Yuliia Anosova
National University of Kyiv-Mohyla Academy, Ukraine

THE GENOCIDE AGAINST THE RUSSIAN-SPEAKING POPULATION OF DONBASS REGION: REALITY OR MYTH? (LEGAL ANALYSIS)

The article analyses allegations of the Investigative Committee of the Russian Federation concerning the genocide of the Russian-speaking population in Donbass region. The jurisdictional basis of the allegations is discussed, as well as the possibility of Ukrainian high officials to apply immunities. The author also provides a detailed comparison of the provisions of the Russian legislation dealing with the crime of genocide with the corresponding provisions of the Genocide Convention. Based on the case law of the *ad hoc* international criminal tribunals and the International Court of Justice, the validity of the qualification of the situation in the Eastern Ukraine as genocide is concerned. Specifically, the article considers the issue of designation of a group as "national" and "Russian-speaking", and analyses specific features of Ukrainian language legislation which might have led to respective allegations.

Key words: genocide, universal jurisdiction, functional immunities, national groups, Russian-speaking population

The qualification of the conflict in Eastern Ukraine is a highly debated issue both in terms of national and international law. It becomes even more controversial taking into account political interests involved. Thus, in 2014 and 2015 the Investigative Committee of the Russian Federation (ICRF) initiated criminal proceedings for the commission of the crime of genocide against Russian-speaking population on the territory of Donetsk and Luhansk People`s Republics under article 357 of the Criminal Code of the Russian Federation[1]. It is worth noting that the ICRF is the main federal criminal investigative body which is responsible solely to the President of the Russian Federation[2].

The jurisdictional basis for the initiating criminal proceedings concerning crimes allegedly committed against foreign citizens on the territory of a foreign state, as the ICRF claims, lies in the rules of international humanitarian law and legislation of the Russian Federation, namely Article 12(3) of the Criminal Code[3]. The respective provision stipulates that foreign citizens, who committed crimes abroad, can be prosecuted by Russian authorities if the crimes were committed against the citizens of the Russian Federation or in cases foreseen by the international treaties of the Russian Federation on condition that foreign citizens were not prosecuted in a foreign country and are being prosecuted on the territory of the Russian Federation[4].

Thus, the position of the Russian investigative authorities is based on the principle of universal jurisdiction[5]. However, application of this principle in the present situation is not justified neither from the

[1] Маркин, В.И. (2014). Уголовные дела, расследуемые управлением по расследованию преступлений, связанных с применением запрещенных средств и методов ведения войны ГСУ СК РФ. *Следственный комитет Российской Федерации*. < http://sledcom.ru/news/item/523738>; < http://sledcom.ru/news/item/886833> (2016, May, 15).

[2] *Федеральный закон* о *Следственном комитете Российской Федерации*, ст. 13 (2010) (Государственная Дума Российской Федерации). *Официальный сайт компании «КонсультантПлюс»*. <http://www.consultant.ru/document/cons_doc_LAW_108565> (2016, May, 15).

[3] Маркин, В.И. (2015). Александр Бастрыкин провел совещание по вопросам противодействия нарушениям прав гражданского населения юго-востока Украины. *Следственный комитет Российской Федерации*. <http://sledcom.ru/news/item/963906> (2016, May, 15).

[4] *Уголовный кодекс Российской Федерации*, ст. 12 (3) (1996) (Государственная Дума Российской Федерации). *Официальный сайт компании «КонсультантПлюс»*. <http://www.consultant.ru/document/cons_doc_LAW_10699/ecaca87fc0031575ba99ae9bfdad56f1cc08f34b> (2016, May, 15).

[5] Маркин, В.И. (2015). Александр Бастрыкин провел совещание по вопросам противодействия нарушениям прав гражданского населения юго-востока Украины. *Следственный комитет Российской Федерации*. <http://sledcom.ru/news/item/963906> (2016, May, 15).

position of international law, nor according to Russian legislation.

The principle of universal jurisdiction in international law remains one of the most controversial jurisdictional principles. When applied by national authorities, it usually requires the support by other jurisdictional bases. The example of Belgium is quite illuminating in this respect. In 1993 Belgium adopted Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, which provided the most extensive formulation of the principle of universal jurisdiction[1]. There were several unsuccessful attempts to apply this law, including the prosecution of several prominent politicians such as Ariel Sharon, Jiang Zemin, George H.W. Bush, Richard Cheney and Colin Powell[2]. Nevertheless, under the political pressure of other states, and especially the US, the Law was subsequently repealed and the respective provisions were included into to the Belgian Code of Criminal Procedure. It established much stricter jurisdictional bases, that is active personality principle, i.e. when a crime was committed by Belgian citizen or resident, and passive personality principle, i.e. when a crime was committed against Belgian citizen or resident[3].

