# SEVENTY-FIVE YEARS OF THE GENOCIDE CONVENTION: THE OBLIGATIONS ON STATES TO PREVENT GENOCIDE

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## ABSTRACT

This contribution explores the historical background of genocide in international law, emphasising its role in shaping the current legal framework for preventing and punishing genocide. The discussion begins by taking a look at the origins of the term "genocide" as introduced to international law after World War II through the Genocide Convention of 1948. This contribution highlights the extensive historical context of the concept of genocide, emphasising the need to examine it from an international public-law perspective to understand the obligations placed on states for preventing genocide. The recent case law before the International Court of Justice in cases brought by Ukraine and South Africa illustrate the importance of genocide in the contemporary international legal context. South Africa requested the court to grant an order for Israel to suspend its military operations in and against Gaza. The court chose to rather follow precedent and granted the order that Israel take all reasonably available measures to prevent

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genocide. This was predictable as the court has an extensive history of interpreting the crime of genocide. This contribution discusses the legal status of genocide by looking at reports from the International Law Commission, relevant case law of the International Court of Justice and international instruments signed to enforce obligations toward genocide prevention. It provides a much-needed academic summary of the interpretation of genocidal acts as mentioned in the Convention, as well as of the obligations of states toward the prevention of genocide under international law. Such research is relevant as the prevention of genocide remains a priority in the international community.

**Keywords:** Genocide; Genocide Convention; Israel; Gaza; Armenia; Kosovo; South Africa; Ukraine; Russia; state obligations; atrocity prevention; *jus cogens*; *erga omnes*

# 1 Introduction

This contribution, in part one, sets out the history of genocide with a focus on its emergence in international law, previous case law before the International Court of Justice (hereafter "ICJ") and the recent cases in which both Ukraine and South Africa brought cases before that court.[1] Genocide has gone from being a fringe subject to one discussed daily by the global media on account of the armed conflicts in the world currently.[2] The codification of genocide prevention in international law is illustrated in this contribution with the use of examples of how the international community of states[3] – through state practice – responds to acts of genocide, and

1 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* ICJ Reports (16 Mar 2022) (hereafter "*Ukraine v Russian Federation*"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (26 Jan 2024) (unreported) (hereafter "*South Africa v Israel*").

2 See, eg, Human Rights Watch 2024; Tolajian 2024; Anon 2024.

3 The idea of an international community of states is a contentious one and is dealt with by my colleague, Jessie Phyffer, in her forthcoming doctoral thesis – please look out for it. See, also, Kritsiotis 2002: 966, who refers to "the traditional sense of states as opposed to individuals, international institutions as opposed to non-governmental organizations" and then discusses whether the term "international community" includes entities other than states. She questions "whether 'community' becomes more than the mere collection of its parts, or, to use Franck's words, 'the system's values, aims, and effects'". She argues that "humanity" and "community" is an integral part of what forms international law and how international law should be applied and interpreted.



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of how their determination to prevent it from reoccurring resulted in codifying it in treaty form.[4] The discussion of the history of genocide focuses on the codification of genocide prevention in the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (hereafter "Genocide Convention").[5] This study aims to provide an in-depth academic discussion of genocide to supplement the popular coverage by the media.

Part two of the contribution sets out the development and codification of the crime, which includes the definition of genocide as a seminal part. This is important because the definition is used as the determining factor in deciding if an act represents genocide and is interpreted using the tools provided for in international law. The use of the Vienna Convention on the Law of Treaties, 1969 (hereafter "VCLT") is cardinal in the interpretation and determination of acts of genocide.[6] The contribution also traces the development of genocide from the time it was codified in international law to the recent cases brought by Ukraine and South Africa.

The definition of genocide in international law is instrumental in determining the obligations of states toward the prevention of this crime, which is discussed in part three of the contribution.[7] In fact, this very definition was used in the case brought by South Africa to clarify Israel's obligations regarding its armed conflict with Hamas. The discussion of these state obligations follows the same order as listed in the VCLT, in accordance with the reasoning of the ICJ. The first obligation is to prevent the crime of genocide, followed by the second obligation, which is to punish it.[8] These obligations have different goals, scopes and depth.

For an opposing view, see Hakimi 2017: 318, who argues for "as an alternative, a theory that accounts for the combined integration and discord that actually characterize[s] most global governance associations".

4 Convention on the Prevention and Punishment of the Crime of Genocide, 1948. (hereafter "Genocide Convention")

5 *Ibid.*

6 Articles 31–33 of the VCLT.

7 Article II of the Genocide Convention.

8 *Idem* art 1 states as follows: "The Contracting Parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Article IV states: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."



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In part four, the discussion looks at the decisions of the ICJ[9] and domestic courts around the world. This contribution aims to provide a basis for the strictest interpretation of the obligations of states toward the prevention of genocide.

The last part of the contribution addresses the impact of the prohibition on genocide as a peremptory norm or *jus cogens* on such state obligations.

## 2 The history of the term "genocide"

The history of "the term "genocide"" provides the context and purpose for the current law in this regard, which may assist in understanding the establishment of the obligations of states toward the prevention of genocide.[10]

The crime of genocide was first codified in international law shortly after World War II in the Genocide Convention in 1948. However, the "fact of genocide" is as old as humanity.[11] The term itself was first coined in 1944 by Lemkin, who was one of the drafters of the Genocide Convention.[12] For Lemkin, however, the concept itself originated under a different name, namely "the crime of barbarity, ie persecution of racial, religious or social groups".[13] The idea to include the crime of genocide as a crime under international law had already been suggested years earlier, after the Armenian genocide.[14] After World War I, the governments of France, Great Britain and Russia issued a joint statement in which they referred to what is now known as the Armenian genocide as "new crimes of Turkey against humanity and civilization".[15] It was only later,

9 *South Africa v Israel*; *Bosnia & Herzegovina v Serbia & Montenegro* ICJ Reports (26 Feb 2007) at 43; *The Gambia v Myanmar* ICJ Reports (23 Jan 2020) at 3; *Ukraine v Russian Federation* at 211.

10 See Luterstein's (2017: 224) argument that arts 31 and 32 have been used and expanded on by judicial bodies, including – and especially – the ICJ, in order to interpret the Genocide Convention: "It is submitted that the ICJ in its two contentious cases on the Genocide Convention has followed a more traditional approach, in accordance with the VCLT."

11 Sartre & Kaim-Sartre 1968: *passim*; Falk, Kolko & Lifton 1971: 534.

12 Falk, Kolko & Lifton 1971: 228.

13 Kornat 2008: 86. See, also, Lemkin 1933: *passim*.

14 United States Holocaust Memorial Museum (*sd*) "The Armenian Genocide (1915–16): Overview" available at *https://encyclopedia.ushmm.org/content/en/article/the-armenian-genocide-1915-16-overview* (accessed 23 Oct 2024).

15 The statement by the Triple Entente to the Ottoman Empire was relayed via US telegram to Constantinople on 29 May 1915.



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during World War II, that Lemkin coined the term "genocide" and defined it as–[16]

> a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves ... . [T]he objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even lives of the individuals belonging to such groups.

This shows that the term "genocide" developed over a century ago in large part due to the atrocities committed during the two world wars. To understand the source of the obligations on states under international law to prevent genocide, one must take an international public law perspective. This is done in the next section by examining the sources of international law.

## 2 1 Codification of genocide in international law

The aim of this part of the discussion is to determine the status of genocide in international law and to discuss the act from a purely legal perspective.[17] This study focuses on state responsibility and intentionally avoids going into too much detail when it comes to individual criminal responsibility. In order to understand the concept of genocide as currently accepted in international law, it must be determined how international crimes, such as genocide, have been codified in international law.[18] Article 13(1) of the Charter of the United Nations, 1945 requires the United Nations

16 Lemkin 1944: *passim*.

17 This status is determined first by looking at the roots or sources in international law.

18 For the accepted sources of public international law, see art 1 of the Statute of the International Court of Justice, 1945, which provides for the sources of international law as follows: "(a) International conventions, whether general or particular, establishing rules expressly recognised by contesting parties; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations." This codification and the United Nations General Assembly's role in it is well documented by Ramsden 2021: 641, who asks the following question: "It has already been noted that Resolution 96(1) provided an important framework, a textual precedent, in the drafting of the Genocide Convention; but how



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General Assembly (hereafter "UNGA") to initiate studies and to make recommendations for the purpose of "the progressive development of international law and its codification".[19] The UNGA embraced this obligation at its first session in 1947 by adopting Resolution 94, thereby creating the Committee on the Progressive Development of International Law and its Codification.[20] This Committee was directed by the UNGA to–[21]

> treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an international criminal code, of the principles recognized in the Charter of the Nuremburg Tribunal and in the judgment of the tribunal.

The Committee was later renamed as the International Law Commission (hereafter "ILC") at its second session.[22] At the same session, the UNGA also reiterated its directive to the ILC to formulate the principles of the Nuremburg Charter and judgments[23] and to prepare a draft international criminal code that would later be known as the Code of Offences against the Peace and Security of Mankind.[24] It could be argued that the UNGA provided the first crime for the Code of Offences against the Peace and Security of Mankind in resolution 96(1) by describing genocide and confirming its status as a crime in international law. In 1947, and parallel to the codification work of the Committee, the UNGA also instructed the United Nations Economic and Social Council (herafter "ECOSOC") to "undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly".[25]

have Assembly resolutions since then fared in advancing the interpretation of provisions in this treaty regime?" See, also, Ferencz 1981: 674.

19 Charter of the United Nations, 1945.

20 United Nations General Assembly (hereafter "UNGA") Res 94(1) (11 Dec 1946) resolved "to establish a committee of seventeen Members of the United Nations to be appointed by the General Assembly on the recommendation of the President, each of these Members to have one representative on the Committee". See, also, the summary and discussion of Allain & Jones 1997.

21 UNGA Res 95(1) (11 Dec 1946).

22 UNGA Res 174(2) (21 Nov 1947).

23 See, eg, the case of *France v Goering* (1946) 22 IMT 203.

24 UNGA Res 177(2) (21 Nov 1947).

25 UNGA Res 96(1) (11 Dec 1946). See the discussion surrounding the drafting process as described as follows by Schabas 2022: 80: "At the midpoint in



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The UNGA, therefore, set in motion two parallel processes that culminated in two treaties that would both contain the crime of genocide. The Genocide Convention was adopted before any other processes were started in 1948 and is therefore discussed here first.

### 2 1 1 The Genocide Convention

The first of the developments that led to the emergence of the criminalisation of genocide in international treaty law was the Genocide Convention. Along with its instruction to ECOSOC, the UNGA confirmed that "genocide is a crime under international law which the civilized world condemns" and stated that genocide is—[26]

> a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups and is contrary to the moral law and to the spirit and aims of the United Nations.

The above definition was arguably the first international law definition of genocide and impacted on the further development of the later definition discussed below. In compliance with UNGA Resolution 96(1), ECOSOC completed its task with the adoption of the text for the Genocide Convention annexed to UNGA Resolution 260 A(III) on 9 December 1948.[27] According to the ICJ, in its advisory opinion of 1951, the purpose of the Convention and the latter Resolution was to establish genocide as a "crime under international law"; it further recognised that "the principles underlying the convention are recognized by civilized nations as binding on states even without any conventional obligation" and that it was "intended to be universal in scope".[28] With the Genocide Convention completed and adopted, and the work of ECOSOC in relation to genocide done, it was time for the ILC to complete its work.

> the process of drafting the Convention, in December 1947[,] the General Assembly adopted a resolution requesting the Economic and Social Council 'to continue the work it has begun concerning the suppression of the crime of genocide, including the study of the draft convention prepared by the Secretariat, and to proceed with the completion of a convention prepared by the Secretariat'."

26 UNGA Res 96(1) (11 Dec 1946).

27 UNGA Res 260(3)(A) (9 Dec 1948).

28 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ Reports (28 May 1951) para 15.



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### 2 1 2 The Draft Code of Crimes against the Peace and Security of Mankind

The ILC completed its first draft Code of Offences against the Peace and Security of Mankind in 1954 (hereafter "1954 Draft Code"). This Code made no specific mention of genocide, but stated in article 2(9) that the intent to destroy "national, ethnic, racial or religious groups" would be seen as one of the offences.[29] The 1954 Draft Code used the definition of genocide as adopted in the Genocide Convention, without using the term "genocide".[30]

In 1981, the UNGA invited the ILC to resume its work on the Draft Code with a view to elaborating on it.[31] As a result, several reports were published by the Special Rapporteur on the Draft Code of Crimes against the Peace and Security of Mankind, Doudou Thiam.[32] In his 1984 report, Thiam stated that the definition of genocide in the 1954 Draft Code follows the definition accepted by the Genocide Convention, falling under the umbrella of "crimes against humanity". Thiam defined genocide as—[33]

> inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connection with other offences defined in this article.

