). The CAVV subsequently discusses various options for international procedures relating to the investigation of the Holodomor (section 5). This is followed, finally, by the report's conclusion and recommendations (section 6).



— 1

Terminology

Pursuant to the 1948 Genocide Convention, the term ‘**genocide**’ refers to acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Such acts include killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.⁹ The Genocide Convention states that genocide, whether committed in time of peace or in time of war, is a crime under international law that the Contracting Parties undertake to prevent and to punish.¹⁰ The International Criminal Court also has jurisdiction over genocide.¹¹

The term ‘genocide’ differs from the term ‘**crimes against humanity**’, which refers to crimes committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.¹² As in the case of genocide, crimes against humanity do not need to be linked to an armed conflict and can also occur in peacetime. When it comes to crimes against humanity, however, it is not necessary to prove intent to destroy.

In its 2017 report, the CAVV pointed out that genocide and crimes against humanity are closely related in terms of the development of the law and by their nature. There is also a degree of overlap in terms of substance. For acts to be characterised as genocide or crimes against humanity they must be committed systematically or on a certain scale.¹³ The CAVV accordingly recommended that, at least in the prevention phase, ‘there should be no differentiation between genocide and crimes against humanity’. It also advised ‘using the two terms together as standard practice so that attention is focused not on terminological debates but on the more relevant question of what preventive acts and measures should be taken or continued.’¹⁴

— 2

Recognition of the Holodomor as genocide by other parliaments

Given its narrow mandate, the CAVV has refrained from articulating its own legal characterisation of the Holodomor. It nevertheless points out that multiple parliaments and other representative bodies have recognised the Holodomor as genocide.¹⁵ There have been many such recognitions in recent months, since the end of 2022, due to the 90th anniversary of the Holodomor in 2022-2023.

On 15 December 2022, for example, the European Parliament recognised ‘the artificial famine of 1932-1933 in Ukraine caused by a deliberate policy of the Soviet regime, as a genocide against the Ukrainian people, as it was committed with the intent to destroy a group of people by deliberately inflicting conditions of life calculated to bring about its physical destruction’.¹⁶ In 2023, the Belgian Chamber of Representatives, the Flemish Parliament and the French National Assembly similarly recognised and condemned the Holodomor as ‘a genocide against the Ukrainian people’.¹⁷

— 3

On the existence of genocide and crimes against humanity as violations of international law at the time of the Holodomor

The Genocide Convention was adopted in 1948 and entered into force in 1951. The Holodomor took place in 1932 and 1933. From a legal perspective, therefore, the question arises whether the term ‘genocide’ can be applied to the Holodomor. For this to be possible, it needs to be proved that genocide was already explicitly prohibited under (unwritten) customary international law in 1932-1933. If that is the case, the characterisation of the Holodomor as genocide must obviously meet the criteria of that prohibition.

At the outset, the CAVV notes that the Genocide Convention does not have retroactive effect as such. That is to say, it neglects to provide that it applies to facts that took place prior to its entry into force. Pursuant to the law of treaties,



contents



[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.¹⁸ However, nothing prevents rules laid down in a treaty from having already been binding under customary international law prior to that treaty's entry into force.

The 1948 Genocide Convention was inspired by a 1944 publication by Polish jurist Raphael Lemkin, who coined the term 'genocide' to meet the need to criminalise 'barbarism' and 'vandalism' by a state against its own citizens, acts for which the state could also be held responsible in peacetime.¹⁹ The primary example he had in mind was the Holocaust.²⁰ In Lemkin's view, genocide was a new word for an old evil.²¹

