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WEAPON OF CHOICE: ON THE INTERSECTION OF STARVATION, GENOCIDE AND STATE RESPONSIBILITY

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TABLE OF CONTENTS

INTRODUCTION

If one was to make a case for the greatest humanitarian achievement of the 20th century, a strong argument could be made for the near-eradication of starvation. Advancements in public health, developments in the agricultural science sector, the growth of political freedoms, and an intense, coordinated humanitarian effort[1] have made it such that the chances of dying from famine are at the lowest they have ever been in human history.[2] A similarly strong argument could be made for the creation of a multilateral international legal order, enshrined within it the principles of fundamental human rights, dignity, and sovereign equality.[3] The Convention on the Prevention and Punishment of the Crime of Genocide (the Convention) is a prime example of this new legal order at work. The 'humanitarian and civilising' provisions of this convention were adopted unanimously by the members of the United Nations, signifying a widespread commitment to rule of law.[4] Of course, nothing exists in isolation, with starvation and genocide having made good bedfellows throughout history.

Both are among the most ancient of concepts. For as long as mankind has existed, it has known hunger. South African jurist Leo Kuper evoked the antiquity of genocide in saying 'the word is new, the crime ancient'.[5] Genocide as we know it today is an occurrence observable in ancient Israelite and early Jewish scriptures. In Deuteronomy, the Israelites are commanded to enter Canaan and 'slaughter its indigenous inhabitants', such that none are spared.[6] It is not just biblical accounts stemming from this region which give rise to genocidal incidences. There are historical accounts of assaults perpetrated by Babylonians against the people of Judah, which laid waste to the population through violence and starvation.[7] Here can be seen the beginnings of an historical theme, the employment of starvation in the commission of mass atrocities.

Rome's siege of Carthage gave rise to the infamous anachronism that salt was sown into the fields, rendering the land barren for generations to come. Regardless of the veracity of the anecdote, infliction of starvation through siege warfare was a preferred method in the quest to

[1] Alex de Waal, *Mass Starvation: The History and Future of Famine* (Polity Press, 2018) 83-113
[2] ibid at 5
[3] Preamble, Charter of the United Nations (Signed 26 June 1945, entered into force 24 October 1945) XV UNCIO 335, amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119
[4] *Reservations to the Convention on Genocide*, (Advisory Opinion) ICJ Reports 1951, 23
[5] Leo Kuper, *Genocide: Its Political Use in the 20th Century* (Penguin, 1981) 9
[6] TM Lemos, 'Genocide in Ancient Israelite and Early Jewish Sources' in Ben Kiernan, TM Lemos and Tristan S Taylor (eds), Cambridge World History of Genocide Volume 1: Genocide in the Ancient, Medieval and Premodern Worlds (Cambridge University Press, 2023) 185
[7] ibid at 199

bring Rome to the world; razing of entire communities such as Carthage, slightly less so.[8] Early Modern and Modern colonial powers would continue the practice of inflicting starvation on peoples through requisition, siege and naval blockade. Oliver Cromwell's conquest of Ireland would result in the eradication of hundreds of thousands through starvation.[9] Amongst the countless atrocities committed by European powers in Africa, starvation is particularly notable in the genocide of the Herero people in present-day Namibia.[10] The correlation between genocide and starvation becomes stronger yet, when taking into account the subjugation of indigenous peoples by colonial settlers in North America and Australia. Considering the pervasiveness of the two elements in history, it makes the aforementioned humanitarian achievements of the 20th century that much more impressive, with a small caveat – starvation has returned, while the Genocide Convention has failed to prevent genocide.

Speaking to the United Nations Security Council (UNSC, Security Council) in March of 2017, erstwhile Under-Secretary for Humanitarian Affairs Stephen O'Brien stated that 'without collective and coordinated global efforts, people will simply starve to death'.[11] O'Brien had just returned from visiting Yemen, Somalia, South Sudan and North-eastern Nigeria. He stressed that the situation 'had deteriorated in all four countries amid environments of increased fighting, displacements, drought' and that attacks on humanitarian facilities had further plunged vulnerable populations into acute food insecurity.[12] As for the success of the Convention, multiple judicial mechanisms and fact-finding commissions have reported that instances of genocide have taken place. The persistence of starvation and genocide raises important questions about how we consider one in relation to the other. The relationship between the two becomes clearer once it is acknowledged that starvation is no longer the natural consequence of lacklustre agricultural policy and freak weather events.[13] It happens on purpose.

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[8] Tristan S Taylor, 'A Tale of Three Cities: Roman Destruction' in Ben Kiernan, TM Lemos and Tristan S Taylor (eds), *Cambridge World History of Genocide Volume 1: Genocide in the Ancient, Medieval and Premodern Worlds* (Cambridge University Press, 2023) 305

[9] Frances Stewart, *War and Underdevelopment: Economic and Social Consequences of Conflict* (Oxford University Press, 2000) 51

[10] n(1) de Waal, at 99

[11] United Nations Security Council, 'Amid Humanitarian Funding Gap, 20 Million People across Africa, Yemen at Risk of Starvation, Emergency Relief Chief Warns Security Council' (10 March 2017) SC/12748, accessible at: https://press.un.org/en/2017/sc12748.doc.htm

[12] ibid

[13] Bridget Conley and Alex de Waal, 'Genocide, Starvation and Famine' in Ben Kiernan, TM Lemos and Tristan S Taylor (eds), *Cambridge World History of Genocide Volume 1: Genocide in the Ancient, Medieval and Premodern Worlds* (Cambridge University Press, 2023) 146

This divergence in consideration was not intended by the coiner of the term 'genocide', Raphael Lemkin. The Polish lawyer was fascinated with the persecution of the Jewish people and more generally, that the world was in the 'presence of a crime with no name'.[14] Lemkin found this gap in international law intolerable, and began to advocate for its codification.[15] In 1944 Lemkin would publish his seminal work, in which he proposed the term 'genocide' for the theretofore unnamed crime.[16] Owing largely to his initiative, the United Nations would begin discussions concerning the status of genocide as an international crime, resulting in the unanimous adoption of the Genocide Convention less than two years later.[17] Despite his instrumental role in the conceptualisation of the crime, Lemkin was largely excluded from the drafting of the Convention, a 'tortuous political process in a divided Cold War atmosphere', which ultimately offered up a narrower definition of genocide than initially foreseen by its auteur.[18] The result is a definition of genocide which makes no mention of hunger. The contents of Lemkin's unfinished work show a dedication to the recurring themes of genocide, such as 'forced deportations under harsh conditions', along with 'death from illness, hunger and disease'.[19] As such, Lemkin clearly had in mind not only the Holocaust, but the Herero, Armenian and Ukrainian genocides which largely employed starvation as their weapon of choice. Somewhere along the drafting process, political considerations watered down the link between starvation and genocide.

Nonetheless, the Convention did provide something which states had mulled over for a century. Ideas for an international criminal justice mechanism were proposed and discarded sporadically from the mid-19th century onwards, the intention being to hold accountable violators of the 1846 Geneva Convention, and functionaries of the Ottoman and German empires involved in genocide. For various political reasons, no meaningful prosecution or mechanism thereof ever

[14] Winston Churchill, 'Prime Minister Winston Churchill's Broadcast to the World about the Meeting with President Roosevelt' (27 August 1941) available at: https://www.ibiblio.org/pha/timeline/410824awp.html
[15] Katherine Goldsmith, 'The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' (2010) 5 *Genocide Studies and Prevention* 238
[16] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Address* (Carnegie Endowment for International Peace, 1944)
[17] UNGA Res 260(III)A
[18] Ann Curthoys and John Docker, 'Defining Genocide' in Dan Stone (ed), The Historiography of Genocide (Palgrave Macmillan, 2008), 13
[19] ibid at 12

came to fruition.[20] That is not to say that the Convention inspired immediate results in preventing and punishing the crime of genocide. For half a century, genocide largely went unpunished.[21] The international community would not see a prosecution for genocide until the formation of international criminal tribunals for Rwanda and the Former Yugoslavia (ICTR, ICTY). While the tribunals were significant undertakings, the fact that they had to be formed at all suggests that the international community had 'fallen drastically short' on delivering the promises of prevention and punishment imbued in the Convention.[22]

Meanwhile, the study of genocide has become an academic discipline in and of itself. Whilst output is prolific, there is a concerning lack of consensus on 'defining principles such as definition of genocide, typology, application of a comparative method, and timeframe'.[23] Part of this must be down to the convergence of academics from multiple fields, and their failure to strike an effective collaborative balance. Political scientists, psychologists, philosophers and sociologists all abound within the field to the point where what is lacking is, at times, legal analysis. In fact, it is apparent that most people's idea of what genocide is differs greatly from the legal standard; a phenomenon to which some of the Western World's finest minds are not immune. Hannah Arendt coined the term 'administrative massacres' to describe violent systematic atrocities committed by states against their own civilians as distinct from genocide.[24] She can at least be commended for arriving independently at the concept of crimes against humanity. Jean-Paul Sartre, in his capacity as President of the ambitiously named International War Crimes Tribunal, spoke of cultural genocide.[25] This is despite the fact that such an idea was entertained and roundly rejected during the drafting process of the Convention. In justifying the creation of a new term, 'democide', American political scientist R.J Rummel referred to the 'staggering number of civilians killed in violent conflicts other than wars'[26]; Article I of the Convention expressly states that genocide is a crime 'whether committed in time of peace or in time of war'.[27] The purpose of this illustration is not to bemoan

[20] WA Schabas, 'Prosecuting Genocide' in Dan Stone (ed), The Historiography of Genocide (Palgrave Macmillan, 2008) 254
[21] ibid 253
[22] Berglind Halldórsdóttir Birkland, 'Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide' (2009) 84 *New York University Law Review* 1623, 1624
[23] Anton Weiss-Wendt, 'Problems in Comparative Genocide Scholarship' in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008) 42
[24] Hannah Arendt, *Eichmann in Jerusalem* (Viking Press, 1963) postscript
[25] Jean-Paul Sartre, *On Genocide* (Beacon Press, 1968)
[26] n(23) Weiss-Wendt at 46
[27] Article I, Convention on the Prevention and Punishment of the Crime of Genocide (signed 9

that there exist multiple interpretations of genocide. Rather, it calls attention to an underlying dissatisfaction associated with 'perceived deficiencies of the prohibition' as formulated in the Convention.[28] Such dissatisfaction manifests itself in reworked imaginings of genocide, despite the fact that the definition offered in the Convention is by far the most reasonable option from which to analyse the phenomenon.[29] The attention of some scholars is thus misguided. It is not the definition of genocide itself which is the problem, but rather how it has been interpreted.

The International Court of Justice (the Court, ICJ) is by virtue of Article IX of the Convention the only judicial mechanism which may pronounce on state responsibility for genocide. There are currently two cases pending before it which, should they proceed to be judged on the merits, will require a close analysis of the use of starvation in the alleged commission of genocide. In 2019, The Gambia submitted an application under the Convention to the Court against Myanmar;[30] in 2024, South Africa similarly did so against Israel.[31] Both cases have attracted a huge level of international interest, as demonstrated by their applications *erga omnes* and the number of interventions by other states registered by the Court. They mark the first occasion in which the Court will scrutinise the intersection of starvation, genocide and state responsibility. As well as the symbolic justice and potential for reparations that may arise from the Court's decisions, there is also a practical consideration attached to the outcome of the case provided by Article 94 of the Charter.[32] Despite historical entanglement of starvation and genocide and the ongoing litigation before the Court, there is little to no research that brings starvation into the legal framework that would facilitate its consideration as a means of committing genocide.[33]

The objective of this work is to establish the conditions under which the infliction of starvation may engage state responsibility for genocide under the Convention. Pursuant to this objective, three questions will be put forward. Firstly, on the basis of historical analysis, what are the

December 1948) 78 UNTS 277

[28] Stearns Broadhead, 'The Conventional Definition of Genocide' (2024) *4 Insitutiones Administrationis - Journal of Administrative Sciences* 90

[29] n(23) Weiss-Wendt at 44

[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, (Request for the Indication of Provisional Measures: Order), [2020] ICJ Rep 3

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Indication of Provisional Measures: Order) [2024] General List 192

[32] n(3) UN Charter, Article 94(2): 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council'

[33] n(13) Conley and de Waal at 141

elements common to instances of genocide through starvation? Secondly, it will be evaluated whether the current legal regime of responsibility, attribution and intent surrounding genocide vitiate the possibility of the commission of genocide through starvation. Lastly, how might this analysis inform the stance taken by the Court in relation to the cases before it? This work will approach the given questions through four separate parts. The first part will examine starvation: how it fits into the provisions of the convention, and how it has been utilised in select genocides. The second part will explore the current regime of state responsibility and attribution, and what the potential ramifications it has for starvation and genocide. The third part of the work will focus on the question of genocidal intent, and how this interacts with starvation. Finally, a case study will be undertaken to examine how the sum of prior analyses may be applied to the facts of one of the relevant cases before the Court.

The predominant scientific method utilised throughout the work will be analytical. In the first part of the paper, a historical analysis of sorts will be undertaken, in order to identify the elements common to the relevant instances of genocide. Throughout the rest of the paper, legal analysis will be carried out to understand the doctrines of attribution, responsibility and intent. The primary sources are the Convention itself, the jurisprudence of international judicial mechanisms, and UN documents pertaining to resolutions and preparatory work associated with the Convention. Whilst the phenomena of starvation, genocide and state responsibility enjoy considerable scholarship in their own right, it is submitted that research considering the interaction of all three is severely lacking. Thus, this thesis is primarily intended to further the current academic understanding of this interaction.

Keywords: genocide, starvation, intent, attribution, state responsibility

CHAPTER I: STARVATION

I.I: Effects and uses of starvation

The effects of starvation encompass a diverse set of physical, psychological and social phenomena. Once access to food is restricted the clock begins to tick for the onset of a litany of potential physical ailments other than the discomfort of hunger, such as 'scurvy, kwashiorkor, marasmus, pneumonia, typhus, diphtheria, and a wide range of infections and skin diseases'.[34] Eventually, psychological distress takes hold. Physical degradation along with exasperation allow 'real insanity' to set in, manifesting itself through 'hallucinations, psychosis, and depression'.[35] These factors compound suffering within the group, leading to the distortion of social norms. Survivors recall how the currency of familial and neighbourly ties was rendered worthless, as the foundations of ordinary morality failed to bear the weight of desperation.[36] In short, the effects associated with starvation are such that it presents a 'slow death' which is affected not only through malnutrition, but through various other corporeal and societal factors which stem from it.[37]

Starvation has thus been used as a 'a tool of conquest and subjugation in every continent', at every stage of history.[38] In recent times, it has found a niche as a tool of economic coercion. In the aftermath of World War I, British Foreign Secretary Arthur Balfour proposed subjecting the Kingdom of the Netherlands to a naval blockade, with a view to starving it into submission and securing the extradition of the exiled German Kaiser.[39] Even the United Nations has had recourse to blockades in its efforts to maintain global peace and security. Following the invasion of Kuwait by Iraq, the Security Council imposed a comprehensive embargo on the latter, forming a complete restriction on all items entering the territory. Whilst a thorough set of economic sanctions would remain in place for over 12 years, the blockade on foodstuffs was lifted by the Security Council through Resolution 687 in 1991.[40] After hearing concerning reports of humanitarian distress, the Security Council charged a fact-finding commission with

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[34] Anne Applebaum, *Red Famine: Stalin's War on Ukraine* (Penguin Random House, 2017) 213
[35] ibid
[36] ibid at 215
[37] Florian Jessberger, 'The Definition and the Elements of the Crime of Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 100
[38] n(13) Conley and de Waal at 129
[39] Nicholas Mulder and Boyd van Dijk, 'Why did Starvation Not Become the Paradigmatic War Crime in International Law?' in Ingo Venske and Kevin Jon Heller (eds) *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press, 2021) 370
[40] UNSC Res 687

delivering a report on the situation in Iraq.[41] The 'near apocalyptic' conditions encountered by the commission surprised the international community, prompting the lifting of the blockade. Between the two anecdotes offered here, lie the dissolution of the League of Nations, a World War, the formation of the United Nations, the Cold War, and the fall of the Soviet Union. Yet in both instances, starvation was opted for as a tool of hardline diplomacy with enthusiasm. The efficacy of starvation is neither understood nor taken seriously in either case.

I.II: Prohibition of starvation in international law

With the effects potentiated by the infliction of starvation in mind, the question is raised as to how an organisation such as the UN could resort to it as a means of coercion with, at least initially, little backlash. The answer lies in the limited prohibition imposed on starvation in international law. This can be traced to the circumstances surrounding the drafting of important international conventions in the post-World War II context.