Another weak point in Russian position is a failure to consider the application of functional immunities of Ukrainian high officials. Functional immunities, or immunities *ratione materiae*, are immunities conferred upon state officials who perform certain acts in their official capacity, that is on behalf of a state[4]. The state practice in the area remains vague and differs from state to state, since no clear rules of international law are elaborated[5]. However, as the ICJ indicated in the case *Djibouti v. France*, "the State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other States concerned"[6]. Otherwise, the forum state is under no obligation to consider the matter of immunities *proprio motu*[7]. This means that in any case Ukraine should notify the Russian Federation about any immunities which may be applicable to the accused state officials.

From the point of view of national Russian legislation, it should be mentioned that the prerequisite for the prosecution of a foreign national under Article 12(3) of the Criminal Code is the physical presence of the accused on the territory of the Russian Federation, which means that the application if the universal jurisdiction *in absentia* is not allowed. The official statement by the ICRF dated by 3 September 2015 mentions 30 accused, almost all of whom are currently holding posts in Ukrainian Government and Armed Forces. Since all these people remain on the territory of Ukraine, the ICRF concludes that as soon as all relevant implicating evidence is gathered, they will be arrested *in absentia*[8]. Thus, application of the principle of universal jurisdiction by the ICRF is groundless due to the rules of national, as well as of international law.

The next important issue which needs to be considered is the relevance of qualification of alleged crimes committed at the territory of Ukraine as crimes of genocide under article 357 of the Criminal Code of the Russian Federation and under the Genocide Convention. Article 357 defines genocide as "acts

[1] International Committee of the Red Cross. Customury International Humanitarian Law. Belgium: Practice Relating to Rule 157. Jurisdiction over War Crimes. *International Committee of the Red Cross*. <https://www.icrc.org/customary-ihl/eng/docs/v2_cou_be_rule157> (2016, May, 15).

[2] Kaleck, W. (2009). From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008. *Michigan Journal of International Law, 30,* 933-934.

[3] Baker, R. (2009). Universal Jurisdiction and the Case of Belgium: A Critical Assessment. *ILSA Journal of International and Comparative Law*, *16:1,* 157-158.

[4] Foakes, J. (2011). Immunity for International crimes? Developments in the Law on Prosecuting Heads of state in Foreign Courts: Briefing Paper. *Chatham House, the Royal Institute of International Affairs*. <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp1111_foakes.pdf> (2016, May, 15).

[5] Mazzeschi, R.P. (2015). The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories. *Questions of International Law, 3.*

[6] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* [2008], ICJ, Judgment, para. 196. <http://www.icj-cij.org/docket/files/136/14550.pdf> (2016, May, 15).

[7] Foakes J. (2011). Immunity for International crimes? Developments in the Law on Prosecuting Heads of state in Foreign Courts: Briefing Paper. *Chatham House, the Royal Institute of International Affairs*. <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp1111_foakes.pdf> (2016, May, 15).

[8] Маркин, В.И. (2015). Александр Бастрыкин провел совещание по вопросам противодействия нарушениям прав гражданского населения юго-востока Украины. *Следственный комитет Российской Федерации*. <http://sledcom.ru/news/item/963906> (2016, May, 15).

directed at complete or partial destruction of a national, ethnic, racial or religious group as such through killing members of the group, causing serious harm to their health, forcible prevention of births, coercive transfer of children, forced displacement or other infliction of conditions of life calculated about to bring about physical destruction of members of the group"[1]. This definition is different from the formulation of the notion of genocide presented in the Genocide Convention in several aspects. First of all, the requirement of the genocidal intent, or *dolus specialis*, is absent. Instead the word "directed" is used which, if at all, denotes much lesser extent of culpability. Secondly, there is a disparity in the lists of genocidal acts. In particular, in Article 357 only general harm to health is mentioned, with no specification whether this harm should be caused to physical or mental health, which is explicitly stated in the Genocide Convention. Furthermore, the list in the Criminal Code involves such an act as a "forced displacement", which serves as an example of a wider category of infliction of conditions of life calculated about to bring about physical destruction of members of the group. The latter category corresponds to the provision of Article 2(2)(c) of the Genocide Convention. It should be noted that international courts, interpreting the Convention, addressed this issue on multiple occasions. The basic question was whether forced displacement *per se* can be included into the scope of Article 2(2)(c). The International Criminal Tribunal for the Former Yugoslavia (ICTY) answered in the negative[2]. This view was also taken by the International Court of Justice[3]. However, if the forcible displacement is considered in the context of *mens rea*, that is as a subjective element, and not *actus reus*, an objective element, of the crime of genocide, this act, according to the ICTY, can serve as supporting evidence of the special intent to commit genocide[4].

