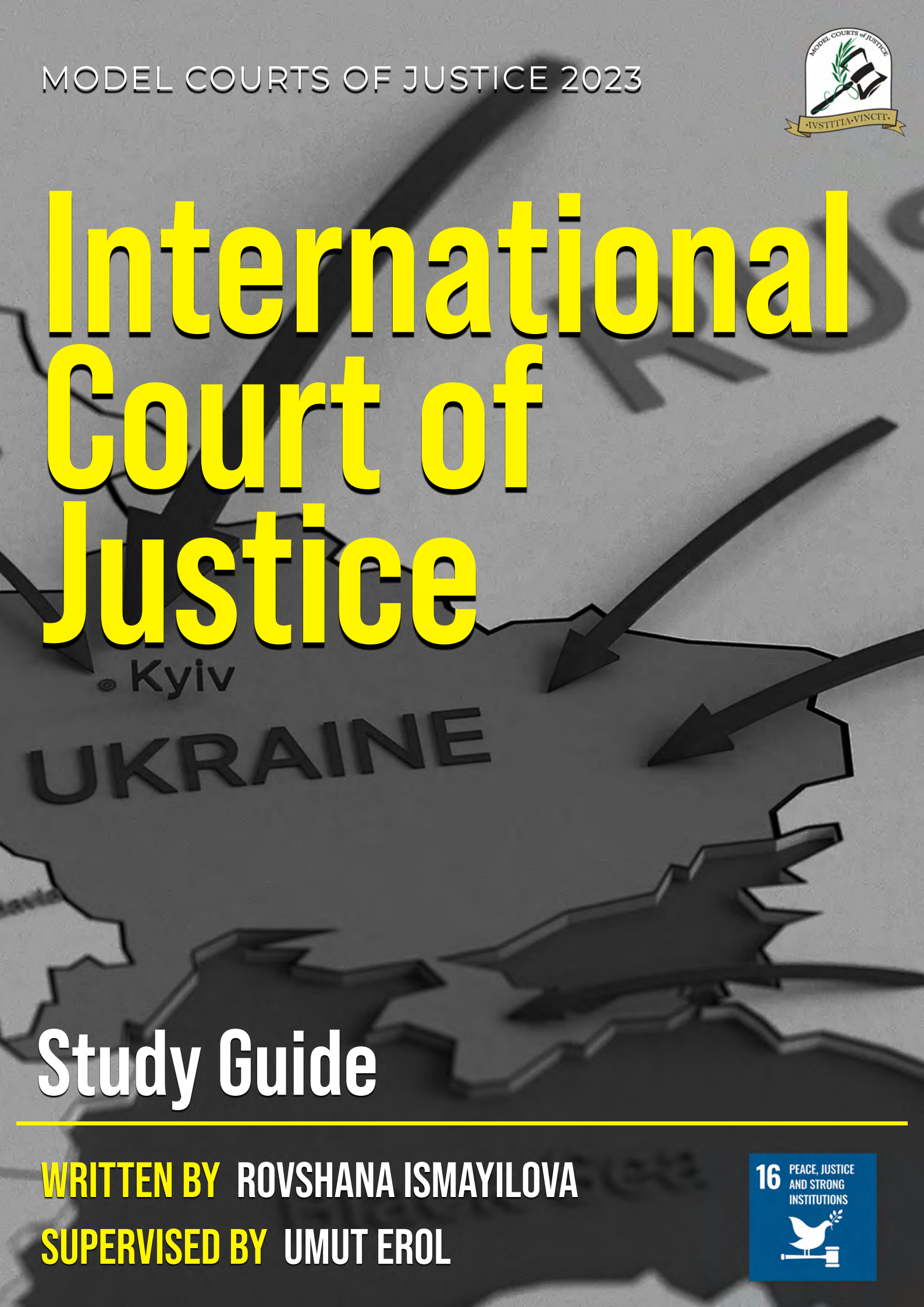
MODEL COURTS OF JUSTICE 2023

International Court of Justice



Study Guide

WRITTEN BY ROVSHANA ISMAYILOVA
SUPERVISED BY UMUT EROL

16 PEACE, JUSTICE AND STRONG INSTITUTIONS

LETTER OF THE SECRETARY-GENERAL

Esteemed Participants,

It is my pleasure to welcome you all to the twelfth edition of the Model Courts of Justice as the Secretary-General. My name is Umut Erol and I am a senior law student at Ankara University.

The participants of the Model Courts of Justice 2023 will be focusing on the fields of international humanitarian law, international criminal law, and human rights law in the International Court of Justice. The case that will be simulated is '*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide between Ukraine and the Russian Federation'.* The participants planning to participate in the Philip C. Jessup International Law Moot Court Competition will have the opportunity to practice their subjects and improve their written and oral skills.

I would like to first thank Miss Rovshana Ismayılova for writing this up-to-date case, in which she had to write a new fact every day and showing exquisite effort during the whole process. Second, I appreciate the trainee of the International Court of Justice, Mr. Buğra Öksüz for his endeavor and contribution to the preparation phase. Last, I would like to thank the Director-General of the Model Courts of Justice 2023 and my beloved partner, Miss Selin Özgören for enduring organizational excellence and professionalism with her wonderful organization team.

Before attending the sessions, I highly recommend all the participants read the Study Guide and Rules of Procedure and bring the printed versions of these documents with them while coming to the Conference.

If you have any questions or hesitations about the Conference, please do not hesitate to contact me at secretarygeneral@modelcj.org

Sincerely,

Umut Erol

Secretary-General of the Model Courts of Justice 2023

LETTER FROM THE UNDER-SECRETARY-GENERAL

Honourable Participants,

My name is Rovshana Ismayilova, and it is my utmost pleasure to welcome you all to the twelfth annual edition of Model Courts of Justice, the leading international law conference in Turkey. As a sophomore law student, it is a pleasure of mine to serve as the Under-Secretary-General responsible for the International Court of Justice.

In this year's edition, Model Courts of Justice will be simulating the case that holds profound global significance which is *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide between Ukraine and the Russian Federation.* Together with the principles enshrined in the Genocide Convention, which emphasizes the prevention and punishment of acts of genocide, this case highlights its important role in protecting fundamental human rights and deterring grave atrocities. Furthermore, the International Court of Justice will examine the dispute in order to find answers to the questions that international law has left unanswered for years, answering many debatable problems in the doctrine.

Before concluding my words, I would like to express my sincerest gratitude to each and every member of the both academic and organizational team, who made the 12th edition of Model Courts of Justice possible. I would to extend my appreciation to our dear Secretary-General Mr Umut Erol for his great efforts and for encouraging and supporting me in every step. I would also like to thank our dedicated Director-General Ms Selin Özgören for making Model Courts of Justice come true. Last but not least, I would like to deliver my gratitude to my great trainee Buğra Öksüz for his dedication and diligence.

Yours truly,

Rovshana Ismayilova

Under-Secretary-General for the International Court of Justice

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I. INTRODUCTION TO HUMANITARIAN LAW

International humanitarian law (IHL) is a specialized field of public international law that primarily regulates relations between states, international organizations, and other subjects of international law engaged in an armed conflict. IHL is also referred to as the 'law of armed conflict' or 'law of war'. [1]

The term 'international humanitarian law' relates to the present interpretation of the *ius in bello*[2], the laws governing the conduct of warfare. The International Committee of the Red Cross (ICRC), as the main guardian of IHL, described it as '*International humanitarian law is part of the body of international law that governs relations between states. It aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.*'.[3]

1. History of IHL

a. Establishment of ICRC

During his nineteenth-century Italian journey, Henry Durant witnessed a fierce battle in Solferino between French, Italian, and Austrian troops. After returning to Geneva, the horrific violence that he witnessed there inspired him, and he wrote *A Memory of Solferino*. In his book, he proposed creating relief societies in each country to alleviate the suffering of wounded soldiers.[4] The proposals that he made led to the establishment of the International Committee

[1] Nils Melzer, *International Humanitarian Law a Comprehensive Introduction* (International Committee of the Red Cross 2016) 17

[2] the law that governs the way in which warfare is conducted

[3] International Committee of the Red Cross (ICRC), *War and International Humanitarian Law* (29 October 2010), available at www.icrc.org/eng/war-and-law/overview-war-and-law.htm (accesed 2 September, 2022)

[4] International Committee of the Red Cross (ICRC), *The ICRC and the Geneva Convention (1863-1864)* (29 December 2004), available at https://www.icrc.org/en/doc/resources/documents/misc/57jnvt.htm#:~:text=In%20his%20book%2C%20A%20Memory,whichever%20side%20they%20were%20on (accesed 4 October, 2022)

of the Red Cross in 1863.[5] A small committee, with the endorsement of the Swiss Government, held a diplomatic conference which resulted in the adoption of the first multilateral IHL treaty, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864.[6] For the first time in history, the States agreed to limit their own authority in favor of the individual, with an international treaty open to universal ratification.[7] As the result of a process between 1864 and 1949, the Geneva Conventions were revised and extended in 1906, 1929, 1949, and 1977 based upon the experiences of World War I and World War II. [8]

Today, IHL is codified under the four Geneva Conventions of 1949 and the Additional Protocols of 1977 and is applicable in all armed conflicts. In particular, the case-law of the Nuremberg and Tokyo Tribunals, the International Court of Justice (the ICJ), the ad hoc Tribunals for the former Yugoslavia, Rwanda, and Sierra Leone, and the establishment of the International Criminal Court have contributed to the clarification of IHL.[9]

2. Basic Principles of IHL

a. The Principle of Distinction

The principle of distinction, which directs parties to *'at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives,'* [10] is one of the cornerstones of IHL. The implementation of the principle can be achieved if the distinction between civilians and combatants is made and the difference between civilian objects and

[5] Nils Melzer, *International Humanitarian Law a Comprehensive Introduction* (International Committee of the Red Cross 2016) 35

[6] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edwar Elgar Publishing 2019) 7

[7] Ibid

[8] Ibid 8

[9] Nils Melzer, *International Humanitarian Law a Comprehensive Introduction* (International Committee of the Red Cross 2016) 37

[10] Additional Protocol I, Art. 48; CIHL, Rules 1 and 7.

military objectives is defined. The protective norm of the principle is to prevent erroneous targeting and the incidental death and injuries of civilians and civilian objects.[11]

b. The Prohibition to Attack *Those Hors De Combat*

During the war, it is prohibited to attack those who are recognized or should be recognized as being *hors de combat*.[12] The term hors de combat is defined in Article 41 of Additional Protocol I of the Geneva Convention as;

"Attacking persons who are recognized as hors de combat is prohibited. A person hors de combat is:

(a) anyone who is in the power of an adverse party;

(b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or

(c) anyone who clearly expresses an intention to surrender;

provided he or she abstains from any hostile act and does not attempt to escape."[13]

c. The Prohibition to Inflict Unnecessary Suffering

The prohibition on inflicting unnecessary suffering was first mentioned in the preamble of the 1868 Saint Petersburg Declaration relating to prohibiting the use of certain weapons in war, which was formulated as a general principle regarding weapons in the Hague Regulations.[14] This principle equally limits the suffering or injury given to combatants, despite the fact that they are legal targets of attacks under IHL and the principle is applicable in both international

[11] Nils Melzer, *International Humanitarian Law a Comprehensive Introduction* (International Committee of the Red Cross 2016) 78

[12] Ibid 106

[13] Additional Protocol I, Art. 41

[14] Hague Regulations, Art 23(e).