Some legal experts argue that genocide was already a crime under customary international law before 1948 and even before the Second World War. Proponents of this thesis point to various sources, including a UN General Assembly resolution of 1946,²² the preamble to the Genocide Convention, which states that 'at all periods of history genocide has inflicted great losses on humanity', and article I of the Genocide Convention, in which the contracting parties *confirm* 'that genocide, whether committed in time of peace or in time of war, is a crime under international law'.²³ In this context, it is also worth referring to the decision of the Israeli Supreme Court in the *Eichmann* case (1961), in which it held that genocide had long been a crime under customary international law.²⁴ In addition, in its final report published in 1990, the International Commission of Inquiry into the 1932-33 Famine in Ukraine,²⁵ which was sponsored by the Ukrainian diaspora, noted that 'if genocide of the Ukrainian people occurred, it was contrary to the provisions of international law then [1932-1933] in force.'²⁶ The Commission defended this position by referring, inter alia, to the (alleged) lawfulness – at least since the end of the 19th century – of humanitarian intervention aimed at preserving certain populations from massive persecution (principally in Turkey),²⁷ the Treaty of Versailles, concluded after the First World War, which provided for the prosecution

of the German emperor for a 'supreme offence against international morality and the sanctity of treaties',²⁸ and the 'Martens clause' in the preamble to 1899 Hague Convention with Respect to the Laws and Customs of War on Land, which refers to 'the usages established between civilized nations, [...] the laws of humanity, and the requirements of the public conscience'.²⁹ In line with the aforementioned approach, the Genocide Convention is not constitutive but rather declaratory in nature, suggesting that it merely established or confirmed what was already legally applicable.

However, the CAVV is uncertain whether it can be concluded from the above-mentioned references that genocide already constituted a punishable crime under international law before 1948. It notes that the General Assembly's genocide resolution of 1946 and the Genocide Convention call on states to enact 'necessary legislation'.³⁰ In the absence of such legislation in the period prior to 1946, it is therefore difficult to speak of existing customary international law. It is also significant that several members of the aforementioned International Commission of Inquiry into the 1932-33 Famine in Ukraine were not convinced that the Genocide Convention was merely declaratory in nature and that genocide already constituted an international crime. Commission members Levasseur and Levene, in particular, expressed concern about the alleged retroactive effect of the Genocide Convention.³¹ The literature also appears to be divided on the question whether 'genocide' already existed as an international crime at the time of the Holodomor. Lemkin appeared to answer this question in the affirmative,³² but not everyone shares this point of view.³³ One factor that complicates matters is that the international legal definition of genocide is restrictive – more restrictive than Lemkin's definition. The *characterisation* of the Holodomor as genocide also gives rise to debate.³⁴ James Mace, who supports using the term 'genocide' to describe the Holodomor, expresses this in so many words: 'The famine of 1932-33 poses particular problems from the standpoint of internationally accepted definitions of genocide, since its focus was geographic, rather than discriminatory against specific groups within a given area, and it was clearly not an attempt to destroy all members of a given group.'³⁵



contents



Since international criminal law holds that an international crime exists only in the case of conduct involving ‘an act that international law deems *universally* criminal’,³⁶ the CAVV is of the opinion that genocide had not yet been recognised as an international crime as such prior to the adoption of the Genocide Convention.³⁷

The question then arises whether crimes against humanity had already been recognised as international crimes at the time of the Holodomor, and thus whether the Holodomor could potentially be characterised as a crime against humanity. For example, the aforementioned Commission members Levasseur and Levene pointed out that the declaratory nature of the term ‘crimes against humanity’, which first emerged as a crime under international law during the Nuremberg trials in 1946, had been acknowledged for some time, even prior to the Second World War, including for crimes committed in peacetime.³⁸ The earliest reference to ‘crimes against humanity’ can be found in a 1915 declaration by France, Great Britain and Russia condemning the mass murder of Armenians by Turkey as ‘crimes against humanity and civilization’.³⁹ The commission tasked with drawing up a list of suspects for an international tribunal to be set up after the end of the First World War – the Leipzig tribunal – used the term ‘offences against the laws of humanity’.⁴⁰ Violation of these ‘laws of humanity’ could lead to individual criminal responsibility. In 1948, the United Nations War Crimes Commission (UNWCC) referred to the Armenian massacres and the legal groundwork of the Leipzig tribunal in order to conclude that the concept of crimes against humanity already existed before the Second World War.