Overall, the mentioning of the forcible displacement in the list of acts which constitute the crime of genocide, lack of specification of the type of health harm which should be caused, and most importantly, and lack of the requirement of special intent, which is the basic feature which distinguishes the crime of genocide from other international crimes, attest to the fact that the standards of proof established by Article 357 of the Russian Criminal Code are much lower than those required by the Genocide Convention. This means that it is much easier to hold Ukrainian officials liable for the crime of genocide before Russian national courts on the basis of the principle of universal jurisdiction using the extensive provisions of national criminal legislation than to transfer this case for the trial by the international courts.

It is worth noting that the notion of the crime of genocide in the Article 442 of the Criminal Code of Ukraine is much stricter even compared to the Genocide Convention. In particular, the element of special intent in the respective provision is reinforced by the requirement of purpose-based intent. In addition, the infliction only of serious bodily injury is stipulated, while the harm to mental health is not even mentioned[5].

The most contested issue of Russian accusations is the designation of the protected group, which is "nacionalnaja gruppa russkojazychnyh lic", or "national group of Russian-speaking population"[6]. With regard to the protected groups, the aforementioned definition of genocide in Article 357 of the Russian Criminal Code is identical with the conventional definition, i.e. it refers exclusively to national, ethnic,

[1] *Уголовный кодекс Российской Федерации,* ст. 357 (1996) (Государственная Дума Российской Федерации). *Официальный сайт компании «КонсультантПлюс»*. <http://www.consultant.ru/document/Cons_doc_LAW_10699/b21e235ab7f2ffdb9921d73f1d1828628780cf10> (2016, May, 15).

[2] *Prosecutor v. Milomir Stakić (Trial Judgment)*, IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 July 2003, paras. 519, 557.

[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007], ICJ, Judgment, p. 43, para. 190. <http://www.icj-cij.org/docket/files/91/13685.pdf> (2016, May, 15); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* [2015],ICJ, Judgment, para. 163. <http://www.icj-cij.org/docket/files/118/18422.pdf> (2016, May, 15).

[4] *Prosecutor v. Zdravko Tolimir (Appeal Judgment)*, IT-05-88/2-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 8 April 2015, para. 254.

[5] *Кримінальний кодекс України*, ст. 442, розділ 20 (2001) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon0.rada.gov.ua/laws/show/2341-14/page> (2016, May, 15).

[6] Маркин, В.И. (2015). Александр Бастрыкин провел совещание по вопросам противодействия нарушениям прав гражданского населения юго-востока Украины. *Следственный комитет Российской Федерации*. <http://sledcom.ru/news/item/963906> (2016, May, 15).

racial and religious groups[1]. In order to define whether "national group of Russian-speaking population" is covered by the scope of the respective provision it is necessary to define the listed groups and therefore identify to which type the mentioned group belongs.

Generally speaking, the group can be defined as a permanent (collective) unity of people, which distinguishes itself from the rest of the population on the grounds of common characteristics shared by its members[2]. As was contemplated by Raphael Lemkin, the author of the notion of genocide and one of the experts who participated in the drafting of the Genocide Convention, the protected groups should have included national, racial and religious groups[3]. In the UN Resolution 96(I) dated 11 December 1946, that is the first international document which dealt with the issue of genocide, the list of the groups included the categories of racial, religious and political groups, and also a reference to "other groups" was made, meaning that the Genocide Convention shall define the list more precisely[4]. In the first draft of the Genocide Convention, which was prepared by the UN Secretariat in 1947, racial, national, linguistic, religious and political groups were mentioned[5]. In the second draft, prepared by the ECOSOC Ad Hoc Committee on Genocide in 1948, the formulation was as follows: "genocide means… deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members"[6]. As for the final version of the Genocide Convention, political groups were not included due to their perceived instability, lack of precise definition, and the possibility that the inclusion of this category would prevent some states with active opposition movements from ratification[7]. The ethnic groups were added to the list with the aim to define the scope of national groups more precisely, meaning that the constituents of national groups are language, common cultural and historical heritage, and not just enjoyment of civic rights in a given state[8].

It should be noted that naming of the groups protected in the Genocide Convention does not imply that the meaning of these categories stays immutable. For example, the category of racial groups at the beginning of the twentieth century was understood as "a tribe, people, or nation, belonging or supposed to belong to the same stock or lineage"[9]. In fact, it was equated with the category of ethnic groups in its contemporary meaning. At the time of the adoption of the Convention, a race was understood as "a great division of mankind having in common certain distinguishing physical peculiarities constituting a comprehensive class"[10]. Hence, in the middle of a century, the ground for racial division was derived predominantly from the distinctive physical traits. However, this approach changed substantially during the second half of the twentieth century with decline of racial theories. Therefore, now, at least in the field of

[1] *Уголовный кодекс Российской Федерации,* ст. 357 (1996) (Государственная Дума Российской Федерации). *Официальный сайт компании «КонсультантПлюс»*. <http://www.consultant.ru/document/Cons_doc_LAW_10699/b21e235ab7f2ffdb9921d73f1d1828628780cf10> (2016, May, 15).