(IAC) and non-international armed conflicts (NIAC). In practice, IHL restricts the types of weapons that are considered to be overly cruel regardless of the circumstances, including expanding bullets and blinding lasers.[15]

d. The Principle of Necessity

The principle of military necessity limits the use of military objections to the degree of force required to achieve the military objective and to minimize the loss of life and property. The prohibition on inflicting unnecessary suffering is connected to the doctrine of military necessity, as it is permitted to use the required degree of force.[16] However, military necessity does not give the belligerents *carte blanche*[17] to launch an unrestricted war.[18] For instance, there is a reference to military necessity as *'diminish the evils of war, as far as military requirements permit*' in the Preamble of Hague Convention IV of 1907.

e. The Principle of Proportionality

The principle of distinction allows for an attack on a military objective, but it may cause incidental damage to civilians and objects. The principle of proportionality restricts the attacks that are likely to cause excessive civilian casualties or property damage in relation to the anticipated military benefit.[19] This rule is applicable as customary law in both IACs and

[15] Nils Melzer, *International Humanitarian Law a Comprehensive Introduction* (International Committee of the Red Cross 2016) 110

[16] J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 53

[17] full discretionary

[18] Nils Melzer, *International Humanitarian Law a Comprehensive Introduction* (International Committee of the Red Cross 2016) 18

[19] J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 55

NIACs. That obligates forces to assess an attack's impact and refrain from major attacks to avoid violating the principle.[20]

A statement of the proportionality principle, as defined in Article 51(5)(b) of Additional Protocol I, as follows:

"(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

3. Sources of IHL

International humanitarian law is codified in several essential international conventions: the Hague Regulations of 1899, the Geneva Conventions of 1949, and the two Additional Protocols of 1977. In addition, the sources include specialised conventions, customary international law, which is regularly updated by the ICRC Customary Law Study, the decisions of tribunals, the legislation of the UN organs, and scholarly writings.

a. Treaty Law

i. The Hague Conventions of 1907

The First Hague Peace Conference was held in the Hague, Netherlands in 1899, and was established at the proposal of the Russian Czar Nicholas II. The establishment of the conference was an attempt to move beyond the legal system of international arbitration between states, which resulted in negotiations about disarmament and the law of war and led to the creation of the Permanent Court of Arbitration to settle international disputes. [21]

The establishment of the Second Hague Peace Conference took place with the call of U.S President Theodore Roosevelt and the conference convened in Hague in 1907. The topics of

[20] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edwar Elgar Publishing 2019) 360

[21] Solis GD, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edition Cambridge University Press 2016) 51

matter were the same as in the First Hague Peace Conference. The three conventions agreed upon in 1899 were revised and ten new conventions were adopted, along with one declaration. The most notable conventions that were adopted at the 1907 Hague Conference were: the Convention Concerning Bombardment by Naval Forces in Times of War; and the Convention Relative to the Laying of Automatic Submarine Contact Mines.[22]

ii. The Four Geneva Conventions of 1949

The four Geneva Conventions of 1949 lay the cornerstone of the Law of Armed Conflict (the LOAC). The Geneva Conventions are intended to protect medical personnel, prisoners of war, injured or surrendering members of the armed forces, and civilians or other noncombatants during international and non-international armed conflict, as well as during peaceful occupation. [23] Each Convention contains specific provisions that provide a minimum standard of treatment to which State parties must adhere during the course of any armed conflict or occupation. Each of the Geneva Conventions protects a particular group of people who may be at risk during an armed conflict or a peaceful occupation. The first Geneva Convention of four with the establishment of the ICRC was ratified in 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field. The second Geneva Convention of 1906 was for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, which was implemented through the Hague Conventions. World War I emphasised the need for the strengthening of protections accorded prisoners of war. Consequently, the third Geneva Convention of 1929 was relative to the Treatment of Prisoners of War. [24]

The purpose of the Geneva Conference in 1949 was to update the treaties in the lights of developments after the Second World War (WWII) and the Spanish Civil War. In the time of war, it was seen that the existing Geneva Conventions required strengthening protection for civilians. As a result, in the Geneva Convention of 1949, with the Convention Relative to the Protection of Civilian Persons in Time of War, these gaps were filled. The Spanish War

[22] J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 34

[23] Geneva Conventions common art. 2 & 3.

[24] Solis GD, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edition Cambridge University Press 2016) 73

signified the need to impose limitations on internal armed conflicts. [25] Therefore, the Geneva Conference inserted a common Article 3; provision for regulating non-international armed conflicts, for the protection and humane treatment of those who are no longer taking part in hostilities. [26]

iii. The Two Additional Protocols of 1977 and the Third Additional Protocol of 2005

The two Additional Protocols of 1977 and the third Additional Protocol of 2005 to the Geneva Convention are international treaties that are separate from the Conventions. Protocol I regulate International Armed Conflicts (the IACs); while Protocol II addresses Non-international Armed Conflicts (the NIACs). Mostly, the two Additional Protocols deal with the field of the conduct of hostilities, which is not covered by the Conventions. The third Additional Protocol of 2005 adds a new protective emblem to the Red Cross and the Red Crescent. [27]

b. Customary Law

To consist of a rule as a rule of customary law, two elements are required: the rule must be supported by consistent state practice and *opinio juris*.[28]. [29] Despite the fact that customary law is not established through traditional legal procedure, it plays a significant role in the international legal order by filling the legal gaps left by treaty law. [30] Customary IHL is also important because, all states are bound by customary international law, with the exception of states that have consistently rejected a custom as it develops. [31] Furthermore, international

[25] D. Djukić and N. Pons, *The Companion to International Humanitarian Law* (Brill 2018) 654

[26] Nils Melzer, *International Humanitarian Law a Comprehensive Introduction* (International Committee of the Red Cross 2016) 36

[27] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edwar Elgar Publishing 2019) 38

[28] The sense of legal obligation

[29] J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 25

[30] D. Djukić and N. Pons, *The Companion to International Humanitarian Law* (Brill 2018) 71

[31] Solis GD, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edition Cambridge University Press 2016) 12

tribunals and some legal systems prefer to apply customary law; in fact, in some systems, only customary law is directly applicable in domestic law. [32]

Customary international law that will be applicable between parties can be modified by treaties, but it will only be applicable to the Parties of the treaty. There are some rules that cannot be regulated under the treaties and are known as *jus cogens*. This term includes norms that are accepted by the international community, in which derogation is not acceptable. For instance, the crimes of genocide, torture, and crimes against humanity are involved in that distinction. [33]

The revival of customary IHL started with the judgments of the International Criminal Tribunal for the former Yugoslavia (the ICTY), in which customary law was applied because the United Nations Security Council (the UNSC) could not retroactively establish substantive criminal law. The ICRC prepared a study of 'Customary International Humanitarian Law' for the IACs and NIACs, which has been updated since 2005 and identified 161 rules. [34] The content of the rules generally includes; the principle of distinctions, specifically protected persons and objects, specific methods of warfare, use of weapons, treatment of civilians and persons *hors de combat*, and the implementation of IHL. [35]

c. General Principles of Law

Jean Pictet stated for the IHL rules that "*a number of principles which inspire the entire substance of the documents*" that are "*expressly stated in the Conventions,...clearly implied [or]...derive from customary law"*. [36] The principle of distinction, military necessity, and proportionality can be cited as the general principle of IHL. Especially for the IHL, "Elementary Considerations of Humanity" are essential, and even more, they are not only applied during times of conflict but they are also applied in times of peace. In the area of

[32] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edwar Elgar Publishing 2019) 51

[33] J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 27

[34] Ibid 46

[35] Jean M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (International Committee of the Red Cross, Cambridge University Press 2005)

[36] Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 59–60.

international law, there are abstractions from treaties and customary law in particular: the sovereign equality of States; the concept of the common heritage of mankind; the freedom of navigation on the high seas; and every state's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States. [37]

i. The Martens Clause

The Martens Clause, first appeared in the Preamble to the Hague Convention of 1899 (II) with respect to the laws and customs of war on land, by the proposal of the Russian delegate. [38] Clause came into existence during the confusion about non-combatants who had picked up arms against the forces during Hague Peace Conference in 1899. The disagreement was arised between small states and Great Powers, in which small countries argued that they should be threated as lawful combatants, while big military powers defended that they should be threated as *francs-tireurs*[39]. [40]

As formulated in 1899, the Martens Clause read:

"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

[37] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edwar Elgar Publishing 2019) 53

[38] Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", (2000), vol. 94, no. 1 The American Journal of International Law, JSTOR https://doi.org/10.2307/2555232 Accessed, October 4 2022

[39] a guerrilla or irregular soldier

[40] Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) International Review of the Red Cross, No. 317 https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm Accesed, October 31 2022

II. INTRODUCTION TO THE INTERNATIONAL COURT OF JUSTICE

1. History

In the atmosphere of the Hague Peace Conferences, the creation of the 'world court' seemed to be a long-felt need. The first steps taken in that regard were the establishment of the Permanent Court of Arbitration (the PCA) by the authorization of the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. There had been several international arbitration courts, particularly in the previous 100 years, like the London Court of International Arbitration. As a result of this progression, PCA became the first global mechanism for settling disputes between states.[41]After the establishment of the PCA, no such steps were taken until the end of the First World War.[42]

After World War I, the worldwide intergovernmental organization, the League of Nations, was established. Article 14 of the Covenant of the League of Nations gave the Council of the League responsibility for establishing a Permanent Court of International Justice (the PCIJ). [43] The PCIJ would be competent not only to hear and decide any international issue brought to the Court by the Parties to the dispute but also to give an advisory opinion on any dispute submitted to the Council or the Assembly of the League of Nations.[44] Before the Second World War outbreak, the PCIJ dealt with 29 contentious cases between the States and delivered 27 advisory opinions between 1922 and 1940. [45]

At the end of World War II, with the establishment of the United Nations (the UN), the International Court of Justice (the ICJ) was established under Article 92 of the Charter as the

[41] 'History' (Permanent Court of Arbitration) https://pca-cpa.org/en/about/introduction/history/ accessed July 21, 2022

[42] Malcolm N. Shaw, *International Law* (Cambridge University Press 2008) 1058

[43] History, The Permanent Court of International Justice (PCIJ) *(International Court of Justice)* https://www.icj-cij.org/en/history accessed July 21, 2022

[44] Ibid.

[45] General Topics 1.2 International Court of Justice (*United Nations Conference on Trade and Development 2003*) https://unctad.org/system/files/official-document/edmmisc232add19_en.pdf accessed July 21, 2022

'*principal juridical organ'*.[46] All UN members are *ipso facto*[47] parties to the Statute; non-members of the UN may become parties by the recommendation of the Security Council and on conditions laid down by the General Assembly. The ICJ was the successor to the PCIJ, as any distinction was made between the PCIJ and the ICJ, as they had the same line statute and jurisdiction.

2. Structure

The International Court of Justice is comprised of 15 judges whose period of service is nine years and who are elected by the United Nations General Assembly (the UNGA) and the Security Council (the UNSC).[48] Because the ICJ sought to represent various nations and legal systems, no more than one national from any state may become a member of the Court. Representatives of the Court are prohibited from taking a role in politics and administration and cannot act as agent, counsel, or advocate in any case.[49]

3. Conclusion of the Case

A case can be concluded if there is a settlement, by the Pacific Settlement of Disputes, between the parties at any stage of the proceedings. Due to the settlement, the dispute may seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Furthermore, if applicant Party concludes and does not wish to continue, Party have a right to withdraw the case.

According to Article 55 of the Statute, *all questions shall be decided by a majority of the judges present.* In the equality of votes, the vote of the President is the casting one. [50]

[46] Malcolm N. Shaw, *International Law* (Cambridge University Press 2008) 1058

[47] By the fact itself; the direct consequence of an action.

[48] Members of the Court (International Court of Justice) https://www.icj-cij.org/en/history https://www.icj-cij.org/en/members

[49] Statute of the International Court of Justice, art, 17

[50] Statute of the International Court of Justice, art, 55

4. Jurisdiction

The International Court of Justice is not a legislative organ that creates law; it is a judicial institution that decides cases on the basis of international law.[51]

The jurisdiction of the International Court of Justice is divided into two parts: its ability to decide disputes between states and its ability to provide advisory jurisdiction when it is requested.[52]

a. Advisory Opinion

As the public (governmental) international organizations cannot be a party in contentious cases, the advisory jurisdiction of the ICJ provides advisory proceedings for the organs authorized by the Charter of the UN, '*The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.'*.[53] ICJ gives advisory opinions to organizations and them alone, which are five United Nations organs, fifteen specialized agencies, and one related organization.[54] Contrary to the contentious cases, the judgments of advisory jurisdiction are not binding; it is the choice of requesting organ to implement or not.

b. Contentious Jurisdiction

The contentious jurisdiction of the ICJ is for the cases only between states and depends on the consent of the parties.[55] The Court is open to all states that are parties to the Statute. In addition to that, Non-member states may become parties to the Statute of the Court by the

[51] Fisheries Jurisdiction case, ICJ Reports, 1974, pp. 3, 19; 55 ILR, pp. 238, 254.

[52] Malcolm N. Shaw, *International Law* (Cambridge University Press 2008) 1070

[53] Statute of the International Court of Justice, art, 65

[54] Advisory Jurisdiction (International Court of Justice) https://www.icj-cij.org/en/advisory-jurisdiction accessed July 22, 2022

[55] Ian Brownlie and James Crawford, *Brownlies Principles Of Public International Law* (Oxford University Press 2012) 724

recommendation of the Security Council and the determination of the General Assembly.[56] States may apply to the contentious jurisdiction in four different ways including compromis[57], jurisdictional clause, the declaration made under Article 36(2) of the Statute, and the doctrine of Forum Prorogatum[58].

The Member States, the contracting parties to the Charter, must comply with any decision or the law in any case to which they are a party. If the party fails to perform its obligations, the court has a right to bring it to the Security Council to empower the judgment.

5. Sources of Law Applicable to the International Court of Justice

The Court applies the rules of international law, as outlined in Article 38 (treaties, customs, general principles of law). Despite that, the court may decide *ex aequo et bono* [59], where the parties agree, on the basis of justice and equity untrammelled by technical legal rules.