During the course of the Second World War, starvation was a method of warfare used not only by the Axis Powers, but also by Allied forces. Blockades enacted by Britain had contributed to famine in Greece, whilst wartime economic policies precipitated widespread hunger in British Benghal.[42] In the Pacific Theatre, the United States implemented the subtly entitled 'Operation Starvation' against certain Japanese islands.[43] This left the Allied states in a conundrum during the judicial process which followed the war. Convicting the Axis leaders of crimes which articulated the use of starvation would be to some extent an admission of guilt, that they too had committed heinous crimes during the conflict. Thus, Allied use of starvation was swept under the rug somewhat, with the prosecution of Axis starvation policies 'subsumed under meta-crimes such as extermination' at both the Tokyo and Nuremburg Trials.[44]

The conservative stance taken by the Allies in this instance would have a significant knock-on effect for the drafting of seminal international legal conventions. The paradox lay in the fact that the very same states which had utilised starvation to great effect during the Second World War, were now tasked with constructing provisions to prohibit it. The draft history of the Geneva Conventions cogently outlines the situation. The British delegation was instructed to

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[41] Rene Provost, 'Starvation as a Weapon: Legal Implications of the United Nations Food Blockade against Iraq and Kuwait' (1992) 30 *Columbia Journal of Transnational Law* 577, 588

[42] n(13) Conley and De Waal at 130

[43] n(39) Mulder and Van Dijk at 377

[44] ibid at 379

frustrate the primary humanitarian elements of any prohibition on starvation. The right of free passage for food, the mandatory nature of permitting such passage, and any reductions in the discretion of the receiving state were therefore opposed.[45] The United States would similarly stand in opposition to any mandatory elements of the draft. In the end, what was agreed upon was a compromise which handed 'widely drawn discretionary powers' to block the entry of outside aid.[46] Both delegations recorded satisfaction in the watering down of what would become Article 23 of the fourth Geneva Convention.[47] This conveys well the double-edged nature of the Geneva Conventions. What reads as a weak prohibition on blockades, in practice delivers a legalised form of starvation.[48] The beneficiaries of this were 'those in possession of the naval capacity to enforce the measure'; civilians caught in the crossfire of conflict would be the ones to pay for it.[49]

I.III: Starvation in the Genocide Convention

The Convention makes no express mention of starvation. In comparison to the Geneva Convention whose *travaux preparatoire* provided a clear image of how and why its prohibition on blocking humanitarian aid came to be weakened, the preparatory work of the Convention does not deliver the same degree of lucidity. Considering the similar timeframe and humanitarian purpose of both conventions, it is tempting to translate the reasoning conveyed by major powers during the course of one drafting process to another. It would not be correct to do so. The negotiations pursuant to the drafting of the Convention were evidently emotive affairs, and much of this was directed at the resurrection of memories specifically associated with genocide. It is a fact acknowledged plainly by delegations themselves that lived experiences and traumas came into play during the drafting process, both to expand their interests and protect them.[50] China, for example, advocated for the inclusion of the use of narcotics as a means of committing genocide. In doing so, it explicitly evoked the memory of Japanese occupation and the extermination of Chinese peoples through such means, albeit to no avail.[51] Greece found success in lobbying for the inclusion of the abduction of children as a

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[45] ibid at 382
[46] ibid at 383
[47] Article 23, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV)
[48] n(39) Boyd and Van Dijk, 384
[49] n(13) Conley and de Waal, 129
[50] UN Economic and Social Council, Summary Record of the 218th Meeting (13 April 1948) UN Doc E/SR.218
[51] UN Economic and Social Council, Summary Record of the 140th Meeting (23 June 1947) UN Doc E/SR.140, see also: UN Doc E/AC.25/SR.28.

means of exacting genocide, drawing on the memory of the forcible transfer of Christian children by the Ottoman Empire during the Balkan War.[52] To put it simply, states were looking backward during the drafting of the Convention just as much as they were looking forward. It is within this characteristic of historical reflection that the rationale for omitting mention of starvation comes into focus.

In June of 1947, the Secretary-General of the United Nations transmitted to member states the first full draft of the Convention (Secretariat Draft). This incarnation of the convention, which was drafted with the assistance of a core group of international lawyers (among them Raphael Lemkin), would include references to many elements of genocide which would be lost along the ensuing scrutiny exercised by delegations.[53] The Secretariat Draft indeed made direct reference to the alimentary needs of peoples, through the provision that 'subjection to conditions of life which, by lack of proper housing, clothing, food… are likely to result in the debilitation or death of the individuals' was to be an act qualificative of genocide.[54]

However, this explicit mention was to be removed in April the following year, replaced with a construction more reminiscent of the wording found in the final draft of the Convention.[55] In deliberating over the amendment, the Ad Hoc Committee endorsed it for the reason that it captured the vulnerability of both those deprived of and those in possession of their liberty. Peoples detained by way of ghettoisation, forced labour, concentration camp, and imprisonment would be protected under the provision; so too would those who retained their liberty, but otherwise faced destruction through the denial of access to housing, provisions and work.[56] While obviously well-meaning, the explanation given by the committee is unusual. Firstly, there is nothing to suggest that the prior wording of the provision would not have given rise to the same effect. That the Convention would have effect in both times of peace and of war was, even at this stage, undisputable. As such the amendment of a provision on the basis of an arbitrary distinction based on the enjoyment of liberty strikes as odd. Secondly, the

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[52] UN General Assembly, Summary Record of the 82nd Meeting of the Sixth Committee (27 November 1948) UN Doc A/C.6/SR.82

[53] UN Economic and Social Council, Report of the Economic and Social Council (1947) UN Doc E/447 (Secretariat Draft)

[54] ibid at Article I.II.1.b

[55] UN Economic and Social Council, Commentary on Articles Adopted by the Committee (20 April 1948) UN Doc E/AC.25/W.1: "*Inflicting on the members of the group such measures or conditions of life which would be aimed to cause their deaths*"

[56] ibid

wording used by the Ad Hoc Committee heavily invokes the methods employed during the Holocaust, further evincing how the provisions of the Convention owe their formation to historical reflection. In practicality, the significant effect of this amendment was to change the provision concerning slow-death physical destruction from a closed to an open list. Specificity was exchanged for abstraction. It is nonetheless clear from the preparatory work that acts concerning the withholding of food were intended to be subsumed by this new, general provision which would eventually become Article II(c) of the Convention.[57]

This line of reasoning is corroborated by ample jurisprudence. In *Akayesu,* the trial chamber held that the infliction of conditions of life calculated to bring about the destruction of a group or part thereof included, 'inter alia, subjecting a group of people to a subsistence diet'.[58] The judgment delivered in *Kayishema* would broaden the scope of the article further. The trial chamber noted that 'the starving of a group of people' would engage Article II(c) of the Convention,[59] provided that it 'would lead to the destruction of the group in whole or in part'.[60] The interpretation delivered in *Kayishema* is a favourable advancement, given that subjection to a subsistence diet is but one method of inflicting starvation and implies some dispossession of victims' liberty, contravening the rationale behind the wording of Article II(c). Starvation was further confirmed as an act engaging Article 2(c) of the Convention in *Milosevic*[61], and in both genocide cases brought before the Court by *Bosnia*[62] and *Croatia.*[63]

Although starvation does not receive express mention in the provisions of the Convention, its status as an act subsumed by Article II(c) is well settled. Multiple judicial mechanisms, across a variety of distinct cases, have noted this. Additionally, analysis of the *travaux preparatoire* shows that starvation was clearly intended to fall under this provision. From this basis, the attention of this work is directed towards a brief historical analysis of the use of starvation in the commission of genocide.

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[57] n(13) Conley and de Waal at 136
[58] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 505-506
[59] Note that both International Criminal Mechanisms utilised exactly the same wording as Article II(c) of the Convention. See: UNSC Res 808; UNSC Res 955
[60] *Prosecutor v Kayishema,* (Judgment) ICTR-95-1-T (21 May 1999) para 116
[61] *Prosecutor v Milosevic*, (Indictment) IT-02-54-T (22 November 2001) para 32
[62] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* (Judgment) [2007] ICJ Rep 43 (*Bosnia*), para 320-322
[63] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia*), (Judgment) [2015], ICJ Rep 3 (*Croatia*)*,* para 161

I.IV: Historical analysis of starvation in genocide

To date there has been no opportunity for a judicial mechanism to consider the relationship between starvation and genocide in depth. Thus in order to obtain a vision of what the commission of genocide through starvation may look like, one is forced to look beyond the temporal parameters defined by the adoption of the Convention. The objective in doing so is to ascertain the elements common to historical incidences of genocide through starvation. In considering these elements in the context of the Convention and jurisprudence stemming from it, an insight can be gained as to how starvation may manifest itself in contemporary instances of genocide, and furthermore how such an occurrence may interact with the Convention.

The subjects of this brief analysis will be the Armenian Genocide, the Holodomor, and the Holocaust. The unfortunate truth is that more examples could have been chosen, and the analysis need not have been brief. However, these examples have been chosen by virtue of their fulfilling several criteria. Firstly, the selected events occurred in the 20th century, meaning within a state-centric international order relatively similar to what we have today.[64] Secondly, certain technological and administrative advances of the time, such as the advent of radio, telephone, and bureaucratic efficiencies, mean that the form taken by these genocides is closer in profile to what would be seen now.[65] Thirdly, recognising that this imposes a limitation on the work, all of these cases occurred in Europe. The practical consequences of this are twofold: English speaking diplomats and missionaries were posted in these locations and wrote at length about what they saw, and; academics have taken it upon themselves to contribute to the study of these cases largely through English. Finally, and perhaps most importantly, all three of these instances are generally recognised as instances of genocide.[66]

I.IV.I: The Armenian Genocide

Within the study of the Armenian genocide, there exist two divergent schools of thought. The first is that 'assembled by the proponents of the Turkish state' which views the event as a series of 'reciprocal massacres' resulting in the unintentional destruction of the Armenians.[67] The

[64] Jay Winter, 'War and Genocide in the Twentieth Century' in Ben Kiernan, Wendy Lower, Norman Naimark, and Scott Strauss (eds) *The Cambridge World History of Genocide Volume III: Genocide in the Contemporary Era, 1914 – 2020* (Cambridge University Press, 2023), 44
[65] ibid at 46
[66] Nicolas Werth, 'The Crimes of the Stalin Regime: Outline for an Inventory and Classification' in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008) 415
[67] Donald Bloxham and Fatma Gocek, 'The Armenian Genocide' in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008) 344-345

second is that put forward by the Western academic sphere, which takes into account empirical evidence, eyewitness accounts of diplomats, missionaries, and merchants, and the experiences of Armenian survivors.[68] It is rooted in the same spirit of scholarly enquiry as this work, and for this reason will be the source from which knowledge is drawn.

The Armenian case 'constitutes an unusually complete instance' of genocide,[69] in which a community with distinct religious and cultural characteristics was obliterated.[70] The decision to eradicate the Armenians has its roots in the Balkan War, which resulted in massive territorial and population losses for the Ottoman Empire.[71] The ideology of 'Ottomanism', which united diverse groups of people under a central sultanate figure, was discarded along with the government when the Committee for Union and Progress (CUP) seized power in 1913.[72] The Balkan War had instilled a deep-seated sense of mistrust against Christian populations within the Empire. A scapegoat was needed to account for the failures of the campaign, and the CUP place the blame on 'treacherous minorities', namely Armenians.[73] Such was the strength of this negative sentiment that coexistence was not merely thought of as unlikely, but rather dangerous.[74]

As with most cases of genocide, it is difficult to triangulate an exact moment of departure when disdain for the Armenian people modulated into genocidal intent. Certain policy decisions do indicate a general timeline. November of 1913 saw the creation of the 'Special Organisation' by the CUP, an organ in the vein of a secret police service which would undergo rapid reorganisation to target Armenians.[75] What started off as detention of community figures would escalate to deportations. By the Spring of 1915, deportations would progress to extermination. This was evinced in a letter written by a senior figure of the Special Organisation, who wrote

[68] ibid at 345
[69] ibid at 354
[70] n(64) Winter at 50
[71] Taner Akçam, 'The Armenian Genocide: An Overview' in Ben Kiernan, Wendy Lower, Norman Naimark, and Scott Strauss (eds) *The Cambridge World History of Genocide Volume III: Genocide in the Contemporary Era, 1914 – 2020* (Cambridge University Press, 2023), 67
[72] ibid at 68
[73] George Shirinian, 'Starvation and Its Political Use in the Armenian Genocide (2017) 11 *Genocide Studies International* 8, 12
[74] n(71) Akçam at 68
[75] ibid 68-71

that the CUP had 'taken the decision to annihilate all of the Armenians living in Turkey until not one remains'.[76]

The act of genocide itself was carried out in a variety of different ways, principally by bands of criminals under the direction of the CUP.[77] Generally, the first act was to slaughter the military-aged men.[78] From there, convoys consisting of women and children were sent on forced marches through harsh, arid landscapes into present day Syria and Iraq.[79] Conditions on these marches were horrific. American ambassador Henry Morgenthau described one convoy as 'a stumbling horde of dust-covered skeletons… crazed by the hideous sights that filled every hour of their existence'.[80] Starvation was used as a tool of extortion by the CUP along the way, with the Armenian deportees being fleeced of their valuables in the twisted economic relations between prisoner and enforcer.[81] The food situation would become so desperate, that survivors recall resorting to eating indigestible grass, foraging through garbage, and scavenging nutrition from animal faeces.[82] Around a million Armenians lost their lives during these deportations.[83] The majority of these deaths were due to hunger and thirst.[84]

Despite the massive number of mortalities, Ottoman authorities were surprised at the number of survivors that reached Syria.[85] This brings to mind two pertinent points, the first of which is the nature of the state's involvement. The fact that much of the killing and supervision of marches was executed by irregulars, does not absolve the state of responsibility. These groups were under the direct control of the CUP and Special Organisation, and the state was heavily involved in other areas of the deportations as well. For instance, the entire process of 'deportation and massacre was conducted by the statistics branch of the Interior Ministry', meaning in this instance the conditions of life inflicted were *literally* calculated to bring about the destruction of the group.[86] The second point is that of considering starvation in conjunction with other crimes in the context of genocide. During the deportations, a number of factors such

[76] ibid 71
[77] n(73) Shirinian at 13
[78] n(71) Akçam at 79
[79] n(13) Conley and de Waal at 129
[80] Henry Morgenthau, *Ambassador Morgenthau's Story* (Doubleday, 1918) 316-317
[81] n(73) Shirinian at 17-19
[82] ibid 19-20
[83] n(64) Winter at 50
[84] n(13) Conley and de Waal at 129
[85] n(71) Akçam at 79
[86] ibid 89

as displacement, forced marches, and food insecurity converged to create a man-made disaster. Deportation does not in and of itself constitute the actus reus of genocide; however, if it is done so as to inflict on members of the group conditions of life calculated to bring about their destruction, such as by starving members of the group, then it may engage Article II(c).[87]

I.IV.II: The Holodomor

The term 'Holodomor' translates from Ukrainian as death by hunger. The event was a man-made famine which took place in present day Ukraine from 1932 to 1933, claiming the lives of millions. The famine was the result of the convergence of Soviet political and economic policy, which strove for rapid industrialisation and the simultaneous dismantling of the independent peasantry.[88] Ukrainian territory would bear the brunt of this refashioning of state. As a primary grain-growing region of the USSR, it was expected to feed the people and coffers of the state industrial plan. Compounding this was the existence of a strong nationalist Ukrainian identity among the peasantry working the land.[89] Thus, Ukraine was subject to unrealistic demands relating to agricultural collectivization which Stalin enforced harshly to shatter nationalism.

Multiple aspects of Stalin's private life combined to enhance his paranoia concerning the Ukrainian territory in the Autumn of 1932. The suicide of his wife, presence of political opposition within his own party, and imminent failure of agricultural policies implemented in the bread basket of the USSR were the primary contributing factors.[90] By the Autumn, Stalin was aware that famine was a certainty in Ukraine should the demands of the collectivisation policy remain in place. At this point, it would have been possible to avoid by reducing quotas, redistributing resources, or requesting assistance from abroad. Instead, the knife was twisted further into Ukraine.[91]

[87] Marko Milanovic 'State Responsibility for Genocide' (2006) 17 European Journal of International Law 553, 594; See also n(62) *Bosnia* para 190
[88] Norman Naimark, 'Genocide in Stalinist Russia and Ukraine, 1930–1938' in Ben Kiernan, Wendy Lower, Norman Naimark, and Scott Strauss (eds), *The Cambridge World History of Genocide Volume III: Genocide in the Contemporary Era, 1914 – 2020* (Cambridge University Press, 2023) 162
[89] ibid 171-172
[90] n(34) Applebaum at 168
[91] ibid at 169-170

The primary method by which Ukrainians were deprived of food was through requisition. Intake lower than that reflected in Stalin's unrealistic demands meant that all grain and seed had to be turned over to Ukrainian communists, without excuse nor exception.[92] Grain was not the only foodstuff targeted by requisitions. Underperforming farmers had to pay both a livestock and a potato penalty. The practical consequence of such penalties was such that all meat, livestock and potatoes held by the farmers had to be relinquished to the Communist authorities. Fierce, widespread hunger followed, and Ukraine was plunged into a desperate famine which more than decimated its population.[93]

The hunger presented two problems for Stalin. Firstly, how Ukrainians could be prevented from leaving their villages and finding food elsewhere. Secondly, how the spread of news of the famine throughout the Soviet Union and further afield could be curbed.[94] The solution was to severely restrict the movement of Ukrainians, confining them to their villages and preventing their leaving the Soviet. On a local level, roadblocks were set up 'to prevent Ukrainian peasants from escaping the hungry villages', prohibiting them from seeking food elsewhere.[95] These roadblocks were many, and manned by military detachments and the People's Commissariat for Internal Affairs (NKVD).[96] The problem of news spreading through Belarus and Poland was still an issue. To confront this, initially the sale of rail tickets was suspended.[97] Eventually, Stalin and Molotov would simply close the borders of Ukraine, further condemning the population to death by starvation.[98]

I.IV.III: The Holocaust

The Holocaust endures as a central tenet of Western thought, and vestiges of its influence are readily observable across the academic discipline of genocide studies.[99] Such is the intimacy between genocide and the Holocaust that the terms have come to be used almost concomitantly. Some consider that 'the logical corollary of equating the Holocaust with genocide is to make

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[92] ibid at 171
[93] n(88) Naimark at 174-175
[94] n(34) Applebaum at 175-179
[95] n(88) Naimark at 175
[96] n(66) Werth at 408
[97] ibid
[98] n(34) Applebaum at 179
[99] Dan Stone, 'The Holocaust and its Historiography' in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008), 374

genocide consubstantial with state-sanctioned mass murder'.[100] As is wont to occur, scholars project their own research tendencies onto the subject matter. From a juridical point of view, one would not (or at least, should not) 'equate' the holocaust with genocide. To do so would be to consider an event in history as coterminous with the legal definition of a specific crime. The necessity of addressing such questions indicates the influence of the Holocaust on the perception of genocide.