One of the seminal differences between Thiams's definition of genocide and the one in terms of UNGA Resolution 96(1) is the inclusion of the explicit intent to destroy or threaten to destroy the right of existence of a people or person. The commentary to the above quoted paragraph 10 of the 1954 Draft Code, which stated that this substantially corresponds with the definition of

29 Art 2 of the Draft Code of Offences against the Peace and Security of Mankind, 1954 states: "The following acts are offences against the peace and security of mankind." Although the Code references at least thirteen crimes, the crime of genocide is not named; however, the acts of genocide as found in the Genocide Convention is included in para 10.

30 *Ibid.*

31 UNGA Res 106 (10 Dec 1981) para 1. See commentary by Thiam 1984: para 28, where he discussed the crime as mentioned in para 9 of the Draft Code of Offences against the Peace and Security of Mankind, 1984 UN Doc A/Res/39/80-AR.

32 See, in general, Thiam 1984: *passim*.

33 *Idem* para 10.



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"crimes against humanity" as found in article 6(c) of the Charter of the Nuremburg Tribunal.[34] However, the crime of genocide was mentioned separately from other crimes of international law by the UNGA in its initial 1947 resolutions (93–96) requesting that the codification of crimes takes place.[35] The intention for the autonomous character of the crime of genocide is discussed by Thiam as possibly being meant not to jeopardise the implementation of the prevention and punishment of genocide where "measures for the implementation of the [1954 Draft Code] were not taken".[36] This had been specifically mentioned by the UNGA as a concern at its third session on 9 December 1948, directly after it attached the text of the Genocide Convention to Resolution 260, when it invited the ILC to also work on the formation of an international legal tribunal.[37] However, the question arose whether genocide should be introduced separately, as it has already been introduced into international law by the Genocide Convention. Thiam mentioned that the inclusion of genocide in the 1954 Draft Code did not deprive the crime of its autonomy, that it was not influenced by other parts of international law, and that genocide had also been included in the Draft Articles on State Responsibility[38] as a serious violation of international law.[39] The seriousness of the crime of genocide arguably requires it to be introduced and clearly crystallised into international law in as many ways as possible.

The ILC eventually published the Draft Code of Offences against the Peace and Security of Mankind in 1996 (hereafter "1996 Draft Code").[40] Similar to the 1954 Draft Code, the 1996

34 Article 6(c) of the Charter of the International Military Tribunal, 1945 (also known as the Nuremberg Charter) defines crimes against humanity as "namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

35 UNGA Res 96(1) (11 Dec 1946).

36 Thiam 1984: para 29.

37 UNGA Res 260B(3) (9 Dec 1948) tasked the ILC "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions".

38 International Law Commission 2001.

39 See Thiam 1984: para 30.

40 International Law Commission 1994.



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Draft Code also contained the same definition of genocide as found in the Genocide Convention.[41] This time, however, genocide was defined separately from crimes against humanity.[42] The 1996 Draft Code has been described as the addition of certain elements to already existing crimes under international law in order to clarify the seriousness of these crimes and to sculpt them into universal crimes against the peace and security of mankind.[43]

The foundation for the codification of the international crime of genocide in the Rome Statute of the International Criminal Court, 1998 (hereafter "Rome Statute") could be found in the 1954 Draft Code[44] and the 1996 Draft Code – both following the definition of the Genocide Convention – before it became part of the Rome Statute.[45] The focus of the inclusion of new or even distinguishing elements were based on the focus shifting to the individual and had no intention of prejudicing the responsibility of states for violating general international law.[46]

The ILC's work on the 1954 and 1996 Draft Codes were later replaced by its own work on the drafting of a statute for an international criminal court, which resulted in the Rome Statute of the International Criminal Court.[47] At the time of writing, this latter document has been signed by 137 states and ratified by 123

41 In the text adopted by the ILC in 1954, it was included under art 2(10); and in the text adopted in 1996, it was included separately as a "Crime of Genocide" under art 17.

42 These are defined separately in the 1996 Draft Code, namely "crimes against humanity" (art 18) and "genocide" (art 17).

43 Allain & Jones 1997: 100.

44 Crawford 1995: 404 describes it "as an offshoot of its work on a Code of Crimes against the Peace and Security of Mankind".

45 Rome Statute of the International Criminal Court, 1998. It was also included in art 2 of the Statute of the International Tribunal for Rwanda, 1994 and in art 4 of the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, 2009, both of which copy the wording of the Genocide Convention.

46 Article 4 of the Draft Code of Crimes against the Peace and Security of Mankind, 1996.

47 Ortega 2000: 290. See, also, International Law Commission 1994: 109, which defines a crime under general international law to be "accepted and recognised by the international community of States as a whole as being of such fundamental character that its violation attracts the criminal responsibility of individuals".



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states,[48] whilst the Genocide Convention has been acceded to by 153 parties. As the definition of genocide found in the Rome Statute has its roots in the Genocide Convention and in the Draft Codes of 1954 and 1996, this is where the interpretation of the accepted definition of genocide should start.

To summarise, the international legal process regarding the criminalisation of genocide ultimately culminated in two important treaties, namely the Genocide Convention and the Rome Statute. In accordance with the international law of treaty interpretation, both these treaties should therefore be considered when studying the crime of genocide in international law.[49] In this regard, the Rome Statute concerns itself primarily with individual crimes of genocide.[50] The next section first takes a look at the interpretation of the definition in what is arguably the primary legal instrument regarding genocide in international public law, namely the Genocide Convention.

## 2 2 Definition of genocide

This part of the discussion aims to provide an interpretation of the definition of genocide in terms of the Genocide Convention in order to establish a basis for the obligations of states to prevent that crime. Since the Genocide Convention is a treaty,[51] it must be interpreted using the VCLT,[52] starting with the text of the Genocide Convention itself.

48 See the International Criminal Court "The State Parties to the Rome Statute" *https://asp.icc-cpi.int/states-parties* (accessed 29 Oct 2024).

49 Articles 31–33 of the VCLT.

50 Article 5 of the Rome Statute sets out the jurisdiction of the ICC as follows: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: a) the crime of genocide; b) crimes against humanity; c) war crimes; d) the crime of aggression."

51 Conventions or treaties are a source of international law as set out in art 38(1)(a) of the Statute of the International Court of Justice, 1945.

52 Ris 1991: 111. Aust 2006: para 1 describes the Vienna Convention on the Law of Treates as covering "the most important areas [of the law of treaties] and is the indispensable starting point for any description of the law". The proposals that art 31 of the VCLT should not receive preference above that of art 32 are well refuted by Linderfalk 2007: 154, who defends the clarity and clear meaning of the text as follows: "Clarity, in the sense of the Vattelian maxims, means clarity *prima facie* justified."



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Genocide is defined in article II of the Genocide Convention as follows:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group;
>
> (b) causing serious bodily or mental harm to members of the group;
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group;
>
> (e) forcibly transferring children of the group to another group.

When using the VCLT to interpret treaties, articles 31 and 32 are cardinal. Article 31 deals with the general rule of interpretation and article 32 discusses supplementary means of interpretation.[53] The primary source of interpretation is the ordinary meaning of the words of a treaty in their context and in light of the particular treaty's object and purpose.[54] The context may be determined by looking at the preamble and any agreements made in relation to that treaty, as well as at subsequent agreements and practice by the parties in the application of the treaty.[55] Finally, the context of the treaty may be determined using any applicable international law.[56]

53 Articles 31 and 32 of the VCLT.

54 *Idem* art 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

55 *Idem* arts 31(2): "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." *Idem* art 31(3) (a-b) states: "There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

56 *Idem* art 31(3)(c) provides that "any relevant rules of international law applicable in the relations between the parties". This relates to any agreements or other rules of international law, such as diplomatic obligations and customary international law.



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### 2 2 1 Interpretation of "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"

The ordinary meaning of the various terms used in this phrase are discussed separately. A "national" group is defined as "relating to, or characteristic of a nation".[57] An "ethnical" group is defined as relating to "a group of people having a common national or cultural tradition".[58] A "racial" group is defined as "relating to race", with "race" being defined as "each of the major divisions of humankind having distinct physical characteristics".[59] Lastly, "religious" groups are those "belonging to a monastic order or other group united by their practice of religion".[60]

The first rule of treaty interpretation adds that the ordinary meaning must be determined by also looking at the context.[61] The context may be determined by looking at, for example, the preamble to a convention.[62] The preamble to the Genocide Convention refers to UNGA Resolution 96(1), which provides a general definition of the crime of genocide.[63] The groups mentioned in that Resolution were "racial, religious, political and other" groups;[64] the annihilation of such groups would be an unacceptable loss for humanity and they should not be deprived of their right to exist.[65] When looking at the ordinary meaning of the words combined with the context provided by the preamble, the defining characteristic of these groups is that depriving them of the right to exist, their destruction, in whole or in part, deprives humanity of contributions that are essential to the spirit and aims of the United Nations.[66]

57 *South African Concise Oxford Dictionary* (2007) 3 ed *sv* "nation: a large aggregate of people united by common descent, culture or language, inhabiting a particular state or territory"; *Oxford School Thesaurus* (2005) 2 ed *sv* "nation, people, population, country, community society".

58 *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "ethnic".

59 *Idem sv* "race: the transmission of customs or beliefs from generation to generation, or the fact of being passed on". *Oxford School Thesaurus* (n 57 *supra*) *sv* "race: ethnic group, nation, people, clan, tribe".

60 *Idem sv* "religion".

61 See art 31(1) of the VCLT.

62 *Idem* art 31(2).

63 The preamble to the Genocide Convention recognises that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world".

64 UNGA Res 96(1) (11 December 1946).

65 *Ibid.*

66 *Ibid.*



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The VCLT provides the method for confirming the above interpretation.[67] In order to confirm the interpretation of these groups as set out by the ordinary meaning in terms of its context and purpose, the preparatory work done by the committees tasked with drafting the VCLT is instrumental.[68] The UNGA provided ECOSOC with two approaches on which to base its work, namely one focusing on a "human group" and the other focusing on the listed groups of humans mentioned above.[69] These two approaches were then condensed into an enumerated list by the Secretariat of the UN after ECOSOC had instructed it to produce a draft.[70] The Secretariat's draft contained a list of groups that are to be protected under the draft convention, namely "racial, national, linguistic, religious and political" groups.[71] The reasons offered by the Secretariat for the inclusion of these groups were that they are the groups mentioned by the General Assembly. The term "linguistic" was included in response to a request that the Secretariat submit the widest possible formula.[72] The delegations that commented on less important aspects of the draft were India, France, Haiti and the Philippines.[73]

Some governments provided significant comments. Venezuela pointed out that its National Constitution protects nationality, race or religion,[74] and therefore did not see the need for an international

67 Article 32 of the VCLT gives two uses for the supplementary means of interpretation, namely first, that the latter may be used to confirm the meaning resulting from the application of art 31 and, secondly, that it may be used to determine the meaning of the text should the use of art 31 "leave the meaning ambiguous or obscure".

68 *Idem* art 32 specifically prescribes the use of preparatory work to confirm that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty ... in order to confirm the meaning resulting from the application of article 31".

69 The Crime of Genocide UNGA Res 96(1) (11 Dec 1946).

70 Draft Convention on the Prevention and Punishment of Genocide UN Doc E/447 (26 Jun 1947).

71 *Ibid.*

72 *Idem*. The comments on art I mentions that the Secretariat received contradicting views from experts as to the inclusion of the term "political" as a human group.

73 See *Comments by State Parties Sent into the Meeting of the First Sitting of the Sixth Committee of the UN General Assembly* UN Doc A/401 (First comments) (27 Sep 1947); UN Doc A/401/Add.1 (Further comments) (1 Oct 1947); and UN Doc A/401 (First comments) (27 Sep 1947).

74 Article 46(b) of the National Constitution of Venezuela, 1999.



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instrument to address these as well.[75] The United States of America (hereafter "USA") removed the reference to "linguistic" groups, insisting that the latter is already included under the terms "racial, national and religious".[76] The *Ad Hoc* Committee of ECOSOC then agreed to include "racial, national and religious groups" and to include other groups later.[77] The representative from Lebanon made an important point when discussing the inclusion of groups by stating that these "groups bore an inalienable character".[78] France wanted to include "opinion" as a group, but this was rejected by the other members as too unstable and difficult to prove.[79] The inclusion of the identifier "ethnical" was later suggested by the Swedish representative and then included in the definition after the draft Convention moved to a vote in the Sixth Committee of the UNGA (hereafter "Sixth Committee") while attempting to reconcile the several drafts of the Convention.[80] While discussing the inclusion or exclusion of "political" groups, the inclusion of the word "ethnical" was argued by the state parties to be a compromise if the contentious group "political" was to be removed.[81] "Political" groups was eventually removed in the 128th meeting of the Sixth Committee.[82] The USA confirmed that the particular groups must

75 See n 73 *supra*.

76 *The Comments by State Parties Sent into the Meeting of the First Sitting of the Sixth Committee of the UN General Assembly* UN Doc A/401/Add.2 (23 Oct–15 Dec 1946) provided as follows: "The inclusion of 'linguistic' groups is believed to be unnecessary, since it is not believed that genocide would be practiced upon them because of their linguistic ... characteristics."