In Article 38 of the Statute, the sources of law applicable to the International Court of Justice enumerated as;

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

international custom, as evidence of a general practice accepted as law;

the general principles of law recognized by civilized nations;

[56] U.N. Charter art. 93, para. 2.

[57] A special agreement between states to submit a particular issue either to an arbitral tribunal or to the International Court.

[58] Jurisdiction on the basis of tacit consent after a case has been submitted.

[59] A manner of deciding a case pending before a tribunal with reference to the principles of fairness and justice in preference to any principle of positive law.

subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.[60]

[60] Statute of the International Court of Justice, art, 38

III. KEY CONCEPTS

During the sessions of the court, the concepts mentioned below will be essential for the debates.

1. International Armed Conflicts

When one or more states use military forces against other states, international armed conflicts occur. There is no need for a formal declaration of war or the recognition of the situation to be regarded as an armed conflict.[61] In Oppenheim's view of war, there are four primary requirements;

(a) there has to be contention between at least two States;
(b) the use of the armed forces of those States is required;
(c) the purpose must be overpowering the enemy (as well as the imposition of peace on the victor's terms) and it may be implied, particularly from the words 'each other';
(d) *both Parties are expected to have symmetrical, although diametrically opposed, goals.* [62]

Under international law, only armed conflicts between states are qualified as war in the broadest meaning of the term. The application of the IHL to conflict relies on conflict categorization, which has a significant impact, particularly on the legislations for atrocities and breaches, such as Geneva Conventions.[63] It is stated in Common Article 2 of the Geneva Conventions that the Conventions '*shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*'[64] Additionally, Protocol I also applies to the situations mentioned in Common Article 2, because Protocol I notes that it supplements the Geneva Convention.

[61] 'International armed conflicts' (International Committee of Red Cross) https://casebook.icrc.org/glossary/international-armed-conflict , (accessed 1 November 2022)

[62] L. Oppenheim, II International Law 202 (H. Lauterpacht ed., 7th edn, 1952)

[63] Solis GD, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edition Cambridge University Press 2016) 150

[64] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention) art 2

2. The Contemporary Prohibition of the Use of Inter-state Force [65]

In nineteenth century, the concept of war was a method of dispute settlement and an attribute of statehood. However, the adoption of the Covenant of the League of Nations of 1919 resembled beliefs of the nineteenth century. In Article 10, the Members were obliged *to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.*[66] In 1925, the Sixth Assembly of the League adopted a resolution to fill the gap in the Covenant by stating that the 'war of agression' is an 'international crime'.[67]

The General Treaty for the Renunciation of War, also known as the Kellogg–Briand Pact, is the international peace agreement signed in 1928. Article I of the Agreement, states that Parties '*condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another'.* Article II states that disputes between Parties must always be resolved peacefully. [68] By the Kellogg-Briand Pact, the legal regime of the Charter of the United Nations was drafted, and the Pact provided the continuation of the interwar period. [69] The Kellogg-Briand Pact moved beyond the notion of international law from *ius ad bellum*[70] to *ius contra bellum*[71], that the prevention of war by legal remedy became the main purpose.[72]

Franklin Delano Roosevelt's Cabinet started working for the replacement of the League of Nations in 1939. What emerged in 1945 at the San Francisco Conference as the United Nations, and while drafting the Charter of the United Nations, one of its main principles was to make

[65] For the comprehensive understanding of the Contemporary Prohibition of the Use of Inter-state Force see UNGA Res 2625 (XXV) 24 October 1970, UNGA Res 662 (1990) 9 August 1990.

[66] The Covenant of the League of Nations (signed 28 June 1919) (The Peace Treaty of Versailles) art 10

[67] LNOJ Sp Supp 33, Annex 14, 403 (adopted 25 September 1925)

[68] Ian Brownlie and James Crawford, *Brownlies Principles Of Public International Law* (Oxford University Press 2012) 745

[69] Ibid

[70] Law on the use of force

[71] Law on the prevention of war

[72] Dinstein Y, *War, Aggression and Self-Defence* (6th ednCambridge University Press 2017)

up for the deficiencies of the Kellogg-Briand Pact.[73] The present-day ius ad bellum is based on Article 2, which proclaims:

> *(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*
> *(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*
> *(7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.*[74]

3. Self-Preservation and the Right of Self-defence

One of the exceptions to the prohibitions against the use of inter-State force is the extent of the right of self-defence, which is arranged under Article 51 of the Charter of the United Nations, as;

"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 the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[75]

[73] O'Connell, Mary Ellen, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (New York, 2008; online edn, Oxford Academic, 1 Jan. 2009)

[74] United Nations, 'Charter of the United Nations' (24 October 1945) 1 UNTS XVI

[75] United Nations, 'Charter of the United Nations' (24 October 1945) 1 UNTS XVI

Furthermore, the International Court of Justice established the right of self-defence in the *Nicaragua* case as an inherent right under customary international law as well as under UN Charter.[76] In its decision on Nicaragua, the Court recognized that in the case of a use of force or interference that did not amount to an armed attack, the respondent state could not engage in military action on the basis of its right of self-defence.[77]

The difficulty of the application of Article 51 is the notion of the armed attack since it was drafted by comparison to the Second World War. Consequently, the development of modern weapons and the evolution of modern warfare makes it difficult to pursue. [78] In addition, irregular forces are increasingly being used alongside or instead a place of official armies in modern warfare. In these circumstances, the emphasis would turn to a consideration of the involvement of the state, which would render it liable and permit justified self-defence action against the relevant state. [79] According to the General Assembly's 1974 definition of 'aggression', *the Court concluded there was general agreement that armed attack included 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries', 'if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces'*[80].[81]

The use of force applied in self-defence must be both necessary and proportionate. Furthermore, restrictions must be applied to all types of self-defence, individual and collective. The defending state must have no other choice than act in forceful self-defence and must use the degree of force required to achieve the military objective and minimize the loss of life and property. [82]

[76] Nicaragua, ICJ Reports 1986 p 14, 94. Further: Gray (3rd edn, 2008)

[77] Ibid

[78] Ian Brownlie and James Crawford, *Brownlies Principles of Public International Law* (Oxford University Press 2012) 748

[79] Malcolm N. Shaw, International Law (Cambridge University Press 2008) 1133

[80] ICJ Reports 1986 p 14, 103

[81] Ian Brownlie and James Crawford, *Brownlies Principles of Public International Law* (Oxford University Press 2012) 748

[82] Ibid 749

Another form of the right to self-defence is pre-emptive self-defence. In its most general form, preventive self-defence is defined as the use of force by a state in order to eliminate a potential threat of aggression against it. In the Nicaragua judgment, the Court did not make any assessment on preventive self-defence by remaining limited to the subject matter of the dispute and avoiding making a different assessment. According to the view that preventive self-defence is valid today, the right to self-defence was already protected under customary international law before its normative existence under Article 51 of the UN Charter. The normative regulation did not abrogate the previous customary international law protection. If this view is accepted, the right to pre-emptive self-defence derived from customary international law should be applied today in line with the Caroline Doctrine even though it falls outside the scope of protection of Article 51 of the UN Charter.

According to those who argue that preventive self-defence is not applicable today, approximately 80 years have passed since the UN Charter was signed. The effect of customary international rules that were applied before this period is open to debate. Within the scope of the right of preventive self-defence, it is accepted that the use of force to prevent possible acts of terrorism is lawful as long as self-defence is necessary and proportionate, and if there is a UNSC resolution.

Article 51 of the UN Charter also regulates the collective aspect of the right to self-defence. This provision is in fact the legal basis for international organizations established for security purposes, such as NATO. For collective self-defence to exist, the call for assistance must be made by the State(s). In addition, there must be an armed attack directed against the State(s) that has expressed the call for assistance. In the absence of these elements, the right to collective self-defence cannot be invoked. In the International Court of Justice proceedings, the United States claimed that the use of force against Nicaragua was carried out in collective self-defence. However, the Court stated that the criteria for collective self-defence were not met because there was no record of any armed attack against Honduras, Costa Rica or El Salvador, and there was no call for assistance from the states concerned to the United States.

4. Right to Self Determination

Self-determination is defined as the free determination of a population of its geographical boundaries, political status or its own future independently of other states. In other words, it means that the people living in a country decide on their governance without the influence of another state. [83]

A 1981 UN report defined in general terms what should be understood by the concept of people. According to this report, the necessary conditions for a community to be a people are a distinct culture, language or religion, a sense of common history, a desire to maintain a social identity and integration in a defined territory. Based on these conditions, it can be argued that peoples, ethnic groups, national or ethnic minorities have the potential to become a people, and within this framework, the population of a state can be composed of different peoples. However, these conditions are not sufficient for these communities to have the right to self-determination as a people. In order for a people to be able to legitimately benefit from self-determination, the state or the international community in which it lives must recognize this right. In other words, in order to take advantage of the right to self-determination, it needs to be "recognized by the other".

5. The Principle of Distinction Between Civilians and Combatants

In international armed conflicts, civilians and combatants have different systems of protection during the conduct of hostilities and in the power of the enemy. [84] Combatants are defined as the members of the armed forces of the party to an IAC. They are the sole actors in an IAC which have right to directly participate in an armed conflict, this right is referred to as ‘combatant priviledge’. Combatants cannot be punished for the hostilities, even if participation constitutes a crime under the enemy’s domestic legal order. Civilians are described as a person who do not fall within the categories of combatants under Article 50 of Additional Protocol I.

[83] Michla, Pomerance, *Self Determination in Law and Practice: The New Doctrine in the United Nations* (1982) 37

[84] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edwar Elgar Publishing 2019) 20

[85]Even in the doubt whether the person is civilian or a combatant, she/he must be considered as a civilian.

There is a distinction in both people (civilians and combatants) and property (civilian and military objects). [86] Likewise in the distinction of people, the civilian objects are the ones which are not military objects. Two criterias are essential for the distinction of military objectives: firstly, the nature, location and purpose of use must make a military action; secondly,; the destruction, capture, or neutralisation of the object must offer a military advantage. [87] Weapons, military equipment, naval bases, and airfields are some examples of military objectives.

6. The Protective Regimes

By the legal system and sources of international humanitarian law the protection of the wounded, sick and shipwrecked; combatants and prisoners of war; civilians in the power of the enemy; the dead and the missing are covering with the methods mentioned below. [88]

Wounded and sick persons are the ones who are required to have medical support because of their disability, physical or mental disorder. In the 'Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864' was stated *'Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.'*[89] for the status of the wounded during hostilities. This rule is one of the few laws which was born on the battlefield of Solferino.

[85] Additional Protocol I, art 50

[86] J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 70

[87] Additional Protocol I, art 52(2)

[88] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edwar Elgar Publishing 2019) 231

[89] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864) 129 CTS 361, Art 6.

Furthermore, medical personnel may not be attacked and must be allowed to perform their duties during hostilities. Even in enemy-controlled territory, personnel must be repatriated because they are not taking a part in armed conflict. [90]

a. The Prohibition of Attacks Against those *Horse de Combat*

As it was mentioned above, *hors de combat* is a term, used for the combatants outside of the fight. A person considering hors de combat, can be described as; if she/he is in the power of an adverse party, clearly expresses an intention to surrender has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and is therefore incapable of defending her/himself.[91]

b. Internment of Prisoners of War

The Prisoners of War (the POWs) are the combatants who fall into the power of the enemy and lose the status of being combatants in an IAC. Article 4 of Geneva Convention III provided a definition of the POW status as;

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

[90] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edwar Elgar Publishing 2019) 234

[91] 'Hors de combat' (International Committee of Red Cross) https://casebook.icrc.org/glossary/hors-de-combat , accessed 24 October 2022

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.[92]

Combatants benefit from the protections from the moment they are captured by the enemy until they are released and returned. It is not essential for them to be caught or physically held in order to come under the control of the enemy. Although the enemy may no longer attack it is under no obligation to obtain control of combatants who are *hors de combat*, in the contact zone. [93]

7. Crimes Against Humanity

Crimes against humanity comprise a wide range of crimes committed against civilians on a large or systematic scale. The specific actions include murder or extermination, forcible transfer or deportation, enslavement, torture sexual slavery or sexual violence, deprivation of liberty or imprisonment, and other acts of inhumane treatment causing mental or physical injury. [94] The action in issue must occur as a result of an assault that is either systematic in its level of planning, strategy, and preparation or extensive in its scope and the number of victims it claims.

An 'attack directed against any civilian population' is defined in the Rome Statute as '*a course of conduct involving the multiple commission of [any of the acts referred to above] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit*

[92] Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention) art 4

[93] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edwar Elgar Publishing 2019) 264

[94] J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 177

such attack'[95]. In brief, the attack against civilians must be actively encouraged by the state or an organization. [96]

8. Ethnic Cleansing

The term 'ethnic cleansing' surfaced in the context in the 1990s in the former Yugoslavia conflict, when a large numbers of Bosnian Croats and Muslims forced to leave their country or even expelled. Ethnic cleansing can be defined as the systematic expulsion or killing of racial, religious, and ethnic groups, not only the destruction of people, but also monuments, cemeteries, or houses of worship. Ethnic cleansing aims to build geographic zones in which the population formed by the persons of same ethinicity, or nationality. Furthermore, ethnic cleansing is a new concept in the area of international law and, for that reason, it is not recognised as an independent crime under the particular fields.