[2] Ambos, K. (2014). *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing*. New York: Oxford University Press, 5.

[3] Lemkin, R. (1944). *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redres*. Washington: Carnegie Endowment for International Peace Division of International Law, 91; Lemkin, R. (1946). Genocide. *American Scholar*, *15:2,* 227-230.

[4] UNGA Res. 96 (I) (11 December 1946). <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/47/IMG/NR003347.pdf?OpenElement> (2016, May, 15).

[5] E/447, 26 June 1947, ECOSOC, *Draft Convention on the Crime of Genocide*. In Abtahi, H., Webb, P. (eds.) (2008). *The Genocide Convention: The Traveaux Préparatoires*. Leiden: Martinus Nijhoff Publishers, 214.

[6] E/AC.25/12, 19 May 1948, ECOSOC Ad Hoc Committee on Genocide, (5 April – 10 May 1948) *Draft Convention on Prevention and Punishment of Genocide (Drawn up by the Committee).* In Abtahi, H., Webb, P. (eds.) (2008). *The Genocide Convention: The Traveaux Préparatoires*. Leiden: Martinus Nijhoff Publishers, 1155.

[7] E/794, 24 May 1948, ECOSOC, Ad Hoc Committee on Genocide (5 April – 10 May 1948*), Report of the Committee and Draft Convention Drawn Up by the Committee* (Dr. Karim Azkoul – Rapporteur). In Abtahi, H., Webb, P. (eds.) (2008). *The Genocide Convention: The Traveaux Préparatoires*. Leiden: Martinus Nijhoff Publishers, 1123.

[8] A/C.6/SR.73, *Seventy-third meeting, Palais de Chaillot*, Paris, Wednesday, 13 October 1948, at 3.15 p.m. In Abtahi, H., Webb, P. (eds.) (2008). *The Genocide Convention: The Traveaux Préparatoires*. Leiden: Martinus Nijhoff Publishers, 1389.

[9] Black, H.C. (1910). *A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern.* Minnesota, St. Paul: «West Publishing Co.», 989.

[10] Black, H.C. (1933). *Black`s Law Dictionary*. Minnesota, St. Paul: «West Publishing Co.», 1491.

international law, as well as in social sciences generally, the notion of race is considered obsolete[1]. Notwithstanding this fact, *ad hoc* international tribunals hold to the old, restrictive interpretation of races defining them as a category which is "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors"[2].

In the context of Russian allegations, it is important to consider the category of a national group more closely. It should be noted that the notion of national groups is one of the most controversial in international law, and particularly in the case law of international courts. Thus, the International Criminal Tribunal for Rwanda (ICTR), based on the *Nottebohm case*, defined national groups as "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties"[3]. However, as William Schabas points out, the tribunal confused two different notions, namely "nationality" and "membership in a national group". "Nationality" in the Nottebohm case was used in the sense of citizenship, while the conventional provision refers to the membership in a certain nation[4]. In this sense, a notion of a national group is closely connected with the category of an ethnic group which was defined by *ad hoc* international tribunals as "a group whose members share a common language or culture"[5]. However, national groups are generally bigger than ethnic groups and thus can comprise of several ethnic groups[6]. Apart from quantitative factor, the nation differs from ethnic and other similar groups in several other respects. The defining features of a nation, which other groups usually lack and which were widely recognized at the time of the adoption of the Genocide Convention, include: autonomy or self-government, that is the independence of the community as a whole from the interference of any foreign power in its affairs, or any subjection to such power; being an organized jural society, that is both governing its own members by regular laws and defining and protecting their rights; and most importantly, the nation constitutes one indivisible whole and for this reason is destined to form only one state[7]. Although the notion of a nation transformed throughout the second half of the twentieth century[8], which partly explains so cautious and restrictive interpretation by the *ad hoc* tribunals, still, even today, a nation cannot be equated simply with linguistic minorities. It is also worth noting that during the preparation of the Genocide Convention the representative of Sweden straightly indicated that "the constituent factor of a minority might be the language spoken by that group. If a linguistic group were unconnected with an existing state, it would not be protected as a national group, but it could be protected as an ethnic group"[9].

