

Genocide and Ukraine Do words mean what we choose them to mean?

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Abstract

Allegations of genocide have been made on both sides during the armed conflict in Ukraine. This article reviews the claims, concluding that they appear to be inconsistent with the crime of genocide as defined in article II of the 1948 Convention, as interpreted by the International Court of Justice, the ad hoc tribunals and the International Law Commission. Most of the claims appear to use the term genocide in a rhetorical sense, without serious concern for the legal issues. The available evidence does not permit inferences to be drawn that the punishable acts are committed with genocidal intent, to the exclusion of other reasonable explanations.

A speech dealing with household budgets in an agricultural community with a population of less than 500 might seem an odd place for one world leader to accuse another of genocide. But that is what President Biden did on 12 April 2022, when he delivered prepared remarks to some Iowa farmers. ‘Your family budget, your ability to fill up your tank, none of it should hinge on whether a dictator declares war and commits genocide a half a world away’, he said.¹ Later in the day, when questioned by journalists about his reference to genocide, he explained: ‘[W]e’ll let the lawyers decide internationally whether or not it qualifies, but it sure seems that way to me.’² According to Biden, ‘Putin is just trying to wipe out the idea of even being — being able to be Ukrainian’.³

In his speech to the nation on 24 February 2022, President Putin said that ‘[t]he purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime’.⁴ Explaining the ‘rationale’ for Russia’s use of force to the Security Council, Russia’s Permanent Representative said ‘the occupation of Ukraine is not part of our plans. The purpose of the special operation is to protect people who have been subjected to abuse and genocide by the Kyiv regime for eight years.’⁵ Interviewed on 25 February 2022, Vladimir Chizhov, the Russian Ambassador to the European Union, said ‘[w]e can turn to the official term of genocide as coined in international law. If you read the definition it fits pretty well.’ But when asked if President Zelenskyy should be tried for

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¹ Remarks by President Biden on Lowering Energy Costs for Working Families, 12 April 2022 (<https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/12/remarks-by-president-biden-on-lowering-energy-costs-for-working-families/>).

² Tyler Pager, ‘Biden calls Russia’s war in Ukraine a “genocide”’, *Washington Post*, 12 April 2022.

³ Remarks by President Biden Before Air Force One Departure, 12 April 2022 (<https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/12/remarks-by-president-biden-before-air-force-one-departure-13/>).

⁴ Address by the President of the Russian Federation, 24 February 2022 (<http://en.kremlin.ru/events/president/transcripts/statements/67843>). The address was subsequently circulated as an official document of the Security Council: Annex to the letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, 24 February 2022, S/2022/154.

⁵ Verbatim record, 23 February 2022, S/PV.8974. p. 12.

genocide, Chizhov said: ‘I don’t know what will be the specific charges against him. There are professional lawyers to deal with that.’⁶

Alongside the armed conflict itself a war of words is being waged where ‘genocide’ is one of the heavy weapons. Those who employ it, on both sides, sometimes acknowledge their use of the term is intuitive and colloquial rather than rooted in international law. Biden said ‘it seems that way to me’ while Chizhov said ‘it fits pretty well’. The deference to international lawyers has a tinge of cynicism, a warning that pedantic experts may undercut the rhetorical impact of the term. The message seems to be that unlike the lawyers, politicians are charging genocide on the basis of ‘common sense’, speaking from the heart. Yet the demagogic use of the term by leaders may not be without serious legal consequences. Moscow’s ‘false claim of genocide’⁷ has provided a plausible case for Ukraine at the International Court of Justice, which has granted it a provisional measures order demanding that Russia suspend its military operations in Ukraine.

Political determinations of genocide

Within a few days of the invasion, on 2 March 2022, the Ukrainian representative told the General Assembly, sitting in emergency session, that ‘[i]t is already clear that Russia’s goal is not merely occupation; it is genocide’.⁸ President Zelenskyy himself is reported to have used the term as early as 9 March when he said the bombing of a children’s hospital and maternity ward in Mariupol was ‘proof that the genocide of Ukrainians is taking place’.⁹ A few days after Biden’s remarks, President Zelenskyy told CNN: ‘I had the same opinion as President Biden’.¹⁰ Ukraine has not yet charged Russia before the Court with actually perpetrating the crime of genocide and there are no indications that it plans to do so.

Other government leaders have joined the fray, although often with some degree of circumspection. In the General Assembly, the representative of Bosnia and Herzegovina referred to genocide in his own country, noting that ‘[t]he developing situation in Ukraine unfortunately resonates very close to home’.¹¹ In the Human Rights Council, Latvia’s representative spoke of ‘precursors of genocide’.¹² Two weeks before Biden’s comment, the Albanian representative in the Security Council cited the mayor of Mariupol who had claimed Russia’s aim was to wipe the city off the face of the Earth, along with its inhabitants. ‘There is a legal definition for that despicable practice’, said Ferit Hoxha.¹³

Biden’s seemingly offhand use of the word ‘genocide’ received a polite but somewhat lukewarm endorsement from Prime Minister Justin Trudeau of Canada. He said ‘I think it’s

⁶ Georgi Gotev, ‘Russian ambassador Chizhov: Nord Stream 2 is not dead, it’s a sleeping beauty’, EURACTIV, 25 February 2022 (www.euractiv.com/section/globaleurope/interview/russian-ambassador-chizhov-nord-stream-2-is-not-dead-its-a-sleeping-beauty/).