77 The *Ad Hoc* Committee on Genocide, specifically the ECOSOC *Ad Hoc* Committee 1948: 2 acknowledged that "[g]enocide was the extermination of racial, national and religious groups". Schabas 2006: 386 discusses these groups and states the following: "Attacks on groups defined on the basis of race, nationality, ethnicity and religion have been elevated, by the Genocide Convention, to the apex of human rights atrocities, and with good reason. The definition is a narrow one, it is true but recent history has disproven the claim that it was too restrictive to be of any practical application. For society to define a crime so heinous that it will occur only rarely is testimony to the value of such a precise formulation."

78 *Ad Hoc* Committee on Genocide 1948: 10.

79 *Ibid* at 12.

80 *Summary Report of the Seventy-Fifth Meeting of the Sixth Committee on Genocide* UN Doc A/C.6/SR.75 (7 Apr 1948).

81 *Ibid.*

82 *Summary Report of the One-Hundred-and-Eighth Meeting of the Sixth Committee on Genocide* UN Doc A/C.6/SR.128 (7 Apr 1948).



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be given the opportunity to beneficially contribute to humanity as set out in the UNGA Resolution 96(1).[83] The discussion in the preparatory work of this latter Resolution confirms the context and purpose of the Convention and the seminal element of the group as being the ability of the group to be stable and the identity of the group as being an inalienable part of it.

One commentator also points to the Sixth Committee's comments, stating that the groups must be stable.[84] The question as to the identification of these groups in practice is the most controversial part.[85] The Darfur Commission emphasised a relationship between the target group's perception of themselves and the perception of the perpetrators, especially as it relates to the groups of "national" and "ethnical".[86] The latter Commission added that the groups should be stable and are likely to enrich global civilisation by their cultural contributions, in accordance with the UNGA resolution and the preparatory work of the drafters of the Genocide Convention.[87] The reference to "racial" group is not conclusively defined in international instruments, but the ordinary meaning has not been challenged. The Sixth Committee's main concern was the instability of "political" groups; it noted, for example, that in comparison, "religious" groups are more conducive to the formation of stable groups than "political" groups.[88]

83 *Summary Report of the Seventy-Third Meeting of the Sixth Committee on Genocide* UN Doc A/C.6/SR.73 (7 Apr 1948). The representative from the USA mentioned the need to enforce genocide prevention and the protection of human groups on an international level, but at the same time he also provided an interpretation of the "human groups" and their contributions to civilisation.

84 Kress 2006: 474 states: "The guiding idea of the drafters of the Genocide Convention when devising the list of protected groups was to cover only stable groups into which human beings are born without an (easy) way out." See, also, *Summary Report of the Third Meeting of the Sixth Committee on Genocide* UN Doc A/C.6/SR.3 (11 Jan 1946) for the comments made by Brazil, Venezuela, the United Kingdom, Egypt, Norway, the USSR, Iran and Poland.

85 See Kress 2006: 478, where he argues that the term "religious groups" were particularly controversial.

86 *Idem* at 477 argues as follows: "The Darfur Commission has confronted the issue directly and appears to have placed decisive emphasis on a concurrence between the self-perception of the targeted group and perception of the perpetrators."

87 *Ibid.*

88 See *idem* at 479, where he states that "[t]he *travaux préparatoires* of the Genocide Convention reflect the drafters' feeling that a common religious belief may be particularly conducive to the formation of stable groups".



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It is clear that these groups listed in the Genocide Convention were intended to consist of individuals with shared inalienable parts of the individual and their group. Such a group must have the capacity and stability as a group to be beneficial to humanity, but this was only a consideration in determining the broad categories of groups that should be listed as protected and cannot be used on a case-to-case basis. The above interpretation is argued to be the correct interpretation of the groups as mentioned in the Convention. The next section examines the enumerated acts of genocide, starting with the act of "killing" members of the group.

### 2 2 2 Interpretation of "killing" members of the group

The first type of act that qualifies as genocide is the killing of members of one of the groups discussed in paragraph 2 2 1 above.[89] In its ordinary meaning, "killing" means "an act of causing death".[90] As required by the VCLT, the context and purpose of the Genocide Convention therefore imply that causing the death of any member of the group ends the possibility of that person being able to contribute to humanity the unique perspective of their belonging to one of the listed groups. Killing a member of the group has the effect of removing the possible contributions that the individual could have brought to humanity. The interpretation of "killing" is therefore straightforward when interpreted literally.

According to one commentator, the killing of "one member of a protected group suffices".[91] However, this interpretation is questioned since the killing of more than one person is required in terms of the phrasing "persons in a group";[92] genocide cannot exist where there is only one victim.[93] However, this latter view was disputed in the International Criminal Tribunal for Rwanda (hereafter "ICTR") case of *Gacumbitsi v The Prosecutor*,[94] in which

89 Article II(a) of the Genocide Convention.

90 *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "kill".

91 Kress 2006: 480.

92 Cassese 2002: 348 states: "The only thing that can be clearly inferred from the rule is that genocide cannot exist when there is only one victim". See, also, Dixon, Khan & May 2003: 13–32, where it is argued that the use of the plural term, namely "members of the group", tends to suggest more than one person.

93 Cassese 2002: 348.

94 Case no ICTR-2001-64-A (7 Jul 2006).



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Shahabuddeen J, in a separate opinion, referred to Schabas's view that "from a grammatical standpoint, the phrase can easily apply to a single act of killing" and "clearly the quantitative dimension belongs to the mental and not material element".[95]

### 2 2 3 Interpretation of "causing serious bodily or mental harm"

The second act qualifying as genocide is the "causing of serious bodily or mental harm".[96] In terms of its ordinary meaning, "bodily" is defined as "concerning the body";[97] "mental" is defined as "done by, or occurring in the mind";[98] and "harm" is defined as "physical injury, especially that which is deliberately inflicted".[99] As already mentioned above in paragraph 2 2 1, the context and purpose of the Genocide Convention are the prevention of the destruction of stable human groups whose contributions are beneficial to humanity, which groups are listed in the definition. It is submitted that the causing of serious bodily or mental harm on a part of the group or on the whole should have the effect of depriving humanity of the possible contributions that the group would have made to humanity if not for the harm caused. This is confirmed by statements made during the preparatory work of the Sixth Committee, where the Chinese representative suggested the inclusion of "mental harm" due to China's history of the introduction of narcotics to its population and the effect this had on some persons mental abilities.[100]

95 See *idem* at 76 for the separate opinion of Shahabuddeen J; Schabas 2006: 58.

96 Article II(b) of the Genocide Convention.

97 *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "bodily". *Oxford School Thesaurus* (n 60 *supra*) gives the synonyms for "bodily" as "physical or corporeal".

98 *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "mental". *Oxford School Thesaurus* (n 60 *supra*) gives the synonyms for "mental" as "intellectual, cerebral, abstract, rational, cognitive, theoretical".

99 *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "harm". *Oxford School Thesaurus* (n 60 *supra*) gives the synonyms for "injury" as "hurt, injure, maltreat, mistreat, ill-treat, wound, molest, abuse, lay a finger on (informal)".

100 *Summary Report of the Eighty-First Meeting of the Sixth Committee on Genocide* UN Doc A/C.6/SR.81 (25 Oct 1948) para 175: "The purpose of the amendment (inclusion of the 'mental element') is to include acts of genocide committed through the use of narcotics. Mr Ti-tsun Li from China recalled that he drew the attention of the Committee to the fact that Japan had committed numerous acts of that kind of genocide against the Chinese population. 'If those acts were not as spectacular as Hitlerite killings in gas chambers, their effect had been no less destructive.'"



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The inclusion of "mental harm" indicates that the Committee intended to include "serious bodily or mental harm" as it has the effect of debilitating a group's ability to contribute to humanity with its unique and diverse characteristics.

An appropriate interpretation of this act would be a "grave and long-term disadvantage to a person's ability to lead a normal and constructive life".[101] According to one scholar, an important factor that explains the meaning of "mental harm" is the word "lasting" as used in the *Krstic* case.[102] Such lasting effect of the harm also helps with the understanding and interpretation of the term "serious".[103] Another view suggests that the effects of "mental harm" must be the same as that of "serious bodily harm" in that it "creates a substantial risk of fatal consequences".[104] It is submitted that none of these views adequately address the effect of the "physical or mental harm" on the ability of the group to contribute to humanity and therefore does not qualify as a measure of "harm" in terms of the context and purpose of the Genocide Convention. The focus should rather be on the effects of the acts of a suspected genocidaire on a population.

Notwithstanding the above, the discussion of "degrading treatment" in the *Akayesu* judgment extended the meaning of "harm" beyond its purpose as contemplated in the Genocide Convention. This is especially true when looking purely at the ordinary meaning within the context and purpose of the Convention as confirmed by the preparatory work of the drafters of the Convention.[105]

101 See *Prosecutor v Krstic* Case no ICTY-98-33-T (2 Aug 2001) paras 510 and 513. The court added that there must be a disregard for "attacks on the dignity of the human person not causing lasting impairment" when it comes to this specific act of genocide.

102 Milaninia 2018: 1381. See, also, *Prosecutor v Krstic* Case no ICTY-98-33-T (2 Aug 2001).

103 Milaninia 2018: 1396.

104 See Gorove 1951: 186.

105 *Prosecutor v Jean-Paul Akayesu* Case no ICTR-96-4-T (2 Sep 1998) para 504 held as follows: "For purposes of interpreting Article 2(2)(b) of the Statute, the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or *degrading treatment*, persecution" (my emphasis). The inclusion of "torture" and "degrading" treatment was a reference to *Attorney-General of the Government of Israel v Eichmann* 36 ILR 5 regarding the Jewish genocide during the Holocaust. It is submitted that the court should rather have followed the rules of interpretation as set out in the VCLT.



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### 2 2 4 Interpretation of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"

The ordinary meaning of the word "deliberately" is defined as "done consciously and intentionally" or "fully considered; not impulsive".[106] The term "physical" is defined as "relating to things perceived through the senses as opposed to the mind; tangible or concrete".[107] A group exists as a physical unit that is tangible, concrete and, as already established in paragraph 2 2 1, stable. The infliction of conditions of life in terms of the context and purpose of the Convention must have the effect of depriving humanity of the potential contributions of the group, which group must be one of the stable groups as listed in the definition.[108] It is submitted that, in terms of the context and purpose of the text of the Genocide Convention, the requirement regarding "conditions on life" qualifies as genocide if it has the effect of reducing the ability of the group to contribute to humanity. However, the addition of the need for "physical destruction" arguably requires the group to be destroyed in whole or in part, which requires the actions to "put an end to the existence" of members of the group,[109] in whole or in part. This could be interpreted as the causing of the death or the infliction of conditions that would lead to the cessation of the members' existence, and to the group's ability to contribute to humanity.[110]

The ordinary meaning in the context and purpose of the Genocide Convention as examined above must be confirmed with the use of the preparatory work of the drafters of the Convention as required by the VCLT.[111] Subparagraph 2(3) of the Genocide Convention was originally included in the draft convention prepared by the Secretariat of the UN and listed the conditions of life.[112]

106 *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "deliberately".

107 *Idem sv* "physical".

108 This is also in reference to the foundation of the Genocide Convention, which, arguably, is UNGA Res 96(1) ((11 Dec 1946) act of genocide "results in … loss to humanity."

109 *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "destruction".

110 In *Prosecutor v Radoslav Brđanin* ITY-99-36-T (1 Sep 2004), the ICTY defined physical destruction as the "deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion".

111 See art 32 of the VCLT.

112 The Draft Convention on the Prevention and Punishment of Genocide UN Doc E/447 (26 Jun 1947) at 20 described conditions of life as "confiscation



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The *Ad Hoc* Committee of ECOSOC, however, did not limit the conditions that would be aimed at causing the "physical destruction" of the members of the group.[113] The provision was then slightly amended by the representative of the USSR to the Sixth Committee, imposing conditions of life that are aimed at causing physical destruction.[114] The main debate in the latter Committee concerned the inclusion of the word "deliberate".[115] The representative of Belgium made it clear that there must be a "deliberate creation" of such conditions. The focus of the debate with regard to the word "deliberate" and the intent of the crime is in line with the ordinary meaning and the context and purpose of the Convention, which contemplates an intent to destroy.[116] It is submitted that the text of the Genocide Convention and the *travaux préparatoires* (preparatory work) are aligned in that what is required is the deliberate intention to destroy the group through the imposition of conditions that would result in the death or physical destruction of members of the group.