Overall, considering the vague concepts of national, ethnic and racial groups which constantly transform with the development of social, legal and political sciences, it is hard in practice to define objectively the specific group to which the victims of the alleged crimes belong. Being confronted with this task, *ad hoc* tribunals relied predominantly on the national legislation defining certain groups as ethnic or

[1] Schabas, W.A. (2009). *Genocide in International Law: The Crime of Crimes*. New York: Cambridge University Press, 142; *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (25 January 2005) UN Doc. S/2005/60, para. 494. <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Darfur%20S200560.pdf> (2016, May, 15).

[2] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 514; *Prosecutor v. Clement Kayishema and Obed Ruzindana (Trial Judgment)*, ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999, para. 98.

[3] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment),* ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 512.

[4] Schabas, W.A. (2009). *Genocide in International Law: The Crime of Crimes*. New York: Cambridge University Press, 134-135.

[5] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment),* ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 513.

[6] *Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur* (para. 57), UN Doc. A/CN.4/398. In *Yearbook of the International Law Commission* (1986), II (1). <http://legal.un.org/ilc/documentation/english/a_cn4_398.pdf> (2016, May, 15).

[7] Black, H.C. (1933). *Black`s Law Dictionary*. Minnesota, St. Paul: «West Publishing Co.», 1221.

[8] Garner, B.A. (2009). *Black`s Law Dictionary*. St. Paul: «West Group», 1372.

[9] A/C.6/SR.75*, Seventy-fifth meeting*, Palais de Chaillot, Paris, Friday, 15 October 1948, at 3.20 p.m. In Abtahi, H., Webb, P. (eds.) (2008). *The Genocide Convention: The Traveaux Préparatoires*. Leiden: Martinus Nijhoff Publishers, 1412.

national[1]. In order to compensate this uncertainty, the objective approach was supplemented by subjective. The subjective approach, unlike objective, is based on the perception of the group membership by the victims themselves, the perpetrators or the society as a whole[2]. Now both approaches are used interchangeably depending on the specific circumstances of the case[3].

Hence, can Russian-speaking population of the Eastern Ukraine constitute a protected group in the terms of conventional definition? If the objective approach is applied, the Russian-speaking population living on the territory of Donetsk and Luhansk People`s Republics cannot constitute a separate national group, since they belong to Ukrainian nation. According to a broad definition, the Ukrainian nation exercised its right to self-determination forming in 1991 an independent state of Ukraine within respective borders determined thereupon. If we consider the notion of a nation in a narrow meaning, offered by the ICTR, then the argument will be even more convincing, since almost all the population of Eastern Ukraine hold Ukrainian citizenship. Another possible view is that Russian-speaking population of Donbass might constitute a part of the Ukrainian national group, which means that there might have been "a destruction of a national group in part". In this case, the issue of autogenocide would arise. However, the concept of autogenocide has never become recognized in international law.

As for the classification of the population of Donbass region as a separate ethnic group, this issue is more complicated, and requires thorough historical, cultural and sociological analysis. However, the central question, based on Russian allegations, is different. It can be formulated as follows: whether language factor is enough to be the only constituent of any type of a protected group? And most importantly, is the language factor can be applied at all in the present situation? Both questions should be answered in negative. In order to be the main feature of a certain group, the language should be unique for that group, meaning that it must be something which differentiate that group from the rest of population. Generally speaking, since the time of the Soviet Union most of the Ukrainian population has been traditionally bilingual. Nevertheless, in practice, international tribunals usually rely not on statistics, but on the respective national legislation. Thus, the question now is whether the status of Russian language as regional in certain areas of Eastern Ukraine can be considered as a basis for establishing Russian-speaking population as a separate protected group, in particular separate ethnic group?

In order to answer this question, some European regional particularities shall be analyzed. To begin with, traditionally there is a difference in the use of terms to denote certain groups. For instance, European human rights law prefers using the term "national minorities" in legal documents[4]. It should be noted, however, that even in the Framework Convention for the Protection of National Minorities, the Council of Europe does not provide a definition of national minorities, since, according to it, "it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States"[5]. Instead of

[1] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, paras. 170-171, 702; *Prosecutor v. Radislav Krstić (Trial Judgment),* IT-98-33-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 August 2001, paras. 559-560; *Prosecutor v. Radislav Krstić (Appeal Judgment)*, IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004, para. 6.

[2] *Prosecutor v. Clement Kayishema and Obed Ruzindana (Trial Judgment)*, ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999, para. 98; *Prosecutor v. Laurent Semanza (Trial Judgement)*, ICTR-97-20-T, International Criminal Tribunal for Rwanda (ICTR), 15 May 2003, para. 317; *Prosecutor v. Radoslav Brđanin* (Trial Judgment), IT-99-36-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 1 September 2004, para. 684.

[3] *Prosecutor v. Radoslav Brđanin (Trial Judgment)*, IT-99-36-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 1 September 2004, para. 684.