⁷ Oral submission of Jean-Marc Thouvenin, Verbatim record, 7 March 2022, CR 2022/5, p. 17, para. 2; *Dispute relating to Allegations of Genocide (Ukraine v. Russian Federation)*, Application, 26 February 2022, para. 8. Also *ibid.*, Request for the indication of provisional measures submitted by Ukraine, 26 February 2022, para. 2.

⁸ General Assembly, Verbatim record, 2 March 2022, A/ES-11/PV.5, p. 11.

⁹ ‘Europeans must tighten sanctions against Russia so that it has no chance to continue the genocide in Ukraine - address by President Volodymyr Zelenskyy’, 9 March 2022 (<https://www.president.gov.ua/en/news/yevropejci-povinni-posilyuvati-sankciyi-proti-rosiyi-tak-sho-73465>).

¹⁰ ‘Zelensky calls for action: “Not everyone has the guts”’, CNN, 17 April 2022 (<https://news.yahoo.com/volodymyr-zelenksyy-substantial-evidence-points-164730126.html>).

¹¹ General Assembly, Verbatim record, 1 March 2022, A/ES-11/PV.4, p. 4.

¹² Statement by Foreign Minister Eva-Maria Liimets at the Human Rights Council, 2 March 2022 (<https://vm.ee/en/news/statement-foreign-minister-eva-maria-liimets-human-rights-council>).

¹³ Security Council, Verbatim record, 29 March 2022, S/PV.9008, p. 15.

absolutely right that more people be talking and using the word genocide’ but Trudeau added that ‘there are official processes around determinations of genocide’.¹⁴ Colombia’s President Iván Duque also echoed Biden’s remarks.¹⁵ French President Emmanuel Macron was more guarded, saying an ‘escalation of words’ was not desirable.¹⁶

Noting Biden’s deference to ‘international law experts’, the Permanent Representative of the United States to the Organization for Security and Co-operation in Europe described the President’s comment as a ‘very clear moral determination’.¹⁷ American legal experts have yet to confirm Biden’s assessment. When a member of the Senate Foreign Relations Committee asked Ambassador-at-Large for Global Criminal Justice Beth Van Schaack when the international community would respond to Russia’s ‘plan to wipe out the culture of a country’, she provided a careful and unenthusiastic reply: ‘As you know, President Biden shares your view about this constituting genocide, and he also raised the point that this is a legal determination that is difficult to do.’¹⁸ In June, when asked about Biden’s statement, Van Schaack’s predecessor, Todd Buchwald, was similarly cautious, saying ‘[i]n fairness, President Biden said at the time that this was simply his view’ and that he would let the lawyers decide.¹⁹ Days before Biden’s comment, another former American ambassador for war crimes, David Scheffer, wrote that ‘[e]stablishing the genocidal intent of senior Russian leaders, however, could prove difficult.’²⁰

Allegations of genocide have also been made in interviews and on social media by leaders of Albania, Estonia, Ireland, Kosovo, Latvia, Poland, and Spain. In a compilation of such statements, Elizabeth Whatcott observed that ‘it is not always clear whether officials are referring to the legally defined crime of genocide, or if they are employing a broader meaning of the term’.²¹ It would be more accurate to say that it is almost never clear whether the term is being used within the context of the international legal definition. Most if not all of the statements point to a notion of genocide that is much more expansive than what has emerged in the case law of international courts and tribunals.

Resolutions and declarations of legislative bodies have also accused Russia of genocide in Ukraine. The Polish Sejm referred to genocide in a resolution adopted on 23 March 2022. It condemned ‘acts of constant violence, war crimes, crimes against humanity, acts of genocide, systemic violations of human rights and other criminal offenses’ but without further precision.²² On 21 April 2022, the Estonian legislature adopted a resolution declaring that ‘the

¹⁴ Lee Berthiaume, ‘Trudeau welcomes talk of Russia’s actions in Ukraine as genocide’, *The Globe and Mail*, 13 April 2022; Pierre Saint-Arnaud, ‘«On peut de plus en plus parler de génocide» en Ukraine, dit Justin Trudeau’, *Le Devoir*, 13 April 2022.

¹⁵ ‘Colombian President Ivan Duque discusses the war, saying Russian leader Vladimir Putin is a “war criminal”’, 13 April 2022 (https://twitter.com/BloombergTV/status/1514324132267180037?ref_src=twsrc%5Etfw).

¹⁶ Julian Borger, ‘Macron declines to follow Biden and call Russian acts in Ukraine “genocide”’, *The Guardian*, 13 April 2022.

¹⁷ Online Press Briefing with US Ambassador to OSCE Michael Carpenter, 13 April 2022 (<https://www.state.gov/online-press-briefing-with-u-s-ambassador-to-osce-michael-carpenter/>).