9. The Crime of Genocide

The crime of genocide was identified as a criminal act in 1946 by UN General Assembly and was followed by the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. The main principles of the crime of genocide are outlined in Article 6 of the Rome Statute as;

For the purpose of this Statute, "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;

[95] Statute of the International Criminal Court, art 7(2)(a)

[96] J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 177

Forcibly transferring children of the group to another group. [97]

The material element which comprises an act of killing, causing serious bodily or mental harm, and inflicting adverse life conditions is the *actus reus* [99]or physical element of the crime. In the crime of genocide, the acts aimed at eliminating the material (physical, biological) existence of the targeted group and regulated in five paragraphs in Article II of the Convention constitute the material element of the crime of genocide. All acts constituting the crime of genocide and specified in Article II may be committed by commission, while some of these acts may also be committed by omission. The acts specified in Article III, other than genocide, are different from those specified in Article II and each may have its own additional material elements.

The notion of the intent of destroying, in whole or in part, a national, ethnic, racial or religious group is a *mens rea*[100], moral element of the crime. [101] In order for the crime of genocide to be committed, the material element of the crime must be established together with the moral element of the crime. It is the moral element of the crime of genocide that distinguishes it from other international crimes. The " *intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*..." in the first paragraph of Article II of the Convention is the moral element required for the crime of genocide to occur and is the "constituent element" of the crime. The nature of the crime of genocide is that the targeted persons are "de-personalized" and the acts are committed not because of the personal characteristics of the targeted persons, but because of their belonging to a particular group.

[97] Statute of the International Criminal Court, art 6
[99] the act or omission that comprise the physical elements of a crime
[100] Criminal intent
[101] J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 175

IV. INTRODUCTION TO ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (UKRAINE V. RUSSIAN FEDERATION)

1. Overview

a. Historical Background of Ukraine

i. History of the Ukrainian Territory:

The geography where Ukrainians are living today has been called the 'gate of Europe' by many people as many civilizations have entered Europe through the land. The maritime powers in the Black Sea and the Danube River coming through Ukraine gave it particular importance as a gateway between East and West. Throughout history, the territory served as a strategic and, at times, a meeting point for various empires.

Slavs first appeared in history during the Byzantine Empire, but after the annexation of the Goths and Huns, some of them migrated to the Balkans. The remaining Slavs occupied what is now western and north-central Ukraine and southern Belarus. The Slavic ancestors of Ukrainians began to seek their place in Medieval Europe under the influence of Christianity. A strong mediaeval state known as 'Rusland' or simply 'Rus' was created, and it evolved into Ukrainian territories, reaching its zenith around the turn of the 11th century. [102]

Figure 1: Kyivan Rus', 980-1054 [103]

In the year 882, the ruler of Novgorod annexed Kyiv and made it the centre of the first East Slavic state, Kyivan Rus. In 998, Christianity was adopted as a religion, and Kyiv entered the orbit of Byzantine (Orthodox) Christianity and culture.

[102] 'Origins & History of Ukraine' (*UkraineNow*) <https://ukraine.ua/explore/origins-history-of-ukraine/> accessed 28 November 2022.

[103] Kyivan Rus', 980-1054 in Z. E. Kohut, B. Y. Nebesio, and M. Yurkevich, *Historical Dictionary of Ukraine* (Scarecrow Press 2005)

In the 15th century, the Cossacks[104] were beginning to evolve in the European arena. Cossack detachments fought in practically all of the major conflicts of the region, either as an autonomous military force or as mercenaries. They had their own distinct traditions, self-government, and military heritage.[105] Meanwhile, Crimean Tatars established their own state, the Crimean Khanate, on their ancestral soil. History has both unified the Crimean Tatars and the Cossacks in one alliance and brought them together in brutal battles. The Crimean state ceased to exist about the time the Polish-Lithuanian Commonwealth was partitioned, and the Hetmanate lost its authority. Imperial Russia played a role in all of these events.[106]

Between the 18th and 20th centuries, Ukraine was a part of the Austrian and Russian empires. During that period, Ukrainian intellectuals were inspired by nationalism and wanted to revive Ukrainian cultural traditions by re-establishing a Ukrainian nation-state. Russia, feared by the separatists, imposed limits on attempts to raise the Ukrainian culture by banning its study. Most of the Ukrainian intellectuals fled to Western Ukraine, which was ruled by the Austrian Empire. In the 20th century, millions of Ukrainian people were thrown into World War I. In February 1917, the Russian Revolution brought the Provisional Government into power. At the same time in March, the Central Rada (Council) was established in Kyiv as a Ukrainian representative body. However, after the Bolshevik coup, the Central Rada refused to recognise the new authority over Ukraine and declared the formation of the Ukrainian National Republic while remaining in federation with the new democratic Russia predicted to emerge from the next Constituent Assembly. The Bolsheviks declared Ukraine a Soviet republic and created a rival government at the first All-Ukrainian Congress of Soviets. The Ukrainian government's socialist policies, particularly land nationalisation, clashed with the German high command's need to enhance food production for its own war effort. The Rada administration was deposed on April 29, 1918, in a coup aided by Germany. In order to gain the support of the Allies, Ukrainian delegates declared their intention to form a federation with a future non-Bolshevik Russia, sparking an insurrection. The hetman abdicated on December 14, and the Kyiv administration was taken over by the Directory. The Bolsheviks seized Kyiv again in February

[104] 'free men', from Turkic languages

[105] 'Origins & History of Ukraine' (*UkraineNow*) <https://ukraine.ua/explore/origins-history-of-ukraine/> accessed 29 November 2022.

[106] Ibid

1919. Ukraine marched alongside Poles in order to liberate Europe from communism and defeat the Russian Bolsheviks.[107] Historian Paul Kubicek stated that:

"Between 1917 and 1920, several entities that aspired to be independent Ukrainian states came into existence. This period, however, was extremely chaotic, characterized by revolution, international and civil war, and lack of strong central authority. Many factions competed for power in the area that is today's Ukraine, and not all groups desired a separate Ukrainian state. Ultimately, Ukrainian independence was short-lived, as most Ukrainian lands were incorporated into the Soviet Union and the remainder, in western Ukraine, was divided among Poland, Czechoslovakia, and Romania."[108]

ii. Ukrainian Soviet Socialist Republic

From 1922 until 1991, Soviet Ukraine was one of the constituent republics of the Soviet Union. As a part of the entire Soviet korenization[109] campaign, the Ukrainian SSR implemented a policy of so-called 'Ukrainization' throughout the 1920s, which included boosting the usage and social standing of the Ukrainian language and elevating ethnic Ukrainians to positions of leadership. In the year of 1932, one of the most catastrophic events happened in Ukrainian history, under the rule of Stalin. The famine-genocide, also known as the Holodomor, resulted in the deaths by starvation of 4 million Ukrainians.[110] Even though Ukrainians living outside the Soviet Union acknowledged the famine as a tremendous national catastrophe as early as 1933, mention of it was prohibited in the Soviet Union, and it was denied until late 1987. No evidence was found that it was a plan to starve Ukrainians, and it was caused by a combination

[107] Vasly Markus and Ihor Stebelsky, 'History of Ukraine' (*Internet Encyclopedia of Ukraine*) <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CH%5CI%5CHistoryofUkraine.htm> accessed 29 November 2022.

[108] P. Kubicek, *The History of Ukraine* (Greenwood Publishing Group, 2008) 79

[109] Policy of the Soviet Union for the integration of non-Russian nationalities into the governments of their specific Soviet republics

[110] Bohdan Klid, Andrij Makuch, 'Famine-Genocide of 1932–3' (*Internet Encyclopedia of Ukraine*) <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CH%5CI%5CHistoryofUkraine.htm> accessed 29 November 2022.

of factors by the International Commission of Inquiry.[111] Furthermore, United Nations General Assembly does not recognise it as an act of genocide, but as a 'great tragedy'.

In World War II, the Soviet Union invaded Poland, and occupied lands in Eastern Europe inhabited by Ukrainians, Poles and Jews, Bulgarians and Gagauz including them into the Ukrainian SSR. Following World War II, revisions to the Ukrainian SSR's Constitution were ratified, allowing it to function as an independent subject of international law in some circumstances and to some extent while being a member of the Soviet Union. With these amendments, the Ukrainian SSR became one of the founding members of the United Nations (UN) together with the Soviet Union and the Byelorussian SSR.

In 1953, after the death of Stalin, Khrushchev came into power, and the period of de-Stalinization began. In contrast to Stalin's anti-Ukrainian paranoia, Khrushchev had few prejudices against Ukrainians who followed the party line and loyally served the Soviet Union. On June 4, 1953, Oleksii Kyrychenko took over as First Secretary of the CPU, succeeding Leonid Melnikov; this was notable since Kyrychenko was the first ethnic Ukrainian to manage the CPU since the 1920s. In February 1954, the Russian Soviet Federative Socialist Republic (RSFSR) handed up Crimea to Ukraine, despite the fact that just 22 per cent of the Crimean population was ethnically Ukrainian.[112]

The unintended result of Gorbachev's attempt to address the rising economic problems of the Soviet Union was a spike in nationalism. Beginning in 1986, Gorbachev initiated an ill-defined restructuring campaign, calling for an honest confrontation with genuine issues, or openness as well as popular participation in the process. These measures provided non-Russian republics with the ability to express not only economic but primarily national issues. In March 1988, the first big movement with an explicitly political goal was established. This was the Ukrainian Helsinki Union, which was founded by freshly freed political prisoners, many of whom had been members of the mid-1970s Helsinki Watch Group. The Helsinki Union's stated goal was to restore Ukraine's sovereignty as the primary guarantee of its population's national and human rights, as well as to turn the USSR into a true confederation of nations. Faced with a rising

[111] Hobbins, AJ; Boyer, Daniel (2001). "Seeking Historical Truth: The International Commission of Inquiry into the 1932-33 Famine in Ukraine". Dalhousie Law Journal. 24 (2): 139–91.

[112] Magocsi, Paul R, *A History of Ukraine* (University of Toronto Press, 1996) 702-703

wave of nationalism, Gorbachev had previously suggested a renegotiated new union contract that would grant the Soviet republics significant autonomy while retaining central authority over foreign policy, the military, and the financial system.

After the Soviet coup d'état attempt in August 1991, the Supreme Soviet of Ukraine declared its independence. The outcome of the 1991 independence referendum, conducted on December 1, 1991, came as a surprise. The referendum for independence was won by an overwhelming majority of 92.3%. The referendum was passed in the majority of oblasts. Notably, Crimea, which was a region of the RSFSR until 1954, backed the vote with a 54 percent majority. Over 80% of Eastern Ukraine's people opted for independence. The international world nearly instantly acknowledged Ukraine's independence. Ukraine's newfound freedom marked the first time in the twentieth century that Ukrainian independence was tried without the assistance of foreign powers or civil strife.[113]

b. Historical Background of the Russian Federation

i. Historical Background of Russia

Russian history is a turbulent story that is being played out on a large, violent stage that spans millions of square miles. There is an endless list of extremes: extreme weather, twists of destiny, changes in fortune, and extreme answers to severe issues.[114] The territory of Russia, as it is known as the largest country in the world, today encompasses an area of 6.5 million square miles, which spans Eastern Europe and Northern Asia. Mikhail Pogodin, the imperial historian of the 19th century, described his native land as;

"Russia! What a marvelous phenomenon on the world scene! Russia distance of ten thousand versts [about two-thirds of a mile] in length on a straight line from the virtually central European river, across all of Asia and the Eastern Ocean, down to the remote American lands! [At the time Russia owned Alaska.] A distance of five thousand versts in width from Persia, one of the southern Asiatic states, to the end of the inhabited world to the North Pole. What state can equal it? Its half? How many can match its twentieth, its fiftieth part? . . . Russia state

[113] Magocsi, Paul R, *A History of Ukraine* (University of Toronto Press, 1996) 724

[114] M. Kort, *A Brief History of Russia* (Checkmark Books, 2008) xiii

which contains all types of soil, from the warmest to the coldest, from the burning environs of Erivan to icy Lapland; which abounds in all the products required for the needs, comforts, and pleasures in life, in accordance with the present state of development a whole world, self-sufficient, independent, absolute. (Riasanovsky, 1969: 3)"

When the 18th century began, Europe still referred to Russia as Muscovy, a faraway, primitive, partially Asian, and mostly foreign land that few people visited and even fewer regarded well. The expansion of European influence on Russia, known as Westernisation, continued throughout the century. The tsars had long hoped to reach the Black Sea and re-establish Russian dominion in the fertile southern steppes, which had been lost under Kyiv to nomadic invaders from Asia.[115] Russia gained a large expanse of steppe north of the Black Sea in what is now Ukraine by the Treaty of Kuchuk Kainardji in 1774, as well as the independence of Crimea, which it annexed in 1783.