The causes of the Holocaust are still debated fiercely. Some argue that agency, or the will of the individual actor, is the key factor. Others point towards looming societal forces. A middle ground focusing on practical realities, where genocide was carried out on a regional basis according to corresponding political need, such as food shortages and plans for urban and rural 'Germanisation', also finds support.[101] The causes themselves are not of great import for the purposes of this work; more so, the methods employed in its execution. Whilst they are several, the use of starvation had its place across multiple periods of time and space.

Prior to 1942, the Nazi government had implemented, with inconsistent degrees of application and success, policies regarding the fate of the Jewish population. They ranged from logistically viable campaigns of forced deportation, to isolation under German rule in an ambitious Madagascar plan.[102] By the end of 1941, it was clear that the final solution had been redefined, downward. All of the Jews of the East were to be killed.[103] The Wannsee Conference would signal a further significant point in the downward spiral, in which the annihilation of European Jews shifted from a latent possibility to a policy objective.[104]

Starvation was utilised as a method of exterminating civilians and prisoners of war alike. During the course of the War, as many as six million people are thought to have died of starvation. The settings in which this occurred are multiple. Ukraine saw hunger once more as the Nazi *hungerplan* cut off supplies of food to Ukrainian cities, in an attempt to fuel the

[100] A Dirk Moses, 'The Holocaust and Genocide' in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008) 534
[101] n(99) Stone at 376
[102] Florent Brayard, 'From Persecution to Genocide: The Evolution of the Nazi Anti-Jewish Policy (1938–1942)' in Ben Kiernan, Wendy Lower, Norman Naimark, and Scott Strauss (eds) *The Cambridge World History of Genocide Volume III: Genocide in the Contemporary Era, 1914 – 2020* (Cambridge University Press, 2023) 211-219
[103] ibid 222
[104] ibid 226

invasion of the Soviet Union. In the Warsaw ghetto, blockades were enacted and infrastructure destroyed to starve its Jewish inhabitants. In concentration camps, food was withheld from prisoners, many already slated for death; the ensuing malnourishment would foment the ideal atmosphere for pestilence to thrive.[105] As many as two million Soviet prisoners of war would perish due to policies of deliberate starvation enacted in prison camps.[106] Forced acquisition of produce and sieges of major cities such as Leningrad condemned many more to death through starvation, with as many as a million dying of hunger in Russia's second city.[107]

I.IV.IV: Commonalities

There are several elements common between each instance, the identification of which may serve in progressing the study of starvation in the commission of genocide. This can enhance our general understanding of how genocide is carried out, and – on a more particular level – provide insight into how the phenomenon may interact with principles of international law and the provisions of the Convention.

The first commonality of note is the level of state involvement in each case. In the Armenian context, genocide was executed by members of the CUP and Special Organisation officers. Bands of irregulars assisting in the murder were under the direct control of the government, without evident ability to act independently. Other organs such as the statistics branch of the Interior Ministry were involved in the 'calculation' of the deportations. During the Holodomor, the Red Army and NKVD played a key role in restricting the freedom of movement of starving Ukrainian peoples, whilst Communist Party bureaucrats were instrumental in the requisitioning of agricultural produce and livestock. The breadth and depth of the Nazi war machine is staggering, with essentially every part of it having, in some way, a bearing on the commission of genocide. The academic study of Holocaust perpetrators has become a discipline in and of itself, and research continues to affirm that high functionaries, mid-level bureaucrats and Wehrmacht soldiers were all complicit in practice.[108] In each of the three cases, the act of genocide was carried out by an organ whose conduct would, by todays' standards, be attributable to the state.

[105] n(13) Conley and de Waal at 133
[106] n(102) Brayard at 228
[107] Harrison Evans Salisbury, *The 900 Days: The Siege of Leningrad* (Da Capo Press, 1969) 594
[108] n(99) Stone at 378-379

Genocide seemed to be a matter of policy in each instance. Government correspondence from the Armenian genocide shows that the decision was taken on a political level to exterminate all Armenians present on Turkish territory. The reorganisation of the Special Organisation would also point to concerted policy considerations in executing genocide. The agricultural policies of collectivisation and *de-kulakisation* enforced during the Holodomor were not explicitly genocidal; however, there is clear evidence that Stalin knew they would lead to widespread famine. With this in mind, subsequent decisions taken by him take on a new light, particularly the requisitions of livestock and potatoes, the restriction of movement, and the delaying of implementing a taxation system which would lessen the impact of starvation on Ukrainians. Whilst the panoramic scope of the Holocaust's bureaucracy makes it difficult to distinguish where one policy begins and another ends, one can point to the implementation of *der hungerplan* and the Wannsee Conference as sure-fire crystallisations of genocidal intent in state policy.

Finally, a theme emerges of starvation constituting but one aspect of the overall commission of genocide; that is, it is used in conjunction with other methods to inflict conditions of life calculated to bring about the destruction of a group in whole or in part. During the Armenian genocide, victims were deprived of food and water whilst enduring forcible deportation through treacherous conditions. In Ukraine, starvation was compounded by restriction of movement, leaving victims no choice but to remain in their starving villages. Throughout the Holocaust, starvation was utilised as a weapon alongside ghettoization, internment, deportation and siege. Each of these factors, in a modern legal context, would raise pertinent questions regarding state responsibility, attribution, and genocidal intent.

CHAPTER II: STATE RESPONSIBILITY AND ATTRIBUTION

In order to understand the Convention, it is important to understand the context of its creation. Drafting began immediately (at least by the glacial standards of international law) after the end of World War II, in targeted response to the atrocities witnessed therein. A cursory glance of its provisions reveals that the Convention reads similarly to a penal legislative instrument. The main focus appears to be the prevention and punishment of acts committed by individuals, rather than states. This may be of little surprise, accounting for what must have been the considerable influence of the Tokyo and Nuremburg trials on international law at the time. As such the Convention seems to align with the Nuremburg Tribunal's famous pronouncement that 'crimes against international law are committed by men, not by abstract entities'.[109] This statement still exercises some kind of alluring power within the conversation of state responsibility for genocide, seemingly for the reason that the debate becomes simpler to grasp when the role of the state is deemed obsolete.[110] However this line of reasoning misconstrues the intent behind the words of the Nuremburg Tribunal. Almost ironically, the pronouncement was meant to explain that individuals could be held accountable for international crimes at a time when state responsibility was the primary focus of international law.[111] Recognition of the existence of one kind of responsibility, was not intended to extinguish the other.

Nevertheless, the fact remains that the provisions of the Convention do lean towards the punishment of individuals, more so than states. 'Persons' consistently form the object of its articles, which detail through which legislation, and by which tribunals, 'persons' are to prosecuted for genocide. In fact, the Convention does not explicitly call on states to refrain from committing genocide, such is the individual focus arising from its obligations. On the surface, it would appear that states could evade liability in this way, which raises questions about the viability of the Convention, particularly considering the systematic nature of genocide and the recalcitrance of states in prosecuting their own functionaries.[112] With this in mind, this part of the work will seek to analyse the current regime for responsibility and attribution, with a view to understanding in what circumstances acts inflicting starvation in the

[109] *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Goring, et al* (Judgment) International Military Tribunal (01 October 1946) 55
[110] William Schabas, *Genocide in International Law* (2nd edition, Cambridge University Press, 2009) 512
[111] Anja Seibert-Fohr, 'State Responsibility for Genocide under the Genocide Convention' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 370
[112] Kevin Aquilina and Klejda Mulaj, 'Limitations in Attributing State Responsibility under the Genocide Convention' (2017) 17 *Journal of Human Rights* 123, 126

commission of genocide may be imputable to the state. Responsibility and attribution are key principles caught in the crossfire of a true paradox: genocide as an act is virtually inconceivable without the substantial involvement of the State, yet; no government has ever been brought to account for its involvement in genocide under the Convention.[113] Underpinning the above paradox is the fact that genocide has been held to have occurred on multiple occasions by multiple competent judicial mechanisms, including the Court.

II.I: State Responsibility

State responsibility is a foundational element of international law. To borrow some Orwellian logic, if the principle of state responsibility is equally important across all ambits of public international law, it is even more equally important as regards genocide. Should the crime as defined by the Convention presuppose 'a systematic governmental campaign' by default, this systemic nature will only serve to be compounded when considering starvation, which is typically affected by a state machine.[114] Moreover, states have historically been the object of international law,[115] and delegations must have had the role of the state in perpetrating genocide fresh in their minds during the drafting process.[116] This makes it all the more confusing that state responsibility for genocide is not expressly provided for in any of its provisions. Nor was it prohibited; the wording of the Convention left the question of state responsibility hanging in the air for some six decades.

Article IX of the Convention is essentially a dispute settlement clause, conferring jurisdiction on the Court for any disputes related to the interpretation, application or fulfilment of the Convention. That same article also holds the special privilege of being the only place in the entire treaty where 'the responsibility of a state for genocide' in mentioned.[117] Thus it would appear that Article IX assumes the existence of state responsibility for genocide, despite it not being provided for elsewhere. Naturally this raises questions regarding the manner in which this reference is to be construed, whether it covers solely the acts enumerated in Article III or the act of genocide *per se*, and the intention of the drafters, among others.[118] As tends to happen

[113] ibid 125
[114] n(22) Birkland at 1625
[115] n(87) Milanovic at 554
[116] Lennert Breuker, 'The Nature of the Genocide Case' (2007) 2 *Hague Justice Journal* 117, 119
[117] n(27) the Convention at Article IX
[118] Chittharanjan Felix Amerasinghe, 'The Bosnian Genocide Case' (2008) 21 *Leiden Journal of International Law* 411, 418-419

from time to time, the difficult question, the one borne out of political inconvenience, is left to the Court to clarify, as it did by affirming the existence of state responsibility for genocide in *The Genocide Case (Bosnia v Serbia).*[119] Perhaps the most compelling way to gain a meaningful understanding of how the Court came to that conclusion is through dialectic reasoning; understanding the arguments *against* the existence of state responsibility for genocide, and how the Court came to reject them.

II.I.I: Lack of express obligation

As has been mentioned, the Convention does not expressly oblige states to refrain from committing genocide. Therefore any prohibition towards committing the act of genocide in itself would have to be inferred by implication from its provisions. The primary argument against such a conclusion relates to the essential nature of the Convention. In his separate opinion to the *Bosnia* judgment, Judge Owada made reference to the Convention as a 'solemn compact' made between states. It follows that, in his view, an obligation not to commit genocide could not be presumed as arising between states, given that the 'Convention itself is totally silent on that point'.[120] Thus the implicit inference of the existence of a prohibition cannot be reconciled with the onerous nature of that prohibition's contents. Whilst it is doubtless true that 'the rules of law binding upon States therefore emanate from their own free will as expressed in conventions', the matter then turns to one of interpretation, in identifying what states intend to express in treaty provisions.[121]

In affirming the implicit prohibition of genocide, the Court raised two aspects of the Convention. Firstly, through recognising that genocide constitutes a crime in each of Resolution 260(III)(A), the Preamble to the Convention, and Article I, states had logically taken it upon themselves 'not to commit the act so described' in each case.[122] Secondly, the Court examined the wording of Article I, in light of the object and purpose of the Convention. It held that by virtue of the express obligation imposed upon states to prevent the commission of genocide, there naturally followed an implicit obligation on states not to commit genocide. The Court reasoned that it 'would be paradoxical if States were thus under an obligation to

[119] n(116) Breuker at 119
[120] n(62) Bosnia, separate opinion of Judge Owada at para 45
[121] *The Case of the S.S. "Lotus" (France v Turkey)* (Judgment) PCIJ Rep Series A No 10, 4, 18
[122] n(62) *Bosnia* at 166

prevent… commission of genocide' but were not prohibited from committing genocide through their own organs and functionaries.[123]

The rationale employed by the Court here was brief, and the concerns transmitted by Judge Owada in his separate opinion are not addressed within it. However on balance, it constitutes a 'logical and welcome' interpretation of the Convention.[124] That the Convention does not provide explicitly for the aforementioned prohibition should not forsake its object and purpose. A finding to the contrary would have not only highlighted what is, earnestly speaking, a flaw of the Convention; it would have given a needless permanence to its effect.

II.I.II: The Convention as a criminal law act

Most provisions of the Convention seem to point to it being a criminal law instrument, concerned with the culpability of individuals, rather than states, for genocide and its inchoate offences. Article III and IV both refer to the punishment of individuals, with Articles V through VII dealing with the punishment, prosecution and extradition of individual persons. States are obliged to give effect to these provisions, but it cannot be said that stemming from these provisions is a liability of the state for the act of genocide itself.

As such there are, generally speaking, two possible interpretations of Article IX. One of these is that that the provision 'only relates to the explicit obligations on states; namely, the obligation to prevent and punish' the act of genocide, whereas the other foresees responsibility for the act itself.[125] The former is the view taken by the United States: however, the fact that the US has consistently evaded state responsibility before the Court and filed a reservation to Article IX, only strengthens the case for it engaging state responsibility.[126] If it was not a

[123] ibid

[124] n(116) Breuker at 120

[125] Sam Clearwater, 'Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the ICJ's 2007 Decision in Bosnia v Serbia' (2009) 15 *Auckland University Law Review* 1, 11

[126] The failure of the US to ratify several notable conventions, such as the United Nations Convention on the Law of the Sea, the Convention on the Eradication of All Forms of Discrimination against Women, the Rome Statute and Protocols Additional to the Geneva Conventions, conveys a considered policy of avoiding seizure by international judicial mechanisms. Indeed the US, despite its heavy involvement in the drafting process of the Convention, delayed significantly in ratifying it, only doing so in 1988 after a lengthy Senate battle. William Proxmire, Senator for Wisconsin, delivered a speech advocating for ratification of the Convention every day the house was in session – totalling over 3200 speeches – from 1967 to 1988.

distinct possibility that the article could foreseeably engage such responsibility, there would be little point in filing a reservation.

The Court was of the view that the individual criminal liability foreseen in the provisions of the Convention could run concurrently to the state responsibility for genocide arising implicitly from Article I. It saw 'nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I'.[127] Although the Convention may be a criminal-focused text, this does not by right injunct the extraction of a different type of responsibility from the document.[128] Regardless of the primary focus of the text, it cannot be ignored that Article IX makes express reference to state responsibility for genocide. States have chosen to confer upon the Court jurisdiction to adjudicate over such matters in very clear language, in a manner separate to considerations of criminal law.[129] The Court rightly recognised this.

II.I.III: Intention of drafters

The final argument laid before the Court was that it was not the intention of the drafters to provide for state responsibility for genocide. As such it was put to the Court that an examination of the *travaux preparatoire* of the Convention would reveal this. In truth, the preparatory work of the Convention is notoriously confusing. This can be illustrated by a recent anecdote which can be drawn from the public hearings on the Request for the indication of provisional measures submitted by Sudan against the UAE, a case also concerning the interpretation of the Convention. Sir Michael Wood KC, speaking on behalf of the UAE, undertook to deliberate on the *travaux* pertaining to Article IX. Shortly thereafter he began to mince his words. Seemingly electing to forgo what was written in front of him, he simply remarked that 'it is a complicated set of events' before swiftly moving on. It is the only time during over an hour of otherwise elegant deliberation that he stuttered.[130]

The inclusion of state responsibility was debated amongst delegates with regard to three different articles: IV, VI, and IX. There were three general schools of thought throughout these debates. France led the cohort advocating exclusively for individual responsibility. The US and

[127] n(62) *Bosnia* at 174
[128] n(125) Clearwater at 18
[129] n(87) Milanovic at 566
[130] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan* v. *United Arab Emirates),* (Verbatim Record, Public Hearings of 10 April 2025) 36

USSR, best friends as they were, opted for a middle ground in curtailing state responsibility in favour of the individual. The UK and Belgium on the other hand, saw the inclusion of state responsibility as an indispensable element in securing the proper functioning of the Convention.[131] During discussion over Article IV of the Convention, the amendment put forth by the UK advocating for state responsibility was narrowly rejected. It would appear that the reason for the failure of the amendment was not a generic refusal of state responsibility *per se*; rather that there was confusion amongst delegates regarding responsibility as possessing a character of a civil or criminal nature, the latter of which generated the majority of nays.[132]

A reformulated amendment was proposed during the debate on Article IX. Despite there still remaining considerable confusion as to what kind of liability arose by virtue of the provision, it was adopted with little controversy.[133] Despite the opacity surrounding Article IX, two conclusions can be drawn from it: states had rejected the idea of state crimes, and; states had elected to introduce at least *some form* of state responsibility into the Convention. To employ some kind of syllogism, the only certainty to be drawn from this particular part of the *travaux* was that state responsibility existed, and it definitely was not of a criminal nature.