¹⁸ State Department Officials Testify on Aid to Ukraine, 12 May 2022 (<https://www.c-span.org/video/?520168-1/state-department-officials-testify-ukraine-aid>), at 1:04.

¹⁹ Genocide Determinations and Ukraine: AQ&A with Fmr. Ambassador Todd Buchwald, *Justsecurity.org*, 14 June 2022.

²⁰ David Scheffer, ‘Can Russia Be Held Accountable for War Crimes in Ukraine?’, *Council on Foreign Relations*, 4 April 2022.

²¹ Elizabeth Whatcott, ‘Compilation of Countries’ Statements Calling Russian Actions in Ukraine “Genocide”’, *Justsecurity.org*, 20 May 2022.

²² Resolution of the Sejm of the Republic of Poland of 23 March 2022 on committing war crimes, crimes against humanity and human rights violations by Russia in Ukraine, 23 March 2022 (<https://www.nato-pa.int/download-file?filename=/sites/default/files/2022->

Russian Federation has committed acts of genocide, inter alia mass atrocities against the civilian population. These have consisted of murders, enforced disappearances, deportations, imprisonment, torture, rape, and desecration of corpses'.²³ Similar declarations have been made by legislatures in Latvia,²⁴ Canada,²⁵ and Ireland.²⁶

Some of the language in these statements seems loosely inspired by formulations in article II of the Genocide Convention. The Estonian parliament said it was 'guided by the principles of the Convention on the Prevention and Punishment of the Crime of Genocide and the standards of customary international law' but it provided no specifics to suggest that the treaty had actually been consulted. The legislatures of Poland, Lithuania, and Latvia made similar perfunctory references to the Convention. The Irish Senate invoked the Convention but then wrongly conflated genocide with 'illegal invasion'. It is not as if these legislatures are ignorant, in a collective sense, about the meaning of the term 'genocide'. Most of them have enacted the crime of genocide into their national criminal law closely following the definition set out in article II of the 1948 Convention.

In 2017, several international lawyers in the Netherlands prepared a report on political declarations concerning genocide. It was in response to a request from the country's legislature explaining that 'the legal definition of genocide is always a determination to be made by a court but that such determinations often take years, while the political recognition that the crime has been committed is of great importance, not least because it enables the affected groups to process their grief'. The experts rejected the suggestion that the matter be reserved to courts and tribunals and acknowledged a place for such parliamentary initiatives.²⁷ However, they seemed to assume that in making a determination about genocide, the legislature would endeavour to apply the definition in article II of the Convention as it has been interpreted by major international tribunals. However, the parliamentary statements on genocide in Ukraine show that this is not the case.

Evidence of genocide

Some of the allegations of genocide appear to rest upon the claim that Russia wants to eliminate Ukraine and Ukrainians as an ethnic, linguistic or cultural entity.²⁸ Biden's allegation that Putin was 'trying to wipe out the idea of even being — being able to be Ukrainian' is characteristic of this view.²⁹ Implicit in such allegations is recognition that Russia's purpose is

03/Resolution%20on%20committing%20war%20crimes%2C%20crimes%20against%20humanity%20and%20human%20rights%20violations%20by%20Russia%20in%20Ukraine.pdf).

²³ Statement of the Riigikogu on the War Crimes and Genocide committed by the Russian Federation in Ukraine, 21 April 2022 (<https://www.riigikogu.ee/wp-content/uploads/2022/04/Statement-of-the-Riigikogu-on-Genocide-in-Ukraine-21.04.2022.pdf>).

²⁴ Pazinojums, 21 April 2022 (https://titania.saeima.lv/LIVS13/saeimalivs_imp.nsf/0/70ECF827438991E8C225882B00231388?OpenDocument). For an unofficial translation of the statement of the Saeima, see https://www.justsecurity.org/wp-content/uploads/2022/05/Statement_2104.pdf.

²⁵ *House of Commons Debates*, Vol. 151, No. 059, 22 April 2022, p. 4439.

²⁶ *Seanad Éireann debate*, Vol. 285, No. 11, 1 June 2022.

²⁷ Netherlands, Advisory Committee on Issues of Public International Law and External Adviser on Public International Law, 'Advisory report on the scope for and the significance and desirability of the use of the term "genocide" by politicians', March 2017, p. 16.

²⁸ For example, Douglas Irvin-Erikson, 'Is Russia Committing Genocide in Ukraine?', *Opinio juris*, 21 April 2022; Francine Hirsch, "'De-Ukrainization" is genocide — Biden was right to sound the alarm', *The Hill*, 14 April 2022.

²⁹ Remarks by President Biden before Air Force One Departure, 12 April 2022 (<https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/12/remarks-by-president-biden-before-air-force-one-departure-13/>).

not the physical annihilation of Ukrainians. This phenomenon, often described as ‘cultural genocide’, has been clearly excluded from the scope of article II of the Genocide Convention by the case law of the International Court of Justice³⁰ and the International Criminal Tribunal for the former Yugoslavia,³¹ and by the work of the International Law Commission.³² According to these authorities, in order to meet the terms of the Convention, the destruction of the targeted group must be physical or biological.