[4] *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art.14. <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (2016, May, 15); *Framework Convention for the Protection of National Minorities* (adopted 10 November 1994, entered into force 1 February 1998) CETS No.157. <https://www.coe.int/t/dghl/monitoring/minorities/1_atglance/PDF_H%2895%2910_FCNM_ExplanReport_en.pdf> (2016, May, 15).

[5] *Explanatory report to the Framework Convention for the Protection of National Minorities* (adopted 10 November 1994, entered into force 1 February 1998) CETS No.157. para. 12. <https://www.coe.int/t/dghl/monitoring/minorities/1_atglance/PDF_H%2895%2910_FCNM_ExplanReport_en.pdf> (2016, May, 15).

the notion "national minorities", the UN in universal human rights instruments use the term "ethnic, religious or linguistic minorities"[1]. Thus, the category of national minorities in European law seems to be more general than separate categories of ethnic, linguistic and religious groups. Moreover, it does not directly correspond to the notion of a nation, and in particular, the notion of a national group as it was used in the Genocide Convention. Nonetheless, traditional use of this term in European human rights instruments can explain why Russian investigative authorities refer to a "national group of Russian-speaking population", and not, for example, "ethnic group".

Turning to the question of the group based on linguistic constituent as a group falling within the scope of the conventional protection and its relevance to the situation in Ukraine, the following issues should be considered. In 2003 Ukraine ratified the European Charter for Regional or Minority Languages. In order to implement the Charter in 2012, the state adopted the Law on the Foundations of State Language Policy[2]. Applying this law, Russian language was officially recognized as regional in nine regions of Ukraine, including all Eastern and Southern regions[3]. The aforementioned law is widely criticized, since it may be arbitrarily interpreted as the one aimed at the protection not of minority languages, but minorities themselves, and in particular, ethnic minorities. In reality, the problem of interpretation stems from the inconsistency in the official translation of the text of the Charter in Ukrainian. The term "regional and minority languages" was translated as "regionalni movy abo movy menshyn" ("regional languages or languages of minorities")[4]. Hence, the word "minority" which is an adjective in the English version was translated as a noun in Ukrainian. In fact, the adjective form of "minority" was used in the Charter in order to emphasize that this term "refers to factual criteria and not to legal notions and in any case relates to the situation in a given State"[5]. Subsequently, the incorrect translation of the respective phrase from the Charter was transferred to the Law as well. Moreover, in the Law a separate definition of the notion "the languages of national minorities" was provided[6], which is not used in the further text of the law, nor was it given in the Charter, and thus, it seems unnecessary *per se*. However, even if unwillingly, the inclusion of this definition provides an additional adverse connotation to the notion of the "languages of minorities" as the languages spoken by national minorities, and thus may be perceived as a basis for delineation of these minorities from the rest of population.

Overall, the status of the Russian language as regional does not secure to Russian-speaking population any particular characteristics as a separate group, and especially an ethnic group based on the linguistic criterion. This status does not even concerns minorities, its only aim is to protect and enhance the development of languages. Thus, Russian-speaking population of Donbass cannot be regarded as a separate ethnic group or a part of such group formed on the basis of language.

Conclusion. The case initiated by the ICRF lacks consistency. It was inspired by political motives, and its legal foundation remains unconvincing. First of all, the jurisdictional basis applied, that is the principle of universal jurisdiction, is not widely accepted in international law, nor is it supported by the national legislation of the Russian Federation. Secondly, there is a complete disregard of functional

[1] *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art. 27. <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (2016, May, 15).

[2] *Закон про засади державної мовної політики 2012* (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon3.rada.gov.ua/laws/show/5029-17> (2016, May, 15).

[3] Інформаційно-аналітичні матеріали з питань державної мовної політики: Стан реформування законодавства про мови, зокрема Закону України "Про засади державної мовної політики". *Офіційний сайт Міністерства культури України.* <http://mincult.kmu.gov.ua/control/uk/publish/article?art_id=244971395&cat_id=244949514> (2016, May, 15).

[4] *Європейська хартія регіональних мов або мов меншин. Офіційний переклад* (прийнято 5 листопада 1992, ратифіковано Україною 15 травня 2003). *Офіційний сайт Верховної Ради України*. <http://zakon5.rada.gov.ua/laws/show/994_014> (2016, May, 15).

[5] *Explanatory Report to the European Charter for Regional or Minority Languages* (adopted 4 November 1992, entered into force 1 March 1998) ETS 148, para. 18. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5e5> (2016, May, 15).

