



Bohdan A. Futey

Bohdan A. Futey is a Senior Judge on the United States Court of Federal Claims in Washington, DC, appointed by President Ronald Reagan in May 1987. Judge Futey has been active in various Rule of Law and Democratization programs in Ukraine since 1991. He served as a member of the working group on Ukraine's Constitution adopted on June 28, 1996. Judge Futey is a professor at the Ukrainian Free University in Munich, Germany and a visiting professor at the National University of Kyiv-Mohyla Academy in Kyiv, Ukraine. In March 2015, he was appointed by the President of Ukraine to serve as a consultant on the Constitution Commission.

LEGAL RECOGNITION OF THE HOLODOMOR AS GENOCIDE INTERNATIONAL COVENANTS, AGREEMENTS, AND COURT DECISIONS

Implementing Lemkin's Legacy

Thank you for the honor of speaking at this event, in remembrance of the Holodomor Genocide. Between 1932 and 1933, millions were starved to death in one of the gravest man-made tragedies inflicted on the Ukrainian people and nation. My remarks today will concentrate on the legal basis for calling this tragedy a genocide in accordance with international law, conventions, and standards established for war crimes and crimes against humanity.

The crime of genocide has become a familiar charge in both international and domestic tribunals over the last seventy-five years, originating at the end of the Second World War. The International Military Tribunal at Nuremberg ("Nuremberg Tribunal") provided the framework for much of today's international humanitarian law and international tribunals. World War II "marked the transition of international law from a system dedicated to state sovereignty to one also devoted to the protection of human dignity"¹. The Nuremberg Tribunal, which was created in 1945, was the first international tribunal before which individuals were found criminally liable for violations of international humanitarian law or the law of war². Significantly, the Charter of the Nuremberg Tribunal also provided the first formal definition of crimes against humanity:

"murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the Jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated"³.

The final Judgment of the Nuremberg Tribunal, however, did not use the term "genocide." What the indictment framed as genocide – the extermination of racial and national groups – the judgment "conceptualized... as a distinct and aggravated form of murder," but not as an offense separate from war crimes or crimes against humanity. The success of the Nuremberg Tribunal paved the way for the Genocide Convention of 1948, the necessity of which was emphasized by the Nuremberg Judgment.

The U.N. General Assembly unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention")⁴ on December 9, 1948 in Paris, France, with the purpose of preventing, criminalizing and punishing acts of genocide⁵. The Genocide Convention entered into force on January 12, 1951. It was ratified by the

¹ David J. Bederman & Christopher J. Borgen & David A. Martin, *International Law: A Handbook for Judges* 87 (The American Society of International Law, Foundation Press 2001).

² *International Law and Litigation for U.S. Judges: Federal Judicial Center* 13 (The American Society of International Law).

³ See Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 *Ariz. J. Int'l & Comp. L.* 415, 425 (1998).

⁴ U.N. GAOR, 3rd Sess., Part I, at 174, U.N. Doc. A/810 (1948).

⁵ Lippman, *supra* note 3, at 452.