A common feature in some of the allegations of genocide, whether those of politicians and legislatures or of academics, pundits, and commentators, seems to be an emphasis on the five punishable acts listed in article II of the Convention and a corresponding neglect of the contextual elements set out in the introductory paragraph, particularly the requirement of the specific intent to destroy. Demonstrating that the punishable acts listed in paragraphs (a) to (e) have been committed is rarely very challenging. They tend to overlap with similar provisions in the definitions of crimes against humanity and war crimes, as well as with ordinary crimes. Several of them, perhaps all of them, appear to be present in the conflict and are attributable to the armed forces of the Russian Federation.³³

Some charges of genocide simply ignore the specific intent requirement altogether and treat proof of one of the punishable acts in the separate paragraphs as sufficient. For example, a post on the Atlantic Council website declares that ‘the fate of over 200,000 Ukrainian children who have been sent to Russia’ is ‘a textbook example of genocide as defined by the UN Genocide Convention’.³⁴ Actually, the textbooks require that for the transfer of children to amount to genocide there must be evidence of the specific intent to destroy the group physically.³⁵ A report produced by the New Lines Institute, a think tank affiliated with a tiny private university in northern Virginia, issued in conjunction with the Montreal-based Raoul Wallenberg Centre for Human Rights, states that ‘[t]he acts under Art. II are constitutive of genocide and, therefore, can point toward genocidal intent when viewed in their totality.’³⁶ This is quite an original idea that does not find support in the case law. New Lines/Wallenberg considers that an accumulation of violations of paragraphs (a) to (e) of article II of the Convention in and of itself provides evidence of genocidal intent. If that were really the case, any large-scale killing in an armed conflict where the two sides are not of the same ethnicity would constitute compelling proof of the intent to destroy the group physically. Based upon a broad range of open sources, the New Lines/Wallenberg provides many examples of breaches

³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, para. 344.

³¹ *Prosecutor v. Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 580

³² Report of the International Law Commission on the work of its Forty-eighth Session, *Yearbook...1996*, Vol. II, Part Two, pp. 45-46, para. 12.

³³ See, for example, the reports of indiscriminate killing of civilians, of summary executions, and of conflict-related sexual violence in the Donbas region reported by the Human Rights Monitoring Mission of the High Commissioner for Human Rights: Report on the Human Rights Situation in Ukraine, 24 February 2022-15 May 2022, 29 June 2022, paras. 21-108, especially paras. 24-25, 27, 29-30, 34, 46, 48, 54, 91-94, 98, 102, 105. Also Sergii Masol, ‘Ukraine and the International Criminal Court, Between Realpolitik and Post-truth Politics’, (2022) 20 *Journal of International Criminal Justice* 167, pp. 170-171.

³⁴ Taras Kuzio, ‘Vladimir Putin’s Ukrainian genocide is proceeding in plain view’, 29 June 2022 (<https://www.atlanticcouncil.org/blogs/ukrainealert/vladimir-putins-ukrainian-genocide-is-proceeding-in-plain-view/>).

³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, paras. 344, 423, 438; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, p. 3, paras. 137, 390.

³⁶ *An Independent Legal Analysis of the Russian Federation’s Breaches of the Genocide Convention in Ukraine and the Duty to Prevent*, New Lines Institute/Raoul Wallenberg Institute for Human Rights, May 2022, p. 21.

of paragraphs (a) to (e) of article II. All of these are quite indistinguishable from war crimes and describe atrocities that are frequently committed in many armed conflicts.

Where there is evidence that the acts listed in paragraphs (a) to (e) of the definition have been perpetrated, and this is certainly the case as far as Russia's conduct in Ukraine is concerned, the existence of genocidal intent can never be ruled out entirely. It is almost always possible that an international armed conflict be pursued with genocidal intent although in practice this is very rarely the case. The same is true of non-international armed conflict that has an ethnic dimension. There may be isolated indicators emanating from individuals who appear to harbour genocidal intent and who manifest racial hatred on social media or express genocidal sentiments when they attack victims. The Ukrainian ombudsman told BBC News of a case where victims of rape had been told by Russian soldiers that 'they would rape them to the point where they wouldn't want sexual contact with any man, to prevent them from having Ukrainian children'.³⁷ The Elements of Crimes of the Rome Statute exclude such isolated scenarios from the scope of genocide by requiring that the conduct 'took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'. It is also theoretically possible that there are documents, such as e-mail exchanges and minutes of meetings, proving that Putin and his colleagues have attacked Ukraine with the intent to destroy the Ukrainian people. However, no such direct evidence has come to light.