The Court employed similar reasoning in holding that Article IX was 'about jurisdiction in respect of the responsibility of States simpliciter'.[134] The Court had pre-empted its position on the matter somewhat beforehand, in observing that 'the obligations in question… are obligations and responsibilities under international law. They are not of a criminal nature'.[135] Taking the opportunity to flog a dead horse, it is worth remembering that what is not prohibited in international law is permitted. A similar line of reasoning can be applied to the situation presented by the *travaux:* states who had advocated for a strictly individual version of responsibility arising from the convention failed with the passing of the amendment to article IX, leaving the door open for state responsibility.[136] The Court simply availed of this.

For the reasons outlined above, the Court saw fit to infer from the provisions of the Convention the existence of state responsibility for genocide. This is a welcome interpretation, if not

[131] n(110) Schabas at 492
[132] ibid 494
[133] ibid 497
[134] n(62) *Bosnia* 178
[135] ibid at 170
[136] n(111) Seibert-Fohr at 361

unusually progressive for a mechanism often scorned for its conservatism. It is an important development in genocide jurisprudence, given that genocide presupposes a systematic governmental campaign, and its commission through starvation in modern history has always been executed by a state machine. Further to the objective of this chapter, the principle of attribution and its ramifications for starvation and genocide will be considered.

II.II: Attribution

When speaking of attribution, it may be pertinent to make a clarification on terminology. A state cannot commit genocide – individuals commit genocide, and their actions can be attributable to the state.[137] On this distinction hinges the symbiotic relationship of responsibility and attribution; attribution acts as the bridge connecting the doings of individuals and the responsibility of the state. Being an essential component of state responsibility, issues of attribution can be 'outcome determinative' in collocating the responsibility of a state for genocide.[138]

The regime of attribution encompasses a 'diffuse system of state accountability', the most authoritative description of which is provided by the International Law Commission (ILC) through the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[139] Whilst this particular work of the ILC is not a treaty as such, it is broadly considered to constitute customary international law, to the point where the Court regularly makes reference to the work of the ILC as an authoritative voice on international law.[140] The objective of the ARSIWA is not to impose substantive obligations on states, but rather to outline the consequences that arise when an international obligation is breached by a state. Pursuant to this end, Article 4.1 of the text reads that 'the conduct of any State organ shall be considered an act of that State under international law', before going on to characterise the notion of 'state organ' by means of a sweeping and open-ended categorisation.[141] This categorisation corresponds to the diverse array of state organs priorly shown to be involved in the commission of genocide, particularly when exacted through starvation.

[137] n(87) Milanovic at 567
[138] n(22) Birkland at 1632
[139] ibid 1627
[140] See, for example, n(62) *Bosnia,* paras 186, 198, 344
[141] Article 4, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, [2001] Supplement No. 10 (A/56/10), chp.IV.E.1 (*ARSIWA*)

Also of particular importance is the general principle of dual attribution. International law makes the distinction between the acts of an individual – whatever role they take up in the state system – and the breach of an international obligation by a state. Consequences arising from one do not negate the effects arising from the other, as 'although claims in both circumstances may proceed from the same facts, they involve the breach of quite separate obligations'.[142] Thus when a state organ or an individual whose conduct is attributable to that state commits genocide, state responsibility will be engaged.[143] The nature of dual attribution once more calls to mind the broad spectrum of state organs necessarily implicated in the commission of genocide through starvation. It follows that in order to gain an insight as to how the principle of attribution may potentiate or vitiate the finding of state responsibility for genocide, an examination of the jurisprudence of the Court is warranted.

II.II.I: Attribution before the Court

Where on one hand the ARSIWA provides a codified standard, the jurisprudence of the Court allows for derogation from the general abstractions provided by the ILC text. The practical reality of attribution that can be gleaned from this jurisprudence is instrumental in understanding how the Court interacts with the principle, and with that, whose acts will be attributable to the state in cases of genocide. Although the infliction of starvation would appear to be an act within the exclusive capability of the state, we have thus far seen reason to challenge this notion. Much of the actual 'dirty work' during the Armenian genocide was performed by groups of irregulars, albeit very much so under the control of state authorities. The point being, conflict and with it acts resembling genocide are inevitable. The unpredictable aspect is the form that these acts will take. As such, the attribution to the state of acts committed by non-state actors (NSAs) also warrants scrutiny.

States are naturally liable for the conduct of their own organs. Article 4 of the ARSIWA, which proposes a broad categorisation of what constitutes an organ, is generally considered to be customary international law. As broad as this categorisation is, its parameters are expanded by Article 7, which affirms that states cannot disavow the acts of an organ even if that organ 'exceeds its authority or contravenes instructions'.[144] The Court itself has not had the

[142] Franck, 'Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?' (2007) 6 *Washington University Global Studies Law Review* 567, 581
[143] n(125) Clearwater at 14
[144] n(141) ARSIWA at Article 7

opportunity to pronounce on this matter. The principle is, however, well established in public international law. The *Mallén* case was heard as part of the General Claims Commission, then set up to resolve claims instigated by the citizen of one country against the government of the other. It involved the assault on two separate occasions of a Mexican consul by a sheriff in the employ of the United States, with the second occasion giving rise to a grave injury being inflicted on the consul. The commission held that the US must 'clearly be held liable for the acts of any official responsible for this remarkable state of affairs', even though the evidence showed that the official in question was acting on the basis of a personal grudge rather than in the discharge of his official duties.[145] Mexico's dutiful contribution to the understanding of attribution was extended with the *Caire* case, the judgment of which was issued by the French-Mexican Claims Commission in 1929. The case concerned the death of a French citizen, Jean-Baptiste Caire, at the hands of two Mexican military officers. The Commission in this instance held that Mexico was liable for the claim, as the laws of attribution burdened the state with '*la responsabilité pour tous les actes commis par ses fonctionnaires ou organs et qui constituent des actes délictueux au point de vue du droit des gens*'.[146] Thus the mere fact that the functionaries were, at the moment of the act, acting in an official capacity, was enough to give rise to the liability of Mexico. Exceptions are reserved only for those occasions where state functionaries are acting in a strictly personal capacity.

It is not only state functionaries and organs whose actions may be attributed to the state. The *Nicaragua* case saw the introduction of the 'effective control' test, which set an extremely high threshold for attributing the acts of NSAs to States.[147] Participation in the 'financing, organizing, training, supplying and equipping' of NSAs, the 'selection of its military targets', and even the 'planning of the whole of its operation', is still seen by the Court as insufficient to render the acts of NSAs imputable to the assisting state.[148] The ICTY lowered the associated demands of attribution in putting forward the 'overall control' test, which only required that the state in question be exercising a general control over the NSA, rather than intimately directing its strategic direction and operations.[149] This less stringent approach was not endorsed

[145] *Francisco Mallén (United Mexican States) v USA,* General Claims Commission (Reports of International Arbitral Awards, 27 April 1927) 181
[146] *Estate of Jean-Baptiste Caire (France) v. United Mexican States,* French-Mexican Claims Commission (Reports of International Arbitral Awards, 7 June 1929) 529
[147] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 115
[148] ibid
[149] *Prosecutor v Tadić* (Judgment) IT-94-1-T (7 May 1997), para 120-123

by the ICJ in *Bosnia.* The Court pointed out that the overall control test was sufficient in the accomplishment of its initial task, which was to make a distinction between international and non-international armed conflicts.[150] However, with regard to discerning the imputability of acts by NSAs to a state, it was found to be unsuitable. The Court held that the test 'stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility'.[151] While the Court's wording may be slightly dramatic, the legal sentiment behind it is sound. The effective control test, which it reverted to, closer aligns with the 'fundamental principle governing the law of international responsibility'; that a state can be held responsible for its conduct alone.[152]

II.II.II: Attribution and starvation

Each highlighted development of the principle of attribution has a bearing on whether a state could be responsible for genocide by starvation. When thinking of systematic state involvement, one's mind may be drawn to make comparisons with machinated systems such as the National Socialist party, or the Ottoman Empire in the discharge of their respective genocides. Thus it may be difficult to entertain the thought of the machine as a whole acting *ultra vires* of the scope of their responsibility. However, the form taken by state involvement in genocide may vary considerably; it needs not necessarily implicate the state in its entirety, or be inflicted upon every member of a group. The Srebrenica massacre provides an example of the scale such involvement could take; a few military units, targeting a number of people which, whilst sizeable, constituted a small percentage of the overall population of that group. Cognisance of this scale allows the idea of state involvement to be divorced from the idea of the state or group as a whole. It becomes easier to think of a military unit withholding food from part of a group at a prison camp, or destroying civilian infrastructure, or diverting humanitarian aid, despite not having been ordered to do so.

It is an unfortunate reality of conflict and indeed international law that states hide behind NSAs to limit their liability before the court of public opinion and judicial mechanisms proper. The high threshold for attributing acts of NSAs to the state provides an attractive proposition for states wishing to destroy a group, without being held responsible for it. Much of the 'dirty work' of the deportations and the ensuing infliction of starvation during the Armenian genocide

[150] n(62) *Bosnia*, 404
[151] ibid at 406
[152] ibid

was carried out by bands of irregulars: criminals, prisoners, and unemployed ex-military.[153] In a modern context, questions would be raised pertaining to the level of control exercised by the Ottoman government over the irregulars. For instance, they were not paid – at least on an official level – receiving their benefit-in-kind from the plundering and kidnap of Armenian people.[154] The question would eventually boil down to whether those irregulars 'were in a relationship of such complete dependence on the State' that they could not be thought of as anything other than an organ of that state.[155]

This high threshold is tempered somewhat by three aspects. The first is that the level of endorsement given by a state to acts of NSAs can give rise to attribution through adoption. The second is that the acts *ultra vires* by state organs will always be attributed to the state unless the individual or organ at hand is acting in a manner manifestly private.[156] The third, is that the categorisation of what constitutes a state organ or an individual acting in its capacity is broad. It pertains not only to military attachments, but organs forming part of the state system 'whatever position' it holds, 'whatever its character' within the organisation of the state.[157] Whilst acts of NSAs in the commission of genocide through starvation are obviously possible, the bureaucratic demands of enacting a campaign of starvation make it more likely to be one undertaken by a state proper. The regime surrounding attribution captures the varietal nature of the many organs through which such a campaign may be carried out. For example, state water companies cutting off supply to specific areas, border authorities rejecting aid shipments, law enforcement agencies setting up roadblocks manipulate the movement of those suffering from starvation, and military bombardments of crucial civilian infrastructure such as bakeries and fishing fleets, are acts attributable to the state which could conceivably be performed, in tandem or in isolation, to inflict starvation on a group of people. However, once it has been established that the *actus reus* of genocide has taken place, and that this act is attributable to the state, it must then be shown that the act was committed with the requisite genocidal intent. This is a notoriously difficult task.

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[153] n(67) Bloxham and Göçek at 356
[154] n(73) Shirinian at 13
[155] n(62) *Bosnia* 397
[156] n(141) ARSIWA at Article 7
[157] ibid at Article 4

Chapter III: GENOCIDAL INTENT

Article II of the Convention provides that in order for genocide to occur, it must be committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[158] This has come to be understood as the *dolus specialis*, meaning that the perpetrator 'commits an act while clearly seeking to destroy the particular group, in whole or in part'.[159] The necessity of specific intent constitutes a double-edged sword. Whilst it offers utility in that it serves to make a legal distinction between genocide and other crimes against humanity,[160] it can make genocide exceptionally difficult to prove. Intent refers to a person's state of mind. Unless this is explicitly stated, which is rare, the difficulties associated with ascertaining the 'private thought process' of an actor can present probative barriers which are impossible to overcome.[161]

The Court's approach towards the issue of specific intent has done little to waylay fears that its requirement, in its current form, results in a regime which is overly restrictive towards the punishment of genocide. A divided opinion in the *Bosnia* case spurred extensive academic commentary, illustrating that the issue of specific intent has not truly found a settled status in theory or in practice.[162] One effect of this has been to render the obligation to prevent genocide redundant among states. The dearth of consensus surrounding where genocide begins and where it ends, has allowed states to hide behind chaos.[163] Regarding the punishment of genocide, the plausible deniability afforded by the requirement of specific intent has provided an out for perpetrators of genocide. It is not only that making a judgment as to a person's private intentions is difficult; it is more so that the willingness of the Court to make inferences as to this state of mind is manifestly limited. Starvation finds itself at the particular mercy of such inferences being made. Unpredictable weather conditions and poor agricultural policy can be leveraged as explanations for the infliction of starvation. As such this section of the work will entail a critical analysis of the current regime surrounding specific intent with a view to understanding how it may affect the finding of state responsibility for genocide through starvation.

[158] n(27) Genocide Convention at Article II
[159] n(15) Goldsmith at 241
[160] n(37) Jessberger at 91
[161] n(15) Goldsmith 242
[162] n(22) Birkland at 1626
[163] n(15) Goldsmith 240

III.I: Legal regime surrounding specific intent

The issue of specific intent received its first meaningful consideration in the *Akayesu* case heard before the ICTR.[164] In it, the tribunal recognised the difficulties inherent to ascertaining the state of mind of an individual, considering it a factor which is 'difficult, even impossible, to determine'.[165] As such there was a willingness, 'in the absence of a confession from the accused', to infer their state of mind from the presumption of fact.[166] Several factors were to be taken into account in doing so, including but not limited to the scale of the atrocities, their performance in a particular geographical area, or the membership of the victims to a particular group. It is on the basis of such criteria that the tribunal was able to infer the genocidal intent of an act.[167] Thus the first case considering specific intent offered quite a broad deference to the relevant judicial mechanism in inferring genocidal intent.

Subsequent case law of the ICTY rolled back on this broad deference somewhat. Once more, the tribunal recognised the difficulties in obtaining explicit evidence pertaining to the state of mind of the perpetrator. It noted that whilst obtaining such evidence was not an impossibility, the reality was that 'most usually the intent will have to be inferred from the evidence'. [168] As to through which factors this specific intent may be inferred, the tribunal quoted almost verbatim those proffered by its Rwandan counterpart: the scale of the atrocities, their performance in a particular geographical area, or the membership of the victims to a particular group.[169] The significance of a genocidal plan – or policy, the terms seemingly being used consubstantially – was also highlighted as an element which would significantly favour the establishment of specific intent, in spite of it not being a 'legal ingredient' of the crime of genocide.[170] It would therefore appear that the ICTY intended to follow the ICTR in taking an open approach to the identification of specific intent, flowing from an examination of factors listed above. This openness to inference of intent is betrayed somewhat by the tribunal's findings, however.

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[164] *supra* note 59; whilst not a case heard under the Article IX jurisdiction clause of the Convention, the ICTR and ICTY did integrate the provisions of the Convention into their statutes. The Court has relied heavily on the evidence produced before both tribunals, as well as the deliberations present in their judgments, in its own cases regarding the Convention

[165] n(58) *Akayesu* at para 523

[166] ibid

[167] ibid

[168] *Prosecutor v Milosevic* (Decision on Prosecution motion for admission of transcripts pursuant to Rule 92bis (D) for witness B-1132) IT-02-54 (5 February 2004), para 120

[169] *Prosecutor v Jelisic* (Appeals chamber judgment) IT-95-10 (5 July 2010), para 47

[170] ibid 48

For instance, in *Jelisić,* there was a convincing body of evidence put before the trial chamber which demonstrated the state of mind possessed by the defendant, Goran Jelisić, during the period in which he was a *de facto* commander of the Luka prison camp. Firstly, it is apparent how Jelisić viewed himself as a harbinger of genocide. During his time at Luka camp, he regularly referred to himself as the 'Serbian Adolf'. Furthermore, at his initial hearing Jelisić presented himself as 'Adolf', indicating an enduring affinity to genocide long after the violence had ceased. That he stylised himself in such a manner whilst working in a prison camp should serve to enhance the connotation.[171] Secondly, the views held by Jelisić towards Muslims clearly indicate genocidal intention. One witness recalled how he 'hated the Muslims and wanted to kill them all', whilst any that were to survive would be kept as slaves, forced to do humiliating, degrading work. He held a hatred towards Muslim women, and wished to sterilise them so that they could not reproduce; this, after killing all of the Muslim men.[172] Thirdly, Jelisić made his genocidal intentions clear to Muslims themselves. Muslim detainees were plainly told that 70% of them were to be killed; on another occasion, they were told that between five and ten percent of them would leave the camp. He told witnesses that the world needed to be rid of Muslims, and that he would enjoy his part in that process. His statements on sterilising Muslim women clearly indicate a desire for the deletion of an entire group of people.[173]

The actions of Jelisić within the prison camp should be considered in the context of his self-perception, his views on Muslims, and his outspoken intention to eradicate them. Several witnesses offer anecdotes demonstrating how the state of mind of Jelisić manifested itself in his actions. The tribunal heard how he would kill between 20 and 30 detainees before having coffee each morning; how he would keep a daily tally of the executions he had performed; how he would openly brag about these numbers, which sometimes reached into the hundreds.[174] Despite this seemingly incontrovertible evidence as to his state of mind, the tribunal found specific intent to be lacking. Their rationale for doing so is manifestly weak. Reference was made to his immaturity, his eagerness to please his superiors, and his narcissistic, anti-social tendencies as the reasons for his actions. There was no consideration as to whether these

[171] *Prosecutor v Jelisic* (Trial judgment) IT-95-10 102 (14 December 1999), para 102
[172] ibid
[173] ibid
[174] ibid 103

psychological factors could contribute to the formulation of specific intent, rather than replacing it outright.[175] Moreover, in concluding that his actions were not the manifestation of a specific intent, the tribunal noted that Jelisić appeared to choose his victims at random, neglecting to recall that the detainees were, in the first place, necessarily interned at Luka camp by virtue of their belonging to a protected group.[176] As such the targeting of the protected group had already been done. Thus whilst appearing to leave the door open to inference of specific intent in its judgments, the tribunal either opted not to pursue its own dictum or set an arbitrarily high threshold for doing so.