However, the CAVV believes that ‘crimes against humanity’ had not yet fully crystallised as a concept in international criminal law before the Second World War. This explains why the founding treaty of the Nuremberg Tribunal insisted on the – no longer existing – requirement that crimes against humanity have a ‘nexus’ (connection) with an international armed conflict or war. Crimes against humanity were regarded as an ‘accessory’ crime to the long-established concept of war crimes.⁴¹ Although the Nuremberg

Tribunal did not issue a general statement on the scope of crimes against humanity,⁴² it nevertheless emphasised the connection to war (or war crimes) in order to ensure jurisdiction and avoid violating the principle of legality. As Cherif Bassiouni writes: ‘At the time the [IMT] Charter was enacted, the war-connecting element was indispensable to link “crimes against humanity” to pre-existing conventional and customary international law prohibiting such conduct in time of war. Without such a connecting element, the Charter would have clearly violated the “principles of legality.”’⁴³

The CAVV therefore concludes that, although ‘crimes against humanity’ existed as a concept at the time of the Holodomor, due to the ‘nexus’ requirement it was still very much evolving as a crime under international law.

— 4

Recognition of the Holodomor by the House of Representatives

As argued in section 3, the CAVV has doubts, from a technical and legal perspective, concerning the existence of genocide as an international crime at the time of the Holodomor.

That being said, the House of Representatives could argue that the Holodomor can be regarded as genocide *by contemporary standards*, in so far as it was committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. In a similar vein, the governments of Germany and Namibia stated as follows regarding the atrocities committed between 1904 and 1908 during German colonial rule in Namibia: ‘The German Government acknowledges that the abominable atrocities committed during periods of the colonial war culminated in events that, from today’s perspective, would be called genocide.’⁴⁴ An acknowledgment of this kind would not have any legal consequences, as genocide was not yet an international crime in 1932-1933. In other words, Russia would not attract legal responsibility in its capacity as the continuator of the Soviet Union, and individual persons could not be prosecuted under international criminal law for acts of genocide.⁴⁵



contents



The House of Representatives could also opt to use the term ‘crimes against humanity’ instead of the term ‘genocide’, in so far as the Holodomor was committed as part of a widespread or systematic attack directed against a civilian population. However, it is unclear whether crimes against humanity committed in peacetime had already been recognised as an international crime in 1932-1933.⁴⁶ Another term that can be employed is – the more general – ‘serious human rights violations’,⁴⁷ although the main aspects of international human rights protection likewise did not emerge until after 1945.

The House of Representatives could also refrain entirely from using legal terminology when adopting a resolution on the Holodomor, which is not uncommon in the international context. It could then limit itself, for example, to ascertaining, acknowledging, condemning and/or commemorating the large-scale famine in Ukraine created by a totalitarian government and the untold atrocities committed in that context,⁴⁸ while also expressing sympathy for the victims and contributing to international awareness of the Holodomor, with a view to preventing similar tragedies.⁴⁹

— 5

International procedures

In their earlier advisory report on the use of the term ‘genocide’ by politicians, the CAVV and the EVA noted that, when making a determination that genocide or crimes against humanity have been, are being or will be committed, the preferred course of action is to find support in determinations made by UN bodies, UN commissions of inquiry or international courts and criminal tribunals.⁵⁰ In this context, however, it is worth reiterating that in their report the CAVV and the EVA confined themselves to discussing ongoing situations and largely refrained from considering historical situations.⁵¹

The above recommendation is less pertinent to historical situations, which give rise to a different set of issues. In ongoing situations, the obligation to prevent is activated, potentially leading to the apprehension and prosecution of suspected perpetrators.⁵² That is not the case

in most historical situations due to the passage of time: the situation itself will have come to an end and potential suspects will be old or dead. The passage of time will also hamper efforts to uncover the truth and determine the facts, as suspects and potential witnesses will no longer be available to shed light on relevant events.⁵³ These circumstances obviously preclude recourse to criminal proceedings.