In the absence of direct evidence, genocidal intent may be inferred based upon a 'pattern of conduct'. In the *Bosnia case* at the International Court of Justice, the applicant attempted unsuccessfully to prove genocidal intent based upon such a pattern of conduct. The Court explained: 'The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.'³⁸ In the subsequent case, Croatia asked the Court to reconsider this pronouncement which it argued was 'excessively restrictive'.³⁹ The Court said that the word 'reasonably' had been implied in its 2007 judgment, and proposed a slightly modified formulation: 'in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question'.⁴⁰

The greatest challenge in establishing whether genocide has been committed by Russian forces during the attack on Ukraine is excluding other possible inferences that can reasonably be drawn from the pattern of their conduct. This is not a question of demonstrating the plausibility or even the likelihood of genocidal intent but rather of eliminating other explanations. Given what is known of the facts, it would seem difficult to conclude that the intent to destroy physically the people of Ukraine is the only reasonable explanation for Russia's military activities.

Although 'killing members of the group' is only one of the five punishable acts of genocide, it has a particular importance in proving genocidal intent given that international case law has insisted that the intended destruction be physical in nature. The number of deaths

³⁷ Yogita Limaye, 'Ukraine conflict: "Russian soldiers raped me and killed my husband"', *BBC News*, 11 April 2022.

³⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, para. 373.

³⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, p. 3, para. 145.

⁴⁰ *Ibid.*, para. 148. Also *ibid.*, paras. 417, 510.

in proportion to the overall population of the protected group is obviously of great relevance in drawing inferences of genocidal intent. Where the volume of victims of homicide is of large proportions, the conclusion that the intent was to destroy physically the group is more evident. In Rwanda, for example, even if there had been no other indicators of genocidal intent, the murder, in the course of several weeks, of an estimated 800,000 members of the Tutsi minority, which at the time was perhaps 2 million people, leads inexorably to inferences of genocidal intent. According to a report from the Office of the High Commissioner for Human Rights dated 19 September 2022, there have been 5,916 civilian combat-related deaths since the conflict in Ukraine began in late February. The report specifies that '[m]ost of the civilian casualties recorded were caused by the use of explosive weapons with wide area effects, including shelling from heavy artillery and multiple launch rocket systems, and missile and air strikes'. It cautions that it believes the actual figures to be considerably higher. Nevertheless, while the civilian deaths were said to be 'the tip of the iceberg' in March and April, the most recent reports of the Office indicate a very perceptible decline in civilian deaths since then. In June, the number of civilian deaths was about 10% of what it was in March,⁴¹ and it has declined further since then. To put this in perspective, the figure of 5,916 is about the same as the estimated number of Ukrainian civilian deaths on any given day of the Second World War.

Terrible as it may be, 6,000 civilian deaths over a period of seven months in a country with a population of 40 million does not in itself provide compelling evidence to support the inference of an intent to destroy the group in whole or in part. In its 2015 judgment, the International Court of Justice referred to Croatia's charge that 12,500 Croats were killed by Serbia, stating that 'even assuming that this figure is correct — an issue on which it will make no ruling— the number of victims alleged by Croatia is small in relation to the size of the targeted part of the group'.⁴² Croatia's population is about one-tenth that of Ukraine. The Court suggested that given the opportunities available for mass murder on a much larger scale, it was difficult to draw an inference that there was an intent to destroy the group physically in whole or in part. The Court also declared that where killing is the collateral damage that results from bombardment of military objectives this does not qualify as 'killing' within the terms of article II(a) of the Convention.⁴³

As in the case with killings, some reports use powerful adjectives to describe the scale of the sexual violence without specifying the number of cases. For example, the New Lines/Wallenberg report speaks of '[t]he magnitude of the reports of sexual violence and rape in Russian-occupied areas', saying this 'suggests a widespread and systematic pattern committed by Russian forces'.⁴⁴ One of the rare attempts to quantify the crime is the report of the High Commissioner for Human Rights to the Human Rights Council of 5 July 2022. 'My team has verified 28 cases of conflict-related sexual violence, including cases of rape, gang rape, torture, forced public stripping, and threats of sexual violence', she said.⁴⁵ Some of the alleged perpetrators belong to the Ukrainian forces.⁴⁶ A Ukrainian prosecutor

⁴¹ Office of the High Commissioner for Human Rights, 'Ukraine: civilian casualty update 4 July 2022', 4 July 2022.

⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, p. 3, para. 437. See also *ibid.*, para. 512.

⁴³ *Ibid.*, para. 474.

⁴⁴ *An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent*, New Lines Institute/Raoul Wallenberg Institute for Human Rights, May 2022, p. 31.

⁴⁵ Presentation on Ukraine (Human Rights Council res. 47/22) and interim report of the Secretary-General on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine (GA res. 76/179), 5 July 2022, UN High Commissioner for Human Rights Michelle Bachelet.

⁴⁶ Office of the High Commissioner for Human Rights, Report on the Human Rights Situation in Ukraine, 24 February 2022-15 May 2022, 29 June 2022, para 98.

responsible for investigating rape and related crimes spoke of ‘dozens’ of cases amongst the many thousands of war crimes being investigated.⁴⁷ Undoubtedly there are many unreported cases of such acts. However, the scale does not appear to provide very strong evidence supporting the inference that this is part of a planned or organised campaign driven by a genocidal intent for the purpose of physical destruction.