Some scholars describe this type of genocide as "genocide by attrition" and as a "means employed or bring about mass deaths by forced displacement, or the denial of access to food, water, shelter, healthcare, medicine, or security".[117] Since the text of the Genocide Convention is not entirely clear as to what qualifies as "physical destruction", this act of genocide may well be included in the original intended meaning. It is important, therefore, to note that the VCLT gives the option to look at the *travaux préparatoires* when the text is not clear (ie, when it is "obscure") or ambiguous.[118]

of property, looting, curtailment of work, denial of housing, and of supplies otherwise available to the other inhabitants of the territory concerned".

113 Article 7 of the Genocide – Draft Convention UN Doc E/794 described it as "inflicting on members of the group measures or condition of life aimed at causing their deaths".

114 See the *Amendments Proposed by the USSR in the Sixth Committee of the UNGA* UN Doc A/C.6/223 (ii) (7 Oct 1948) regarding "the deliberate creation of conditions of life for such groups as is aimed at their physical destruction in whole or in part".

115 *Summary Report of the Eighty-Second Meeting of the Sixth Committee on Genocide* UN Doc A/C.6/SR.82 (23 Oct 1948).

116 *Ibid.*

117 Rosenburg & Silina 2016: 112. See, also, Verdeja 2016: 22. For more on the methods of attrition, see Basso 2016: 6.

118 See n 67 *supra* for the two uses the VCLT ascribes for the use of preparatory work. See, also, art 32(a) of the VCLT.



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During its preparatory work on the second draft of the Genocide Convention, the *Ad Hoc* Committee[119] discussed a proposal by Saudi Arabia regarding "physical destruction".[120] The proposal was for the inclusion of "destruction of the essential potentialities of life of a group, people or nation, or the intentional deprivation of elementary necessities for the preservation of health or existence".[121]

The Saudi draft was followed by a draft prepared by the Secretariat of the UN,[122] proposing two provisions of which only one received a significant explanation.[123] In response to the draft, the Genocide *Ad Hoc* Committee of the ECOSOC, lead by China, the USSR and the United States, supported the idea of declaring a genocidal act, which eventually became genocide by means of "imposing conditions of life"; this may be understood as "the premeditated infliction on such groups ... [of] conditions of life aimed at the destruction of the group".[124] This latter view

119 Established by the UN Economic and Social Council's Resolution 117(VI) (3 Mar 1948).

120 See Clapham 2006: 499. For the USA's perspective on genocide, see Power 2013: *passim*.

121 Sixth Committee, Delegation of Saudi Arabia: Draft Protocol for the Prevention and Punishment of Genocide UN Doc A/C.6/86 (26 Nov 1946). The Saudi proposal was eventually adopted in the final version of the Genocide Convention.

122 The draft was prepared by the Secretary-General of the UN in pursuance of the resolution of the Economic and Social Council dated 28 Mar 1947. See Draft Convention on the Prevention and Punishment of Genocide UN Doc E/447 (26 Jun 1947).

123 See the Draft Convention of the Crime of Genocide UN Doc E/447 (26 Jun 1947) at 26, which reads: "Man cannot live without the help he receives from the community in exchange for his services to it. If the state systematically denies to members of a certain group, the elementary means of existence enjoyed by other sections of the population ... in fact condemns them to death at the end of the medium period instead of a quick death in concentration camps; there is only a difference of degree." See the Prevention and Punishment of Genocide Draft Convention UN Doc E/623 (30 Jan 1948) as prepared by the Secretariat. The explanation by the Secretariat read as follows (at 1): "(b) [T]he subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion, are likely to result in the debilitation or death of the individuals; and ... (d) the deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned."

124 Prevention and Punishment of Genocide Draft Convention UN Doc E/623 (30 Jan 1948).



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contemplates the element of physical destruction by imposing conditions of life aimed at that end.

The wording "in whole or in part" in reference to a group was added by China.[125] France attempted to clarify this term further with an example of the act of physical destruction by referring to the Holocaust, and described it as follows: "The Jews were confined in conditions which, either by starvation or by illness accompanied by the absence of medical care, led to their extinction, [and that] must certainly be regarded as an instrument of genocide."[126] The ICTR later used similar terms and stated the following as acts that result in the physical destruction of a group, and may be viewed to classify as genocide in terms of the Convention, namely the provision of a subsistence diet only; expulsion of persons from their homes; and the reduction of medical services to below a minimum requirement.[127] In *Prosecutor v Kayishema & Ruzindana*,[128] the ICTR described the act of genocide by referring to the imposing of conditions of life, such as rape, starvation and a lack of sufficient living accommodation.

125 See *Ad Hoc* Committee of the Sixth Committee of the UNGA's Draft Articles Proposed for Inclusion by the Delegation of China UN Doc E/AC.25/9 (16 Apr 1948); principle II in *Ad Hoc* Committee of the Sixth Committee of the UNGA's Draft Articles Proposed for Inclusion by the Delegation of the USSR UN Doc E/AC.25/7 (7 Apr 1948). This act of genocide was first included by the representative of China, who submitted as follows: "Subjecting such group to such conditions or measures as will cause the destruction, in whole or in part, of the physical existence of the group." See *Ad Hoc* Committee of the Sixth Committee of the UNGA's Draft Articles Proposed for Inclusion by the Delegation of China UN Doc E/AC.25/9 (16 Apr 1948). As was later made clear by the Chinese representative, the importance of this inclusion was to ensure that the application of narcotics to the group would be seen as genocide, as this was the same conditions that the Japanese used on the Chinese during World War II. See the Genocide – Draft Convention UN Doc E/794 at 6, where China stated: "It is clear ... that the Japanese intended to commit, and did commit, genocide by narcotics." However, it is possible for the use of narcotics to fall under several acts of genocide in the final Genocide Convention.

126 See *Ad Hoc* Committee 1948: 14.

127 *Prosecutor v Jean-Paul Akayesu* Case no ICTR-96-4-T (2 Sep 1998) para 505. This is confirmed by Robinson 2008: 18, who states that it may include "putting a group of people on a regimen of insufficient food allocation, reducing required medical attention, providing insufficient living accommodation etc".

128 Case no ICTR 95-1-T (21 May 1999).



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This act of genocide is different from the others as it may include depriving a specific group of certain necessities that may already be lacking (especially in a war situation) and, thus, is rather an inaction and not an action in itself. It must therefore be determined whether the act is defined as a mere omission to provide necessities to one of the groups mentioned in the Convention.[129] One view is that such an act qualifies as genocide when there is clear omission on the part of the perpetrator.[130] However, mere negligence on the part of a state (or individual) will not suffice, as the Convention requires that the omission be "calculated" to bring about the destruction of the group as a whole or in part.

### 2 2 5 Interpretation of "imposing measures intended to prevent births within the group"

A further act of genocide in terms of the Genocide Convention is that of "imposing measures intended to prevent births within the group".[131] The ordinary meaning of "measures" is "a way of achieving something, or a method for dealing with a situation".[132] The meaning of "impose" is defined as "[forcing] someone to accept something, especially a belief or way of living".[133] This ordinary meaning viewed in the context and purpose of the Convention may be interpreted as referring to the preservation of the group. The protection of the group's ability to procreate is to allow for the birth of the next generation of the group once the current generation ceases to exist. The protection of the right to procreate, therefore, ensures the group's continued existence despite the death of its existing or aging members. Any measures to prevent the continued existence of the group by limiting the ability of the group to procreate therefore infringes this right. Without procreation, the

129 Article II of the Genocide Convention mentions a "national, ethnical, racial or religious group".

130 See, also, the recent accusation of genocide made against Myanmar by Sałkiewicz-Munnerlyn 2019: 366 regarding the "deprivation of food and other necessities of life" during the attacks or forced removal of the Rohingya by the Myanmar government in 2017.

131 Article II(d) of the Genocide Convention.

132 *Cambridge Dictionary* (online ed) *sv* "meaning of measure in English" available at *https://dictionary.cambridge.org/dictionary/english/measure* (accessed 26 Oct 2024).

133 *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "impose".



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ability of the group to contribute to humanity is severely limited to the time that the current population is in existence.

In order to confirm the ordinary meaning of the text in its context and purpose, one must refer to the preparatory work of the drafters of the Convention.[134] The Secretariat's draft lists the measures that could be applied to prevent births within the group. These include sterilisation, compulsory abortion, segregation of the sexes and obstacles to marriage.[135] However, the *Ad Hoc* Committee of the ECOSOC removed this list of measures and only mentioned the act of imposing measures intended to prevent births within the group.[136] The Sixth Committee argued that listing the specific measures leaves the act open to misinterpretation.[137] The ordinary meaning of the text in its context and purpose therefore appears to be confirmed by the preparatory work in that a list of measures was initially included, but that due to the fear of misinterpretation it was concluded that the measures preventing births should be unlimited.[138]

The leading scholarly view argues that the prevention of births includes measures that are imposed and are "objectively" capable of preventing births, which would suffice under the definition.[139] This view still does not seem quite clear and, therefore, we must take another look at the *travaux préparatoires*.[140] The draft of the Convention refers to "biological genocide", and under this heading is listed "(a) sterilisation and/or compulsory abortion"; (b) segregation of the sexes; and (c) obstacles to marriage.[141] In response to this, the *Ad Hoc* Committee, after first omitting the act of "preventing births" completely, later accepted "acts or measures

134 Article 32 of the VCLT.

135 Draft Convention on the Prevention and Punishment of Genocide UN Doc E/447 (26 Jun 1947).

136 Genocide – Draft Convention UN Doc E/794.

137 The *Summary Report of the Eighty-Second Meeting of the Sixth Committee on Genocide* A/C.6/SR.82 (23 Oct 1948) at 183 states: "In giving a full list, the *Ad Hoc* Committee had laid itself open to the danger of misinterpretation."

138 *Ibid.*

139 Schabas 2006: 55.

140 Article 32 of the VCLT provides as follows: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty."

141 Draft Convention on the Prevention and Punishment of Genocide UN Doc E/447 (26 Jun 1947) at 26.



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calculated to prevent births within the group".[142] The version of "acts or measures calculated to prevent births within the group" was later changed to the current version that replaced the word "calculated" with "intended".[143]

International jurisprudence also seems to prefer a wide interpretation of the measures under discussion. In *Prosecutor v Jean-Paul Akayesu*, the ICTR has construed measures intended to prevent births to include "sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriages".[144] One view points out that these acts of genocide do not require for it to be "calculated" to destroy the group in whole or in part as in article II(c) of the Convention and also notes the role that rape may play in the prevention of births – and that it falls under paragraph (b) – as it also results in the harming of women.[145] Another scholar agrees with this interpretation of rape as genocide, insofar as it relates to the "mental and physical harm" that it causes.[146] She further notes that the *Akayesu* judgment made clear the impact that rape has on its victims as it causes serious damage by contributing to the breaking of the spirit of the population, leaving the affected women without a will to live.[147]

The notion of rape that causes serious mental and/or physical harm with the intent to destroy a group has been described as genocidal rape.[148] However, whether rape falls under the "prevention

142 Schabas 2006: 198.

143 *Summary Report of the Eighty-Second Meeting of the Sixth Committee on Genocide* UN Doc A/C.6/SR.82 (23 Oct 1948). When adopted, the change received thirty votes in favour, five against and seven abstentions.

144 Case no ICTR-96-4-T (2 Sep 1998) para 507. See, also, Schabas 2006: 483.

145 Schabas 2006: 199.

146 Van Schaack 2008: 20.

147 *Idem* at 21. In *Prosecutor v Jean-Paul Akayesu* Case no ICTR-96-4-T (2 Sep 1998) para 731, the tribunal stated as follows: "Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole ... sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and to life itself." Fletcher 2022: 1597 supports Van Schaack's argument.

148 Genocidal rape is explained as follows by MacKinnon 1994: 11: "Like all rape, genocidal rape is particular as well as part of the generic, and its particularity matters. This is ethnic rape as an official policy of war in a genocidal campaign for political control. That means not only a policy of the pleasure of male power unleashed, which happens all the time in so-called peace; not only a policy to defile, torture, degrade and demoralize the



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of births" category is contentious as it needs further investigation into the psychological effects of rape. This author found little evidence in the *travaix preparatoires* pointing to rape as an act of genocide.[149] If rape *is* to be considered an act of genocide, it must be well motivated, using the context of the crime as it was in the ICTR.

The prevention of births as an act of genocide was recently used to describe in detail measures taken in the Uyghur regions in referring to "pills and shots administered in re-education camps and designed to halt menstruation, coercive IUD insertions, and forced abortions", although the full extent of forced sterilisations is not yet clear.[150]

This act of genocide, therefore, may be argued to include acts that are aimed at preventing the procreation of a specific group of people, leaving that group unable to contribute to humanity and include sterilisation, forced birth control, separation of the sexes and even compulsory abortion. Whether this also includes the act of raping members of the group in order to prevent births remains controversial among scholars. However, it is submitted that it should be included if the intention of the rapist is to prevent the birth of a member of the group, thereby eliminating the possibility of the group's contributions to humanity.