[6] *Закон про засади державної мовної політики*, ст. 1 (2012) (Верховна Рада України). *Офіційний сайт Верховної Ради України*. < http://zakon3.rada.gov.ua/laws/show/5029-17> (2016, May, 15).

immunities of Ukrainian high officials. Thirdly, having compared the provisions of the Criminal Code of the Russian Federation concerning genocide with the respective provisions of the Genocide Convention, it becomes obvious that the standards of proof required by the Russian criminal legislation are much lower. In particular, the main constituent element of the crime of genocide, special intent, is not required according to Russian legislation. Moreover, the list of genocidal acts is more extensive than in the Convention, and the crime of forced displacement constitutes a separate genocidal offence. It is possible that this particular act will become one of the main points in criminal charges against Ukrainian high officials. Finally, the most controversial issue of the ICRF`s allegations is the designation of the protected group as a "national group of Russian-speaking population". However, the language basis cannot be the only constituent of a national group, nor of any other type of groups which fall under protection of the Genocide Convention, especially in the present situation.

References

1. A/C.6/SR.73, *Seventy-third meeting, Palais de Chaillot*, Paris, Wednesday, 13 October 1948, at 3.15 p.m. In Abtahi, H., Webb, P. (eds.) (2008). *The Genocide Convention: The Traveaux Préparatoires*. Leiden: Martinus Nijhoff Publishers.
2. A/C.6/SR.75*, Seventy-fifth meeting*, Palais de Chaillot, Paris, Friday, 15 October 1948, at 3.20 p.m. In Abtahi, H., Webb, P. (eds.) (2008). *The Genocide Convention: The Traveaux Préparatoires*. Leiden: Martinus Nijhoff Publishers.
3. Ambos, K. (2014). *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing*. New York: Oxford University Press.
4. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007], ICJ, Judgment, p. 43. <http://www.icj-cij.org/docket/files/91/13685.pdf>.
5. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* [2015], ICJ, Judgment. < http://www.icj-cij.org/docket/files/118/18422.pdf>.
6. Baker, R. (2009). Universal Jurisdiction and the Case of Belgium: A Critical Assessment. *ILSA Journal of International and Comparative Law*, *16:1.*
7. Black, H. C. (1910). *A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*. Minnesota, St. Paul: «West Publishing Co.».
8. Black, H. C. (1933). *Black`s Law Dictionary*. Minnesota, St. Paul: «West Publishing Co.».
9. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* [2008], ICJ, Judgment. <http://www.icj-cij.org/docket/files/136/14550.pdf>.
10. E/447, 26 June 1947, ECOSOC, *Draft Convention on the Crime of Genocide*. In Abtahi, H., Webb, P. (eds.) (2008). *The Genocide Convention: The Traveaux Préparatoires*. Leiden: Martinus Nijhoff Publishers.
11. E/794, 24 May 1948, ECOSOC, Ad Hoc Committee on Genocide (5 April – 10 May 1948*), Report of the Committee and Draft Convention Drawn Up by the Committee* (Dr. Karim Azkoul – Rapporteur). In Abtahi, H., Webb, P. (eds.) (2008). *The Genocide Convention: The Traveaux Préparatoires*. Leiden: Martinus Nijhoff Publishers.
12. E/AC.25/12, 19 May 1948, ECOSOC Ad Hoc Committee on Genocide, (5 April – 10 May 1948) *Draft Convention on Prevention and Punishment of Genocide (Drawn up by the Committee).* In Abtahi, H., Webb, P. (eds.) (2008). *The Genocide Convention: The Traveaux Préparatoires*. Leiden: Martinus Nijhoff Publishers.
13. *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) <http://www.echr.coe.int/Documents/Convention_ENG.pdf>.
14. *Explanatory Report to the European Charter for Regional or Minority Languages* (adopted 4 November 1992, entered into force 1 March 1998) ETS 148. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5e5>.
15. *Explanatory report to the Framework Convention for the Protection of National Minorities* (adopted 10 November 1994, entered into force 1 February 1998) CETS No. 157. <https://www.coe.int/t/dghl/monitoring/minorities/1_atglance/PDF_H%2895%2910_FCNM_ExplanReport_en.pdf>.
16. *Federal'nyj zakon o Sledstvennom komitete Rossijskoj Federacii 2010* (Gosudarstvennaja Duma Rossijskoj Federacii). *Oficial'nyj sajt kompanii «Konsul'tantPljus».* <http://www.consultant.ru/ document/cons_doc_LAW_108565>.
17. Foakes, J. Immunity for International crimes? Developments in the Law on Prosecuting Heads of state in Foreign Courts: Briefing Paper. *Chatham House, the Royal Institute of International Affairs*. <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp1111_foakes.pdf>.
18. *Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur*, UN Doc. A/CN.4/398. In *Yearbook of the International Law Commission* (1986), II (1). <http://legal.un.org/ilc/documentation/english/a_cn4_398.pdf>.