Charges of genocide by non-judicial bodies must also be assessed with regard to the standard of proof that is being applied. For example, the Fact Finding Mission on Myanmar of the Human Rights Council held that there were ‘reasonable grounds’ to draw an inference of genocidal intent directed at the Rohingya, adding that ‘[i]t is now for a competent prosecutorial body and court of law to investigate and adjudicate cases against specific individuals to determine individual guilt or innocence’.⁴⁸ Similarly, the Commission of Inquiry on Syria found ‘reasonable grounds’ to believe that ISIS had committed genocide against the Yazidi.⁴⁹ A ‘reasonable grounds’ assessment is a low standard that hardly points to the likelihood of a finding of genocide by an international tribunal, whether the issue be individual criminal liability or State responsibility. The New Lines/Wallenberg report concludes that there are ‘reasonable grounds to conclude that Russia bears State responsibility for ... a pattern of atrocities from which an inference of intent to destroy the Ukrainian national group in part can be drawn’.⁵⁰ It makes the erroneous claim that in matters of State responsibility, ‘[i]mportantly, the standard of proof for breaches of a treaty under international law is lower than that required for criminal proceedings’.⁵¹ Recent case law of the International Court of Justice has insisted upon a very high standard of proof in State responsibility proceedings where genocide is alleged. By requiring that the evidence be ‘fully conclusive’ and that it be ‘fully convinced’, the Court has adopted a standard that is analogous to that of a criminal tribunal in the determination of guilt or innocence.⁵²

There have also been charges that anti-Ukrainian statements by President Putin and other Soviet officials constitute ‘direct and public incitement’ to commit genocide. This is a separate offence listed in article III of the Convention as well as in article 25 of the Rome Statute. The adjectives ‘direct’ and ‘public’ considerably narrow the scope of ‘incitement’ in order to limit encroachment on freedom of expression. Incitement that is ‘indirect’ and ‘private’ is always punishable as a form of complicity. The *raison d’être* for the distinct offence of direct and public incitement is that it may take place even if there is no evidence that anyone acted as a result.⁵³ The allegations focus on statements challenging the existence of a distinct Ukrainian national identity. That such views have been expressed publicly at the highest levels in Russia is no secret. The problem is the ‘direct’ criterion. Examples of this in the case law involve explicit instructions to kill people or to perpetrate one of the other acts listed in the paragraphs of article II.⁵⁴ But is it genocide to question the identity of a group? How can the crime of

⁴⁷ Valerie Hopkins, ‘After Rapes by Russian Soldiers, a Painful Quest for Justice’, *New York Times*, 29 June 2022.

⁴⁸ Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, 17 September 2018, A/HRC/39/CRP.2, para. 10.

⁴⁹ ‘They came to destroy’: ISIS Crimes Against the Yazidis, 15 June 2016, A/HRC/32/CRP.2, para. 164.

⁵⁰ *An Independent Legal Analysis of the Russian Federation’s Breaches of the Genocide Convention in Ukraine and the Duty to Prevent*, New Lines Institute/Raoul Wallenberg Institute for Human Rights, May 2022, p. 39.

⁵¹ *Ibid.*, p. 8.

⁵² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, para. 209.

⁵³ Guénaél Mettraux, *International Crimes, Law and Practice, Volume I: Genocide*, Oxford: Oxford University Press, 2019, pp. 311-312.

⁵⁴ *Prosecutor v. Nzabonimana* (ICTR-98-44D-A), Judgment, 29 September 2014, para. 233; *Prosecutor v. Nahimana et al.* (ICTR-99-52-A), Judgment, 28 November 2007, para. 692,

destruction of a group exist if the perpetrator denies its very existence? The anti-Ukraine campaign in Russia appears to be about defining national identity. This may be incitement and it may even be incitement to violence, but it is manifestly not direct and public incitement to physical destruction and extermination.

Russia's allegations of genocide and the International Court of Justice

Within a few days of the outbreak of the Russian armed attack, Ukraine filed an application to the International Court of Justice charging a violation of the Convention on the Prevention and Punishment of the Crime of Genocide. The application states that Russia's 'false claims of genocide' have been used to justify its actions.⁵⁵ In the oral hearing on the application for provisional measures, counsel for Ukraine, Jean-Marc Thouvenin, set out a detailed list of references to genocide and to the 1948 Convention in Russian documents dealing with the situation in Donetsk and Luhansk issued since 2014. He claimed that Russia had justified the invasion 'sous couvert de la convention de 1948', alleging that the Convention lay at the heart of Putin's decision to attack Ukraine. 'Elle est la seule justification juridique avancée par la Russie pour justifier l'attaque de l'Ukraine dans son ensemble', he said.⁵⁶ Several States Parties to the Genocide Convention have now intervened in the proceedings in support of Ukraine's contention that a dispute about a false claim of genocide falls within the Court's jurisdiction.