### 2 2 6 Interpretation of "forcibly transferring the children of the group to another group"

The ordinary meaning of "forcible" is defined as "involving the use of physical power or violence".[151] In turn, "transfer" is defined as "to move someone or something from one place, vehicle, person, group

other side, which happens all the time in war; and not only a policy of men posturing to gain advantage and ground over other men. It is specifically rape under orders. This is not rape out of control. It is rape under control."

149 The term "genocidal rape" has been consistently discussed in scholarly writing ever since the establishment of the Rwandan Tribunal. Two quotes explain this discussion in this context. First, Landesman 2002: 116 argues that "[b]y using a disease, a plague, as an apocalyptic terror, as biological warfare, you're annihilating the procreators, perpetuating the death unto the generations ... the killing continues and endures". The second quote is by Russell-Brown 2003: 354, who states: "According to one reporter, it is the use of AIDS as a tool of warfare against Tutsi women that helped the prosecutors of the Rwandan Tribunal focus on rape as a driving force of the genocide."

150 Finley 2021: 370.

151 *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "forcible".



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to another",[152] and "child" is defined as "a boy or girl from the time of birth until he or she is an adult".[153] The word "adult" is defined as "a person or animal that has grown to full size and strength".[154] Arguably, the ability of the child to contribute to humanity through the unique attributes that it would have had or formed as part of its original group is diminished when it is transferred to another group. The transfer of the child from one group to another strips the child of the possibility of contributing through the unique perspective that its birth group would have offered humanity, which is what the Genocide Convention wants to prevent.[155]

A recent example of the relevance of this act is the order of the ICC on 17 March 2023 for the arrest of Mr Vladimir Vladimirovich Putin and Ms Maaria Alekseyevna Lvova-Belova alleging that they are responsible for war crimes in the form of "unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation".[156] These crimes are listed under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.[157] The press release places the word "children" in brackets.[158] It is submitted that this indicates that the ICC also considers it possible that these two individuals specifically transferred Ukrainian children to Russia; if it is proven that the intent was to raise the children as Russian children and to remove their distinct Ukrainian culture, this also classifies as genocide under article 6 of the Rome Statute. However, proving this intent may be extremely difficult and it is therefore arguably better for the prosecutor to charge the two suspects with war crimes instead.

In the *travaux préparatoires*, this act of genocide was originally placed under the category of "cultural genocide" by the Secretariat of the UN.[159] The *Ad Hoc* Committee of the ECOSOC did not

152 *Idem sv* "transfer".

153 *Idem sv* "child".

154 *Idem sv* "adult".

155 See para 2 2 1 *supra*.

156 International Criminal Court "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova" available at *https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and* (accessed 1 Apr 2024).

157 *Idem* para 2.

158 See *ibid.*

159 Draft Convention on the Prevention and Punishment of Genocide UN Doc E/447 (26 Jun 1947).



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include the phrase "the transfer of children".[160] The Sixth Committee added the forceful transfer of children as it constituted a far more serious and barbarous act than the other acts of cultural genocide mentioned by the Secretariat.[161] The French delegation stated that the act of transferring children had a physical and biological effect as it imposed conditions of life that could cause harm or even death.[162] The delegation from Uruguay argued that since the destruction of a new generation through the prevention of births is argued to be genocide, the destruction of a new generation through the abduction of infants and "forcing them to change their religion and educating them to become enemies of their own people" must also be considered genocide. The inclusion of the word "forced" proved imperative to the inclusion of the act of genocide.[163] The preparatory work arguably confirms that the forced transfer of children must be interpreted to be the transfer of children from one group to another in order to destroy the attributes of the group into which it was born and to force upon the child the attributes of the new group.

The main issue of interpretation here is the meaning of the word "child",[164] which, in its ordinary meaning, is defined as "a young human being below the age of full physical development".[165] A clearer legal definition may be found in the terms of the Convention on the Rights of the Child, 1989, which describes it as follows: "A child means every human being below the age of eighteen years."[166] The term "forcibly" is also contentious. In this regard, one scholar

160 *Summary Report of the First Meeting of the Sixth Committee on Genocide* UN Doc E/AC.25/SR.1 (19 Apr 1948) at 28.

161 In *Summary Report of the Eighty-Second Meeting of the Sixth Committee on Genocide* UN Doc A/C.6/3/SR.82 (18 Nov 1948) at 186, the Greek representative, Mr Vallindas, mentioned "the special case of the forced transfer of children, an act far more serious and indeed more barbarous than the other acts enumerated in the first draft convention". The amendment to include the act of forcibly transferring children was adopted by twenty votes to thirteen, with thirteen abstentions.

162 *Idem* (3 Oct 1948).

163 *Ibid.*

164 However, Mundorff 2009: 92 argues that in recent times there has been a growing consensus on the definition of "child" in international law.

165 *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "child".

166 Article 1 of the Convention on the Rights of the Child, 1989. See, also, s 1093(1) of the USA Genocide Convention Implementation Act of 1987, 18 USC 1988; s 1(b) of the Israelian Crime of Genocide (Prevention and Punishment) Law 5710-1950.



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gives as an example the intention of kidnapping children and raising them in another culture and/or using them as slaves.[167] This was illustrated by Heinrich Himmler's[168] intentions during World War II, when he said: "What the nations can offer in the way of good blood of our type, we will take. If necessary, by kidnapping their children and raising them here with us ... we need them as slaves for our *Kultur*, otherwise it is of no interest to me."[169] One scholar has contended that using children as slaves, as mentioned by Himmler, cannot be construed as genocide when considering the specific intent to "destroy the group" or the *dolus specialis* requirement of genocide.[170] If one has regard to the translation provided by the Nuremburg trial papers, Himmler referred to the death of the people as *verrecken*, which indicates that he did not consider the affected people and their race to be human, but merely viewed them as animals.[171] Himmler wasn't concerned with the Russian and Czech deaths, but was only interested in the way in which their deaths could advance the superior culture of the Germans.[172] The intent here was thus not the destruction of the Russian culture, but the advancement of the German culture; therefore, this example did not meet the *dolus specialis* requirement for genocide.[173]

To summarise, this part of the discussion gives meaning to the term "genocide" within the context of the Genocide Convention through using the methods of interpretation set out in the VCLT. The

167 Schabas 2006: 178.

168 As cited by *ibid.*

169 *France v Goering* (1946) 22 IMT 203 at 480. See, also, the summary of the speech by E Kuesters at "Encountering the revisionists: An outside-inside report on the 1983 International Revisionist Conference" available at *https://codoh.com/library/document/heinrich-himmlers-posen-speech-from-04101943/en/* (accessed 26 Jun 2022).

170 For an opposing view, see Triffterer 2001: 404, where he argues as follows: "Does it in substance, really make a difference for the punishability of genocide, whether someone is aiming with will all his will to achieve such a destruction, in whole or in part, of the 'group as such'? Should it not be sufficient that he commits a genocidal act just with an ordinary intent 'to destroy'[?]."'

171 USA Archives Exhibit USA 170 1919, PS Translation of text office of the US Chief of Counsel: Speech of the Reichsfuehrer – SS at the meeting of the SS Major Generals (SS-Gruppenfuehrer) at Losen 4 Oct 1943. (Copy provided by the National Archives of the US, in which the translator made a special note regarding the use of the word *verrecken* in German.) The translator stated that *verrecken* is only used in relation to the death of animals.

172 *Ibid.*

173 Mundorff 2009: 98.



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definition includes the protection of a list of groups that have been determined to be stable and are beneficial to humanity; any group falling within one of those categories must be protected. Further, for an act to qualify as genocide it must be committed against one of the protected groups that are mentioned in the Genocide Convention. Considering the rationale behind the Convention, the intent must be to prevent the possibility that a person's membership of a protected group benefits the development of humanity. The removal of such possibility through the destruction of the group may be considered as genocide if the removal is by means of one of the acts enumerated in the Convention. The act of killing is straightforward. The imposition of conditions of life must be done intentionally to destroy the group. Serious bodily or mental harm must reduce the ability of the group to contribute to humanity and measures intended to prevent births must have the effect of being detrimental to the procreation of the group. Lastly, the movement of members from one group to another must have the intention of making such members a part of the other group.

## 3 Obligations on states

Whereas part two of the contribution aimed at clarifying the meaning of genocide under public international law, this part aims to analyse the obligations on states to prevent genocide. This is done by considering, first, the obligations stipulated in the Genocide Convention and, secondly, the extent to which these obligations have become customary in nature. This discussion is guided by past and recent case law of the ICJ. Related obligations found in other sources of international customary law are also discussed, again guided by the ICJ decisions and the ILC's work to codify the law relating to norms of general international law.

Within terms of the Genocide Convention, the contracting parties have clear obligations to prevent and punish genocide.[174] In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia & Montenegro)*, (hereafter "*Bosnia & Herzegovina v Serbia & Montenegro*") the ICJ confirmed that parties to the Convention have a duty not to commit

174 Articles I, IV and V of the Genocide Convention.



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genocide even though it is not explicitly stated there.[175] The court made it clear that states may be held responsible for genocide should they commit it and that the inclusion of criminal accountability for genocide does not exclude responsibility for the state under international law.[176] Article I of the Genocide Convention obliges contracting parties to prevent and punish genocide.[177]

According to a textual analysis, the parties have agreed to "undertake", which means to "formally guarantee, pledge or promise".[178] Article I denotes the intention of the drafters that the parties guaranteed and promised to prevent and punish genocide.[179] As the ICJ stated in *Bosnia & Herzegovina v Serbia & Montenegro*: "Despite the clear link between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations, each of which must be considered in turn."[180] It is important to note that even though

175 *Bosnia & Herzegovina v Serbia & Montenegro* para 166. Gaeta 2007: 365 contends that the court erred in its assessment of the Convention: "To contend as the court did, that the Genocide Convention also obliges states themselves not to commit genocide through their organs is at odds with the historical legacy that inspired its drafters." He also notes that this obligation emanates from the general international rule prohibiting genocide and not from the Genocide Convention.

176 *Idem* paras 166 and 167: "Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention. Under Article I the States parties are bound to prevent such an act, which it describes as a 'crime under international law' being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I *is to prohibit States from themselves committing genocide*" (emphasis provided).

177 Article I provides as follows: "The Contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

178 For a secondary definition, see *South African Concise Oxford Dictionary* (n 57 *supra*) *sv* "undertake", namely to "commit oneself to and begin" (an enterprise or responsibility).

179 Gaeta 2007: 635 argues that art 1 of the Genocide Convention deals specifically with the state's responsibility to prevent and punish individuals in line with the historical legacy of Nuremburg.

180 *Bosnia & Herzegovina v Serbia & Montenegro* para 425: "The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph (e), of the Convention. In the light of this finding, and of the



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the obligation to prevent is often linked with the obligation to punish, the former is considered to be broader than the latter.[181]

The obligations toward genocide prevention and punishment in international law stem mainly from the Genocide Convention. However, as will be indicated later in this part, there are also other sources of international law in this regard. First, the scope of the obligations that stem from the Genocide Convention are determined.

## 3 1 The obligation to prevent genocide

In order to fulfil their obligation to prevent genocide in terms of the Genocide Convention, states "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate".[182] According to the ICJ in *Bosnia & Herzegovina v Serbia & Montenegro*, the obligation to prevent genocide does not end when a state relies on article VIII of the Convention by calling upon the competent organs of the UN to take action.[183] This approach has been praised by at least one view, who described it as a sensible one.[184]

The ICJ further stated that the obligation to prevent genocide refers to states' duty to "employ all means reasonably available to them to prevent genocide as far as possible".[185] This is the first time since the approval of the Genocide Convention in 1948 that a court has considered whether a sovereign state may be held responsible for failing to act beyond its borders.[186] The ICJ held that a state incurs state responsibility in terms of the obligations under the

findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole."

181 Forlati 2011: 192.

182 Article VIII of the Genocide Convention.

183 See *Bosnia & Herzegovina v Serbia &Montenegro* para 427, where the court stated as follows: "The State Party's obligation to prevent genocide does not cease when those organs have been called upon to intervene under article VIII of the Convention."

184 Goldstone & Hamilton 2008: 97.

185 *Bosnia & Herzegovina v Serbia & Montenegro* para 430.

186 Goldstone & Hamilton 2008: 96. Morton 2001: 349–350 points to only three cases that have been brought to the ICJ relating to the Genocide Convention, these being the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Yugoslavia)* ICJ Reports (8 Apr 1993) (hereafter "*Bosnia & Herzegovina v*



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Genocide Convention if it does not "employ all means reasonably available to them".[187] It does not matter whether or not the measures are successful, as long as the state explores all available avenues to prevent the genocide.[188] The ICJ stated that this obligation requires that states apply due diligence when they are aware of possible genocide taking place (or about to take place).[189] The measures that are expected to be taken differ from state to state and are determined in accordance with reference to "geographical distance", "strength of political links" and "links between the authorities of that state and the main actors in the events".[190]

States have attempted to evade this obligation from the start by stating that the relevant genocide did not take place within their jurisdiction and that they, therefore, bear no responsibility. This was rejected by the ICJ in the case of *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (hereafter "*Bosnia & Herzegovina v Yugoslavia*"),[191] where Yugoslavia had argued that the genocide did not take place within its territory and thus that it had no obligation to prevent the genocide from occurring.[192] The court dismissed this latter claim and stated that, in terms of the Convention, the parties had agreed that the crime of genocide

*Yugoslavia*"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Yugoslavia)* ICJ Reports (2 Jul 1999).