To a certain extent, these complications could be overcome by conducting detailed legal and historical research. As indicated above, some of this research has already been done. Other options include the establishment of a commission of inquiry by the United Nations, UNESCO or the Council of Europe.⁵⁴ The aforementioned International Commission of Inquiry into the 1932-33 Famine in Ukraine has already paved the way in this regard,⁵⁵ and it is likely that more archival material has become available since. Together with a number of like-minded countries, the Netherlands could push for the establishment of a commission to study the facts of the Holodomor and determine its legal character. However, it is by no means certain that such an initiative would attract sufficient support within the United Nations, not least because such commissions are usually established in connection with current crisis situations.⁵⁶

The Council of Europe appears to provide more opportunities in this area, but it too does not normally occupy itself with facts and events that occurred before its foundation. Nor would recourse to the European Court of Human Rights offer greater promise, given that it has ruled that the mass murder of Polish officers in Katyn in 1940 falls outside its temporal jurisdiction.⁵⁷

Another option would be to ask the International Court of Justice (ICJ) to determine Russia’s responsibility for the Holodomor. For this purpose, the ICJ would need to have jurisdiction on the basis of the consent of the states in question. The only plausible basis for this would be the Genocide Convention, which states in article IX: ‘Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts

enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.’ A case based on the Genocide Convention, in which Ukraine has accused Russia of falsely claiming that it has committed acts of genocide in Donetsk and Luhansk, is currently pending before the ICJ.⁵⁸ The UN General Assembly could potentially also request the ICJ to render an advisory opinion on the legal characterisation of the Holodomor. However, it is doubtful whether the ICJ would accept a case relating to the Holodomor. Despite the aforementioned textual arguments in support of a possible retroactive effect, it seems more likely that the ICJ would reject these arguments due to the absence of a specific provision in this regard, and that it would therefore lack jurisdiction on this issue.



contents



Conclusion and recommendations



contents

In this advisory report, the CAVV has discussed several international legal considerations surrounding the recognition of the Holodomor as genocide. As part of this process, it has examined whether genocide had already been recognised as an international crime at the time of the Holodomor and what actions the House of Representatives and the Netherlands can take with regard to recognising the Holodomor as genocide.

The CAVV's report can be summarised as follows:

1. The concept of genocide did not exist at the time of the Holodomor and had not yet been recognised as an international crime prior to the adoption of the Genocide Convention. Although the concept of crimes against humanity did exist at the time of the Holodomor, due to the 'nexus' requirement it was still very much evolving within international law.
2. Although genocide had not yet been recognised as an international crime at the time of the Holodomor, the House of Representatives could take the position that the Holodomor can be regarded as genocide (or a crime against humanity) *by contemporary standards*, in so far as it actually meets the criteria of such crimes.
3. Instead of 'genocide' or 'crimes against humanity', the House of Representatives could use the term 'serious human rights violations'. Alternatively, it could avoid legal characterisation altogether by using the term 'untold atrocities' in its recognition of the Holodomor.
4. Together with a number of like-minded countries, the Netherlands could push for the establishment of a commission to study the historical facts of the Holodomor and determine its legal character.