In September of 2024, the Independent International Fact-finding Mission for the Sudan delivered its first report on the ongoing conflict between the Sudanese Armed Forces and the Rapid Support Forces (RSF), as well as their allies various.[177] The report detailed extensive human rights abuses allegedly taking place in the region. Not long after, Sudan brought the UAE before the Court in alleging that the support provided by the Emirate state to the RSF amounted to genocide. Experienced international law practitioners and academics alike may be stifling an uneasy sense of *déjà vu,* as the establishment of fact-finding missions that grapple with questions of genocide is nothing new to the Sudan. In 2004, a UN-led commission of inquiry was sent to the region to investigate allegations of, amongst other crimes, genocide in the Darfur region. Whilst the work of the commission was valuable, it represents a missed opportunity in the development of the understanding of genocidal intent.

There are two principal causes for this. Firstly, there were substantive issues with the approach taken by the commission towards the question of genocide. Its report did not adequately take into account the decisions of the ICTR, particularly the *Kayishema* case. Additionally, the report did not identify what would be necessary in the instant case for a finding of genocide to be made.[178] Secondly, the commission readily came to the conclusion that no genocidal policy had been pursued despite the fact that it was repeatedly denied access to documentation recording military operations conducted in Darfur. Such documentation could have elucidated

[175] ibid 105
[176] ibid 106
[177] OHCHR, *Sudan: UN Fact-Finding Mission outlines extensive human rights violations, international crimes, urges protection of civilians,* accessible at https://www.ohchr.org/en/press-releases/2024/09/sudan-un-fact-finding-mission-outlines-extensive-human-rights-violations
[178] n(15) Goldsmith at 243

probative weight in considering the existence of a specific intent or policy towards genocide.[179] Perhaps the most illuminating result of the commission's interaction with genocide is to display how a lack of governmental cooperation necessarily frustrates the establishment of genocidal intent. That being said, a commission of inquiry is just that – a commission of inquiry. The authority carried by its findings, whether arrived at properly or not, enjoy limited standing as compared with those of competent judicial mechanisms.

The Court first had opportunity to deliberate on genocidal intent in *Bosnia.* In doing so it heavily leveraged the findings of the ICTY, recalling that evidence obtained 'by judges skilled in examination and experienced in assessing large amounts of factual information' merited special attention.[180] For the same reasons, much of the findings made by the ICTY regarding specific intent were also entitled 'due weight' throughout the course of proceedings.[181] In accusing Serbia of being responsible for genocide, the Bosnian submission before the Court sought to argue that the 'pattern of the atrocities committed over many communities, over a lengthy period', which 'focused on Bosnian Muslims and also Croats' constituted proof of specific intent.[182] The Court declined to agree with the 'broad proposition' put forth by Bosnia,[183] and reiterated that there was only two ways in which the existence of specific intent could be proven: either 'on the basis of a concerted plan', which is unlikely to be reproduced in writing, or through revealing a 'consistent pattern of conduct which could only point to the existence of such intent'.[184] That the pattern can *only* point to existence of such intent rules out the possibility of two intentions co-existing.

The reasoning attached by the Court to the counterclaim of Serbia in *Croatia* illustrates the inability of specific intent to exist alongside another intent, even if there is considerable overlap in the motive and means by which this is achieved. Transcripts documenting a meeting held by Croatian officials reveal that the objective of military operations enacted by the Croatian government was such that 'the Serbs will to all practical purposes disappear' from the

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[179] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, (25 January 2005) para 33-34
[180] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (Judgment) [2005] I.C.J. Reports 2005 168 para 61
[181] n(118) Amerasinghe at 424
[182] n(62) *Bosnia* at 373
[183] ibid
[184] ibid 376

Krajina.[185] The Court disagreed with the Serbian assertion that such wording constituted genocidal intent, stating that at most the intent held by the Croatian government was to cause 'the flight of the great majority of the Serb population' from the region.[186] While the maintenance of a distinction between genocide and ethnic cleansing is important for legal clarity, more emphasis could be placed on the outcome of such intentions. The statements made by the Croatian government in this case could well be read as indicative of a genocidal intent particularly if the consequences of such operations were to lead to the destruction of a group or part thereof. The practical overlap between the two crimes, with genocide being the 'last resort of the frustrated ethnic cleanser', necessitates a weightier consideration of the end result.[187] It is not unthinkable that, even where a policy objective points towards intent to ethnically cleanse, this intent becomes genocidal when the desired result is not easily come upon. As such it may not be that two intentions co-exist, but rather that one becomes the other; the dictum of the Court on the matter leaves little room for flexibility in this regard.

A paradox of sorts presents itself. The Court found that the provisions of the Convention provide for state responsibility, and endeavoured to justify its rationale in finding so. In the same judgment, the Court saw fit to severely restrict its own ability to impose state responsibility for genocide, through the establishment of onerous standards in proving specific intent. In effect, the Court gave with one hand, and took away with the other. The question arises concerning the suitability of such reasoning, and whether a more desirable outcome may be found.

III.II: Critique of the regime surrounding specific intent

Certain commentary regarding the reasoning of the Court tends to focus on the moral disappointments stemming from its restrictive interpretation of specific intent. This is understandable to a certain degree, keeping in my mind that it is the only mechanism which can rule on state responsibility for genocide. Moreover, obtaining state consent before the Court in the pursuit of judgments pertaining to international humanitarian law or customary international law can be an arduous affair, whereas the Convention is widely ratified, with few states having deposited Article IX reservations. However, the argument could be made for the legal, rather than moral, failings of the Court's rationale.

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[185] n(63) *Croatia* at 502
[186] ibid 505
[187] n(110) Schabas at 200-201

There is a conception that the Court stringently applies a *stare decisis* approach to its judgments.[188] Whilst it is true that the Court generally follows such an approach, it would be incorrect to maintain that the Court is bound by it. Article 59 of the Court Statute (the Statute) provides that 'the decision of the Court has no binding force except between the parties and in respect of that particular case'.[189] As the Court cannot be a party to a case, the judgments it hands down cannot be binding upon it.[190] Article 38 of the Statute additionally provides that judicial decisions are to be considered a subsidiary, rather than primary, source of international law.[191] Moreover, the Court has expressly addressed the bearing held by precedent over its judgments. In *Croatia*, the Court noted that whilst previous decisions were 'in no way binding' upon it, it would 'not depart from its settled jurisprudence unless it finds very particular reasons to do so'.[192] In so noting, the Court made reference to its own illustrative dictum in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, where it invoked the principle enshrined in Article 59 of the Statute in recognising that precedent was indeed only binding on the particular parties to a case.[193] The question at hand was therefore whether the Court had 'cause not to follow the reasoning and conclusions of earlier cases'.[194]

In neither case, did the Court opt to elaborate on what could constitute 'very particular reasons' or 'cause' to so depart. Given the conservatism of the Court, one cannot imagine this list as long. That being said, there are certain aspects of the Court's current understanding of specific intent which may be viewed as a reason to depart from the precedent it set in both Balkan genocide cases. One of them has been touched upon already, which is the absurdity of the Court affirming the existence of state responsibility and essentially prohibiting it from ever being established in the same judgment. The others are that the current regime surrounding specific intent defies the object and purpose of the Convention, and does not find support in the *travaux preparatoire*. Each will be discussed in turn.

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[188] n(112) Aquilina and Mulaj at 145

[189] Article 59, Statute of the International Court of Justice (Signed 26 of June 1945, entered into force 24 of October 1945) XV UNCIO 355 (Statute)

[190] ibid at Article 34(1)

[191] ibid at Article 38(1)(d)

[192] n(63) *Croatia*, preliminary objections judgement at para 53

[193] *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary objections judgment) [1998] ICJ Reports 292

[194] ibid para 28

III.II.I: Defiance of object and purpose

Article 31 of the Vienna Conventions on the Law of Treaties (Vienna Convention) provides that a treaty is to be interpreted with regard to its context and in light of its object and purpose.[195] The context of the treaty can be derived from the text, including its preambles and annexes, in ascertaining its object and purpose.[196] The title of the Convention explicitly mentions 'prevention and punishment of the crime of genocide', whilst its preamble states the aim of liberating mankind from the 'odious scourge' of genocide.[197] The provisions of the text themselves are geared towards both the prevention and punishment of genocide. Additionally, states themselves widely recognise the prevention and punishment of genocide as the object and purpose of the Convention.[198] It is on this understanding that this analysis advances.

The Court should equally keep in mind Article 31 of the Vienna Convention in interpreting the provisions of the Convention. Article II of the Convention, which provides for the definition of genocide, does indeed state that such acts must be committed with the intent to destroy a group in whole or in part. It does not provide that the standard applied to such intent be prohibitively restrictive towards its establishment. In truth, neither does the subsequent jurisprudence which involved the interpretation of this provision, particularly the ICTR cases. The Court has taken it upon itself to apply such an onerous standard for the establishment of specific intent. Article IX of the Convention, by way of the Court's own analysis, affirms the existence of state responsibility for genocide. However, the Court similarly bars itself from imposing responsibility on the state, by introducing standards which in practice, negate the possibility of inferring intent from a pattern of conduct.

The meaning of intent as provided for by Article II is key to understanding when genocide begins. It follows that States are unable to carry out the preventive function imbued in the provisions of the Convention by virtue of the opacity and restriction stemming from the Court's interpretation of that article. Likewise, punishment of states through the establishment of state

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[195] Article 31, Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention)
[196] ibid at Article 31(2)
[197] n(27) Genocide Convention at preamble
[198] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Indication of Provisional Measures) [2023] General List no. 192 (*South Africa*); see the interventions of Ireland, para 42; Nicaragua, para 25; Colombia, para 78; Türkiye, para 133; Maldives, para 73; Bolivia, para 40; Cuba, para 196. Accessible at: https://www.icj-cij.org/case/192/intervention

responsibility is hindered considerably by this restrictive interpretation, at once defying Article IX and the object and purpose of the Convention. In its current form, 'the requirement of intent provides an easy means for evading responsibility' for states involved in the commission of genocide.[199] Put simply, the current interpretation of intent put forward by the Court does not allow for the object and purpose of the Convention to be achieved. This is bad.[200]

III.II.II: Lack of *travaux* support

The Vienna convention provides that where the regular means of treaty interpretation leave the meaning of a term ambiguous or obscure, 'recourse may be had to supplementary means of interpretation'.[201] Regular means of interpretation do include consideration of subsequent practice regarding the treaty. It is contended that such subsequent practice does little to settle the meaning of specific intent. Firstly, of the three international mechanisms to consider the issue, each has offered up a distinct approach towards what specific intent actually entails. The ICTR left a broad deference to infer such intent. The ICTY raised the threshold considerably whilst leaving the door ajar for inferring specific intent, while the Court stated that such intent could only exist to the preclusion of all other possible intentions. Within the Court's own jurisprudence, majority opinions in cases concerning the Convention tend to mask benches that are quite divided on the issue of specific intent and as such deliver dissenting and separate opinions.[202] Secondly, state practice since the adoption of the Convention has done little to reflect convergence of opinion. For example, in 2004 the US declared that genocide was occurring in Darfur, when the commission of inquiry concluded to the contrary.[203] There necessarily existed a difference in opinion on specific intent in this case, as it is on this factor that the opinion of the commission turned. Further to this end, interventions in the ongoing case brought before the Court by South Africa concerning the Convention explicitly call on the Court to rethink its stance on the inference of specific intent, including with regard to Article II(c).[204] The significance of intent as it is provided for in the Convention has remained

[199] n(18) Curthoys and Docker at 26
[200] n(15) Goldsmith at 248
[201] n(195) Vienna Convention at Article 32
[202] See n(62) *Bosnia,* Judge Al-Khasawneh dissenting opinion; 'What other inference is there to draw from the overwhelming evidence of mass killings systematically targeting the Bosnian Muslims than genocidal intent?'
[203] Rebecca Hamilton, 'Inside Colin Powell's Decision to Declare Genocide in Darfur' (The Atlantic, 2011) accessible at: https://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/
[204] n(198) *South Africa*; see intervention of Ireland at para 42-43

ambiguous throughout the development of both jurisprudence and state practice. Accordingly, recourse may be had to interpretation of the *travaux.*[205]

The Court has historically not taken to such interpretation lightly.[206] Doing so necessarily implies that there is a particularly tedious disagreement as to a point of law, which requires a proportionately balanced interpretation. In discerning whether the Court's interpretation of specific intent garners support from the preparatory work of the Convention, two principal aspects may be considered: the debate surrounding *dolus specialis,* and; the debate on intent more generally. The term *dolus specialis* bears a meaning analogous to that of specific intent, and receives considerable use in all jurisprudence regarding the application of the Convention. Within the preparatory work of the Convention however, it is barely mentioned at all. The Brazilian delegation made mention of the term on two occasions, when deliberating on aspects of premeditation and motive.[207] Neither of these were deemed necessary elements in the task of defining genocide.[208] The French delegation mentioned the *dolus specialis* in a similar way, using it to describe the legal inacuity of the inclusion of motive in a later-discarded amendment.[209] On each occasion, its mention was brushed over. Its inclusion or exclusion from the provisions of the Convention was of virtually zero importance to its drafters, and as such it cannot be said that they intended for it to become the standard for establishing intent. Moreover, it is a strictly civil law term which does not find exhaustive support even amongst these jurisdictions. Its inclusion in the provisions would have led to a confusing and ineffective Convention; this has been the effect of its subsequent adoption by judicial mechanisms.[210]

The debate surrounding the inclusion of the general concept of intent within the definition of genocide was a more involved affair. The delegate from the USSR foresaw precisely the issues that would be presented by its inclusion, in remarking that 'the perpetrators of acts of genocide would in certain cases be able to claim that they were not in fact guilty of genocide, having had

[205] n(195) Vienna Convention at Article 32(a)
[206] *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] *ICJ Reports* 8
[207] UN General Assembly, Summary Record of the 72nd Meeting of the Sixth Committee (28 October 1948) UN Doc A/C.6/SR.72; see also General Assembly, Summary Record of the 76th Meeting of the Sixth Committee (4 November 1948) UN Doc *A/C.6/SR.76*
[208] n(15) Goldsmith at 247
[209] UN Economic and Social Council, Summary Record of the 26th Meeting of the Ad Hoc Committee on Genocide (30 April 1948) UN Doc E/AC.25/SR.26
[210] n(15) Goldsmith at 247

no intent to destroy a given group'.[211] The French and Greek delegations agreed to that effect.[212] Unusually, this does not actually seem to be the object of the debate on intent as one might expect. More so, the inclusion of intent was to 'emphasise that the prohibited acts were committed not to target an individual… but as a result of his/her association with the targeted groups'.[213] In effect, its function was to make a distinction between the crime of homicide and that of genocide; 'the characteristic' which engaged this distinction 'was the intention to destroy a group'.[214] This view was reiterated at a later date by the US, who maintained that 'it was, indeed, the intent to destroy a group which differentiated the crime of genocide' from homicide, a view with which the Belgian delegate agreed.[215] As such whilst the delegation of the USSR advocated for the removal of intent from the definition, and this proposition received some support,[216] intent was kept in the definition as a way to distinguish genocide from homicide. The significance of this would be to ensure that the Convention reflected the wording of the resolution which gave rise to its drafting, the opening sentence of which made express reference to the distinction between the two crimes.[217]

Subsequent developments do not reflect the intentions of the drafters with regard to the *dolus specialis* or intent in general. Prior to the *Akayesu* trial heard before the ICTR, *dolus specialis* had not been mentioned as the requisite standard of intent attached to genocide in any UN documents or legal texts.[218] The issue did arise in certain ILC conferences and councils, but it cannot be said that the outcome of any of these events was a consensus on stringent standards of intent. As such, that it was adopted during the *Akayesu* trial is puzzling. What is even more puzzling is that it was allowed to develop in a manner which has had such a negative impact on the effectiveness of the Convention. If the Court was to search for a 'very particular reason' to depart from its own precedent, the defiance of the object and purpose of the Convention presented by its current understanding of specific intent, as well as the lack of support such an interpretation receives from its *travaux preparatoire,* could provide adequate motive to do so.