187 *Bosnia & Herzegovina v Serbia & Montenegro* para 430: "Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the same sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide; the obligation of States Parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible."

188 *Ibid.*

189 *Ibid.*

190 *Ibid.*

191 ICJ Reports (8 Apr 1993) para 595.

192 *Idem* para 30: "To found its jurisdiction, the Court must, however, still ensure that the dispute in question does indeed fall within the provision of Article IX of the Genocide Convention. Yugoslavia disputes this. It contests the existence in this case of an 'international dispute' within the meaning of the Convention, basing parts of the Applicant's territory was of a domestic nature, Yugoslavia was not party to it and did not exercise jurisdiction over that territory at the time in question; and second, that State responsibility, as referred to in the requests of Bosnia and Herzegovina, was excluded from the scope of application of Article IX."



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was a crime under international law; the Convention is therefore applicable to parties "without reference to the circumstances linked to the domestic or international nature of the conflict".[193] This was originally construed by Lauterpacht J to mean that "it would not make sense since it would mean that a party though obliged to prevent genocide within its territory, is not obliged to prevent it in a territory which it invades and occupies".[194]

The obligation therefore compels states to prevent genocide, using "all means reasonably available", even if the genocide occurs beyond its borders,[195] and even after said state has employed the collective security system of the UN through article VIII.[196] This obligation stretches beyond the borders of the state, as set out by the ICJ in *Bosnia & Herzegovina v Yugoslavia*.[197]

The ICJ read the obligation to prevent genocide as covering not only the activities of non-state actors within the territory of the state party, but also to include genocide that may occur beyond a state's borders.[198] It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes* (ie owed to the international community as a whole).[199] The ICJ therefore clearly and without hesitation confirmed that the obligation to prevent the crime of genocide is not territorially limited by the Convention.[200]

It could be construed that a *carte blanche* may be declared in that all states may be held accountable should genocide occur

193 *Idem* para 31: "[A]s to the territorial problems linked to the application of the Convention, the Court should point out that the only provision relevant to this, Article VI, merely provides for persons accused of one of the acts prohibited by the Convention to be 'tried by a competent tribunal of the State in the territory of which the act committed'."

194 *Idem* paras 444–445 (per Lauterpacht J's separate opinion).

195 *Bosnia & Herzegovina v Serbia & Montenegro* para 430.

196 *Ibid.*

197 See n 191 *supra*; Forlati 2011: 193.

198 *Ibid.*

199 It is submitted that the ICJ gave the best summary of the definition: "An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*." See *Barcelona Traction, Lights & Power Company Ltd (Second Phase)* ICJ Reports (5 Feb 1970) para 33.

200 *Bosnia & Herzegovina v Yugoslavia* para 31.



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anywhere.[201] However, the ICJ limits this obligation through applying "due diligence" and by evaluating the "capacity [of the state] to influence effectively the action of persons likely to commit or are already committing genocide".[202]

There are consequences for the breach of the obligation to prevent genocide by not using "all means reasonably available".[203] An example of such breach is the events that took place in Bosnia and Herzegovina, more specifically in Srebrenica, in 1995.[204] The ICJ stated that the massacre at Srebrenica was an instance of genocide,[205] as the former Federal Republic of Yugoslavia breached its obligation to prevent genocide by not doing enough in terms of the Genocide Convention to prevent the massacre.[206] Nevertheless, the court found this to have been the only breach of the Convention.[207] The scholar Gaeta argues that the decision should rather have been based on the breach of article I of the Genocide Convention and the state responsibility for those persons over which it exercises authority and influence.[208] One scholar also points to the ICJ's

201 Gaeta 2007: 39 argues as follows: "Lauterpacht's *obiter* could be construed as a *carte blanche* invitation to challenge each and every third state for failure to prevent genocide." He states that Bosnia and Herzegovina indeed construed Lauterpacht J's *obiter* as an invitation to bring proceedings against a third party – in this case the UK, a member of the Security Council – for failing in its obligation to prevent genocide and indicated its intention to thus proceed. However, they later decided not to proceed.

202 In *Bosnia & Herzegovina v Serbia & Montenegro* para 430, the court expands on this: "The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position *vis-à-vis* the situations and persons facing the danger, or the reality, of genocide."

203 *Ibid.*

204 RJ Smith (online ed 2024) *sv* "Srebrenica genocide" in *Brittanica* available at *https://www.britannica.com/event/Srebrenica-massacre* (accessed 30 Sep 2024).

205 *Bosnia & Herzegovina v Serbia & Montenegro* para 431.

206 *Idem* para 438.

207 See Forlati 2011: 193, who states that the court's interpretation may well depart from the overall approach taken by the drafters, but that it is justified in terms of an interpretation using arts 31(1) and 31(3)(c), especially in light of the recent developments surrounding the responsibility to protect.

208 Gaeta 2007: 648 makes the following point: "The Court could have achieved the same result by simply interpreting the Convention as an international treaty that provides for judicial cooperation. ... It also fatally led it to



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avoidance in confronting the possible conflict between two norms when outside intervention is required to prevent genocide, but no Security Council authorisation has been given.[209]

### 3 1 1 Recent court cases that confirm the obligations of states to prevent genocide

The ICJ has recently seen an increase in applications in terms of the Genocide Convention as it dealt with three such applications in the last four years.[210] The most recent application was for provisional measures in favour of Ukraine against the Russian Federation.[211] The case concerned the military action by the Russian Federation against the Ukraine.[212] The court ordered the immediate suspension of military action in the territory of the Ukraine.[213]

The second case was brought by the Republic of South Africa against Israel, with South Africa asking the court for provisional measures against Israel.[214] However, the latter case is similar to the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (hereafter "*The Gambia v Myanmar*")[215] as the provisional measures are in favour of a third party. In fact, in its provisional order of 26 January 2024, the court confirmed the precedent set in the *Myanmar* case by providing *locus standi* to South Africa in that—[216]

unsuccessfully try to apply criminal law notions to establish the alleged internationally responsibility of a state for genocide."

209 Gaeta 2009: 42 n 80 argues as follows: "It should be noted that in such a case, and in the absence of a Security Council authorization, the thorny issue of the relationship between the obligation to prevent through resorting to armed force (ie humanitarian intervention) as effective prevention would normally require, and the prohibition of the use of force stipulated in art 2(4) of the Charter, a relationship that ostensibly involves a conflict between two cogent norms, still awaits determination."

210 See *The Gambia v Myanmar* ICJ Reports (23 Jan 2020) at 3; *Ukraine v Russian Federation* at 211; *South Africa v Israel*.

211 *Ukraine v Russian Federation* at 211.

212 *Ibid.*

213 See *idem* at 231, where the court held that "[t]he Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine".

214 *South Africa v Israel*.

215 See n 210 *supra*. This is due to *Ukraine* case's focus on Russia's false accusation of genocide and the act of aggression.

216 *South Africa v Israel* para 33.



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> all the States parties to the Convention have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention ... the obligations in question are owed by any State party to all other States parties to the relevant convention; they are obligations *erga omnes partes*.

The *South Africa v Israel* case concerns the Gaza strip, which is a territory inhabited by the Palestinian people who also live in the territory of the West Bank. The Gaza strip, however, is also home to a Palestinian political and armed group, known as Hamas, who carried out an armed attack on Israel on 7 October 2023.[217] The Israeli government contends that it has a right to self-defence as contemplated in article 51 of the Charter of the United Nations, 1945.[218] Regardless of its right to self-defence, the Israeli government also has the obligation to prevent genocide by using all means reasonably available. The Israeli government therefore has an obligation to prevent genocide against the Palestinian people, who may be seen as a national, ethnic, racial or religious group of people distinctly different from that of the Israeli people. The Israeli government must prevent any act of genocide based on these criteria. In deciding on the provisional measures, the court must examine a link between the protection of the rights of the Palestinian people in Gaza and the provisional measures.[219]

In the case of *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (hereafter "*Ukraine v Russian Federation*"), the Russian Federation contended that it had a right to stop genocide

217 A spokesperson for Hamas, Mr Ghazi Hamad, confirms in interviews with press organisations, such as *Telegraph* and *NBC News*, that Hamas carried out the attacks and will continue to attack the state of Israel.

218 *South Africa v Israel* para 20 (per Mr Noam ) states: "If every resort to force in self-defence against an enemy hiding behind civilians can be portrayed as genocide and trigger provisional measures, an inevitable tension will be created." See "Public sitting held on Friday 12 January 2024, at 10 a.m., at the Peace Palace, President Donoghue presiding, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza strip" available at *https://www.icj-cij.org/node/203424* (accessed 8 Dec 2024).

219 *The Gambia v Myanmar* para 61.



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in terms of the Genocide Convention by taking military action. The ICJ disagreed and ordered the suspension of military action.[220] In the Israeli case, however, Israel's right to self-defence was a clear international right in which the use of military force was permitted until such time as the Security Council of the United Nations restores International Peace and Security.[221] Nevertheless, South Africa requested the court to order Israel to "suspend all its military operations in and against Gaza".[222] The ICJ ordered, and rightly so,[223] that Israel take all measures "reasonably available to them" to prevent genocide.[224] Essentially the court instructed Israel to comply with international law without ordering anything specific to be done differently; this will not lead to a cessation of hostilities in Gaza, which was South Africa's ultimate purpose with the application.[225] This was also the court's decision in its provisional measures order of 26 January 2024.[226] However, the court also instructed Israel to take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip and requested Israel to "submit a report to the Court on all measures taken to give effect to this Order".[227] On 24 May 2024, South Africa asked the court to modify its measures in order to preserve life in the Rafah governorate after news of a planned military incursion by Israel in the area.[228] According to reports by top UN organisations, the planned attack led to displacement

220 *Ukraine v Russian Federation* paras 59 and 60.

221 Article 51 of the Charter of the United Nations, 1945 provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

222 *South Africa v Israel* (Institution of Proceedings papers by South Africa) para 144(1).

223 *Ibid.*

224 In *Bosnia & Herzegovina v Serbia & Montenegro* para 430, the court held that "the obligation of States Parties is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible".

225 In *South Africa v Israel* (Institution of Proceedings papers by South Africa) para 144, the court was asked to order Israel "immediately [to] suspend its military operations in and against Gaza".

226 *Idem* para 86.

227 *Ibid.*

228 In *South Africa v Israel* (May 2024) para 8, "[t]he Court notes ... the most recent developments in the Gaza Strip, and in Rafah in particular ... as stated



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of several civilians before the attack even occurred.[229] The court sided with South Africa in its request for a modification to its order and ordered Israel to halt its military offensive and any other action in the Rafah governorate that may inflict on the Palestinian people in Gaza conditions of life that could bring about its physical destruction in whole or in part.[230] The ICJ decided that its jurisdiction ended there. It took care to avoid the discussion of self-defence and instead only focused on aspects that clearly fall under the Genocide Convention. However, the matter of self-defence was addressed in a separate declaration written by Tladi J, in which he reiterated that Israel has a right to defend itself and that, should it want to legitimately defend itself, any actions to that effect would be "consistent" with the order of the court.[231]

The decision for cessation of military acts in self-defence in Gaza as a response to the armed attack by Hamas must ultimately, as indicated in article 51 of the UN Charter, be taken by the United Nations Security Council (hereafter "UNSC"). The UNSC has, until recently, decided not to order the cessation of the conflict, but has consistently ordered that humanitarian aid be granted to the people of Gaza and not hindered in any way by the government of Israel.[232] The provisional measures ordered by the court could arguably be to compel Israel to use force proportionally to the

by the United Nations Secretary-General (Remarks to the General Assembly on priorities for 2024 (7 February 2024)."

229 In *idem* para 44, the court held as follows: "For instance, on 3 May 2024, the Spokesperson of the Office for the Coordination of Humanitarian Affairs (OCHA) warned that an assault on Rafah would put 'hundreds of thousands of people at imminent risk of death' and would severely impact the humanitarian operation on the entire Gaza Strip, which is run primarily out of Rafah".

230 *Idem* para 15.

231 See the separate declaration (para 17) of Tladi J in the order of the court made on 28 Mar 2024.

232 See UNSC Resolution 2720 (2023) UN doc S/Res/2720, which "[d]emands an immediate ceasefire for the month of Ramadan"; and 2728 (2023) UN doc S/Res/2728, which "[e]mphasizes the urgent need to expand the flow of humanitarian assistance to and reinforce the protection of civilians in the entire Gaza Strip and reiterates its demand for the lifting of all barriers to the provision of humanitarian assistance at scale, in line with international humanitarian law as well as resolutions".