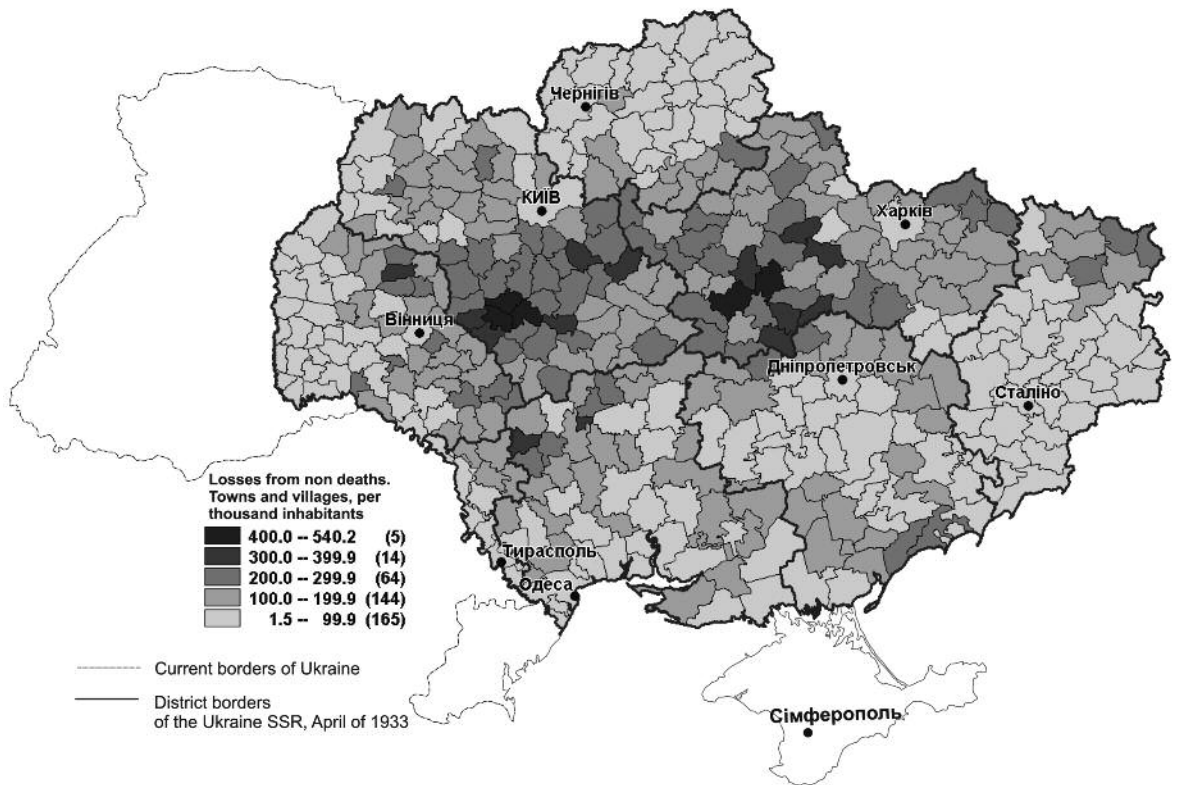
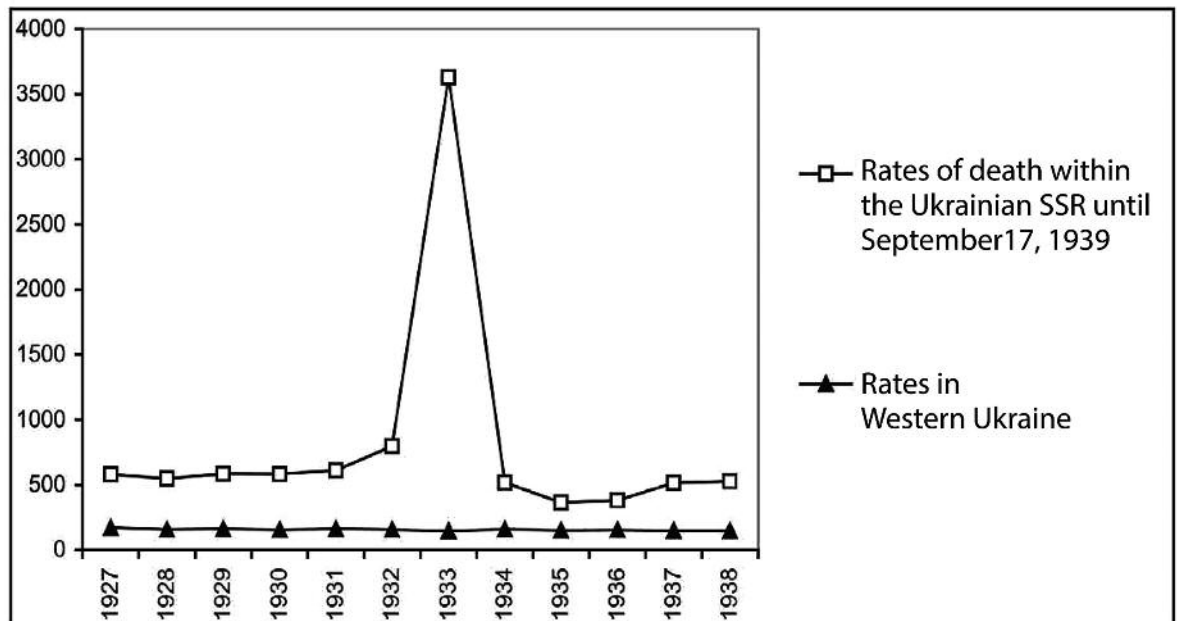


Chart of deaths in Ukraine 1927-1938



Mortality rate surges in Ukraine 1933 (based on research conducted by Mykhaylo Ptukh Institute of Demographic and Social Research of the National Academy of Sciences). The map is based on the collective research conducted by: O. Wolowyna (University of North Carolina), O. Rudnytsky, N. Lewchuk, P. Shewchuk, A. Sawchuk (The Mykhaylo Ptukh Institute), within Harvard University's Ukrainian Studies "Holodomor Atlas" project. The natural mortality rate in Ukrainian SSR at the end of the 1920's (prior to Holodomor) was 18-20 deaths per 1,000 persons.