The geographical expansion of Russia under Catherine drew millions of non-Russians into the empire. Non-Russians comprised not only diverse Baltic nationalities, Poles, Jews, and other people with no cultural or historical ties to Russia, but also Ukrainians, who by the nineteenth century increasingly considered themselves as distinct from Russians. Catherine was anxious about the rising multinationalism of the Russian Empire, which she saw as a danger to the unity of the country. Her answer was a repressive regime termed "Russification." The notion generally took the form of eliminating local institutions that minority nations had previously utilised to govern their affairs under Catherine. The first target was Ukraine and its many Cossack communities, whose last autonomy and native institutions were removed. Similar policies were then implemented in the Baltic provinces, Polish-inhabited territory, and the region north of the Caucasus Mountains.[116]

[115] M. S. Anderson, *The Eastern question, 1774–1923: A study in international relations* (Macmillan 1966) 1–27
[116] Ibid

Figure 2 expansion of Russia, 1689-1796 The overriding territorial aim of Catherine the Great in the latter half of eighteenth century, was to secure year-round navigable outlets to the sea for the vast Russian Empire hence Catherine's push to the Black Sea and Ukraine. Catherine also managed to acquire large areas of Poland through the partitions of that country.[117]

Nicholas II inherited the throne in 1894 at the age of 26, and during his reign, Russia experienced devastating setbacks in two wars: the Russo-Japanese War, which rattled but did not collapse the system, and World War I, which overwhelmed the czar, the monarchy, and Russia itself, resulting in not one but two revolutions in a single year. World War I began in August 1914, with Russia, the United Kingdom, and France (the Triple Entente) facing Germany and Austria-Hungary (the Central Powers), who were later joined by the Ottoman Empire. Within two months, by the end of September, Russia had suffered two terrible losses at the hands of the Germans, and things only got worse from there. Although the Russian army

[117] "Expansion of Russia 1689 – 1796" (*Princeton University*, 2004) <https://commons.princeton.edu/mg/expansion-of-russia-1689-1796/>

defeated the Austrians, it was no match for the sophisticated German war machine. Neither was the semi-industrialized Russian economy capable of meeting the needs of contemporary warfare. Meanwhile, by early 1917, the Russian army had lost 7 million deaths, including dead, wounded, missing, and captive soldiers, and was disintegrating. The largest cities of Russia, notably Moscow and St. Petersburg, were dangerously short of food, and strikes raised the city in January and February.[118]

During 1917, Russia had two revolutionary power moves, one completely terminating the other. The first, in March, brought Russia to the brink of a true parliamentary democracy; the second, in November, plunged the nation into the grip of a one-party dictatorship, the turmoil of civil war, and, eventually, the black hole of Communist regime.[119] A series of public protests begin in Petrograd and extend for eight days, finally leading to the Russian monarchy being abolished. Following the events, a Provisional Government was formed, led by Prince Lvov.[120] After months of turmoil, power was taken in a military coup in November by a tiny militant group dedicated to the idea that the process of change had only just begun. They desired to completely transform society, and this was the Bolshevik Party, and Vladimir Lenin was its crucial leader. Its success in acquiring and retaining power shaped the following seven decades of Russian history.[121]

Between 1918 and 1921, Russia was torn apart by the Russian Civil War. The Civil War arose as a result of the development of resistance to the Bolsheviks following November 1917. Monarchists, militarists, and, for a brief period, foreign nations were among these groupings. With the death of Nicholas II, numerous sections of the Russian empire declared their independence. The Western nations intended to re-establish an Eastern Front for their own benefit, so that the German Army would be split once more, alleviating the issues on the Western Front. Kornilov commanded the Bolsheviks in the south of Russia and was joined by soldiers who had survived World War I. As a result, on July 16, 1918, Lenin ordered their death. The Bolsheviks had a surge following World War I when the Whites lost the upper hand

[118] Richard Charques (1974). The Twilight of Imperial Russia. Oxford U.P. p. 232. ISBN 9780195345872.

[119] Rex A. Wade (2005). The Russian Revolution, 1917. Cambridge U.P. pp. 29–50. ISBN 9780521841559.

[120] Ibid

[121] Riasanovsky, *A History of Russia* (4th ed. 1984) pp. 460–461

due to strategic reasons and the closure of one battlefront. As a result, the Red Army had enough consecutive victories to provide security for the Bolshevik governance. [122]

ii. History of the Union of Soviet Socialist Republics

In July 1918, Soviet Russia established its first constitution and signed treaties with foreign republics such as Ukraine. The latter was critical to economic sustainability of Russia, and Bolshevik will be imposed. It also had an impact in the Caucasus, whereby in 1921, Georgia, Armenia, and Azerbaijan were all allied with Bolshevik Russia. Many communists saw Russia as developing imperialist tendencies. Indeed, under Georgian Joseph Stalin, the commissar for nationalities, Moscow considered territories of the imperial Russia to be its natural inheritance. However, Russia lost control of the Baltic nations and Finland.

Lenin contended, with the flexibility that many of his colleagues lacked, that for the Bolsheviks to remain in power, the country needed to recover economically, and that economic recovery could not be achieved at the point of a pistol. In its stead, Lenin suggested the New Economic Policy (NEP), which he conceded was a "strategic retreat." As a result, a mixed economy emerged, combining aspects of socialist governmental control with private entrepreneurship.

Following the death of Lenin in 1924, communism gained its hold under the rule of Joseph Stalin. Stalin was determined to create a modern industrial civilization and a military colossus, and massive infrastructure projects were built using effectively slave labour. Roads, power plants, communication networks, dams, and massive defence and heavy industry complexes were developed across the enormous territory of the Soviet Union. The authoritarian regime of Stalin, which lasted from 1924 until his death in 1953, became known as a reign of terror.[123]

When the Nazis attacked the Soviet Union during World War II, the 25 million death toll included millions of civilians slaughtered under the rule of Stalin. Much of the infrastructure of the country was devastated, most notably the city of Leningrad, which was under siege for 900 days, and Stalingrad, which was the scene of a bloody battle. Unimaginable deprivation

[122] Ibid

[123] Conquest, Robert, *The Great Terror: A Reassessment* (Oxford University Press 1990)

and agony befell the populace, and millions of families lost fathers and sons. The enormous losses inflicted, as well as the sacrifices and heroism of the Soviet people during World War II, or the Great Patriotic War as it is called in the Soviet Union, have left a major impact on society, and the annual national commemoration in May is still held in many former republics.[124] Following the surrender of Nazi Germany at the end of World War II, the tenuous wartime alliance between the Soviet Union, the United States, and Great Britain began to deteriorate. The United States and the United Kingdom were concerned about the rise of communism throughout Western Europe and the rest of the globe. The North Atlantic Treaty Organisation (NATO) was established in 1949 by the United States, Canada, and its European allies. In response to NATO, the Soviet Union unified authority among Eastern Bloc members in the Warsaw Pact in 1955, starting off the Cold War. [125] The Cold War power struggle between the Eastern and Western blocs, conducted on political, economic, and propaganda fronts, would continue in various forms until the dissolution of the Soviet Union in 1991. [126]

Nikita Khrushchev ascended to power after Stalin passed away in 1953. The Khrushchev presidency covered the most difficult years of the Cold War. He precipitated the Cuban Missile Crisis in 1962 by deploying nuclear weapons in Cuba, approximately 90 miles from the coast of Florida. Khrushchev, on the other hand, started a series of political changes that made Soviet society less restrictive. During this phase, known subsequently as de-Stalinization, Khrushchev criticized Stalin for detaining and deporting opponents, improving living circumstances, released many political prisoners, reducing artistic censorship, and closing the Gulag labour camps.

Mikhail Gorbachev, a long-time Communist Party politician, took power in 1985. He took over a stagnating economy and a collapsing political system. He enacted two sets of measures with the hopes of reforming the political system and assisting the USSR in becoming a more rich and productive society. The gap between the enormous wealth of the Politburo and the poverty of Soviet residents sparked a reaction among younger people who refused to absorb Communist Party belief as their parents had. The USSR was also subjected to international

[124] Krivosheevm G.F, *Soviet Casualties and Combat Losses in the Twentieth Century* (Greenhill Books 1997)

[125] Holden, Gerard, *The Warsaw Pact: Soviet Security and Bloc Politics* (Blackwell 1989)

[126] Gaddis, John Lewis, *Russia, the Soviet Union, and the United States: An Interpretive History* (McGraw-Hill 1990) 176

economic attacks. In the 1980s, President Ronald Reagan isolated the Soviet economy from the rest of the world, causing oil prices to fall to their lowest levels in decades. When the oil and gas revenues of the Soviet Union plummeted, the USSR began to lose its grip on Eastern Europe. Meanwhile, the reforms of Gorbachev were slow to yield fruit and contributed more to precipitating the collapse of the Soviet Union than to aiding it. The loosening of authority over the Soviet people strengthened independence movements in the Soviet satellites of Eastern Europe. The 1989 political movement in Poland spawned additional, generally peaceful, upheavals across Eastern European countries, eventually leading to the fall of the Berlin Wall. The USSR had disintegrated by the end of 1989. In August 1991, an attempted coup by Communist Party hardliners sealed the doom of the Soviet Union by undermining the influence of Gorbachev and pushed democratic forces led by Boris Yeltsin to the forefront of Russian politics. Gorbachev resigned as Soviet leader on December 25. On December 31, 1991, the Soviet Union ceased to exist.

c. Start of the Russia-Ukraine War

In 1991, Ukraine regained its independence with 91% of the votes of the population following the dissolution of the Soviet Union and had the second-largest population among the Soviet republics.[127] The territory that became independent from USSR had previously been ruled by Moscow for varying amounts of time. After the dissolution, Ukraine was looking to erase the reminders of their Soviet past. From the end of August to the end of December 1991, the Communist Party of Ukraine was dissolved, its property was nationalised, and the KGB was banned, while party and ideological pluralism were established, and all individuals living on Ukrainian socialist republic territory were granted citizenship in the emerging independent state.[128]

Two years after of its independence, Ukraine got involved with the North Atlantic Treaty Organization as a member of the Partnership for Peace. Russia joined in the following months

[127] Chrystina Lapchak, *Independence: Over 90% Vote Yes in Referendum; Kravchuk Elected President of Ukraine*, Ukrainian Weekly (Dec. 8, 1991), <https://www.ukrweekly.com/archive/1991/The_Ukrainian_Weekly_1991-49.pdf>.

[128] *Resolution on Declaration of Independence of Ukraine*, Verkhovna Rada of Ukraine, http://static.rada.gov.ua/site/postanova_eng/Rres_Declaration_Independence_rev12.htm

and conducted some activities with NATO until 2014. In 2014, NATO formally suspended ties with Russia. In the same year, 1994, the leaders of Russia, Ukraine, the United Kingdom, and the United States of America (the USA) met to pledge security assurances to Ukraine with its accession as a non-nuclear-weapons state to the Treaty on the Nonproliferation of Nuclear Weapons (the NPT). In this regard, the "Budapest Memorandum on Security Assurances" was signed. Furthermore, Russia, the UK, and the USA are committed to respecting the independence and sovereignty of Ukraine.

During the presidency of Kuchma (1994 – 2005), the administration of Ukraine supported closer ties with Russia. In the second term of Kuchma as president, he launched a campaign of media censorship. The death of journalist Georgiy Gongadze following the Cassette Scandal caused a protest in Ukraine against Leonid Kuchma. Kuchma declined to run for a third term and backed Viktor Yanukovych (also backed by the Kremlin) against Western-oriented Viktor Yushchenko. The election was a tug-of-war between the supporters of closer ties with the European Union (EU) and supporters of Russian alignment. Yanukovych won the first two rounds of the elections, but the supporters of Yushchenko were forced to revote with the Orange Revolution, which ended with the win of Yushchenko. [129] Approximately 500,000 people participated in the Orange Revolution, including Ukrainian young people marching at Independence Square. This is one of the few times in contemporary Ukrainian history that the people have regained some of their political power after losing it for so long. The importance of the Orange Revolution is emphasized by the faith of the Kremlin in his chosen candidate, Yanukovych. Vladimir Putin traveled to Kyiv on the day of the election to encourage Ukrainians on the significance of voting for Yanukovych, exacerbating Ukrainians' hostility towards the Kremlin. [130] The Orange Revolution both freed Ukraine and reinforced the grip of the Kremlin on the Russian people. The Russian government launched a pro-Putin youth movement in April 2005 in order to develop a permanent relationship with the Russian administration, similar to the Hitler Youth organization. Shortly after the Orange Revolution,

[129] Cordesman, Anthony H. "Russia and the 'Color Revolution'"(*Center for Strategic and International Studies*, 28 May 2014)

[130] Peter Dickinson, 'How Ukraine's Orange Revolution shaped twenty-first century geopolitics' (Nov. 22, 2020), https://www.atlanticcouncil.org/blogs/ukrainealert/how-ukraines-orange-revolution-shaped-twenty-first-century-geopolitics/.

the Ukrainian Supreme Court ordered a vote recount, much to the chagrin of Yanukovych supporters. Yushchenko was proclaimed the winner after the recount. [131]

Figure 3 Orange Revolution, Ukraine 2004-2005[132]

In 2006, a gas pricing dispute happened between the Yushchenko administration and Russian Gazprom, resulting in a gas cutoff for a few days. The cutoff affected Ukraine and caused a supply drop of gas to European countries. Gas shutdown amid the economic slowdown in Ukraine, which took the lead to the downfall of the popularity of Yushchenko. In August 2008, Russia invaded Georgia following a Georgian military operation against a South Ossetian separatist stronghold. The invasion ended with a five-day war, resulting in an increased Russian presence in the territory, roughly one-fifth of Georgia. Yushchenko was on the side of Georgia, and it also increased tension between Kyiv and Moscow.