One theme that emerges in the interventions is the basis upon which a State Party may assert a claim that another State Party is committing genocide. For example, the United Kingdom has argued that a 'a good faith assessment of the existence of genocide or risk of genocide' is required by Article I.⁵⁷ Italy has spoken of 'a due diligence obligation to gather fully conclusive evidence from independent sources before taking any action'.⁵⁸ These propositions are linked to the suggestion that where such 'good faith' analysis is undertaken, action to prevent genocide pursuant to Article I of the Convention becomes permissible. The implication seems to be that measures that would otherwise not be allowed under international law may become so when blessed with a valid charge that genocide is taking place. This is a distortion of the Convention, however, as it can in no case provide a basis for intervention that is otherwise forbidden by the Charter of the United Nations. A 'good faith' analysis may result in an obligation to prevent genocide but it does not generate a 'right' to prevent it. The proper interpretation of Article I of the Convention may be a question for the merits if the case gets to that stage. Perhaps the Court will rule on whether measures to prevent genocide involving the

⁵⁵ *Dispute relating to Allegations of Genocide (Ukraine v. Russian Federation)*, Application instituting proceedings, 26 February 2022, para. 30; *Dispute relating to Allegations of Genocide (Ukraine v. Russian Federation)*, Request for the indication of provisional measures submitted by Ukraine, 26 February 2022, para. 12.

⁵⁶ Oral submission of Jean-Marc Thouvenin, Verbatim record, 7 March 2022, CR 2022/5, p. 20, para. 13.

⁵⁷ Declaration of intervention under article 63 of the United Kingdom of Great Britain and Northern Ireland, 1 August 2022, in the case of *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, para. 52. See also Declaration of intervention under article 63 of Denmark, 16 September 2022, para. 38; Declaration of intervention of the Government of Sweden, 9 September 2022, para. 48.

⁵⁸ Declaration of intervention (Article 63 of the Statute) of the Government of Italy, 12 September 2022, para. 46. Also Declaration of intervention under article 63 of Denmark, 16 September 2022, para. 36.

use of force must fit within the limits imposed by the Charter. Some States would like to go beyond this, authorising unilateral intervention in certain circumstances.⁵⁹

Conclusions

Putin stands accused of charging genocide falsely, without making a ‘good faith’ assessment. But how rigorous are those who have made the charge that he is guilty of genocide? Did Biden and the others who charged Russia with genocide make a ‘good faith’ analysis? They too seem to be using the term genocide in a demagogic and provocative manner, a way to stigmatise their enemy in the eyes of public opinion. Genocide, after all, is the ‘crime of crimes’, the ultimate label for a tyrant, the supreme violation of human rights, a line that when crossed transforms the banal perpetrator into the ultimate pariah.

To date, neither Ukraine nor Russia have taken proceedings in the International Court of Justice charging that genocide has been committed in breach of the 1948 Convention. That may suggest that neither of the parties to the conflict considers that the evidence of genocide is sufficient. Their legal advisors are well aware of the precedents at the International Court of Justice, where proof to a very high standard has been required. They may have calculated that it is safer to confine charges of genocide to the political sphere, where rhetoric and demagogy are not disturbed by the rigours of legal analysis and the logic of precedent.

As for the International Criminal Court, whether genocide allegations will ever be tried is a matter for the discretion of the Prosecutor. To date, the Court has issued the charge in only one case, that of Sudanese President Omar Al Bashir. A Pre-trial Chamber initially declined to include the charge of genocide in the arrest warrant.⁶⁰ However, Prosecutor Luis Moreno Ocampo challenged the ruling and the Appeals Chamber agreed that the standards for issuance of an arrest warrant had been applied somewhat too strictly.⁶¹ Although the Pre-trial Chamber later confirmed the charge, its initial assessment that this was a very weak case unlikely to succeed on the merits is persuasive.

There is no hierarchy of crimes in the Rome Statute. Seventeen years ago, a United Nations Commission of Inquiry chaired by the founder of this journal, Antonio Cassese, rejected the charge that genocide had been committed by Sudan in Darfur but insisted that this conclusion ‘should not be taken as in any way detracting from or belittling the gravity of the crimes perpetrated in that region’. The report said that genocide is not necessarily the most serious international crime. Depending on the circumstances, such international offences as crimes against humanity or large-scale war crimes may be no less serious and heinous than genocide.⁶² Nevertheless, while these words are compelling in a legal sense, the general public appears to see things differently. Dirk Moses has noted that ‘genocide monopolises people’s moral imaginations’. He has expressed some perplexity that military attacks on civilian

⁵⁹ For example, Declaration of intervention pursuant to article 63 of the Statute of the Court by the Government of New Zealand, 26 July 2022, para. 31; Declaration of intervention under article 63 of Denmark, 16 September 2022, para. 34.

⁶⁰ *Prosecutor v. Bashir* (ICC-02/05–01/09), Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, 4 March 2009.

⁶¹ *Prosecutor v. Bashir* (ICC-02/05–01/09-OA), Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, 3 February 2010.