Endnotes



contents

- ¹ See <https://www.adviescommissievolkrecht.nl/publicaties/adviesaanvragen/2023/03/28/erkenning-genocide>.
- ² M. Dolot, *Execution by Hunger: The Hidden Holocaust*, New York: W.W. Norton, 1985.
- ³ T. Snyder, *Bloodlands: Europe Between Hitler and Stalin*, New York: Basic Books, 2010, Chapter 2 ('The Soviet Famines').
- ⁴ A. Applebaum, *Red Famine: Stalin's War on Ukraine*, London: Allen Lane, 2017.
- ⁵ CAVV and EVA, *Joint advisory report on the scope for and the significance and desirability of the use of the term 'genocide' by politicians*, CAVV advisory report no. 28, 3 March 2017.
- ⁶ *Ibid.*, p. 16.
- ⁷ *Ibid.*, p. 17.
- ⁸ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, *Dutch Treaty Series* 1960, 32, article II.
- ⁹ *Ibid.*
- ¹⁰ *Ibid.*, article I.
- ¹¹ Rome Statute of the International Criminal Court, 17 July 1998, *Dutch Treaty Series* 2000, 120, article 6. The Rome Statute uses the same definition of genocide as the Genocide Convention.
- ¹² *Ibid.*, article 7; International Law Commission, Draft Articles on Prevention and Punishment of Crimes against Humanity 2019, *Yearbook of the International Law Commission*, 2019, vol. II, Part Two, article 2.
- ¹³ CAVV and EVA, *Joint advisory report on the scope for and the significance and desirability of the use of the term 'genocide' by politicians*, CAVV advisory report no. 28, 3 March 2017, p. 4.
- ¹⁴ *Ibid.*, p. 17.
- ¹⁵ For an up-to-date overview of all recognitions, see: <https://holodomormuseum.org.ua/en/recognition-of-holodomor-as-genocide-in-the-world/>.
- ¹⁶ European Parliament resolution of 15 December 2022, '90 years after the Holodomor: recognising the mass killing through starvation as genocide' (2022/3001(RSP)), *OJ* 2023, C 177/14, para. G (1).
- ¹⁷ Belgian Chamber of Representatives, Resolutie betreffende de Erkenning van Genocide [Resolution on the recognition of genocide], 9 March 2023, DOC 55 3092/004; Flemish Parliament, Resolutie over de erkenning als genocide van de Holodomor [Resolution on the recognition of the Holodomor as genocide], 1503 (2022-2023) – no. 3, 15 February 2023; France: *Résolution, adoptée, par l'Assemblée nationale, portant sur la reconnaissance et la condamnation de la grande famine de 1932 1933, connue sous le nom d'Holodomor, comme génocide le 28 mars 2023* [Resolution, adopted, by the National Assembly, on the recognition and condemnation of the great famine of 1932-1933, known as the Holodomor, as genocide on 28 March 2023], Texte adopté n° 97.
- ¹⁸ Vienna Convention on the Law of Treaties, 23 May 1969, *Dutch Treaty Series* 1972, no. 51, article 28. It may be assumed that this provision embodies a rule of customary international law and a general principle of law that was already in force prior to the Vienna Convention's entry into force in 1980. See M.E. Villiger, *Commentary on the Vienna Convention on the Law of Treaties*, Leiden: Martinus Nijhoff Publishers, 2009, pp. 381 and 386, marginal no. 13.
- ¹⁹ A. Jones, *Genocide. A Comprehensive Introduction*, 3rd ed., London/New York: Routledge, 2017, p. 14.
- ²⁰ R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, New York: Columbia University Press, 1944, chapter IX ('Genocide'), p. 79.
- ²¹ S. L. Jacobs, ed., *Raphael Lemkin: Lemkin on Genocide*, Lanham, MD: Lexington Books, 2012, p. 20.
- ²² UN General Assembly resolution 96(I) The Crime of Genocide, 11 December 1946, UN Doc. A/RES/96(I).
- ²³ See, for example, R. Serbyn, 'The Ukrainian Famine of 1932-1933 and the UN Convention on Genocide', *Human Rights in Ukraine*, 2008, <https://khpg.org/en/1204069771>; K. Bondar, 'The Ukrainian Famine of 1932-1933 as Genocide under International Law', LLM thesis, Harvard Law School, 2011.