After the elections in 2010, Yanukovych, the candidate aided by political consultants from the United States, became the president of Ukraine; by narrowly defeating Tymoshenko, the Prime Minister at the time. At the end of 2011, Yanukovych sentenced Tymoshenko for "abuse of office." The international press interpreted this act by Yanukovych as a politically motivated act to sideline his primary opponent. This move affected the ties between Ukraine and European Union (EU), resulting in the refusal to finalize the association agreement at the EU – Ukraine summit. After, the office of Yanukovych stated that Ukraine would not sign the agreement with the EU and started negotiations with Russian authorities about joining the Eurasian Customs Union. These government acts caused protests in Kyiv, leading to

[131] ibid.

[132] "Orange Revolution" (*Internet Encyclopedia of Ukraine*, 2020) <https://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CO%5CR%5COrangeRevolution.htm>

government collapse. During the protests, the ensuing crackdown kills more than one hundred people; this leads to the call for early elections. Shortly after, Yanukovych flew to Russia, leaving behind a lavishly decorated palace, which protesters see as evidence of his corruption. After the Yanukovych era ended, the acting office of Ukraine made it clear that the top priority would be closer ties with the EU.

Many Ukrainians, particularly students, professionals, and city-dwellers believed their future lay with Europe and the West and not a return to the lesser status of a Russian vassal state – Malorossia "Little Russia." When Yanukovych announced a suspension of the agreement a week before the signing, Ukrainians were not happy and some took to the streets.

On November 21, 2013, Mustafa Nayyem posted on Facebook, appealing for students to gather at Kyiv's Independence Square, known as the Maidan. The students and their supporters asked that the agreement process be continued, but Yanukovych refused to sign the accords despite attending the EU summit. Protests swelled in number, as did skirmishes with police on the periphery of the Maidan. On November 30, the Berkut, a special operations unit of the Ukrainian Ministry of Interior, attempted to evacuate the demonstrators from the square in a ruthless operation that motivated the nation to action. What began as a local protest grew into a national movement. The following day, 700,000 people joined a gathering on the Maidan, and the protest area was transformed into an encampment with barricades, a self-government system, logistical help, and a militia modeled after the Cossacks of Ukrainian history. The Maidan demonstrators were not affiliated with any political party but rather represented a diverse spectrum of political, economic, and cultural ideas and viewpoints. A tiny but vociferous group of protestors were nationalists connected to far-right political parties, an unpleasant truth that the Russian government and others would subsequently use to bring down the entire movement. [133] On December 11, the Berkut attempted to clear the square again but were defeated, and two days later, Yanukovych made overtures to movement leaders, offering amnesty for detained Maidan participants and the identification of government security officers who took part in the worst of the violence. Simultaneously, he reached an agreement with Russia for 15 billion dollars in economic help, a revision of petrol pricing, and the easing of an

[133] Bodhan Harasymiw, Euromaidan Revolution, (*Internet Encyclopedia of Ukraine*) http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CE%5CU%5CEuromaidanRevolution.htm

existing boycott on Ukrainian imports. [134] The infusion of Russian money and economic support, along with minor concessions to the protesters, may have resolved the crisis in Yanukovych's favour, but video of journalist and activist Tetiana Chornovol's operation outside of Kyiv enraged the nation once more, and on December 29, the protesters presented the Maidan Manifesto, which called for international sanctions against Yanukovich, his family, and his friends, among other things. On New Year's Day, almost 500,000 people gathered in Square to mark the end of the year. [135] All government efforts to discredit, disrupt, and disperse the protests failed, and on January 16, 2014, the Supreme Council, under Yanukovych's direction, passed a sweeping package of laws criminalising anything associated with the Maidan protests and severely restricting free speech, privacy, and due process to the point where even his Chief of Staff resigned in protest. The Maidan movement entered a new phase, with protests fast turning into the revolution. Government troops became more brutal, indiscriminately assaulting and killing protestors and abducting the injured from hospitals for imprisonment, torture, and, in some cases, execution. Although Yanukovych continued to make tiny concessions, such as appointing two opposition MPs to the administration, the behavior of his security forces contradicted whatever commitments he made. From February 18 to 20, government security troops and police, including the SBU and the Berkut, supported by snipers and directed by Viktor Yanukovych, murdered 60 people on the Maidan and in neighboring government buildings. This, combined with the threat of additional international sanctions imposed on them personally, was too much for the Supreme Council, and on February 21, an agreement was reached through mediation by representatives from Poland, Germany, France, and a special envoy from Russia to reinstate the 2004 Constitution, suspend the Interior Minister who controlled the SBU and the Berkut, and free Yuliia Tymoshenko. By the time the deal was signed, Viktor Yanukovych had fled to Kharkiv, then to Crimea, before returning to Russia to declare that he was still President of Ukraine. The Supreme Council disagreed, declaring that he had resigned before holding new elections in May 2014. Exact numbers are unknown, but over 100 protestors, dubbed the "Heavenly Hundred," and at least 13 police and security agents were murdered during the Euromaidan, or Revolution of Dignity. [136]

[134] ibid.

[135] ibid.

[136] *Five Years After Euromaidan: Justice for The Victims 'Still Not Even In Sight',* RFE/RL (Feb. 19, 2019) https://www.rferl.org/a/ukraine-maidan-justice-victims-amnesty-fifth-anniversary/29779358.html.

Figure 4 Revolution of Dignity, 2014 Ukraine[137]

d. Annexation of Crimea

Ukraine was a sovereign state before the creation of the USSR, during its existence, and continued to be so after its dissolution. Its status was enshrined in the Constitution of the USSR, as well as in the Constitution of the Ukrainian SSR. The territory of the Ukrainian SSR could not be modified without its approval, and its boundaries with other Union republics could only be changed by mutual agreement of the Soviet republics, subject to USSR confirmation. Even before the dissolution of the USSR, Crimea was an integral part of the territory of Ukraine, and it should have been respected under the perspective of international law.

The Crimean Peninsula, as Ukraine, has been a borderland for millennia, with numerous waves of invasion and colonization. Ukraine sought to claim Crimea as Ukrainian territory following the 1917 Revolution. The Crimeans signed an agreement with the interim Ukrainian government that would have granted Crimea autonomy inside the Ukrainian National Republic. When the Bolsheviks assumed control in 1919, they renamed Crimea the Autonomous Soviet Socialist Republic inside the Russian Soviet Federated Socialist Republic. Under Stalin, the Soviets aggressively promoted Russification; in Crimea, this meant that the

137 "Ukraine's 'Revolution of Dignity' for People and Business" (*Knowledge at Wharton*) <https://knowledge.wharton.upenn.edu/article/ukraines-revolution-dignity-people-business/>

language of advanced education and administration was Russian, to the disadvantage of Ukrainian and Tatar speakers, and the Tatar people were repressed.

Following the Holocaust and the Soviet displacement of the Tatars, the Soviets began resettling Crimea in the late 1940s with a mixture of Russians and Polish Ukrainians. Crimea was handed from the RSFSR to the Ukrainian SSR in 1954. [138] Under Article 72 of the USSR's Constitution of 1977 each Soviet republic retained the right to freely withdraw from the USSR. Article 76 of the USSR's Constitution provided that "the Union republic is a sovereign Soviet socialist state". Article 80 of this Constitution envisaged the right of the Soviet republics to enter into relations with foreign states, to conclude international treaties and exchange diplomatic and consular representatives with them, and to participate in the activities of international organizations. Russification initiatives in Ukraine and Crimea continued with considerable success after the death of Stalin. In 1989, the vast majority of Crimeans identified as Russians or Russian speakers. Despite this, the vote for Ukrainian independence on December 1, 1991, was won in the region by 54%. With independence, more Tatars began to return, and by the mid-1990s, it is believed that almost 250,000 Tatars had returned to Crimea, where they began to reconstruct their culture. The Russian invasion on February 26, 2014, prevented these plans.

Armed individuals seized government buildings on the Crimean Peninsula, including the regional parliament in Simferopol, in the early morning hours of February 27, 2014. [139]They were instantly dubbed "little green men" by the media because they wore camouflage suits with no insignia. Although they claimed to be "Crimea's armed self-defence force," it was later revealed that they belonged to the KSSO, newly founded Special Operations Command of Russia. Russian airborne soldiers (VDV) supported them. [140] In the days that followed, their soldiers took control of the whole peninsula. The Russian Federation Council formally approved the use of Russian soldiers in Crimea on March 1. On March 11, the Republic of Crimea made a proclamation of independence, which called for a vote on the matter. The popular vote was initially slated for May 25 but was pushed back to March 16. It resulted in an

[138] The Supreme Council of the USSR adopted the law "On the Transfer of the Crimean Oblast from the RSFSR to the Ukrainian SSR" in 1954. Later, the legal status of Crimea as an integral part of Ukraine's territory was enshrined in the Constitution of the Ukrainian SSR of 1978.

[139] Lawrence Freedman, Ukraine and the Art of Strategy (Oxford University Press 2019) 82–90.

[140] Galeotti, *Armies of Russia's War in Ukraine* (Osprey Publishing 2019) 11.

overwhelming, but globally disputed, 95 percent vote in favor of independence and reunion with Russia. Putin signed the Accession Treaty on March 18, two days after the referendum. The Russian State Duma accepted the pact two days later, retroactively declaring the accession legitimate from March 18 onwards.[141] The Ukrainian Republic of Crimea was dissolved and absorbed into Russia in about three weeks.[142] All Ukrainian forces who had not defected to Russia retreated to the Ukrainian mainland on March 24. Despite the fact that Ukraine had 22 000 soldiers stationed in Crimea – more than a tenth of its military strength at the time – there was essentially no opposition. This was largely due to the turmoil in Kyiv during the Maidan revolution. When the first "green men" crossed the border on February 27, Ukraine did not even have a Minister of Defence. Furthermore, the forces were not fully prepared, and the invasion caught them off guard. They did nothing since there were no directives from Kyiv. There were almost no deaths when Ukrainian soldiers retreated on March 24 due to Ukrainian apathy and the disciplined attitude of Russian special forces. [143]

[141] Kremlin, 'Agreement on the Accession of the Republic of Crimea to the Russian Federation Signed' <http://en.kremlin.ru/events/president/news/20 604>. The treaty bears the name *Договор между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов* [Treaty between the Russian Federation and the Republic of Crimea about the Accession of the Republic of Crimea to the Russian Federation and the Formation of New Subjects within the Russian Federation] 18 March 2014.

[142] 'Ukrainian Forces Withdraw from Crimea' (*BBC*, 24 March 2014) <https://ww w.bbc.com/news/world-europe-26713727>. Reports suggest that around half of the Ukrainian troops stationed in Crimea defected to the Russian side

[143] Marie-Louise Gumuchian and Victoria Butenko, 'Ukraine Orders Crimea Troop Withdrawal as Russia Seizes Naval Base' (*CNN*, 25 March 2014) <https://edition.cnn.com/2014/03/24/world/europe/ukraine-crisis/index.html>.