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armed attack it suffered on 7 October 2023 and to take "all measures reasonably available to it" to prevent genocide.[233]

In summary, the obligations on a state in international law, created under article I of the Convention, consist of the duty not to commit genocide; the duty to prevent genocide in its own territory; and the obligation to attempt the prevention of genocide in another state if this is within the confines of its "due diligence" and meets the requirement of representing "reasonable measures and other rules and laws of international law".[234]

## 3 2 The obligation to prosecute or punish

Article I of the Genocide Convention obliges the contracting parties to punish any occurrence of genocide.[235] This duty is now discussed in further detail with reference to the obligations as set out in the decisions of the ICJ addressing the lack of fulfilment of other obligations of states as contained in other articles that are integral to the punishment of genocide.[236] These supplementary obligations are seminal to the ability of states to punish the commission of genocide.

Article V of the Genocide Convention obliges states to enact legislation in order to enable them to adequately prosecute the crime of genocide:[237]

233 This provisional order would be in line with the orders granted by the court in the cases of *The Gambia v Myanmar* and *Ukraine v Russian Federation*. In para 60 of the latter case, the court ordered the cessation of military action in Ukraine as the reason for the military action was contended to be acts of genocide by Ukraine and not self-defence: "[T]he Court considers that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine." It would have been helpful to the *South Africa v Israel* case if Russia had argued self-defence as the court would have had a less complex case in which to determine the relationship between self-defence and aggression.

234 *Bosnia & Herzegovina v Serbia & Montenegro* para 430.

235 Article I of the Genocide Convention.

236 *Idem* art VI provides: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

237 *Idem* art V provides: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to



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> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Out of the 152 nations that ratified the Genocide Convention, only 74 have enacted domestic legislation in line with this provision.[238] Parties to the Convention with no domestic legislation regulating

provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III."

238 For the list of nations that have acceded to the Genocide Convention, see "Status of Treaties" available at *https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en* (accessed 19 Feb 2022). The domestic laws enacted by nations are in alphabetical order: Burkina Faso: art 313 of the Code Penal; Côte d'Ivoire: art 137 of the Code Penal; Ethiopia: art 281 of Penal Code of 1957; Ghana: s 1 of the Criminal Code; Mali: art 30 of the Code Penal; Republic of Congo: Law no 8-98 of Oct 1998; Seychelles: Genocide Act, 1993; South Africa: Implementation of the Rome Statute of the International Court Act 27 of 2002; Rwanda: Organic Law no 9 of 96 on Genocide and Crimes against Humanity; Antigua: Genocide Act; Argentina: Note on Penal Code; Barbados: ch 133A of the Genocide Act; Bolivia: art 138 of the Codigo Penal; Brazil: Law no 2.889 of Oct 1956; Canada: Act on Genocide and War Crimes; Columbia: arts 101 and 102 of the Codigo Penal; Costa Rica: art 127 of the Codigo Penal; Cuba: art 361 of Codigo Penal; El Salvador: art 361 of the Codigo Penal; Gautemala: art 376 of the Codigo Penal; Jamaica: Offences Against the Person (amendment of 1968); Mexico: art 149 of the Codigo Penal; Nicaragua: arts 549 and 550 of the Codigo Penal; Panama: art 311 of the Codigo Penal; Paraguay: Article 8(6) of the Codigo Penal; Peru: Title 14 (Law #26926) incorporated into the Codigo Penal as art 319; Trinidad and Tobago: Genocide Act, 1977; United States of America: ch 50A of the United States Code; Australia: Genocide Convention Act, 1949; Bahrain: Decree no 4 of 1990 (on Genocide); Bangladesh: International Crimes Tribunal Act 1973; Cambodia: Law for Prosecuting Crimes from 1975 to 1979; People's Republic of China: s 9A of the Offences against Person Ordinance (cap 212 – Genocide); Fiji: ch 4 of the Penal Code; Indonesia: Pasal 8 (*genosida*); Iraq: Statute of Iraqi Special Tribunal issued Dec 2003; Israel: Crime of Genocide (Prevention and Punishment) Law 5710-1950; Kyrgystan: art 373 of the Criminal Code; New Zealand: International Crimes and ICC Act of 2000; Tajikistan: Crimes against the Peace and Security of Mankind Act; Tonga: Genocide Act, 1969; Tuvalu: art 52 of the Penal Code; Albania: ch 1 of the Crimes against Humanity Act; Armenia: art 393 of the Criminal Code; Austria: para 321 of *Strafgesetzbuch*; Azerbaijan: arts 103 and 104 of the Criminal Code; Belarus: art 127 of the Criminal Code; Belgium: Law on Serious Violations of International Humanitarian Law; Bosnia-Herzegovina: art 141 of the Penal Code; Bulgaria: art 416 of the Criminal



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genocide include Serbia and Namibia.[239] These two examples are especially disappointing in light of the genocide in Bosnia, committed by Serbians during the 1990s,[240] and the genocide of the Herero, San and Namaqua population in Namibia during German colonial rule.[241] Both countries are parties to the Genocide Convention and have an obligation under article V of the Convention to enact legislation.[242] The lack of domestic legislation makes it difficult for these countries to prosecute and so "prevent and punish" genocide in terms of the Genocide Convention.[243]

In *Question Relating to the Obligations to Prosecute or Extradite (Belgium v Senegal)*, the ICJ stated that the provisions of article V of the Genocide Convention is similar in many aspects to article 5(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (hereafter "Convention against Torture"), and that its purpose is as follows: "By equipping themselves with the necessary legal tools to prosecute this type of offense, the States Parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity."[244] The court also pointed out that the matter of jurisdiction becomes complicated for domestic courts when the state prosecuting the crimes has not fulfilled its obligations under the Convention against Torture and the Genocide Convention and, therefore, has not created the jurisdiction to hear and prosecute genocide cases in domestic legislation.[245] This was

Code; Croatia: art 156 of the Penal Code; Cyprus: Uw 59/1980; Czech Republic: art 259 of the Penal Code; and Denmark: Law 132 of 29 Apr 1955.

239 See, also, the list of current parties to the UN Genocide Convention available at *https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en* (accessed 2 Apr 2024).

240 See, in this regard, the historical analysis done by the United States Holocaust Memorial Museum (n 14 *supra*).

241 *Ibid.*

242 *Ibid.*

243 See *Question Relating to the Obligations to Prosecute or Extradite (Belgium v Senegal)* ICJ Reports (20 Jul 2012) para 77, where the court mentioned that this "affected the implementation of the obligations".

244 At *idem* para 75, the court held as follows: "The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combatting of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventative and deterrent character."

245 *Ibid.*



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made clear by the court when referring to a case brought by the Senegalese government before a domestic court in Senegal: "Thus, the fact that the required legislation had been adopted only in 2007 necessarily affected Senegal's implementation of the obligations imposed on it by Article 6, paragraph 2, and article 7, paragraph 1, of the Torture Convention."[246] Regarding the lack of domestic legislation for genocide punishment, the Senegalese court agreed with the ICJ and stated that "[t]he Senegalese legislature should, in conjunction with the reform undertaken to the Penal Code, make amendments to Article 669 of the Code of Criminal Procedure by including therein the offence of torture, whereby it would bring itself into conformity with the objectives of the Convention".[247]

There seems to be a lack of compliance by certain states regarding their obligation to create domestic legislation that helps fulfil their obligations under the Genocide Convention. This lack of compliance results in internal legal hurdles when trying to fulfil their obligations to prosecute due to the absence of local statutes or penal codes. However, the lack of domestic legislation should not be used to evade the obligation to prosecute genocide since there are other ways to do so. For example, in the prosecution of genocide committed in Cambodia between 1975 and 1979,[248] the new Cambodian government fulfilled the obligation under article I of the Genocide Convention by issuing a special decree.[249] This decree relied on the definition of genocide as defined by the Genocide Convention, also adding certain specific details of the crimes it wished to prosecute.[250] The decree, however, was not in force at

246 *Idem* para 77.

247 *Public Prosecutor's Office & François Diouf v Hissène Habré* Judgment no 135 Court of Appeal (4 Jul 2000). The original text reads: "Considérant que la législateur sénégalais devrait parallèlement à la réforme entreprise dans le Code Pénal apporter des modification à l'article 669 du Code de Procédure Pénale en y incluant l'incrimination de torture, qu'en le faisant il se mettrait en harmonie avec les objectifs de la convention et reconnaîtrait par conséquent le principe de la compétence universelle."

248 Quigley 2006: 27.

249 *Ibid.*

250 The preamble to the Decree Law no 1: Establishment of People's Revolutionary Tribunal at Phnom Penh to try the Pol Pot-Ieng Sary Clique for the Crime of Genocide (Cambodia, Aug 1979) (hereafter "Decree Law no 1") starts by stating that genocide is already defined and then refers to the Convention as follows: "Considering that genocide is also defined in international law ... ." See, also, Quigley 2006: 29; and art I of Decree Law no 1 *idem*, which refers to "namely, planned massacres of groups of innocent people; expulsion of



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the time of the alleged genocidal acts, and the new Cambodian government thus had to make the crime retroactively applicable as it did in article 8 of the decree.[251]

It has been argued that there is an option for states with no laws in place to fulfil their obligations under the Convention to prosecute the crime of genocide by using international customary law to prosecute the perpetrators of the crime even if the country was not a party to the Genocide Convention at the time of the commission of the crime and the crime did not exist in municipal law.[252] This is despite the principle of *nullum crimen sine lege, nulla poena sine lege*, subject to certain considerations.[253] This matter was discussed in the Israeli Supreme Court in the case of *Eichmann*,[254] where the court stated that the crime of genocide exists in international law as a crime that has been prohibited by the "law of nations since 'time immemorial'" and that the law promulgated by Israel in 1950 merely instituted a penalty for this crime under municipal law.[255] Since then, the International Covenant on Civil and Political Rights, 1966 was drafted and signed by state parties, which provides in article 15 as follows:[256]

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

inhabitants of cities and villages in order to concentrate them to do hard labour in conditions leading to their physical and mental destruction; wiping out religion; destroying political, cultural and social structures and family and social relations".

251 Article 8 of Decree Law no 1 states that "[t]his decree applies to the criminal acts of the Pol Pot-Ieng Sary clique prior to its signing".

252 Quigley 2006: 70.

253 Olásolo 2007: 301 points out as follows: "The requirement that the prohibited acts and the penalties must be defined by law beforehand, encapsulated in the maxims *nullem crimen sine lege* and *nulla poena sine lege*." Directly translated from the Latin, this refers to "no crime without a law and no punishment without a law".

254 See n 105 *supra* at 277. See, also, Schabas 2013: 667.

255 See n 105 *supra* at 283.

256 Article 15 of the International Covenant on Civil and Political Rights, 1966 determines that "if, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby".



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The above provision does not, however, prohibit the creation of a penalty where no penalty existed in municipal legislation.[257] It allows the crime of genocide to be prosecuted in domestic courts without national legislation criminalising it as such as the crime existed in international law at the time of the offence. The penalty may therefore be created *after* the offence has taken place, as long as it does not exceed any existing penalties.[258] This was the case in both Cambodia and Rwanda, where the governments introduced laws *after* the commission of the relevant crimes that specified the penalties for the crimes existing within the realm of customary international law, and defined as such in the Genocide Convention, at the time of the commission of the offence.[259]

The obligation of a state to prosecute the crime of genocide in terms of the Genocide Convention is limited to the jurisdiction of the "state in the territory of which the act was committed".[260] There is a clear distinction, however, between having the jurisdiction to prosecute and an explicit obligation to prosecute. This distinction is clear from the decision of the House of Lords in the UK case of *Regina v Bartle and the Commissioner of Police for the Metropolis Ex parte Pinochet; Regina v Evans and the Commissioner of Police for the Metropolis Ex parte Pinochet*.[261] In that case, the court discussed the character of universal jurisdiction by stating that "[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed".[262] The court's focus was on the question of extradition and not on the prosecution of the crime.[263] The court was clear that any state may apply universal jurisdiction with regard to crimes that are *jus cogens*, but that the

257 Quiqley 2006: 70.

258 Article 15(2) of the International Covenant on Civil and Political Rights, 1966 states: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

259 See the preamble to Law Decree no 1 and art 1 of Rwanda's Organic Law no 8 of 96, which both included the phrase "as defined in the Convention of December 9, 1948 on the Prevention and Punishment of the Crime of Genocide".

260 Article VI of the Genocide Convention. This would mean that the prosecution of genocide is bound to the territory in which the genocide took place.

261 38 ILM 581 (1999).

262 *Idem* at 588.