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[211] UN General Assembly, Summary Record of the 73rd Meeting of the Sixth Committee, UN Doc A/C.6/SR.73
[212] UN Economic and Social Council, Summary Record of the 13th Meeting of the Ad Hoc Committee on Genocide (20 April 1948) UN Doc E/AC.25/SR.13 (French Delegate); UN General Assembly, Summary Record of the 92nd Meeting of the Sixth Committee, UN Doc A/C.6/SR.92 (Greek Delegate)
[213] n(15) Goldsmith at 248
[214] UN General Assembly, Summary Record of the 69th Meeting of the Sixth Committee, UN Doc A/C.6/SR.69, Panamanian Delegate
[215] n(211) 73rd Meeting of the Sixth Committee
[216] ibid
[217] UNGA Res 96(1)
[218] n(15) Goldsmith at 254

Inconsistent subsequent practice amongst judiciaries and states alike, and the provisions of the Statute and Vienna Convention, would provide the means of exacting reconsideration in a legally comprehensible manner.

III.III: Current regime of intent and starvation

Whilst the jurisprudence of the ICTR left broad deference to infer genocidal intent, subsequent rollbacks enacted by the ICTY and the Court have resulted in a stringent regime pertaining to the establishment of genocidal intent. As such we are left with two avenues by which to pursue a finding state responsibility; through the disclosure of a concerted plan, or through the identification of a consistent pattern of conduct which points only to specific intent. Concerning the concerted plan, both criminal tribunals held that a policy was not a requisite element of the crime of genocide. Rather, it is hard to conceive of it occurring without one, and disclosure of a plan can do a great deal in terms of identifying genocidal intent.[219] Given the practical need for widescale state involvement in starving a group of people, proving the existence of a concerted plan may in certain circumstances constitute a realistic means by which to establish specific intent.[220]

With respect to inference of specific intent through a pattern of conduct, theoretically the door is open to do so. However the Court has set a high bar for finding states responsible through such inference, essentially limiting such findings to cases where there is 'smoking gun' evidence of genocidal intent.[221] This has made 'imposition of state responsibility for the direct commission of genocide virtually impossible', as the onerous standards set by the Court are unlikely to be met.[222] Indeed, in the context of genocide through starvation, the compatibility of starvation with the disclosure of a concerted plan is offset somewhat by the onerous standards of inference through a pattern of conduct. Whilst starving a group of people does require the convergence of many moving parts, the case could easily be made that the act of starvation alone was executed with the intention of, *inter alia,* causing a group of people to flee a certain area, or obtain the submission of combatants who live amongst civilians. In such instances, strong corroborative evidence would have to support any argument for specific intent, for example: where a state was shown to restrict the movement of people seeking to

[219] Antonio Cassese, 'Is Genocidal Policy a Requirement for the Crime of Genocide?' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 129
[220] ibid 136
[221] n(125) Clearwater at 36
[222] n(22) Birkland at 1646

escape the hunger; where foodstuffs were withheld from members of a group deprived of their liberty under the control of the state in question, or; continuing to withhold aid when it becomes clear that members of a group are unable or unwilling to leave a place where food insecurity is a threat to life. Even in such cases, should there remain a reasonable doubt surrounding specific intent, the Court would confer reasonable doubt on the respondent State.

That the Court would uphold its Jerichoan evidentiary burdens to the detriment of the efficacy of the Convention signals the necessity of a departure from precedent. Whilst the Court is not in the habit of changing its mind, it has stated on multiple occasions that it is a possibility, should there be compelling reasons to do so. Such reasons may include the absurd outcome of state responsibility being theoretically permitted yet practically prohibited by the same judgment, the current legal construction of specific intent defying the object and purpose of the Convention, and the lack of support this interpretation of intent receives from the preparatory work. At the very least, a reconsideration of specific intent would entail a recognition that two intentions may coexist, or that an intention may become genocidal even if this was not initially the case. In the context of starvation, this would capture those instances where the intent was *initially* to ethnically cleanse an area whilst the effect was to destroy a group or part thereof. At most, the reconsideration would resemble the dictum of the *Akayesu* trial, in which judicial mechanisms were given broad deference to infer genocidal intent from presumption of fact. This would allow the Court to appreciate the broad scale of state implication necessitated by starvation. If multiple state organs worked in tandem in pursuit of a policy of starvation which led or could have led to the total or partial destruction of a group, it would be reasonable to suspect that there may be a genocidal intent behind such thorough coordination. The current interpretation of intent actively works against the consideration of these suspicions.

CHAPTER IV: CASE STUDY

It is testament to the persistence of genocide that despite the differing contexts surrounding the selected genocides and the judgments of the Court, the constitutive elements of their substance are more alike than they are different. In each of the Armenian, Ukrainian and Holocaust cases, the efficient bureaucracy of the state machine was apparent. This is reflected in the Court's finding that a concerted plan or policy may be indicative of genocidal intent. Similarly, the broad and consistent range of acts committed in these cases finds a parallel in the inference of specific intent through a consistent pattern of conduct, flawed as it may be. The enduring fascination with *who* participated in genocide is duly addressed by the principle of attribution.[223] Other elements such as the cumulative genocidal effect of crimes committed together – for example, forced deportation alongside methods seeking the physical destruction of the group – have been addressed by judicial mechanisms.[224]

Recognition of common elements between the old and the new does not have to be an exercise in historical passivity. Consideration of how genocide was exacted through starvation in the past, in light of the present reasoning of the Court, can further the understanding of whether states may be responsible for that crime in the future. The objective of this section will thus be to apply the historical and legal analysis undertaken in the previous sections to the facts of a case currently pending before the Court. More specifically, the case brought before the Court by South Africa against Israel.[225]

IV.I: Context of the Israel-Hamas Conflict

The background to the case is the Israel-Hamas conflict which has been ongoing since October of 2023. The conflict was catalysed by a horrific terrorist attack perpetrated by Hamas against the state of Israel, in which over 850 civilians lost their lives and a further 250 were taken hostage. The campaign of violence enacted against the Palestinian people by Israel since then, ostensibly on the basis of self-defence, has been particularly forceful. Tens of thousands of Palestinians, the vast and overwhelming majority of them civilians, have been killed during the conflict. In late December of 2023, violence had already reached the point where South Africa felt compelled, as a party to the Convention, to request from the Court the indication of

[223] n(23) Weiss-Wendt at 46

[224] *Prosecutor v Stakić*, (Judgment) IT-97-24-T (31 July 2003) para 557: 'The Trial Chamber recalls in this context that deporting a group or part of a group is insufficient if it is not accompanied by methods seeking the physical destruction of the group'

[225] n(198) *South Africa* (Request for the indication of provisional measures)

provisional measures. The Court so indicated the following month, ordering Israel to 'take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention'.[226] The compliance of Israel with the binding orders handed down by the Court has been lacklustre. In failing to make publicly available reports detailing how it is complying with these measures, Israel has displayed unwillingness to face public scrutiny.[227] Moreover, this failure has cast doubts on their compliance with international law generally, as the period since the indication of provisional measures has seen civilians (among them countless women and children), aid workers and infrastructure come to senseless, irreparable harm at the hands of the Israeli government. The humanitarian situation in Gaza defies hyperbole. Chronic impunity has allowed this to happen.[228]

The reasons for focusing on this case in particular are many. For a start, it exists squarely at the intersection between genocide, starvation and state responsibility. In its application instituting proceedings, South Africa emphasises the risk now faced by Palestinians of death by starvation, noting that thousands of children were suffering from 'wasting', the most serious form of malnutrition, and that the possibility of starvation claiming a greater number of lives than other more direct methods of warfare was imminent.[229] Additionally, the case recalls many of the obiter elements surrounding historic cases of genocide, such as asymmetrical power structures, colonialism, dehumanisation, and impunity. One such observable factor is how the unwillingness of states to cooperate hinders investigation into genocide; Israel has provided no information, and granted no territorial access, to those wishing to better understand the humanitarian situation in Palestine.[230]

It must be noted that the manner in which both parties to the conflict have conducted hostilities is reprehensible.[231] However this work will focus on the actions of the state of Israel for three reasons. Firstly, the scope of this paper is naturally defined by the limits presented by the

[226] n(198) *South Africa* (Provisional measures judgment) para 78
[227] Refugees International, *Siege and Starvation: How Israel Obstructs Aid to Gaza* (2024) 9. Accessible at: https://www.refugeesinternational.org/reports-briefs/siege-and-starvation-how-israel-obstructs-aid-to-gaza/
[228] UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories' (2024) A/79/363, 8 (*Special Committee*)
[229] n(198) *South Africa* (Request for provisional measures) 68-70
[230] UNHRC, Fifty-sixth session 18 June – 12 July 2024 'Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel' (14 June 2024) UN Doc A/HRC/56/26, 2
[231] OHCHR, 'Six-month update report on the human rights situation in Gaza: 1 November 2023 to 30 April 2024' (08 November 2024) 4

consideration of state responsibility. The status of Palestine as a state is contentious. Whilst it recognises the competence of the Court, it only holds observer status at the UN. Whilst cognisant of the fact that UN membership does not a state make, considerations of such issues are outwith the scope of this work. Secondly, if one was to advance on the assumption that Palestine was a state proper, the relationship between that state and Hamas would entail a complex and lengthy examination on questions of attribution. As interesting as this would be, it would contribute nothing towards the overall objective of this work, given that there is no evidence to suggest that either Palestine or Hamas are waging a campaign of genocidal starvation against Israel. Finally, the analysis hinges on the case submitted to the Court by South Africa in which Israel, not Palestine, is the respondent state.

The analysis undertaken will focus on two factors reflective of the jurisprudence of the Court; existence of a concerted plan or policy and of a consistent pattern of conduct. The issue of attribution will be considered only within the context of each of these factors, its nature in this case being such that it does not warrant a separate scrutiny of its own. The objective of this analysis is to gain an understanding of how the Court may approach the issue of state responsibility for genocide by starvation.

IV.II: Starvation in the Israel-Hamas Conflict

It is unquestionable that starvation has been utilised as a weapon of war against the Palestinian people by Israel. Over ninety per cent of the population of Gaza is thought to be facing high levels of food insecurity.[232] Half of these cases indicate a catastrophic level of hunger, according to the Integrated Food Security Phase Classification Initiative, with the Secretary-General of the UN acknowledging this as 'the highest number of people facing catastrophic hunger ever recorded – anywhere'.[233] Solely that the food situation of a protected group has reached a critical level of insecurity does not in and of itself indicate that genocide is taking place. Without regard as to the detrimental humanitarian effect of the act, genocide can only be established where there is the intent to commit it. As the Court had made quite clear, the existence of such intent may, in the absence of a confession, be ascertained in two ways: through disclosure of a concerted plan or policy, or the existence of a consistent pattern

[232] n(228) *Special Committee* at 11
[233] ibid

of conduct which can only point towards specific intent. Each of these will be addressed in turn.

IV.II.I: Concerted plan or policy

Despite making it clear that the existence of a concerted plan or policy can contribute a great deal towards establishing genocidal intent, the Court does not expand upon what the constituent elements of a concerted plan or policy may actually be. Nevertheless, by its wording one could hazard a guess that the organisational factors of the *actus rei* of genocide are at stake. Aspects such as statements by officials, state communications, policy documents and coordination of multiple organs towards a common objective all indicate the existence of a concerted plan. Despite the fact that genocide necessarily requires a certain degree of organisation on part of the state, evidence of such organisation is often not readily found. This was an obstacle the commission of inquiry for Darfur was unable to overcome, with a lack of important documentation regarding military activities received from the Sudanese government preventing a comprehensive analysis of policy from being carried out. This practice is, to a certain extent, repeated by an Israeli state unwilling to cooperate with impartial investigatory mechanisms. Nevertheless, there is some insight to be gained in spite of this lack of support.

In *Krstic,* the trial chamber noted that 'inflammatory public statements made by one group against another – *short of calling for killings* - are common practice in any war and cannot be taken as evidence of genocidal intent'.[234] Thus in order for a statement to be taken as evidence of specific intent, it must clearly convey a desire for the physical construction of the group. Calls for a group to leave a certain area may not necessarily qualify. With this in mind, there have been multiple high-profile statements made by Israeli officials which advocate for the eradication of the Palestinian people. Shortly after the beginning of the conflict, erstwhile Israeli defence minister Yoav Gallant stated that '"Gaza will never return to be what it was", adding that 'released all restraints' in permitting the Israeli Defence Forces (IDF) to 'use

[234] *Prosecutor v Krstic* (Trial judgment) IT-98-33 (2 August 2001) para 593; emphasis added by author

everything' against Hamas.[235] This statement indicated that the IDF had been given 'blanket authorisation' to target civilians in Gaza indiscriminately.

Current defence minister Israel Katz, who at the beginning of the conflict was serving as foreign minister, stated during his tenure in the latter post that the Palestinian people 'will not receive a drop of water or a single battery until they leave the world'.[236] Aside from the intent transmitted by the words 'leave the world', this statement is notable in two other ways. Firstly, taken in conjunction with the prior statement of Yoav Gallant, it represents both the foreign minister and defence minister openly making genocidal statements within their official capacity. That two thirds of the *troika* have done so gives an insight into the intentions of Israel. These are not low-level functionaries; they represent the core of executive government. Secondly, Katz made this statement just days after leaving his post as minister for energy and infrastructure. It brings to mind the special significance of this governmental department in the conflict. In October of 2023, the minister of energy and infrastructure announced that infrastructural aid to Gaza would be restricted, noting that this is what needed to be done to 'a nation of murderers and butchers'.[237] Gaza is wholly dependent on Israel for electricity, fuel and water. The policies implemented by the department for energy and infrastructure have a significant bearing on the wellbeing of Gazans. Within the Israel-Hamas conflict, the intentions of this department thus take on a greater significance. Moreover, it raises the question of exactly whose statements can contribute to the formulation of genocidal intent.

Within the context of the inchoate offence of incitement to genocide, the normal rules of attribution would be followed. However, it is unclear whether incitement to genocide and statements by officials indicating specific intent are materially equal. Per the Court's finding that Serbia failed to prevent genocide, rather than held responsibility for it, a higher evidentiary burden is placed on the latter. The conservative stance taken by the Court thus far with regard to finding intent, would lead one to believe that some kind limit would be formulated on the officials whose words can be taken as construing genocidal intent. Certainly, the aforementioned *troika* will always be considered as conveying the intent of the state. It may be

[235] Times of Israel, 'Gallant: Gaza will never return to be what it was' (accessible at: https://www.timesofisrael.com/gallant-israel-moving-to-full-offense-gaza-will-never-go-back-to-what-it-once-was/

[236] This statement was published in a post on X. See: https://x.com/Israel_katz/status/1712876230762967222?lang=en

[237] n(228) *Special Committee* at 10

that the statements of others will only be taken into account if their area of responsibility relates to the commission of genocide in some way. In such a case, the statements of the minister for energy and infrastructure would hold sway in the indication of genocidal intent.

Top-down, dehumanising language has been employed by Israeli officials across multiple departments, showing that the Israeli government generally seems to be aligned in implementing policies towards the destruction of the Palestinian people.[238] Analysis of the Armenian genocide, Holodomor and Holocaust showed that genocide through starvation was inherently executed by multiple state departments at any given time. Within the Israeli context, such coordination can clearly be seen. Under the auspices of the defence ministry, the IDF carries out military operations within the occupied territories, whilst the Crossing Points Authority restricts the movement of people and aid into Gaza. The ministry of energy and infrastructure has severely restricted the transfer of electricity, fuel and water into Gaza, which has drastically reduced the ability of Gazans to feed themselves. Moreover, the interior and foreign ministries have respectively denied impartial humanitarian mechanisms access to Gazan territory, and refused to face public scrutiny over their actions pursuant to the indication of provisional measures. To what extent the Court will be willing to recognise this extensive interdepartmental coordination as genocidal policy is difficult to say. However, the statements of Israeli officials, the catastrophic humanitarian results of this governmental policy, and the fact that multiple departments worked in tandem to achieve them, do seem to point towards a policy of genocide.[239]

IV.II.II: Consistent pattern of conduct

Should the existence of a concerted plan or policy toward a genocidal end not prove convincing, the Court may infer specific intent from the conduct of the state in question. The acts of Israel in the midst of the hostilities have created a dire food security situation. This was done through the obstruction of humanitarian aid, targeting of aid workers and facilities, destruction of civilian objects, and manipulation of movement of non-combatants. Whilst this has led to the death of thousands of Palestinians over the course of roughly 18 months of conflict, the existence of specific intent *prima facie* is not sufficient in imposing state

[238] n(231) OHCHR at 28
[239] n(228) *Special Committee* at 9

responsibility for genocide. The pattern of conduct must be such that no intention other than to commit genocide can be drawn from it.

i) Obstruction of humanitarian aid

Since Hamas seized power over Gaza in 2007, Israel has enacted a comprehensive blockade by sea, air and land over the territory, restricting imports into the region to a bare minimum.[240] The legality of this blockade is questionable. Israel cites international humanitarian law as its justification for doing so. As previously discussed in this paper, Article 23 of the Fourth Geneva Convention is not so much a prohibition on obstructing humanitarian aid as it is a guideline on how to do so legally.[241] However, such is the effect on civilian non-combatants that the blockade is often seen as disproportionate to the military objective sought. This divergence in legal opinion can be seen in the Palmer Report's endorsement of the legality of the blockade, and the ensuing backlash that this received from states.[242] Keeping in mind the reliance of Gaza on external aid and the enhanced restrictions imposed by Israel since the outbreak of the conflict, it naturally follows that negative humanitarian consequences have stemmed from the obstruction of aid. This obstruction has manifested itself in both the blockade, and the targeting of humanitarian aid workers.