Figure 5 Annexation of Crimea, 2014[144]

e. The Donbas War

Following the annexation of Crimea, the Donbas was the second territorial war to impact Ukraine following the overthrow of President Viktor Yanukovych on February 21, 2014, during the so-called Euromaidan. Demonstrations and violent clashes between supporters and opponents of the Euromaidan occurred in eastern Ukraine, as they did in Crimea. Russian President Vladimir Putin emphasized the need of safeguarding the rights of Russian citizens and Russian-speaking people in Crimea and southeast Ukraine. Pro-Russian rebels in the eastern Ukrainian regions of Donetsk and Luhansk staged their own independence referendums as a result of the situation. Armed confrontation rapidly erupted in the territories between Russian-backed troops and Ukrainian forces. Local armed forces took control of public and governmental facilities in Donetsk and Luhansk in April 2014. Former GRU[145] officer Igor Strelkov led a group of dozens of men to take local police and administration facilities in Slovyansk on April 12. Even at the early stage, Russian special troops were heavily involved in the combat. According to Pavel Felgengauer, a famous Russian military specialist, they formed the "military nucleus of the fighters in Slovyansk." The special forces provided

[144] "Finding elite Russian troops during 2014 Crimea annexation" (*BBC News*) <https://www.bbc.com/news/av/world-europe-47558927>

[145] GRU or GU stands for Главное управление Генерального штаба Вооружённых Сил Российской Федерации [Main Directorate of the General Staff of the Armed Forces of the Russian Federation]. It is Russia's military intelligence agency that also commands its own special forces.

knowledge and weaponry that no ordinary people's militia could have, such as the employment of modern air defence systems against Ukrainian helicopters. The Ukrainian army was too overwhelmed to respond. When Kyiv initiated the so-called "Anti-Terrorist Operation" in mid-April 2014, just around 10% of its troops were prepared for battle. Their training was insufficient, and their equipment was outdated.

Between May and July of 2014, Ukrainians began to fight back. Poroshenko's "Anti-Terrorist-Operation" gained traction, and the fighting reached a new level of violence. During this period, there was an inflow of volunteers from Russia and other countries. Cossacks, veterans of the Afghanistan and Chechnya conflicts, Imperial nostalgists, members of Limonov's Natsbol Party, the Wagner Group, or simply soldiers of fortune banded together to form an unusual army. The majority of volunteers entered Ukraine via Rostov, where they were outfitted, trained, and informed on Russian land. For the time being, suffice it to state that Russian special troops stayed in eastern Ukraine while Russia helped volunteer fighters arrive.

Fighting increased significantly between August 2014 and June 2015, with regular Russian troops fighting alongside rebel forces. Despite huge losses, Kyiv's army advanced and retook vital places including Slovyansk, where Igor Strelkov established his command post. The Ukrainian Army then advanced on Luhansk and Donetsk. It was able to shut off the separatists' supply routes in early August. To avert the rebels' certain loss, Russia decided to open the floodgates and send in large numbers of regular forces. The violence initially subsided with the September 2014 Minsk proposal (Minsk I), but from October 2014 forward, additional Russian soldiers and tanks crossed into Ukraine. By June 2015, OCHA has documented 6 500 deaths, 16 000 injuries, and 15 million people in need of humanitarian aid. Between June 2015 and February 2019, another 6 500 individuals died, bringing the total to 13000.[146] Millions of people are still displaced. Despite the fact that large-scale offensives have ended, Russian forces remain in the LNR and DNR. A Ukrainian court eventually determined that both were "Russian servicemen who had been sent to the territory of Ukraine to commit acts involving weapons and military force." The official Russian view during the Donbas War has remained that the continuing war is a non-international armed conflict between the Kyiv administration and the troops of the LNR and DNR.

[146] OHCHR, 'Report on the Human Rights Situation in Ukraine: 16 February to 15 May 2019' (2019)

Through the Minsk Accords, France, Germany, Russia, and Ukraine sought to jumpstart discussions to cease the conflict in February 2015. The framework deal includes requirements for a cease-fire, the removal of heavy weapons, and complete Ukrainian government authority over the combat zone. Efforts to obtain a diplomatic settlement and a satisfying conclusion, on the other hand, were mainly unsuccessful. NATO announced the deployment of four battalions to Eastern Europe in April 2016, with forces rotating through Estonia, Latvia, Lithuania, and Poland to prevent future Russian aggression elsewhere on the continent, notably in the Baltics. In addition, in September 2017, the United States sent two U.S. Army tank brigades to Poland to strengthen the position of the NATO in the region. The United States imposed additional sanctions in January 2018 on twenty-one individuals, including many Russian officials, and nine corporations tied to the crisis in eastern Ukraine. The United States Department of State approved the transfer of anti-tank weapons to Ukraine in March 2018, the first shipment of weaponry since the conflict began. Ukraine joined the United States and seven other NATO nations in a series of large-scale air drills in western Ukraine in October 2018. The exercises come after Russia staged its own yearly military exercises, the largest since the fall of the Soviet Union, in September 2018.

f. Russian Invasion of Ukraine

Months of observations of Russian troop movements, force buildup, and military contingency funding culminated in a White House briefing with US intelligence, military, and diplomatic leaders in October 2021 on a near-certain mass-scale Russian invasion of Ukraine.[147] The only remaining issues were when the strike would occur and if the US would be able to persuade allies to act in advance. Putin denied these allegations, claiming that the Russian naval buildup in the Black Sea was a pre-planned exercise. While Western officials met with both Zelensky and Putin in an attempt to avert an impending Russian invasion, Putin offered demands that included *de facto* veto authority over NATO enlargement and the confinement of NATO forces to nations that were members before to 1997. [148] This would effectively dismantle the security

[147] Harris, Shane; Sonne, Paul "Russia planning massive military offensive against Ukraine involving 175,000 troops, U.S. intelligence warns". (*The Washington Post* 2021)

[148] Tétrault-Farber, Gabrielle; Balmforth, Tom, "Russia demands NATO roll back from East Europe and stay out of Ukraine" (*Reuters* 2021)

umbrella of NATO in Eastern and Southern Europe, as well as the Baltic republics, therefore these recommendations were completely rejected entirely by NATO.

On February 24, 2022, the President of the Russian Federation, Vladimir Putin, stated that he had conducted a "special military operation" against Ukraine. Putin declared the start of a full-scale land, sea, and air invasion of Ukraine on February 24, 2022, during a last-ditch UN Security Council effort to discourage Russia from attacking Ukraine. Russian military weaponry entered Ukraine from all directions, including Belarus, Crimea, and Donbas. Even the capital city of Ukraine, Kyiv, was hit by missiles and airstrikes. The special military operation, since its beginning, has claimed many lives, has caused extensive displacement, and has resulted in widespread damage. President Putin declared the purpose of the military operation as;

"As I said in my previous address, you cannot look without compassion at what is happening there. It became impossible to tolerate it. We had to stop that atrocity, hat genocide of the millions of people who live there and who pinned their hopes on Russia, on all of us. It is their aspirations, the feelings and pain of these people that were the main motivating force behind our decision to recognise the independence of the Donbass people's republics." [149]

Putin declared the purpose of the military operation as an act of devocation of 8 years of humiliation and genocide perpetrated by the Ukrainian government against people in the Luhansk and Donetsk oblasts (Donbass) in Ukraine.

[149] Address by the President of the Russian Federation of 24 February 2022, http://en.kremlin.ru/events/president/news/67843.

Figure 7 Russian military operation Donbass, 2014[150]

After the invasion, the UN Security Council votes to call for a rare emergency special session of the UN General Assembly, to discuss the military operation of Russia in Ukraine. The vote follows the veto of the draft Security Council resolution by Russia on 25 February.

On 25 April, Sweden and Finland agree to submit applications to join NATO at the same time. In response, Foreign Ministry of the Russian Federation warns:

"Finland joining NATO is a radical change in the country's foreign policy. Russia will be forced to take retaliatory steps, both of a military-technical and other nature, in order to stop threats to its national security arising."

Finland formally joined NATO on April 4, 2023, during a planned summit, completing fastest accession procedure of the treaty in its history. Border of the Finland with Russia is 1,340 kilometers (830 miles), more than doubles the borders of NATO with Russia.

In light of the situation in Ukraine, the president declared and conducted general mobilization in order to ensure the defence of the state and maintain combat and mobilization readiness of

[150] "Donbas: Why Russia is trying to capture eastern Ukraine" *(BBC News)* https://www.bbc.com/news/world-europe-60938544

the Ukrainian Armed Forces and other military units, based on a proposal by the Ukrainian National Security and Defence Council, and in accordance with Article 102, Part 2, and Article 106, Part 1, Clauses 1, 17, and 20 of the Ukrainian Constitution. The Russian incursion encountered a notably robust Ukrainian resistance. [151] The Russian military endeavoured to encircle Kyiv; however, Ukrainian forces remained steadfast in maintaining their established positions.

Millions of Ukrainians fled the nation as Russia launched indiscriminate rocket and artillery attacks on civilians. On March 16, up to 600 people were murdered in the besieged city of Mariupol after a Russian air attack destroyed the Donetsk Academic Regional Drama Theatre, which was well-recognized as the city's main bomb shelter. Looting of civilian houses and businesses was also common in Russian-occupied territory. By late March, four million Ukrainians had left the war, making this the largest refugee crisis in Europe since World War II.

From 24 February 2022, which marked the start of the large-scale armed attack by the Russian Federation, to 7 May 2023, the Office of the UN High Commissioner for Human Rights (OHCHR) recorded 23,606 civilian casualties in the country: 8,791 killed and 14,815 injured. This included:

- *18,999 casualties (6,820 killed and 12,179 injured) in territory controlled by the Government when casualties occurred:*
- *In Donetsk and Luhansk regions: 9,646 casualties (4,010 killed and 5,636 injured); and*
- *In other regions2: 9,353 casualties (2,810 killed and 6,543 injured).*
- *4,607 casualties (1,971 killed and 2,636 injured) in territory occupied by the Russian Federation when casualties occurred:*
- *In Donetsk and Luhansk regions: 3,074 casualties (692 killed and 2,382 injured); and*
- *In other regions3: 1,533 casualties (1,279 killed and 254 injured).* [152]

[151] Kube, Courtney; Siemaszko, Corky "Russian offensive unexpectedly slowed by fierce Ukrainian resistance" (*NBC News* 2022)

[152] "Ukraine: Civilian Casualty Update 8 May 2023" (*OHCHR*, May 8, 2023) <https://www.ohchr.org/en/news/2023/05/ukraine-civilian-casualty-update-8-may-2023>

2. Facts of the Case

1. Ukraine and the Russian Federation are both Members of the United Nations and therefore bound by the Statute of the Court, including Article 36 (1), which provides that the Court's jurisdiction "*comprises . . . all matters specially provided for . . . in treaties and conventions in force*".

2. Ukraine and the Russian Federation are both parties to the Genocide Convention.

3. Article IX of the Genocide Convention provides:
"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

4. Ukraine filed an application to the International Court of Justice for injunctive relief against the Russian Federation, claiming that it had acted in breach of its obligations under the Genocide Convention of January 12, 1951.

5. There is a dispute between Ukraine and the Russian Federation within the meaning of Article IX relating to the interpretation, application or fulfilment of the Genocide Convention.

6. 32 States submitted a declaration in order to submit their views to the Court on issues related to the implementation of the Genocide Convention as a signatory to the Convention in need of international cooperation. States intervene in the proceedings for the implementation of the Convention in Articles I, II, III, VIII, and IX.

7. By an Order dated March 16, 2022, the Court indicated the following provisional measures:

"(1) The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;
(2) The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above;
(3) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

On October 3, 2022, the Russian Federation raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

3. Claims of the Parties

a. Claims of Ukraine

1. No acts of genocide within the meaning of Article 3 of the Genocide Convention have been committed in the Luhansk and Donetsk Regions of Ukraine, contrary to the statements of the Russian Federation.

2. The Russian Federation may not take any legally based military intervention against Ukraine in response to the alleged genocide in the Luhansk and Donetsk regions of Ukraine.

3. The reports on the human rights situation in Ukraine by the OHCHR do not mention any evidence of genocide in Ukraine.

4. Ukraine claims that the Russian Federation's declaration and implementation of a "special military operation" on February 24, 2022, on the basis of alleged genocide, as well as the recognition that preceded the military operation, is incompatible with the Convention and violates the right of Ukraine to be free from unlawful actions, including military attack.

5. Ukraine also accuses the Russian Federation of "planning acts of genocide in Ukraine" and contends that Russia "is intentionally killing and inflicting serious injury on members of the Ukrainian nationality, the *actus reus* [153] of genocide under Article II of the Genocide Convention.

6. Ukraine claims that the recognition of the state status of the separatist groups and the exercise of the right to self-determination is not recognized by Ukraine, and is not recognized under international law.

b. Claims of the Russian Federation

1. On February 21, 2022, the President of the Russian Federation cited the alleged suffering of communities in the Donbas at the hands of the Ukrainian State as the basis for "taking an overdue decision and immediately recognizing the independence and sovereignty of the Donetsk People's Republic and the Luhansk People's Republic".

2. In remarks to the United Nations Security Council on February 23, 2022, the Permanent Representative of the Russian Federation asserted that President Putin "decided to start a military operation in Donbas" and that *"[t]he goal of this special operation is the protection of people who have been victimized and exposed to genocide by the Kyiv regime"*. The Permanent Representative continued: *"To ensure this, we will seek demilitarization and denazification of Ukraine."*

3. There are threats to the territory of the Russian Federation, and under Article 51 of the UN Charter, the Russian Federation has the right to self-defence for preventive purposes.