**IN JUNE OF 1933
 UKRAINIANS WERE DYING
 OF STARVATION AT A RATE OF:**

**HOURLY PERIOD – 34560
 PER HOUR – 1440
 PER MINUTE – 24**

34

Мужичинської рада Земли Вєсково району „13” травня місяця 1933 р. № 433
20

1. Прізвище померлого Остапенко Його ім'я Андрій по-батькові Сави

2. Де постійно жив (назва району та села або міста, вул., буд. №) С. Пучисє

3. Помер(ла) 13 травня міс. 1933 р. 4. Чоловік, жінка (підкреслити)

5. Вік 19 (скільки повних років має) 19 років

6. Для дітей, що померли, не доживши до 1 р., точно зазначити: а) народилося „” міс. 1933 р.
б) якою у матері була померла дитина: перша, друга, або „” в) батьки дитини живуть укупі, чи може розійшлись, батько помер, покинув родину, розлучилися тощо „” г) вік матері „” років.

7. Громадянство померлого Українське 8. Національність Українська

9. Родинний стан померлого: парубок, дівчина, одиць (а), одружений (а), розлучений (а) — (підкреслити).

10. Чи злобував прожиток сам, а як не сам, то хто утримував Най Своїм утримував

11. а) Реміство, промисел, посада та спеціальні за ними.
б) Якщо жив на кошти держави чи громадськ. організації, зазначити на які саме (пенсія, стипендія тощо).
в) Якщо жив з інш. джерел, точно зазнач. з яких саме.

12. Стан за заняттям: робітник, служб., ремісник, мустар-кооперат. (чл. артілі) чи ні, торговель, помічник у заняттях родині тощо — зазначити який саме. Для сільських господарів: одноосібник чи член колгоспу (комуна, с.г. артілі, СОЗ'у).

13. Назва підприєм. установи чи закладу, зазначити яке виробництво, де працює, служить або господарює.

14. Де помер (удомл. в лікарні, дит. домі тощо) Село Вєсково Якщо вдома, то чи користувався з лікарської допомоги померлий (так, ні) 15. Причина смерті — зазначити докладно: Українська

Додано лікарську довідку № „” Чи може запис укладено на оголошеного від суду за померлого (так, ні).

ЗАШС А К Т А П Р О С М Е Р Т Ь

Про померлого або того, хто його утримував

Death Notice of 19 year old Andriy Ostapenko in May 1933, the cause of death being listed as “Ukrainian”.

Presidium of the Supreme Council of the USSR on March 18, 1954, with the Ukrainian SSR ratifying on November 15, 1954, and the Russian SSR on May 3, 1954. Article 1 of the Convention addresses States responsibility, confirming that Contracting Parties will undertake to prevent and punish genocide, whether committed in time of peace or war. Article 2 of the Convention specifically defines genocide, as 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.

In international law, genocide is thus comprised of both a physical act, and a mental element. In order to establish the mental element, a party must show that the prohibited act is done with the intent (*dolus specialis*) to destroy members of a protected group, solely because of their affiliation with that group. This does not require evidence of motive or premeditation, but

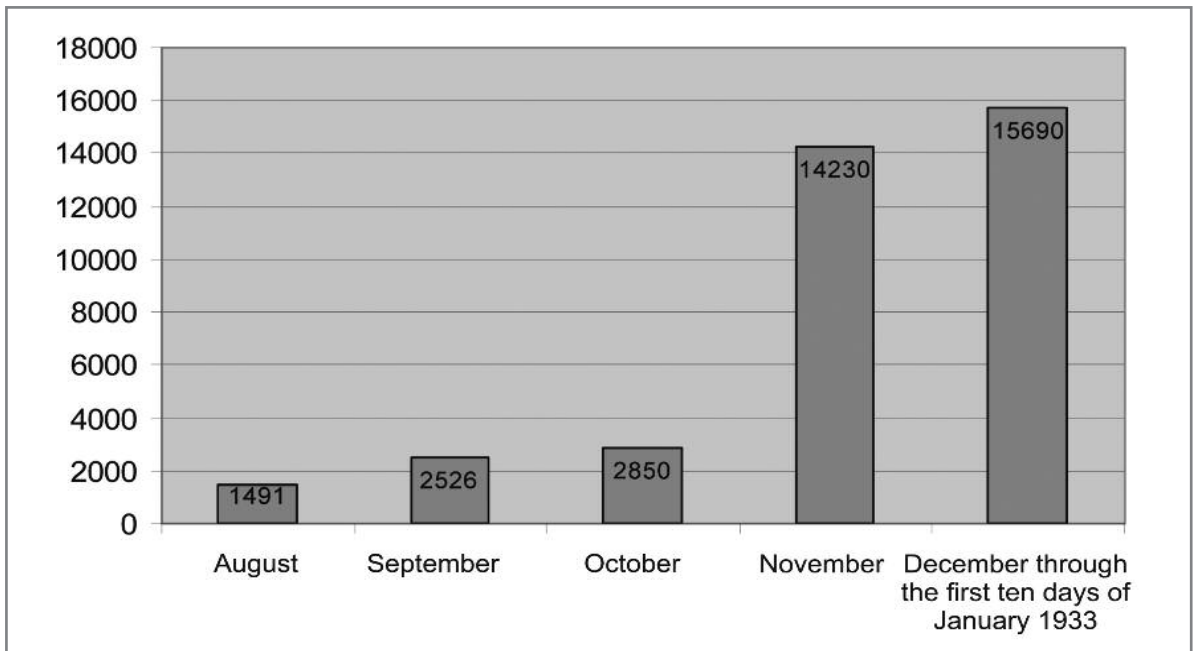
does require the evidence to be “fully conclusive”⁶. Additionally, the Convention’s enumeration of physical acts constituting genocide in Article 2 is intended to be restrictive rather than illustrative, in contrast to the broader conception of genocide advanced by Dr. Raphael Lemkin, the legal advisor to Robert Jackson, the U.S. Chief Prosecutor for the Nuremberg trials, and early advocate for a convention prohibiting genocide. Dr. Lemkin favored an increased scope of protection for racial, national, and religious groups whose cultural, political, social, or physical existence were imperiled⁷. The Convention does succeed, however, in providing expansive categories of criminal liability; these include genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide, and complicity in genocide⁸. Dr. Lemkin is also credited with coining the term “genocide” from the Greek prefix *genos* meaning race and Latin suffix *cide* meaning killing.