263 Falk 2004: *passim*.



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crimes of *jus cogens* are not automatically part of domestic law.[264] This means that the crimes may be used as a reference for cases that rely on universal jurisdiction, but that it does not automatically become a domestic crime in terms of domestic legislation. This is in line with what was said in the *Eichman* case.[265] In accordance with domestic legislation relating to extradition,[266] the House of Lords found torture only to have become a crime in the United Kingdom *after* the appropriate legislation – section 134 of the Criminal Justice Act 1988 – entered into force. The extradition in *Ex parte Pinochet* was therefore denied.[267] If the accused had committed torture *before* the implementation of the 1988 Criminal Justice Act, the court would have regarded the torture as illegal, even in the UK. Since the majority of alleged conduct was not extraditable offences or were committed prior to the coming into force of the domestic legislation, it was up to the Home Secretary to decide if the extradition should take place.[268]

In addition, there is also an obligation under article 7 of the Convention against Torture to extradite or prosecute a person accused of torture.[269] This obligation is not included in the Genocide Convention. It is submitted that, under universal jurisdiction, states do not have an obligation to prosecute or extradite persons for genocide if the crime was not committed in its territory.[270] With regard to the Genocide Convention, universal jurisdiction *may* therefore be used to prosecute genocide, but a state is not *obliged* to do so by the Convention unless it occurred within its territory.[271]

264 *Ex parte Pinochet* n 261 *supra* at 588; Falk 2004: 12 points out that "it doesn't need to be included in municipal law to be part of the law; it just falls under international law".

265 See n 105 *supra*.

266 Extradition Act, 2003 (c 41).

267 *Ex parte Pinochet* n 261 *supra*. The House of Lords had to decide whether to extradite Pinochet due to his crimes of torture committed in Chile.

268 *Ibid.*

269 Article 7 of the Convention against Torture provides that "[i]f it does not extradite him, submit the case to its competent authorities for the purpose of prosecution".

270 Article VI of the Genocide Convention states that "[p]ersons charged with genocide ... shall be tried by a competent tribunal of the State in the territory of which the act was committed". This provision therefore limits the jurisdiction for the prosecution to the country in which the genocide occurred.

271 Confirmed by *Bosnia & Herzegovina v Serbia & Montenegro* para 442.



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This part of the contribution discusses the framework of obligations that states have toward the prevention of genocide. It is submitted that the obligation to punish genocide as contained in the Genocide Convention contributes to the prevention of possible future genocidal acts through deterrence. The contours of the punishment of genocide are discussed in depth and show that it is difficult to effectively punish genocide without settling the matter of universal jurisdiction or providing jurisdiction to a permanent international court. The obligation to prevent genocide are, however, proven not to be limited by jurisdiction or international boundaries. This obligation is universal and must be borne by all nations. The duty to prevent genocide by all means reasonably available to states is one that must be judged on a case-by-case basis; however, states should remain committed to preventing genocide wherever it may possibly occur, including in foreign territory. The obligation to punish as contained in article I of the Convention is thus limited in its scope by article VI of the Convention in that it only *obliges* states to prosecute if genocide occurred within that state's own territory,[272] unlike the extraterritorial nature of the obligation to prevent genocide.[273] Therefore, it is important to discuss this complication when considering the commission of genocide by states in their own sovereign territory.[274] However, the *jus cogens* nature of the crime of genocide, as well as the *erga omnes* effect of *jus cogens* obligations are both imperative to this discussion. The next part therefore takes a look at the possible obligations of states in regard to the prevention and punishment of genocide, more especially those with their origin in international norms.

## 4 *Jus cogens* status and its effect on the obligations of states

The discussion thus far sets out the obligations toward genocide prevention under treaty law as regulated by the Genocide Convention and the Rome Statute. This part, however, argues that

272 *Ibid.*

273 In *idem* para 183, the court held as follows: "The substantive obligations arising from Article[s] I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriating the obligations in question [to prevent genocide]."

274 This will form part of my future research.



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the prohibition of genocide as a peremptory norm of general international law also comes with obligations by first looking at what peremptory norms of international law are. It is submitted that, due to the status of the norm, the obligations that come with peremptory norms are to the international community as a whole. This part of the discussion then looks into the obligations that states have to prevent genocide, due to the prohibition of genocide being viewed as a peremptory norm of general international law.

Several of the provisions in the Genocide Convention have reached customary international legal status.[275] These differ slightly from peremptory norms in that the latter have the added element of being accepted and recognised by the entire community of states as norms from which no derogation is permitted.[276] The fact that obligations accompanied by norms are considered as peremptory are owed to the international community as a whole and these norms, therefore, are applicable to all, or have an *erga omnes* effect.[277]

With regard to the Genocide Convention, the Special Rapporteur quoted an important passage from the 1951 ICJ case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:[278] "The principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation ... the Genocide Convention was therefore intended by the General Assembly to be universal in scope."[279] In a more recent case, the ICJ also stated that the rights and obligations contained in the Genocide Convention are rights and obligations *erga omnes*.[280] The obligation to prevent

275 See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ Reports (28 May 1951) para 15; Bettwy 2011: 170, who states: "The Convention established as Beth van Schaack puts it, 'only a basic minimum' that customary law may build on"; Van Schaack 1997: 2277.

276 Van Schaack 1997: 2277.

277 Gaeta 2009: 43 mentions that "[t]he ICJ's teleological reading of the Convention; the determination that the obligation to prevent is a *jus cogens* norm and an obligation *erga omnes*".

278 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ Reports (28 May 1951) para 15; Tladi 2022: para 35.

279 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ Reports (28 May 1951) para 23.

280 In *Bosnia & Herzegovina v Serbia & Montenegro* para 185, the court held: "Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *jus cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations."



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and punish the crime of genocide is not territorially limited, although the obligation to prosecute *is*, making punishment rather difficult.[281]

The prohibition of genocide is entrenched in international law as a peremptory norm of general international law or *jus cogens.*[282] The prohibition of genocide is a *jus cogens* norm and applies to all states; this means that, irrespective of whether a state has signed or ratified the Convention, it is bound by this obligation.[283] Each state also has an obligation *erga omnes* not to commit acts of genocide.[284]

The definition of what qualifies as a *jus cogens* norm is found in article 53 of the VCLT, which describes it as "a peremptory norm of general international law [that] is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted". *Jus cogens* norms are *sui generis* in nature as they cannot be derogated from.[285] The prohibition of genocide as a peremptory norm of general international law is confirmed in the work done by the Special Rapporteur for *jus cogens* to the ILC,[286] in his fourth report in this regard.[287]

It is clear that any derogation from these norms leads to state responsibility in terms of the Responsibility of States for Internationally Wrongful Acts, 2001.[288] The consequences of such a breach are listed in article 41 of the document.[289]

281 *Bosnia & Herzegovina v Yugoslavia* para 31.

282 Tladi 2022: 35.

283 *Ibid.* See International Law Commission 2019 that, at Draft Conclusion 4, contains the following criteria for the identification of a peremptory norm of general international law: "a) it is a norm of general international law; b) it is accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

284 International Law Commission 2019: 145 determines that "[p]eremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole".

285 Article 53 of the VCLT.

286 The most recent report is that of Tladi 2023.

287 Tladi 2022: 35–38.

288 See art 40.

289 *Idem* art 41 provides: "(1) States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. (2) No State shall recognise as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining



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Although the prohibition on genocide has reached *jus cogens* status, it appears that the obligation to prevent it has not.[290] This leaves room for states with governments actively committing genocide to escape responsibility as there is no obligation on other states to prosecute or punish such genocide outside its territory.[291] However, the perpetrator state still incurs responsibility for the breach of the *jus cogens* norm regarding the prohibition of genocide.[292]

The meaning of the accompanying obligations, called *erga omnes* obligations, is found in draft conclusion 17 of the ILC's *Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens)*,[293] which states the following: "Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all states have a legal interest."[294]

There are five ICJ cases that are of interest to the discussion relating to *erga omnes* obligations.[295] The case of *Barcelona Traction, Lights & Power Company Ltd (Second Phase)* (hereafter "*Barcelona Traction*")[296] was the first case in which the ICJ clearly endorsed the principle of states having obligations to the international

that situation. (3) This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law."

290 Forlatti 2011: 196.

291 Article IV of the Genocide Convention.

292 The Articles of the Responsibility of States for Internationally Wrongful Acts, 2001 provides as follows: "This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law."

293 *Idem* at 194; International Law Commission 2019: 145; Bradley 2021: *passim*.

294 International Law Commission 2019: 145.

295 *Case Concerning East Timor (Portugal v Australia)* ICJ Reports (30 Jun 1995) (hereafter "*Portugal v Australia*"); *Barcelona Traction*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ Reports (9 Jul 2004) at 136; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ICJ Reports (21 Jun 1971) at 16; *The Gambia v Myanmar* at 3.

296 ICJ Reports (5 Feb 1970).



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community as a whole.[297] The cases of *Namibia*[298] and *East Timor*[299] confirmed the right of self-determination as having the character of *erga omnes*. In addition to self-determination, the ICJ added "certain ... obligations under international humanitarian law",[300] and recalled the following regarding *erga omnes* obligations:[301]

> [They] are so fundamental to the respect of the human person and elementary considerations of humanity ... that they are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

It is indisputable that the prohibition of genocide, along with being a norm of *jus cogens,* also has an obligation *erga omnes*.[302]

The aim of this part is to point out that the obligations in terms of the Genocide Convention are not the only obligations placed upon states to prevent genocide. The status of the prohibition of genocide as a peremptory norm of general international law places obligations upon states, irrespective of whether or not they are parties to the Genocide Convention or the Rome Statute. These obligations are owed to the international community as a whole. Any breach of the *jus cogens* norm of the prohibition of genocide will be met with international state responsibility, including the responsibility to take action to end such genocide.

297 Kadelbach 2006: 35. See, also, Bradley 2021: 195; *Barcelona Traction* paras 33–34: "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also form the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."

298 In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ICJ Reports (21 June 1971) para 126, the court held: "South Africa's presence in Namibia are [*sic*] opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship."

299 In *Portugal v Australia* (1995) ICJ Reports (30 Jun 1995) para 29, the court held that "[t]he right of peoples to self-determination ... is irreproachable".

300 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ Reports (9 Jul 2004) para 155.

301 *Legality of the Threat on Use of Nuclear Weapons* ICJ Reports (8 Jul 1996) para 79.

302 Ragazzi 1997: 95.



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## 5 Conclusion

This contribution explores the obligations on states to prevent genocide through treaty law, international custom and the status of the prohibition of genocide as a peremptory norm of general international law. The study, therefore, demonstrates that the obligations of states toward the prevention of genocide flow from multiple sources of international law. These sources are each dissected and interpreted above, using the rules of interpretation of treaties as provided for in the VCLT, in international jurisprudence and in scholarly writings.

The second part of the contribution aims to explore and give further meaning to the term "genocide" as included in the Genocide Convention. The term includes the protection of certain groups; for an act to qualify as genocide, it must be committed against one of the protected groups that are mentioned in the Genocide Convention. Considering the rationale of the Genocide Convention, the intent of an act of genocide includes the removal of the possibility of a person on the basis of their membership of a certain group to beneficially add to the development of humanity. The purpose of this protection, it is argued, is the protection of the beneficial contributions that all humankind are capable of, but with an emphasis on the membership in one of the protected groups under the definition of genocide. The removal of this possibility through the destruction of the group may be considered as genocide if the removal is by means of one of the acts enumerated in the Genocide Convention. This specific intent is instrumental in the understanding of genocide.

The third part of the contribution discusses the framework of obligations that states have toward the prevention of genocide. The obligation to punish genocide as contained in the Genocide Convention contributes to the prevention of possible future genocidal acts through deterrence. The contours of the punishment of genocide are discussed in depth and it is contended that, without settling the matter of universal jurisdiction or granting jurisdiction to a permanent international court, it is extremely difficult to punish genocide effectively. The obligation to prevent was proven not to be limited by jurisdiction or international boundaries. This obligation to prevent genocide by all means reasonably available is universal and must be borne by all nations; it should be judged on a case-by-case basis. States should remain committed to preventing genocide wherever it may possibly occur, including in foreign territory.



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The aim of the fourth and final part is to point out that the obligations in the Genocide Convention are not the only obligations placed upon states to prevent genocide. The status of the prohibition of genocide as a peremptory norm of general international law (*jus cogens*) places obligations upon states, irrespective of whether or not they are parties to the Genocide Convention or the Rome Statute. These obligations are owed to the international community as a whole. Any breach of the *jus cogens* norm of the prohibition of genocide will be met with international state responsibility and states may take action as is available to them in terms of the Articles of State Responsibility. The obligations that flow from the status of *jus cogens* are known as obligations *erga omnes* or obligations applicable to all states. States have clear obligations to take all reasonable measures available to them, regardless of territory, to prevent genocide wherever it takes place. This obligation is one of the most serious, if not the most serious, obligations states have under international law. The sooner states realise this, the safer the whole of humanity will be.

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