4. There are armed attacks against the independent Luhansk People's Republic and the Donetsk People's Republic. In this regard, the Russian Federation was requested for assistance; as a requirement of the call for assistance, the Russian Federation has the right to collective self-defence under Article 51 of the UN Charter.

[153] The guilty act

5. On February 24, 2022, Putin stated, with reference to the Luhansk and Donetsk oblasts of Ukraine, *"We had to stop that atrocity, that genocide of the millions of people who live there and who pinned their hopes on Russia, on all of us."*

6. The right to self-determination of the separatist population in eastern Ukraine, including the Russian population, has not been respected; they have been forced to endure acts of aggression, humiliation and genocide. The Russian Federation, therefore, has legal grounds for humanitarian intervention.

7. Russian Foreign Minister Sergey Lavrov also justified Russia's military actions against Ukraine as "preventing the neo-Nazis and those who promote methods of genocide from ruling this country."

8. Russia claims that the policies and actions of Ukraine have displayed nationalism and discrimination against the Russian-speaking population, as evidenced by language restrictions and marginalization. This intervention is further justified by invoking the legal principle that past precedents, such as the historical actions of Ukraine, support the current actions of Russia in safeguarding minority rights and stability.

9. Russia claims its participation in collective self-defence alongside Donetsk and Luhansk as President Putin's address depicted a grim portrayal of Ukraine, culminating in the statement, "In accordance with Article 51 (Chapter VII) of the UN Charter and with the endorsement of Russia's Federation Council, as well as in alignment with treaties of friendship and mutual assistance ratified by the Federal Assembly on February 22, I have reached the decision to initiate a targeted military operation."

4. Established Agenda of the Court

The Court shall decide:

1. Can the military operation of the Russian Federation be considered a compulsory, inevitable use of force? In other words, can it be considered a compulsory use of force within the scope of the right to self-defence?

2. Can the military operation of the Russian Federation be considered a proportionate use of force?

3. Can the military operation of the Russian Federation be considered a use of force within the scope of the right to preventive self-defence?

4. Do the separatist groups called the Luhansk People's Republic and the Donetsk People's Republic have the right to self-determination? Can the separatist groups be characterized as states?

5. Whether the acts reportedly committed by Ukraine in the Luhansk and Donetsk regions of Ukraine can be considered genocide and thus violate its obligations under the Genocide Convention; and whether the use of military force by the Russian Federation to prevent and punish the alleged genocide is a permissible measure in fulfilling its responsibility to prevent and punish genocide under Article I of the Convention?

6. Whether the actions of Russia amount to "genocide" within the meaning of Article I as applied, as well as the definition of "genocide" contained in Articles II and III of the Convention?

V. APPLICABLE LAW

1. TREATIES AND CONVENTIONS

a. 1948 Convention on the Prevention and Punishment of the Crime of Genocide

Article 1

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 2

In the present Convention, 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.

Article 3

The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article 4

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.

Article 5

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.

Article 6

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.

Article 7

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8

Any Contracting Party 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 for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

b. Statute of International Court of Justice

Article 36

(1) The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

(2) The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning;

a. the interpretation of a treaty

b. any question on international law

c. the existence of any fact which, if established, would constitute a breach of an international obligation

d. the nature or extent of the reparation to be made for the breach of an international obligation.

(3) The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

(4) Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

(5) Declarations made under Article 36 of the Statute of the Permanent Court of International Justice, and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

(6) In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 63

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

c. Budapest Memorandum on Security Assurances

i. *The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and The United States of America reaffirm their commitment to Ukraine, in accordance with the principles of the CSCE Final Act, to respect the independence and sovereignty and the existing borders of Ukraine.*

ii. *The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and The United States of America reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations.*

iii. *The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and The United States of America reaffirm their commitment to Ukraine, in accordance with the Principles of the CSCE Final Act, to refrain from economic coercion designed to*

subordinate to their own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind.

iv. *The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and The United States of America reaffirm their commitment to seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used.*

v. *The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and The United States of America reaffirm, in the case of Ukraine, their commitment not to use nuclear weapons against any non-nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an attack on themselves, their territories or dependent territories, their armed forces, or their allies, by such a state in association or alliance with a nuclear weapon state.*

vi. *Ukraine, The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and The United States of America will consult in the event a situation arises which raises a question concerning these commitments.*

d. Geneva Conventions of 1949

Article 49 of the 1949 Geneva Convention I

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Article 50 of the 1949 Geneva Convention II

Grave breaches to which the preceding Article 49 relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Article 3 of Convention (IV) relative to the Protection of Civilian Persons in Time of War

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 27 of Convention (IV) relative to the Protection of Civilian Persons in Time of War

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.
However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Article 32 of Convention (IV) relative to the Protection of Civilian Persons in Time of War

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal

punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Article 51 of Convention (IV) relative to the Protection of Civilian Persons in Time of War

The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.
The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.
The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.
In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.

Article 52 of Convention (IV) relative to the Protection of Civilian Persons in Time of War

No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.
All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

2. UNITED NATIONS DOCUMENTS

a. Charter of United Nations

Article 2 (1) and (4)

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 51

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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

b. Universal Declaration of Human Rights

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

c. International Covenant on Civil and Political Rights (ICCPR)

Article 20

1. *Any propaganda for war shall be prohibited by law.*

2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

d. United Nations General Assembly Resolution 68/262

"…

1. Affirms its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders;

2. Calls upon all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means;

3. Urges all parties to pursue immediately the peaceful resolution of the situation with respect to Ukraine through direct political dialogue, to exercise restraint, to refrain from unilateral actions and inflammatory rhetoric that may increase tensions and to engage fully with international mediation efforts;

4. Welcomes the efforts of the United Nations, the Organization for Security and Cooperation in Europe and other international and regional organizations to assist Ukraine in protecting the rights of all persons in Ukraine, including the rights of persons belonging to minorities;

5. Underscores that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol;

6. Calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status. … "

VI. CASE LAW

1. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*

On 20 March 1993, the Republic of Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948, as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis for the jurisdiction of the Court. Subsequently, Bosnia and Herzegovina also invoked certain additional bases of jurisdiction.

On 20 March 1993, immediately after the filing of its Application, Bosnia and Herzegovina submitted a Request for the indication of provisional measures under Article 41 of the Statute and, on 1 April 1993, Yugoslavia submitted written observations on Bosnia and Herzegovina's Request for provisional measures, in which it, in turn, recommended the Court to order the application of provisional measures to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention. On 27 July 1993, Bosnia and Herzegovina submitted a new Request for the indication of provisional measures and, on 10 August 1993, Yugoslavia also submitted a Request for the indication of provisional measures. By an Order dated 13 September 1993, the Court, after hearing the Parties, reaffirmed the measures indicated in its Order of 8 April 1993 and declared that those measures should be immediately and effectively implemented. Then, within the extended time-limit of 30 June 1995 for the filing of its Counter-Memorial, Yugoslavia, referring to Article 79, paragraph 1, of the Rules of Court, raised preliminary objections concerning both the admissibility of the Application and the jurisdiction of the Court to entertain the case.

In its Judgment of 11 July 1996, the Court rejected the preliminary objections raised by Yugoslavia and found that it had jurisdiction to deal with the dispute on the basis of Article IX of the Genocide Convention, dismissing the additional bases of jurisdiction invoked by Bosnia

and Herzegovina. Among other things, it found that the Convention bound the two Parties and that there was a legal dispute between them falling within the provisions of Article IX.

By an Order dated 23 July 1996, the President of the Court fixed 23 July 1997 as the time-limit for the filing by Yugoslavia of its Counter-Memorial on the merits. The Counter-Memorial was filed within the prescribed time-limit and contained counter-claims, by which Yugoslavia requested the Court, among other things, to adjudge and declare that Bosnia and Herzegovina was responsible for acts of genocide committed against the Serbs in Bosnia and Herzegovina and for other violations of the Genocide Convention. The admissibility of the counter-claims under Article 80, paragraph 1, of the Rules of Court having been called into question by Bosnia and Herzegovina, the Court ruled on the matter, declaring, in its Order of 17 December 1997, that the counter-claims were admissible as such and formed part of the proceedings in the case. The Reply of Bosnia and Herzegovina and the Rejoinder of Yugoslavia were subsequently filed within the time-limits laid down by the Court and its President. During 1999 and 2000, various exchanges of letters took place concerning new procedural difficulties which had emerged in the case. In April 2001, Yugoslavia informed the Court that it wished to withdraw its counter-claims. As Bosnia and Herzegovina had raised no objection, the President of the Court, by an Order of 10 September 2001, placed on record the withdrawal by Yugoslavia of the counter-claims it had submitted in its Counter-Memorial. On 4 May 2001, Yugoslavia submitted to the Court a document entitled "Initiative to the Court to reconsider ex officio jurisdiction over Yugoslavia", in which it first asserted that the Court had no jurisdiction ratione personae over Serbia and Montenegro and secondly requested the Court to "suspend proceedings regarding the merits of the case until a decision on this Initiative", i.e., on the jurisdictional issue, had been rendered. On 1 July 2001, it also filed an Application for revision of the Judgment of 11 July 1996 ; this was found to be inadmissible by the Court in its Judgment of 3 February 2003. In a letter dated 12 June 2003, the Registrar informed the Parties to the case that the Court had decided that it could not accede to the Applicant's request to suspend the proceedings on the merits.

Following public hearings held between 27 February 2006 and 9 May 2006, the Court rendered its Judgment on the merits on 26 February 2007. It began by examining the new jurisdictional issues raised by the Respondent arising out of its admission as a new Member of the United Nations in 2001. The Court affirmed that it had jurisdiction on the basis of Article

IX of the Genocide Convention, stating in particular that its 1996 Judgment, whereby it found it had jurisdiction under the Genocide Convention, benefited from the "fundamental" principle of res judicata, which guaranteed "the stability of legal relations", and that it was in the interest of each Party "that an issue which has already been adjudicated in favour of that party be not argued again". The Court then made extensive findings of fact as to whether alleged atrocities had occurred and, if so, whether they could be characterized as genocide. After determining that massive killings and other atrocities were perpetrated during the conflict throughout the territory of Bosnia and Herzegovina, the Court found that these acts were not accompanied by the specific intent that defines the crime of genocide, namely the intent to destroy, in whole or in part, the protected group. The Court did, however, find that the killings in Srebrenica in July 1995 were committed with the specific intent to destroy in part the group of Bosnian Muslims in that area and that what happened there was indeed genocide. The Court found that there was corroborated evidence which indicated that the decision to kill the adult male population of the Muslim community in Srebrenica had been taken by some members of the VRS (Army of the Republika Srpska) Main Staff. The evidence before the Court, however, did not prove that the acts of the VRS could be attributed to the Respondent under the rules of international law of State responsibility. Nonetheless, the Court found that the Republic of Serbia had violated its obligation contained in Article 1 of the Genocide Convention to prevent the Srebrenica genocide. The Court observed that this obligation required States that are aware, or should normally have been aware, of the serious danger that acts of genocide would be committed, to employ all means reasonably available to them to prevent genocide, within the limits permitted by international law

The Court further held that the Respondent had violated its obligation to punish the perpetrators of genocide, including by failing to co-operate fully with the International Criminal Tribunal for the former Yugoslavia (ICTY) with respect to the handing over for trial of General Ratko Mladić. This failure constituted a violation of the Respondent's duties under Article VI of the Genocide Convention.

In respect of Bosnia and Herzegovina's request for reparation, the Court found that, since it had not been shown that the genocide at Srebrenica would in fact have been averted if Serbia had attempted to prevent it, financial compensation for the failure to prevent the genocide at Srebrenica was not the appropriate form of reparation. The Court considered that the most

appropriate form of satisfaction would be a declaration in the operative clause of the Judgment that Serbia had failed to comply with the obligation to prevent the crime of genocide. As for the obligation to punish acts of genocide, the Court found that a declaration in the operative clause that Serbia had violated its obligations under the Convention and that it must transfer individuals accused of genocide to the ICTY and must co-operate fully with the Tribunal would constitute appropriate satisfaction."

VII. CONCLUSION

There is a whole process that started with the annexation of Crimea by the Russian Federation and was shaped by the decision to launch a military operation in Ukraine. This process has led to many questions in terms of international law. In particular, whether preventive self-defence is compatible with international law and whether intervention for humanitarian purposes is compatible with international law have emerged as fundamental questions. In the specific case of the dispute, how the elements of collective self-defence should be handled has also raised another problem. With this process, it can be accepted that another period has emerged in which the exceptions to the prohibition of the use of force, which is a jus cogens norm, and the effect of the jus cogens norm due to these exceptions will be discussed. In this new period, it is possible that the International Court of Justice will examine the dispute in order to find answers to the questions that international law has left unanswered for years, answering many debatable problems in the doctrine.

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