From October, Israel announced a 'complete siege' of Gaza, severely curtailing the population's access to food, water and fuel.[243] This entailed the closure of several important entry points for goods into Gaza. Kerem Shalom, the 'main point of entry for goods' into Gaza, was closed for a period of over two months. It was only reopened in December after a period of intense international pressure. The Rafah crossing was closed completely for two weeks, upon which it was reopened.[244] In both cases, the reopening of the crossing points was essentially superficial. The number of trucks permitted passage of these points has dropped significantly since their reopening, representing a massive reduction in the amount of aid reaching Gaza. It is estimated that the reduction in aid is such that the current number of trucks passing into Gaza is between 10 and twenty per cent of the pre-conflict baseline.[245]

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[240] Russell Buchan, 'THE PALMER REPORT AND THE LEGALITY OF ISRAEL'S NAVAL BLOCKADE OF GAZA' (2012) 61 *International and Comparative Law Quarterly* 264, 265
[241] n(47) GCIV
[242] n(240) Buchan at 265-266
[243] n(230) UNHRC at 10
[244] ibid at 11-17
[245] n(227) Refugees International at 12

The issue is not only that border crossings have been closed, but that the practices surrounding permitting or denying the entry of aid are obscure. Additional measures pertaining to the inspection of trucks have been implemented at border crossings.[246] This has resulted in massive amounts of humanitarian aid being turned away by Israeli officials, with the reasons for these denials often being unclear.[247] Authorities regularly turn away shipments that contain so-called prohibited items. However, to everyone except Israeli officials, what constitutes a prohibited item remains a vague and ambiguous matter.[248] Broadly speaking there are two possible overarching practices giving rise to this situation. One is that the personnel charged with controlling entry of aid into Gaza through crossing points are instructed to arbitrarily reject a certain percentage of vehicles, regardless of what they contain. The other, and more likely practice given the fact that dual-use items are a genuine concern, is that the Israeli officials do have a comprehensive list of items to reject, and that they do use this list to deny the passage of aid into Gaza. The issue is that no one else has this list, and the Israeli government are unwilling to shed any light whatsoever on which items are on it. Moreover, it is difficult to infer by deduction what exactly gives rise to denial of entry, as the presence of one prohibited item leads to the rejection of the whole shipment without further explanation.[249] The foreseeable, natural consequence of such practice is that a percentage of aid much lower than that needed to sustain even the most miserable quality of life ends up entering Gaza.

ii) Targeting of aid workers and facilities

Once aid does actually end up in Gaza, an entirely new set of precarities threatens its delivery to those in need. Throughout the course of the conflict, Israel has systematically targeted aid workers and their facilities, treating them almost like military objectives. Numbers provided by the United Nations Relief and Works Agency (UNRWA) illustrate this point cogently. Between October of 2023 and July of 2024, there were 74 reported instances of military interference at UNRWA premises. 189 UNRWA installations had been damaged or destroyed as a result of the use of military force, and over 200 personnel had lost their lives. This is the highest number of UN staff casualties recorded 'in any recent conflict'.[250] The Israeli authorities know exactly where the premises of UN and other aid agencies lay, as they are

[246] n(230) UNHRC at 11
[247] n(227) Refugees International at 17
[248] ibid at 20
[249] ibid
[250] n(228) *Special Committee* at 24

provided with a comprehensive list of protected sites. Attacks on such sites are so common that there is belief amongst aid personnel that they are deliberate; 'not a deconfliction list, but basically a strike list', as one NGO staffer put it.[251]

Attacks on facilities themselves have 'severely damaged the ability' of aid organisations to provide relief to the civilian population of Gaza[252] They are complemented by attacks on humanitarian personnel in areas where aid itself is distributed. In a six-month period the UN Office for the Coordination of Humanitarian Affairs estimated that at least 195 aid workers had been killed in Gaza. In April 2025, IDF soldiers were accused of killing 15 Palestinian aid workers. Israeli authorities had initially denied the incident, until incontrovertible video footage of the event was recovered and circulated widely amongst media sources. The killing of such workers and civilian police further hinders the distribution of humanitarian aid.[253] Certain areas critical to the distribution of aid have been the focus of particularly intense shooting and shelling campaigns, such as the Al Nablusi and Al Kuwaiti roundabouts in Gaza City, 'two points through which vital humanitarian assistance arrives' to the region. This includes the indiscriminate shooting of people who had gathered to received aid.[254] The repeated targeting and killing of aid workers is so egregious and blatant that even the US has had occasion to reprimand Israel for their actions.[255] Moreover, it compounds the effect of the widespread rejection of aid from border crossings. If less people are there to distribute aid, and if those who need it fear for their lives in going to get it, then more are going to starve to death.

iii) Destruction of civilian infrastructure

The multi-pronged approach taken by Israeli authorities in preventing humanitarian aid from reaching Gaza is bolstered by a parallel campaign targeting civilian objects. Within this, there is a concerted effort to destroy civilian infrastructure which could lessen the impact on food security of the obstruction of humanitarian aid. Just 3 months into the conflict, Israel had already destroyed almost a quarter of Northern Gaza's agricultural land. Within the same time frame, seventy percent of that region's fishing fleet had also been destroyed.[256] Despite the

[251] n(227) Refugees International at15
[252] n(231) OHCHR at 17
[253] ibid at 6
[254] ibid at 14-15
[255] Isaac Chotiner, 'Does the Biden Administration Want a Long-Lasting Ceasefire in Gaza?' *The New Yorker* (New York, February 28 2024)
[256] n(228) *Special Committee* at 11

indication of provisional measures issued by the Court, Israel seemingly stepped up their campaign of targeting civilian infrastructure. A broad range of installations related to food production, such as ‘farmland, fisheries… warehouses, food processing facilities, wells, greenhouses, irrigation systems, [and] markets’ were systematically destroyed.[257] Bakeries and wheat mills were particularly targeted, decimating the local capability to convert what little flour was being delivered into bread.[258] To illustrate further the disregard in which the binding orders of the Court were held by Israel, by the end of July almost two thirds of arable land in Northern Gaza had been damaged, the majority of the meat and dairy producing livestock had been killed, and with it food production brought to a complete halt.[259]

Other factors may serve to strengthen the genocidal nexus existing between the obstruction of aid and the destruction of civilian infrastructure. For example, the people of Gaza have been subjected to repeated, massive displacement since the beginning of the conflict.[260] These displacements have taken place in the context of severe hunger, and have often simply led the deportees into more danger than they were originally in. The Office of the High Commissioner for Human Rights noted that, through forcing the displacement of individuals, Israel had ‘instead created a concentration of highly vulnerable civilians effectively in areas of active hostilities’.[261] The argument that such displacement was made towards the ethnic cleansing of an area rather than genocide is weak in this instance for two reasons; Palestinians were ‘evacuated’ into areas where active hostilities were taking place, and they were repeatedly allowed to return. Additionally, despite the emergence of a man-made humanitarian disaster which is clearly the result of Israel’s wartime policies, the state has repeatedly refused to either acknowledge the effects of their actions or diverge from them to lessen the negative humanitarian impact. This is evinced by the ‘the substantial and increasing numbers of casualties… with no change in Israeli policies’ since the beginning of the war.[262] Even at the time of writing, aid is still obstructed, humanitarian workers are targeted, and civilian

[257] ibid at 12
[258] n(227) Refugees International at 13
[259] n(228) *Special Committee* at 11
[260] n(231) OHCHR at 6
[261] Ibid 24-25
[262] n(230) UNHRC at 17

infrastructure has largely been reduced to rubble. Starvation has remained at catastrophic levels.[263]

IV.III: The question of genocide before the Court

It seems that no matter how incontrovertible the evidence presented in light of such a question is, the outcome remains that one hundred people will give that many different answers. In consideration of how the Court may address the issue of genocide through starvation in Palestine, it is useful to be reminded of the basic elements at stake. In order for a state to be responsible for genocide, it must be shown that an act falling under the categorisation of Article II of the Convention was committed. There must be a specific intent to commit genocide, and the act must be carried out by someone whose actions are attributable to the state. As such, a three-part test of sorts is formed composed of the act, the intent, and the attribution. With analysis of attribution not necessary by virtue of the state nature of all perpetrators involved, this section will focus on the act and the intent behind it.

There is ample jurisprudence to affirm that starvation falls under Article II(c) of the Convention, an understanding which is also supported by the preparatory work of the Convention. It is clear that Israel has utilised starvation as a weapon of war during the course of the conflict. This is evinced by the fact that humanitarian aid has been roundly restricted from entering Palestine, aid workers and facilities have been targeted, sites where humanitarian aid is distributed have seen shootings directed at aid workers and civilians alike, and civilian infrastructure allowing for the growth and production of food have been widely neutralised. The effect of these actions has been to plunge Palestine, and in particular northern Gaza, into circumstances of food insecurity not recorded before in history.[264] In doing so, conditions of life calculated to bring about the physical destruction of a group in whole or in part have been inflicted on the Palestinian people.

The Court may infer specific intent from the existence of a concerted plan or policy towards genocide, or from a consistent pattern of conduct which can only point towards a genocidal

[263] Human Rights Watch, 'Gaza: Israel's Imposed Starvation Deadly for Children' (April 2025) accessible at: https://www.hrw.org/news/2024/04/09/gaza-israels-imposed-starvation-deadly-children#:~:text=%28Beirut%2C%20April%209%2C%202024%29%20%E2%80%93%20Children%20in%20Gaza,a%20war%20crime%2C%20Human%20Rights%20Watch%20said%20today.

[264] n(228) *Special Committee* at 11

intent. Analysis of the Israeli governments actions with regard to a concerted plan or policy is difficult to obtain, given that the Court did not expand on what the elements of such a plan may be. Statements made by senior Israeli officials can, however, give an insight into what the intent behind government policy entails. Certain public statements which seem to call for the annihilation of the Palestinian people appear to confer genocidal intent behind the policies of the government. Likewise, the coordination displayed between multiple state departments in depriving the population of food would suggest that the policies of each department do not exist in isolation, but exist as part of a larger concerted plan.

The possibility of inferring genocidal intent through a consistent pattern of conduct faces a prohibitively high evidentiary burden. Throughout the course of the conflict, Israel has inflicted conditions of starvation on the Palestinian people through a coordinated, systematic pattern of conduct. While the restrictions placed on humanitarian aid and destruction of civilian infrastructure did initially take place at the start of the conflict, the Israeli government has continued to pursued these policies to massively detrimental effect. This continuation constitutes a consistency that has withstood the indication of provisional measures and intense international pressure. The question is, whether this pattern of conduct points to genocide and genocide alone. There is reason to believe that it does. The fine delineation between ethnic cleansing and genocide may not serve as a defence for Israel in this case. If the intention of Israel was to ethnically cleanse Palestine, they will have to conjure up answers to difficult questions regarding their practice of limiting the movement of Palestinians. For example, if the intention was to cause a great flight of Palestinians into bordering countries, Israel's practice of closing border crossings for extended periods of time would contradict this intention. As would the controlled displacement of Palestinians into areas of active hostilities. Further still, the fact that Israel allowed Palestinians to return to their territory, after they had fled in great numbers, is completely incongruous with a desire to simply rid a region of a certain group, rather than exterminate them completely.

IV.III.I: External circumstances

Even whilst accounting for the generally conservative stances favoured by the Court with regard to inference of genocidal intent, there are circumstances obiter to the instant case which may influence the Court towards inferring so. For example, in the Balkan genocide cases, the Court was able to leverage the findings of an international criminal tribunal which were as costly as they were detailed. In the South African case, however, the same level of independent fact-finding is simply not a possibility. As such the Court will more than likely make use of the field research and analysis conducted by various commissions and committees set up under the UN banner; these mechanisms are without fail extremely critical of the conduct of Israel, with one even going so far as to conclude that it was 'consistent with the characteristics of genocide'.[265]

Furthermore, the Court exists as the principal judicial organ of an international order which has grown increasingly fed up with the lack of respect consistently shown by Israel towards the rule of law. In the last few years, there has been an advisory opinion that found Israel's continued occupation of Palestine to contravene international law, multiple calls for ceasefire frustrated by US vetoes on the security council, a blatant disregard for the indication of provisional measures, embarrassing tantrums before the general assembly involving tiny paper shredders, and an International Criminal Court arrest warrant issued for the leader of what is supposed to be a free, democratic state. Frustratingly, none of this is new, per se. The recent actions of Israel are built on a legacy of 'creative' interpretations of international law, such as the practice of pre-emptive self-defence against Iraq in 1981 which was forcefully condemned by the Security Council.[266] For the sake of brevity, further analysis of like events will not be undertaken.

Whether the Court will take into account these external factors in its reasoning remains to be seen; whether it *should* essentially boils down to the tired debate of deontology and teleology. The Court has already borrowed evidentiary burdens from criminal law for its genocidal rulings; perhaps it will have something to say about repeat offenders too. Or perhaps it will not see the need to do so, given the not-inconsiderable evidence pointing towards the genocidal intent of Israel. That said, pre-emptively rationalising before the Court is a dangerous game, bearing in mind that it can buck trends in the shadow of its own conservatism. For example, once upon a time there was 'not a single instance of genocide in recorded history which was not committed either directly by a state, or by a state through one of its proxies'.[267] That is, until the Court passed judgment on the matter.

[265] ibid at 25
[266] UNSC Res 487
[267] n(87) Milanovic at 603

CONCLUSION

This thesis set out to establish the conditions under which a state may be found responsible for genocide through starvation under the provisions of the Convention. In doing so, research was directed towards understanding the elements common to instances of genocide through starvation, evaluating whether the current legal regime of responsibility, attribution and intent nullified the possibility of imposing responsibility on the state for genocide through starvation, and assessing how these findings may inform the stance taken by the Court with regard to a relevant case pending before it.

Historical analysis of three select genocides which utilised starvation revealed a set of commonalities in their commission. Each instance saw a high degree of state involvement, with a coordinated effort sustained across multiple departments. In each case, genocide was a matter of policy, with the destruction of a group or part thereof emanating from government decisions. Additionally, starvation was used concurrently with other methods such as forced marches and restriction of movement. The current regime of responsibility and attribution facilitates the imposition of responsibility on the state for genocide through starvation. The degree of coordination needed to starve a group of people necessitates a state machine, and the principle of attribution casts a wide net over state actors. The Court's understanding of specific intent, however, is problematic. It is submitted that a reversion to the threshold of inference espoused in *Akayesu* is favourable. This would better serve the object and purpose of the Convention, and finds support in state practice and the *travaux*.

The *South Africa* case presents the first opportunity to consider starvation through the lens of genocide. Israel has inflicted serious hunger on the population of Palestine through obstruction of humanitarian aid, targeting of humanitarian aid personnel and facilities, and destruction of civilian infrastructure. This has given rise to previously unseen levels of food insecurity. Statements by senior Israeli officials, alongside the coordination observed between departments involved in inflicting starvation, suggests the existence of a concerted plan or policy. That Palestinians were allowed to return to Gaza after they had fled, suggests that the intent behind Israel's policy is not to ethnically cleanse, and therefore more likely genocidal. Extenuating legal and political circumstances may influence the Court's decision in imposing state responsibility for genocide on Israel.

Ultimately this thesis serves as an early contribution to the understanding of an area of study which, whilst not having received much attention to date, will come to the fore of international legal debate after the merits judgment of the *South Africa* case is handed down.

RESUMÉ

Si l'on devait désigner la plus grande réalisation humanitaire du XXe siècle, on pourrait avancer un argument de poids en faveur de la quasi-éradication de la famine. Les progrès en matière de santé publique, les développements dans le secteur des sciences agricoles, la croissance des libertés politiques et un effort humanitaire intense et coordonné ont fait en sorte que les risques de mourir de la famine sont les plus faibles jamais enregistrés dans l'histoire de l'humanité. Un argument tout aussi fort pourrait être avancé en faveur de la création d'un ordre juridique international multilatéral, qui consacrerait les principes des droits fondamentaux de l'homme, de la dignité et de l'égalité souveraine. La Convention pour la prévention et la répression du crime de génocide (la Convention) est un excellent exemple de ce nouvel ordre juridique. Les dispositions «humanitaires et civilisatrices» de cette convention ont été adoptées à l'unanimité par les membres des Nations unies, ce qui témoigne d'un engagement généralisé en faveur de l'État de droit. Bien entendu, rien n'existe isolément, la famine et le génocide ayant été étroitement liés tout au long de l'histoire.

Ces deux concepts sont parmi les plus anciens. Depuis que l'humanité existe, elle connaît la faim. Le juriste sud-africain Leo Kuper a évoqué l'ancienneté du génocide en disant que «*the word is new, the crime ancient*». Le génocide tel que nous le connaissons aujourd'hui est un phénomène que l'on peut observer dans les anciennes écritures israélites et juives. Dans le Deutéronome, les Israélites reçoivent l'ordre d'entrer en Canaan et de « massacrer ses habitants indigènes », de sorte qu'aucun ne soit épargné. Les récits bibliques provenant de cette région ne sont pas les seuls à donner lieu à des incidences génocidaires. Des récits historiques font état d'agressions perpétrées par les Babyloniens à l'encontre du peuple de Juda, qui ont dévasté la population par la violence et la famine. On peut y voir les prémices d'un thème historique, l'utilisation de la famine pour commettre des atrocités de masse.