- ²⁴ Supreme Court of Israel, *Attorney-General of Israel v. Adolf Eichmann*, 1962, 36 ILR 277. Eichmann was charged with ‘crimes against the Jewish people’ rather than genocide as such.
- ²⁵ The Commission of Inquiry, which was sponsored by the World Congress of Free Ukrainians (WCFU), comprised seven eminent jurists. Its mandate covered not only fact-finding but also ‘recommendations as to individual and/or group responsibilities for the famine’. For a detailed analysis of the Commission’s work, see A.J. Hobbins and D. Boyer, ‘Seeking Historical Truth: The International Commission of Inquiry into the 1932-33 Famine in Ukraine’, *Dalhousie Law Journal* vol. 24(2), 2001, p. 139.
- ²⁶ International Commission of Inquiry into the 1932-33 Famine in Ukraine, *Final Report*, 1990, p. 65, <https://web.archive.org/web/20081001225745/http://www.ukrainianworldcongress.org/Holodomor/Holodomor-Commission.pdf>. The Commission did not rule out the hypothesis that a genocide occurred during the famine of 1932-1933. *Ibid.*, p. 61.
- ²⁷ *Ibid.*, p. 63. For a more detailed analysis, see M. Swatek-Evenstein, ‘A History of “Humanitarian Intervention” in Nineteenth-Century International Law’, *A History of Humanitarian Intervention*, Cambridge: CUP, 2020, pp. 42-164. See also G. Molier, *De (on)rechtmatigheid van humanitaire interventie. Respect voor staatssoevereiniteit versus bescherming van mensenrechten?* [The (un)lawfulness of humanitarian intervention: respect for state sovereignty versus the protection of human rights?], The Hague: Boom Juridische Uitgevers, 2003, pp. 111-144.
- ²⁸ International Commission of Inquiry into the 1932-33 Famine in Ukraine, *Final Report*, 1990, pp. 63-64, [zie: https://web.archive.org/web/20081001225745/http://www.ukrainianworldcongress.org/Holodomor/Holodomor-Commission.pdf](https://web.archive.org/web/20081001225745/http://www.ukrainianworldcongress.org/Holodomor/Holodomor-Commission.pdf). See, in particular, article 227 of the Treaty of Versailles (Treaty of Peace with Germany), 13 *AJIL* 1919, Supplement, p. 151 (‘The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.’).
- ²⁹ International Commission of Inquiry into the 1932-33 Famine in Ukraine, *Final Report*, 1990, pp. 63-64, <https://web.archive.org/web/20081001225745/http://www.ukrainianworldcongress.org/Holodomor/Holodomor-Commission.pdf>. Technically, this clause only applies to the law in time of war (and even then only to wars between states), not in time of peace.
- ³⁰ UN General Assembly resolution 96(I) The Crime of Genocide, 11 December 1946, UN Doc. A/RES/96(I); Genocide Convention, article V.
- ³¹ International Commission of Inquiry into the 1932-33 Famine in Ukraine, *Final Report*, 1990, Dissenting Opinion of Professor G. Levasseur, pp. 3-4, and Separate Statement of Professor R. Levene, pp. 16-20, <https://web.archive.org/web/20081001225745/http://www.ukrainianworldcongress.org/Holodomor/Holodomor-Commission.pdf>. The Nuremberg Tribunal’s jurisdiction was limited to crimes against humanity committed in time of war.
- ³² R. Lemkin, ‘Soviet Genocide in Ukraine’, *Journal of International Criminal Justice* vol. 7, 2009, pp. 125-130 (reprint of speech from 1953).
- ³³ Y. Zakharov, ‘Opinion: Legal Classification of the Holodomor of 1932-33 in Ukraine and in the Kuban as a Crime against Humanity and Genocide’, available online at: <http://khpg.org.ua/en/index.php?id=1221299499>. (‘Other lawyers reject the possibility of applying the Convention on Genocide with respect to events which took place before it came into effect. ...One can conclude that the issue around whether there can be retrospective application of the Convention on Genocide of 1948 remains in dispute.’) Zakharov is of the opinion that genocide was already an international crime at the time of the Holodomor and that the Holodomor was a genocide.
- ³⁴ According to Y. Bilinsky, the intent was not necessarily genocidal, since the famine was mainly used as a means to subjugate the peasant population, not to destroy it as such. See Y. Bilinsky, ‘Was the Ukrainian Famine of 1932-1933 Genocide?’, *Journal of Genocide Research* vol. 1(2), 1999, pp. 147-156. Historian T. Snyder and A. Graziosi see things differently. See T. Snyder, *Bloodlands: Europe Between Hitler and Stalin*, New York: Basic Books, 2010; A. Graziosi, ‘The Soviet 1931-1933 Famines and the Ukrainian Holodomor: Is a New Interpretation Possible, and What Would Its Consequences Be?’, *Harvard Ukrainian Studies* vol. 27, 2004, p. 111.
- ³⁵ J. Mace, “Genocide in the U.S.S.R.,” in I. W. Charny, ed., *Genocide: A Critical Bibliographic Review* (New York: Facts on File), 1988, p. 117.