⁶² Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, S/2005/60, para. 522.

populations elsewhere in the world do not generate the same excitement as Russia's war on Ukraine and Ukrainians.⁶³

In his separate opinion issued in conjunction with the Order of provisional measures, Judge Bennouna noted that 'this concept of genocide has been overused and indiscriminately employed by propagandists of all persuasions'.⁶⁴ On two occasions, in the cases filed by Bosnia and Herzegovina and by Croatia, the International Court of Justice has poured cold water on attempts to enlarge the scope of the crime. Similarly, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has declined persistent entreaties from the Prosecutor to apply genocide more broadly.⁶⁵ Yet far from encouraging restraint, this message seems almost to have provoked the opposite, a proliferation of allegations. The term 'genocide' exerts a fascination for victims of atrocity who have been convinced that nothing else will suffice to recognise their suffering. It has also been weaponised by politicians as a way of demonising their adversaries.

It is often difficult to clarify what the debate is about. Which definition is being used? National legislatures adopt resolutions declaring certain events to be 'genocide' where they have manifestly departed from the definition those same legislatures have adopted in their domestic criminal law, and that generally track article II of the 1948 Convention. What is the standard of proof? Allegations of genocide often fail to clarify whether they rest on the very low requirement of 'reasonable grounds to believe' or rather that the proof be 'fully conclusive' to the exclusion of other explanations. The requirement of specific intent to destroy lies at the heart of this conundrum. It is hard to prove and hard to disprove. It can almost never be ruled out entirely given the possibility that the perpetrator of atrocities may nurture, within his or her *forum internum*, the intent to exterminate the victim group. But in the absence of direct evidence, it is very difficult to infer such intent. It is a bit of a cliché to say that 'genocide is very hard to prove'. Actually, all crimes are hard to prove where there is a lack of evidence!

Much energy is devoted to 'warning signs' of genocide. The Framework of Analysis for Atrocity Crimes issued by the United Nations Special Adviser on the Prevention of Genocide is sometimes cited as if it provides a guide to the actual commission of genocide. The Special Adviser flags such phenomena as 'Intergroup tensions or patterns of discrimination against protected groups'.⁶⁶ Some factors identified by the Special Adviser will be present in almost every situation where there are manifestations of racial discrimination. Many may be present in both Ukraine and Russia, but it takes little effort to find them also in Poland, Turkey, the United States, Canada, France, Germany, the United Kingdom, and so on. They are only warning signs in the sense that a sneeze or a cough is a warning sign of terminal respiratory disease. They require our attention, but they provide no real guide to the likelihood of genocide actually taking place. It seems noteworthy that the Special Adviser on the Prevention of Genocide has provided no encouragement to allegations of genocide in the Ukraine armed conflict.⁶⁷

In Ukraine, neither side makes out a compelling case for genocide committed by its opponent. There is an ethnic dimension to the conflict, of course, but this can also be said of many other situations. Most if not all wars in recent centuries have been marked by war crimes

⁶³ A. Dirk Moses, 'The Ukraine Genocide Debate Reveals the Limits of International Law', *Lawfare*, 16 May 2022.

⁶⁴ *Dispute relating to Allegations of Genocide (Ukraine v. Russian Federation)*, Declaration of Judge Bennouna, 16 March 2022, para. 4.

⁶⁵ Most recently, *Prosecutor v. Mladić* (MICT-13-56-A), Judgment, 8 June 2021, paras. 572-591.

⁶⁶ Framework of Analysis for Atrocity Crimes, A/70/741/ S/2016/71, Annex.

⁶⁷ See Statement by Ms. Alice Wairimu Nderitu, Special Adviser on the Prevention of Genocide, on the Order of the International Court of Justice of 16 March 2022.

and atrocities without there being attempts to exterminate physically one or the other party to the conflict. They have frequently included brutal bombardment of urban areas and the inevitable killing on a large scale of civilian non-combatants. If the shelling and bombing of Mariupol is an act of genocide, should we say the same about attacks on Gaza City, Hanoi, Guernica, Belgrade, Dresden, Hiroshima, and the towns and cities of Yemen? That both parties in the Ukraine conflict seek to exterminate physically the other side cannot be ruled out, of course. But little proof of this intent has been produced. Furthermore, it seems unlikely that such proof exists. There is certainly nothing that would be sufficient to meet a high evidentiary standard.

When politicians and legislatures use the term ‘genocide’ without precise reference to a legal provision there can be no certainty as to what they mean. We are reminded of Lewis Carroll’s *Through the Looking Glass*. ‘When I use a word, it means just what I choose it to mean—neither more nor less’, said Humpty Dumpty.’ ‘The question is whether you can make words mean so many different things’, replies Alice. International lawyers have no monopoly on use of the word ‘genocide’ any more than criminal lawyers have ownership of terms like murder, torture, and rape. Nor do international lawyers necessarily agree on the meaning and interpretation of the term. However, case law of the International Court of Justice and the international criminal tribunals has become consolidated in recent decades around a rather restrictive approach to the definition. Lawmakers, at both the international and domestic levels, have shown no inclination in recent times to amend the definition. Of course, the pressure to broaden the scope of the definition is not a new phenomenon. International law has been resistant to such influences in the past. The best one can say is that it seems likely that this will not change.