Le siège de Carthage par Rome a donné lieu à un anachronisme tristement célèbre: du sel a été semé dans les champs, rendant la terre stérile pour les générations à venir. Indépendamment de la véracité de l'anecdote, infliger la famine par la guerre de siège était une méthode privilégiée dans la quête de l'avènement de Rome dans le monde; raser des communautés entières comme Carthage l'était un peu moins. Les puissances coloniales du début de l'ère moderne et de l'ère moderne continueront à infliger la famine aux peuples par la réquisition, le siège et le blocus naval. La conquête de l'Irlande par Oliver Cromwell entraînera l'éradication de centaines de milliers de personnes par la famine. Parmi les innombrables atrocités commises par les

puissances européennes en Afrique, la famine est particulièrement remarquable dans le génocide du peuple Herero dans l'actuelle Namibie. La corrélation entre génocide et famine est encore plus forte si l'on tient compte de l'asservissement des peuples indigènes par les colons d'Amérique du Nord et d'Australie. L'omniprésence de ces deux éléments dans l'histoire rend d'autant plus impressionnantes les réalisations humanitaires du XXe siècle mentionnées plus haut, avec une petite réserve: la famine est revenue, tandis que la Convention sur le génocide n'a pas réussi à empêcher les génocides.

Cette thèse a pour but d'établir les conditions dans lesquelles un État peut être jugé responsable de génocide par inanition en vertu des dispositions de la Convention. Ce faisant, la recherche a été orientée vers la compréhension des éléments communs aux cas de génocide par inanition, l'évaluation du régime juridique actuel de la responsabilité, de l'attribution et de l'intention qui annule la possibilité d'imposer la responsabilité de l'État pour génocide par inanition, et l'évaluation de la façon dont ces résultats peuvent informer la position prise par la Cour à l'égard d'une affaire pertinente pendante devant elle.

L'analyse historique de trois génocides sélectionnés qui ont eu recours à la famine a révélé un ensemble de points communs dans leur commission. Dans chaque cas, l'État s'est fortement impliqué, avec un effort coordonné entre plusieurs ministères. Dans chaque cas, le génocide était une question de politique, la destruction d'un groupe ou d'une partie de celui-ci émanant de décisions gouvernementales. En outre, la famine a été utilisée en même temps que d'autres méthodes telles que les marches forcées et les restrictions de mouvement. Le régime actuel de responsabilité et d'attribution facilite l'imposition de la responsabilité de l'État pour le génocide par la famine. Le degré de coordination nécessaire pour affamer un groupe de personnes nécessite une machine d'État, et le principe d'attribution permet d'élargir le champ d'action des acteurs étatiques. L'interprétation de l'intention spécifique par la Cour pose toutefois problème. Nous soutenons qu'un retour au seuil d'inférence adopté dans l'affaire Akayesu est favorable. Cela servirait mieux l'objet et le but de la Convention, et trouve un soutien dans la pratique des États et dans les travaux de la Cour.

Le cas de l'Afrique du Sud offre pour la première fois l'occasion de considérer la famine sous l'angle du génocide. Israël a infligé une grave famine à la population palestinienne en faisant obstacle à l'aide humanitaire, en prenant pour cible le personnel et les installations d'aide humanitaire et en détruisant les infrastructures civiles. Cette situation a engendré des niveaux d'insécurité alimentaire jamais atteints auparavant. Les déclarations des hauts fonctionnaires israéliens, ainsi que la coordination observée entre les services impliqués dans la famine, suggèrent l'existence d'un plan ou d'une politique concertée. Le fait que les Palestiniens aient été autorisés à retourner à Gaza après avoir fui suggère que l'intention derrière la politique israélienne n'est pas de procéder à un nettoyage ethnique, et qu'il s'agit donc plus probablement d'une politique génocidaire. Des circonstances politiques atténuantes peuvent influencer la décision de la Cour d'imposer à Israël la responsabilité de l'État pour génocide.

En fin de compte, cette thèse constitue une première contribution à la compréhension d'un domaine d'étude qui, bien qu'il n'ait pas reçu beaucoup d'attention jusqu'à présent, occupera le devant de la scène dans le débat juridique international après que l'arrêt sur le fond de l'affaire de l'Afrique du Sud aura été rendu.

BIBLIOGRAPHY

Literature

Books

1. Alex de Waal, *Mass Starvation: The History and Future of Famine* (Polity Press, 2018)
2. Anne Applebaum, *Red Famine: Stalin's War on Ukraine* (Penguin Random House, 2017) 213
3. Frances Stewart, *War and Underdevelopment: Economic and Social Consequences of Conflict* (Oxford University Press, 2000)
4. Hannah Arendt, *Eichmann in Jerusalem* (Viking Press, 1963) postscript
5. Henry Morgenthau, *Ambassador Morgenthau's Story* (Doubleday, 1918)
6. Jean-Paul Sartre, *On Genocide* (Beacon Press, 1968)
7. Leo Kuper, *Genocide: Its Political Use in the 20th Century* (Penguin, 1981)
8. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Address* (Carnegie Endowment for International Peace, 1944)
9. William Schabas, *Genocide in International Law* (2nd edition, Cambridge University Press, 2009)

Journal Articles and Chapters

10. A Dirk Moses, 'The Holocaust and Genocide' in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008) 534
11. Anja Seibert-Fohr, 'State Responsibility for Genocide under the Genocide Convention' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009)
12. Ann Curthoys and John Docker, 'Defining Genocide' in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008), 13
13. Anton Weiss-Wendt, 'Problems in Comparative Genocide Scholarship' in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008) 42
14. Antonio Cassese, 'Is Genocidal Policy a Requirement for the Crime of Genocide?' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009)

15. Berglind Halldórsdóttir Birkland, 'Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide' (2009) 84 *New York University Law Review* 1623
16. Bridget Conley and Alex de Waal, ‘Genocide, Starvation and Famine’ in Ben Kiernan, TM Lemos and Tristan S Taylor (eds), *Cambridge World History of Genocide Volume 1: Genocide in the Ancient, Medieval and Premodern Worlds* (Cambridge University Press, 2023)
17. Chittharanjan Felix Amerasinghe, ‘The Bosnian Genocide Case’ (2008) 21 *Leiden Journal of International Law* 411
18. Dan Stone, ‘The Holocaust and its Historiography’ in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008)
19. Donald Bloxham and Fatma Gocek, ‘The Armenian Genocide’ in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008)
20. Florent Brayard, ‘From Persecution to Genocide: The Evolution of the Nazi Anti-Jewish Policy (1938–1942)’ in Ben Kiernan, Wendy Lower, Norman Naimark, and Scott Strauss (eds) *The Cambridge World History of Genocide Volume III: Genocide in the Contemporary Era, 1914 –2020* (Cambridge University Press, 2023)
21. Florian Jessberger, ‘The Definition and the Elements of the Crime of Genocide’ in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009)
22. George Shirinian, ‘Starvation and Its Political Use in the Armenian Genocide (2017) 11 *Genocide Studies International* 8
23. Harrison Evans Salisbury*, The 900 Days: The Siege of Leningrad* (Da Capo Press, 1969)
24. Jay Winter, ‘War and Genocide in the Twentieth Century’ in Ben Kiernan, Wendy Lower, Norman Naimark, and Scott Strauss (eds) *The Cambridge World History of Genocide Volume III: Genocide in the Contemporary Era, 1914 – 2020* (Cambridge University Press, 2023)
25. Katherine Goldsmith, ‘The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach’ (2010) 5 *Genocide Studies and Prevention* 238
26. Kevin Aquilina and Klejda Mulaj, ‘Limitations in Attributing State Responsibility under the Genocide Convention’ (2017) 17 *Journal of Human Rights* 123

27. Lennert Breuker, ‘The Nature of the Genocide Case’ (2007) 2 *Hague Justice Journal* 117
28. Marko Milanovic ‘State Responsibility for Genocide’ (2006) 17 European Journal of International Law 553
29. Nicholas Mulder and Boyd van Dijk, ‘Why did Starvation Not Become the Paradigmatic War Crime in International Law?’ in Ingo Venske and Kevin Jon Heller (eds) *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press, 2021)
30. Nicolas Werth, ‘The Crimes of the Stalin Regime: Outline for an Inventory and Classification’ in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008)
31. Norman Naimark, ‘Genocide in Stalinist Russia and Ukraine, 1930–1938’ in Ben Kiernan, Wendy Lower, Norman Naimark, and Scott Strauss (eds), *The Cambridge World History of Genocide Volume III: Genocide in the Contemporary Era, 1914 – 2020* (Cambridge University Press, 2023)
32. Rene Provost, ‘Starvation as a Weapon: Legal Implications of the United Nations Food Blockade against Iraq and Kuwait’ (1992) 30 *Columbia Journal of Transnational Law* 577
33. Russell Buchan, ‘THE PALMER REPORT AND THE LEGALITY OF ISRAEL'S NAVAL BLOCKADE OF GAZA’ (2012) 61 *International and Comparative Law Quarterly* 264
34. Sam Clearwater, ‘Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the ICJ's 2007 Decision in Bosnia v Serbia’ (2009) 15 *Auckland University Law Review* 1
35. Stearns Broadhead, ‘The Conventional Definition of Genocide’ (2024) 4 *Insitutiones Administrationis - Journal of Administrative Sciences* 90
36. Taner Akçam, ‘The Armenian Genocide: An Overview’ in Ben Kiernan, Wendy Lower, Norman Naimark, and Scott Strauss (eds) *The Cambridge World History of Genocide Volume III: Genocide in the Contemporary Era, 1914 – 2020* (Cambridge University Press, 2023)
37. Thomas Franck, ‘Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?’ (2007) 6 *Washington University Global Studies Law Review* 567

38. TM Lemos, ‘Genocide in Ancient Israelite and Early Jewish Sources’ in Ben Kiernan, TM Lemos and Tristan S Taylor (eds), *Cambridge World History of Genocide Volume 1: Genocide in the Ancient, Medieval and Premodern Worlds* (Cambridge University Press, 2023)
39. Tristan S Taylor, ‘A Tale of Three Cities: Roman Destruction’ in Ben Kiernan, TM Lemos and Tristan S Taylor (eds), *Cambridge World History of Genocide Volume 1: Genocide in the Ancient, Medieval and Premodern Worlds* (Cambridge University Press, 2023)
40. WA Schabas, ‘Prosecuting Genocide’ in Dan Stone (ed), *The Historiography of Genocide* (Palgrave Macmillan, 2008)

International Legal Acts, Articles

41. Charter of the United Nations (Signed 26 June 1945, entered into force 24 October 1945) XV UNCIO 335, amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119
42. Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948) 78 UNTS 277
43. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
44. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, [2001] Supplement No. 10 (A/56/10), chp.IV.E.1 (*ARSIWA*)
45. Statute of the International Court of Justice (Signed 26 of June 1945, entered into force 24 of October 1945) XV UNCIO 355
46. Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Case Law

International Criminal Tribunals

47. *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998)
48. *Prosecutor v Jelisic* (Appeals chamber judgment) IT-95-10 (5 July 2010)
49. *Prosecutor v Jelisic* (Trial judgment) IT-95-10 102 (14 December 1999)
50. *Prosecutor v Kayishema,* (Judgment) ICTR-95-1-T (21 May 1999)
51. *Prosecutor v Krstic* (Trial judgment) IT-98-33 (2 August 2001)

52. *Prosecutor v Milosevic* (Decision on Prosecution motion for admission of transcripts pursuant to Rule 92bis (D) for witness B-1132) IT-02-54 (5 February 2004)
53. *Prosecutor v Milosevic*, (Indictment) IT-02-54-T (22 November 2001)
54. *Prosecutor v Stakić*, (Judgment) IT-97-24-T (31 July 2003)
55. *Prosecutor v Tadić* (Judgment) IT-94-1-T (7 May 1997)
56. *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Goring, et al* (Judgment) International Military Tribunal (01 October 1946)

International Court of Justice, Permanent Court of International Justice, and Claims Commissions

57. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* (Judgment) [2007] ICJ Rep 43
58. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia*), (Judgment) [2015], ICJ Rep 3
59. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, (Request for the Indication of Provisional Measures: Order), [2020] ICJ Rep 3
60. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Indication of Provisional Measures: Order) [2024] General List 192
61. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan* v. *United Arab Emirates)* (Verbatim Record, Public Hearings of 10 April 2025)
62. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (Judgment) [2005] I.C.J. Reports 2005
63. *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary objections judgment) [1998] ICJ Reports 292
64. *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] *ICJ Reports* 8
65. *Estate of Jean-Baptiste Caire (France) v. United Mexican States,* French-Mexican Claims Commission (Reports of International Arbitral Awards, 7 June 1929)

66. *Francisco Mallén (United Mexican States) v USA,* General Claims Commission (Reports of International Arbitral Awards, 27 April 1927)
67. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14
68. *Reservations to the Convention on Genocide*, (Advisory Opinion) ICJ Reports 1951, 23
69. *The Case of the S.S. "Lotus" (France v Turkey)* (Judgment) PCIJ Rep Series A No 10, 4

United Nations Documents

Travaux Preparatoire of the Convention

70. UN Economic and Social Council, Commentary on Articles Adopted by the Committee (20 April 1948) UN Doc E/AC.25/W.1
71. UN Economic and Social Council, Report of the Economic and Social Council (1947) UN Doc E/447 (Secretariat Draft)
72. UN Economic and Social Council, Summary Record of the 140th Meeting (23 June 1947) UN Doc E/SR.140
73. UN Economic and Social Council, Summary Record of the 218th Meeting (13 April 1948) UN Doc E/SR.218
74. UN Economic and Social Council, Summary Record of the 13th Meeting of the Ad Hoc Committee on Genocide (20 April 1948) UN Doc E/AC.25/SR.13
75. UN Economic and Social Council, Summary Record of the 26th Meeting of the Ad Hoc Committee on Genocide (30 April 1948) UN Doc E/AC.25/SR.26
76. UN Economic and Social Council, Summary Record of the 28th Meeting of the Ad Hoc Committee on Genocide (10 May 1948) UN Doc E/AC.25/SR.28
77. UN General Assembly, Summary Record of the 69th Meeting of the Sixth Committee, UN Doc A/C.6/SR.69,
78. UN General Assembly, Summary Record of the 72nd Meeting of the Sixth Committee (28 October 1948) UN Doc A/C.6/SR.72
79. UN General Assembly, Summary Record of the 73rd Meeting of the Sixth Committee, UN Doc A/C.6/SR.73
80. UN General Assembly, Summary Record of the 76th Meeting of the Sixth Committee (4 November 1948) UN Doc A/C.6/SR.76

81. UN General Assembly, Summary Record of the 82nd Meeting of the Sixth Committee (27 November 1948) UN Doc A/C.6/SR.82
82. UN General Assembly, Summary Record of the 92nd Meeting of the Sixth Committee, UN Doc A/C.6/SR.92

Resolutions

83. UNGA Res 260(III)A
84. UNGA Res 96(1)
85. UNSC Res 487
86. UNSC Res 687
87. UNSC Res 808
88. UNSC Res 955

Reports

89. OHCHR, 'Six-month update report on the human rights situation in Gaza: 1 November 2023 to 30 April 2024' (08 November 2024)
90. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, (25 January 2005)
91. UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories' (2024) A/79/363
92. UNHRC, Fifty-sixth session 18 June – 12 July 2024 'Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel' (14 June 2024) UN Doc A/HRC/56/26

Online Sources

93. Emanuel Fabian, 'Gallant: Gaza will never return to be what it was' *Times of Israel* (Jerusalem, 10 October 2023) accessible at: https://www.timesofisrael.com/gallant-israel-moving-to-full-offense-gaza-will-never-go-back-to-what-it-once-was/

94. Human Rights Watch, 'Gaza: Israel's Imposed Starvation Deadly for Children' (April 2025) accessible at: https://www.hrw.org/news/2024/04/09/gaza-israels-imposed-starvation-deadly-children#:~:text=%28Beirut%2C%20April%209%2C%202024%29%20%E2%80%93%20Children%20in%20Gaza,a%20war%20crime%2C%20Human%20Rights%20Watch%20said%20today.
95. Isaac Chotiner, 'Does the Biden Administration Want a Long-Lasting Ceasefire in Gaza?' *The New Yorker* (New York, February 28 2024) accessible at: https://www.newyorker.com/news/q-and-a/does-the-biden-administration-want-a-long-lasting-ceasefire-in-gaza
96. OHCHR, *Sudan: UN Fact-Finding Mission outlines extensive human rights violations, international crimes, urges protection of civilians,* accessible at https://www.ohchr.org/en/press-releases/2024/09/sudan-un-fact-finding-mission-outlines-extensive-human-rights-violations
97. Rebecca Hamilton, 'Inside Colin Powell's Decision to Declare Genocide in Darfur' (The Atlantic, 2011) accessible at: https://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/
98. Refugees International, *Siege and Starvation: How Israel Obstructs Aid to Gaza* (2024) 9. Accessible at: https://www.refugeesinternational.org/reports-briefs/siege-and-starvation-how-israel-obstructs-aid-to-gaza/
99. United Nations Security Council, 'Amid Humanitarian Funding Gap, 20 Million People across Africa, Yemen at Risk of Starvation, Emergency Relief Chief Warns Security Council' (10 March 2017) SC/12748, accessible at: https://press.un.org/en/2017/sc12748.doc.htm
100. Winston Churchill, 'Prime Minister Winston Churchill's Broadcast to the World about the Meeting with President Roosevelt' (27 August 1941) available at: https://www.ibiblio.org/pha/timeline/410824awp.html