contents



- ³⁶ See K.J. Heller, 'What Is an International Crime? (A Revisionist Theory)', *Harvard Journal of International Law* vol. 28, 2017, p. 354 [emphasis added].
- ³⁷ Compare: Answers of the Minister of Foreign Affairs to questions from MP Sjoerd Sjoerdsma (D66) on the Holodomor genocide issue, Parliamentary Papers, House of Representatives, 2020/21, 3608, 16 July 2021, answer to question 3 ('At the time of the events in 1932 and 1933 the legal norm regarding genocide did not yet exist.').
- ³⁸ International Commission of Inquiry into the 1932-33 Famine in Ukraine, Final Report, 1990, Dissenting Opinion of Professor G. Levasseur, pp. 3-4, and Separate Statement of Professor R. Levene, pp. 16-20, <https://web.archive.org/web/20081001225745/http://www.ukrainianworldcongress.org/Holodomor/Holodomor-Commission.pdf>. The Nuremberg Tribunal's jurisdiction was limited to crimes against humanity committed in time of war.
- ³⁹ 'En présence de ces nouveaux crimes de la Turquie contre l'humanité et la civilisation, les Gouvernements alliés font savoir publiquement à la Sublime Porte qu'ils tiendront personnellement responsables des dits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ses agents qui se trouveraient impliqués dans de pareils massacres.' See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office, 1948, p. 35.
- ⁴⁰ *Ibid.*, p. 36.
- ⁴¹ According to Egon Schwelb, who served as secretary of the UNWCC. E. Schwelb, 'Crimes Against Humanity', *British Yearbook of International Law* vol. 178, no. 23, 1946, p. 206. See also K. Von Linger, 'Defining Crimes Against Humanity: The Contribution of the United Nations War Crimes Commission to International Criminal Law, 1944-1947', in M. Bergsmo, Cheah W.L. and Yi P. (eds.), *Historical Origins of International Criminal Law: Volume 1*, FICHL Publication Series no. 20, Brussels: Opsahl Academic EPublisher, 2014.
- ⁴² Roger Clark writes that he does not believe 'that the Tribunal was trying to make a pronouncement about the concept of crimes against humanity in general. What it was concerned with was both a much narrower question as to its own jurisdiction and a question as to what had been proved in respect of the relationship between pre-1939 offenses and aggressive war.' R.S. Clark, 'Crimes Against Humanity', in G. Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, The Hague: Kluwer Law International, 1990, p. 195. Theodor Meron writes: 'Although largely because of an amending Protocol to the Charter the Nuremberg Tribunal did not consider crimes committed before the war to be crimes against humanity, it may have been guided by jurisdictional considerations and not necessarily by a conceptually narrow definition of crimes against humanity.' T. Meron, 'Editorial Comment, War Crimes in Yugoslavia and the Development of International Law', *American Journal of International Law* vol. 88, 1994, p. 85.
- ⁴³ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed., The Hague: Martinus Nijhoff Publishers, 1999, p. 265.
- ⁴⁴ Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, 'United in Remembrance of Our Colonial Past: United in Our Will to Reconcile, United in Our Vision of the Future', 2021, para. 10, <https://www.parliament.na/wp-content/uploads/2021/09/Joint-Declaration-Documents-Genocide-rt.pdf>.
- ⁴⁵ In practice, all potential defendants are already deceased, so criminal prosecution is no longer an option anyway.
- ⁴⁶ In this sense, compare also CAVV and EVA, *Joint advisory report on the scope for and the significance and desirability of the use of the term 'genocide' by politicians*, CAVV advisory report no. 28, 3 March 2017, p. 14, in which the CAVV and the EVA concluded that there was no need to differentiate between genocide and crimes against humanity, although the scope of this part of the report was limited to the prevention phase. The European Parliament previously used the term 'crimes against humanity' in the context of its recognition of the Holodomor. See Resolution of the European Parliament, 'Commemoration of the Holodomor, the artificial famine in Ukraine (1932-1933)', 23 October 2008, *OJ* 2010, C 15 E/16 ('an appalling crime against the Ukrainian people, and against humanity').
- ⁴⁷ Compare Resolution of the Parliamentary Assembly of the Organization for Security and Co-operation in Europe (OSCE), 'Holodomor 1932-1933 in Ukraine', 3