19. *Framework Convention for the Protection of National Minorities* (adopted 10 November 1994, entered into force 1 February 1998) CETS No. 157. <https://www.coe.int/t/dghl/monitoring/minorities/1_atglance/PDF_H%2895%2910_FCNM_ExplanReport_en.pdf>.
20. Garner, B. A. (2009). *Black`s Law Dictionary*. St. Paul: «West Group».
21. Informacijno-analitychni materialy z pytan' derzhavnoji movnoji polityky: Stan reformuvannja zakonodavstva pro movy, zokrema Zakonu Ukrajiny "Pro zasady derzhavnoji movnoji polityky". *Oficijnyj sajt Ministerstva kul'tury Ukrajiny.* <http://mincult.kmu.gov.ua/control/uk/publish/article?art_id=244971395&cat_id=244949514>.
22. International Committee of the Red Cross. Customury International Humanitarian Law. Belgium: Practice Relating to Rule 157. Jurisdiction over War Crimes. *International Committee of the Red Cross*. <https://www.icrc.org/customary-ihl/eng/docs/v2_cou_be_rule157>.
23. *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.
24. *Jevropejs'ka hartija regional'nyh mov abo mov menshyn. Oficijnyj pereklad* (pryjnjato 5 lystopada 1992, ratyfikovano Ukrajinoju 15 travnja 2003). *Oficijnyj sajt Verhovnoji Rady Ukrajiny*. <http://zakon5.rada.gov.ua/laws/show/994_014>.
25. Kaleck, W. (2009). From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008. *Michigan Journal of International Law*, *30.*
26. *Kryminal'nyj kodeks Ukrajiny 2001* (Verhovna Rada Ukrajiny). *Oficijnyj sajt Verhovnoji Rady Ukrajiny*. <http://zakon0.rada.gov.ua/laws/show/2341-14/page>.
27. Lemkin, R. (1944). *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Washington: Carnegie Endowment for International Peace Division of International Law.
28. Lemkin, R. (1946). Genocide. *American Scholar*, *15:2.*
29. Markin, V. I. (2014). Ugolovnye dela, rassleduemye upravleniem po rassledovaniju prestuplenij, svjazannyh s primeneniem zapreshhennyh sredstv i metodov vedenija vojny GSU SK RF. Sledstvennyj komitet Rossijskoj Federacii. <http://sledcom.ru/news/item/523738>; <http://sledcom.ru/news/item/886833>.
30. Markin, V. I. (2015). Aleksandr Bastrykin provel soveshhanie po voprosam protivodejstvija narushenijam prav grazhdanskogo naselenija jugo-vostoka Ukrainy. Sledstvennyj komitet Rossijskoj Federacii. <http://sledcom.ru/news/item/963906>.
31. Mazzeschi, R. P. (2015). The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories. *Questions of International Law*, 3.
32. *Prosecutor v. Clement Kayishema and Obed Ruzindana (Trial Judgment)*, ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999.
33. *Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998.
34. *Prosecutor v. Laurent Semanza (Trial Judgement)*, ICTR-97-20-T, International Criminal Tribunal for Rwanda (ICTR), 15 May 2003.
35. *Prosecutor v. Milomir Stakić (Trial Judgment)*, IT-97-24-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 July 2003.
36. *Prosecutor v. Radislav Krstić (Appeal Judgment)*, IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004.
37. *Prosecutor v. Radislav Krstić (Trial Judgment),* IT-98-33-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 August 2001.
38. *Prosecutor v. Radoslav Brđanin* (Trial Judgment), IT-99-36-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 1 September 2004.
39. *Prosecutor v. Zdravko Tolimir (Appeal Judgment)*, IT-05-88/2-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 8 April 2015.
40. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (25 January 2005) UN Doc. S/2005/60. <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Darfur%20S200560.pdf>.
41. Schabas, W. A. (2009). *Genocide in International Law: The Crime of Crimes*. New York: Cambridge University Press.
42. *Ugolovnyj kodeks Rossijskoj Federacii 1996* (Gosudarstvennaja Duma Rossijskoj Federacii). *Oficial'nyj sajt kompanii «Konsul'tantPljus».*
<http://www.consultant.ru/document/cons_doc_LAW_10699/ecaca87fc0031575ba99ae9bfdad56f1cc08f34b>.
43. UNGA Res. 96 (I) (11 December 1946). <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/47/IMG/NR003347.pdf?OpenElement>.
44. *Zakon pro zasady derzhavnoji movnoji polityky 2012* (Verhovna Rada Ukrajiny). *Oficijnyj sajt Verhovnoji Rady Ukrajiny*. <http://zakon3.rada.gov.ua/laws/show/5029-17>.