Another important development in prosecution of genocide was the Convention on the Non-Applicability

⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*); Summary of the Judgment of 26 February 2007, No. 2007/2, at 11, available at www.icj-cij.org. See also Lippman, *supra* note 4, at 454-55.

⁷ Lippman, *supra* note 3, at 424.

⁸ *Id.* at 458.



The dynamics of the arrest in Ukraine from August 1932 through the first ten days of 1933.

of Statutory Limitations to War Crimes and Crimes Against Humanity adopted by the U. N. on November 26, 1968⁹. The Convention on Statutory Limitations emphasizes and expands the scope of prosecutions for genocide under the Genocide Convention by eliminating any domestic barriers to such prosecutions. The Ukrainian SSR ratified the agreement on June 19, 1969, and Russian SSR on April 22, 1969. The Council of Europe introduced the European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes in 1974.

The Convention on Statutory Limitations, taken together with the *jus cogens* (“compelling law”) status of the prohibition of genocide, eliminates the argument that acts of genocide committed prior to the Genocide Convention are not subject to prosecution. The prohibition of genocide is now universally regarded as *jus cogens* (compelling law of preemptory nature), and the duty to punish genocide as an obligation *erga omnes* (against all – states and individuals)¹⁰. Persons charged with genocide cannot “credibly contend that their prosecution for the contravention of a primary and pre-existing norm of international law constitutes retroactive punishment”¹¹. Thus, the Convention on Statutory Limitations eliminates any potential domestic restrictions on the prosecution of persons for acts of genocide as a crime against humanity.

The Genocide Convention was examined by the International Court of Justice (“ICJ”) at the Hague when Bosnia and Herzegovina brought suit against

Serbia and Montenegro alleging violations of the Genocide Convention¹². The ICJ issued its opinion of February 26, 2007¹³. The decision is significant in that it recognized an affirmative obligation to prevent genocide, thus showing that state responsibility is a corollary to a State’s obligation to prevent genocide under Article 1. The Court articulated that “responsibility is not incurred simply because genocide occurs, but rather if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing genocide”¹⁴. The Court found by a fourteen to one vote that Serbia had violated its obligation to prevent genocide, but stated that the acts of those who committed the genocide at Srebrenica could not be attributed to Serbia¹⁵.

In light of the evolution of both the definition of “genocide” under the Genocide Convention and prosecutions for acts of genocide before various international and domestic tribunals, the Famine-Holodomor of 1932-1933 in Ukraine meets the international definition of genocide, and should be recognized as such¹⁶.

⁹ U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968).

¹⁰ See Orna Ben-Naftali & Mlri Sharon, *What the ICJ Did Not Say About the Duty To Punish Genocide*, 5 J. Int’l Crim. Just. 859, 869 (2007).

¹¹ Lippman, *supra* note 3, at 471-72.

¹² Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro); Summary of the Judgment of 26 Feb. 2007, No. 2007/2, available at www.icj-cij.org.

¹³ International Court of Justice, Press Release 2007/8, February 26, 2007, available at www.icj-cij.org.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ “International Legal Responsibility for the Genocide: Justice in the Courts” Bohdan A. Futey, conference materials, the Holodomor, Sept. 25-26, 2008, Kyiv Ukraine.