contents



- July 2008, which uses the term ‘tremendous human rights violations’. See *Astana Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the Seventeenth Annual Session*, Astana, 29 June to 3 July 2008, p. 44.
- ⁴⁸ This was more or less the outcome of the aforementioned Holodomor Commission report. See International Commission of Inquiry into the 1932-33 Famine in Ukraine, *Final Report*, 1990, pp. 38-43, <https://web.archive.org/web/20081001225745/http://www.ukrainianworldcongress.org/Holodomor/Holodomor-Commission.pdf>. See also ‘Joint Statement [...] on the Seventieth Anniversary of the Great Famine of 1932-1933 in Ukraine (Holodomor)’, UN Doc. A/C.3/58/9, 7 November 2003 (‘the cruel actions and policies of the totalitarian regime’, ‘a national tragedy’); ‘Declaration on the Seventy-Fifth Anniversary of the Holodomor of 1932-1933 in Ukraine’, UN Doc. A/63/613, 16 December 2008 (‘man-made famine’, ‘past horrors and atrocities’); and Resolution 1723 (2010) of the Parliamentary Assembly of the Council of Europe, ‘Commemorating the Victims of the Great Famine (Holodomor) in the Former USSR’, 28 April 2010.
- ⁴⁹ Compare Resolution adopted on the report of the PRX Commission at the 19th plenary meeting on 1 November 2007, in UNESCO, *Records of the General Conference*, 34th session, Paris, 16 October-2 November 2007, vol. 1: Resolutions, p. 72.
- ⁵⁰ CAVV and EVA, *Joint advisory report on the scope for and the significance and desirability of the use of the term ‘genocide’ by politicians*, CAVV advisory report no. 28, 3 March 2017, pp. 8-9.
- ⁵¹ *Ibid.*, p. 6, 7.
- ⁵² *Ibid.*, pp. 10-12.
- ⁵³ The establishment of a ‘truth and reconciliation commission’ along South African lines is likewise not a realistic option, as the passage of time makes it impossible to call witnesses and Russia is not expected to cooperate given current circumstances.
- ⁵⁴ UNESCO runs an International Program on Holocaust and Genocide Education, see <https://www.unesco.org/en/teaching-holocaust-genocide/iphge>.
- ⁵⁵ Nevertheless, this Commission was somewhat controversial. The fact that it was funded by the Ukrainian diaspora contributed to perceptions of bias.
- ⁵⁶ But see the Communication from several UN Special Rapporteurs of 23 February 2023 to Germany (AL DEU 1/2023) and Namibia (AL NAM 1/2023) criticising the Joint Declaration issued by the two countries on the subject of Germany’s colonial crimes in Namibia, in particular p. 5.
- ⁵⁷ European Court of Human Rights, 21 October 2013, ECLI:CE:ECHR:2013:1021JUD005550807, *Janowiec and Others v. Russia* (Application nos. 55508/07 and 29520/09), Judgment [GC], 21 October 2013, paras. 127-161 and 177-186. An application to the Court is probably no longer possible due to Russia’s exclusion from the Council of Europe in 2022.
- ⁵⁸ See International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order on Admissibility of the Declarations of Intervention, 5 June 2023, <https://www.icj-cij.org/case/182>.



contents



List of abbreviations

CAVV

Advisory Committee on Issues of Public International Law

EVA

External Adviser on Public International Law

UN

United Nations

UNESCO

United Nations Educational, Scientific and Cultural Organization

UNWCC

United Nations War Crimes Commission

VCLT

Vienna Convention on the Law of Treaties



[contents](#)

