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## INDICATORS RELEVANT FOR THE EVALUATION OF THE ALLEGED GENOCIDAL INTENT TO DESTROY A NATIONAL GROUP

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### **Vishchyk M. Indicators relevant for the evaluation of the alleged genocidal intent to destroy a national group.**

Special intent to destroy a protected group in whole or in part is a central legal ingredient distinguishing the crime of genocide from other international crimes. At the same time, it also remains one of the most complicated and multi-layered elements to prove. Since direct evidence pointing to the existence of genocidal intent is rare and often impossible to obtain, the analysis usually rests on circumstantial evidence considering the requirement that genocidal nature of the intent is the only reasonable inference from the available evidence. This article presents a methodology for evaluating the existence of genocidal intent in cases where a national group is alleged to be the target. It is of particular relevance for the Ukrainian justice actors in their investigation of genocide in the context of the Russian atrocities in Ukraine. The article presents an algorithm involving several stages, whereby filtering down the pool of underlying acts is the first critical step aimed at discerning acts bearing discriminatory character from those that are inherently indiscriminate and devoid of the signs of special intent. Further, it highlights the importance of establishing the alleged intent's direction at the group in whole or, alternatively, in part, as well as evaluating the substantiality of the targeted part. The article presents the methodology for the substantiality assessment via both quantitative (i.e., numeric) and qualitative approaches, with the latter involving the evaluation of the targeted part's prominence. Adopting the lenses of international jurisprudence, the article elaborates on the importance of various contextual factors in analysing the alleged existence of genocidal intent. The first set of factors for the analytical focus relates to the *modus operandi* of underlying acts. It highlights the examination of various circumstances, such as the repetition and consistency of the pattern of conduct, the acts' brutality, orchestrated and coordinated manner of their commission. Additionally, the article underscores the importance of a thorough evaluation of the identities of victims of underlying acts, particularly their significance to the group's survival. Among them, the leadership of the group plays a critical role, especially when national groups are targeted for destruction. The article concludes with an analysis of the role of socio-cultural targeting, the perpetrator forces' rhetoric and utterances, as well as the existence of a plan or policy for the intent's determination.

**Key words:** international criminal law, criminal law, Genocide Convention, genocide, genocidal intent, *dolus specialis*, national group.

### **Віщик М. Релевантні індикатори для оцінки ймовірного геноцидного наміру знищити національну групу.**

Спеціальний намір знищити захищенну групу повністю або частково є центральним правовим інгредієнтом, що відрізняє злочин геноциду від інших міжнародних злочинів. Водночас він також залишається одним із найскладніших та найбільш багатошарових елементів для доведення. Оскільки прямі докази, що вказують на наявність геноцидного наміру, є рідкісними та здебільшого неможливими для отримання, аналіз зазвичай ґрунтується на непрямих доказах

з огляду на вимогу, що геноцидний характер наміру є єдиним розумним висновком з наявних доказів. У цій статті представлено методологію оцінки ймовірного існування геноцидного наміру у випадках, коли національна група є ймовірною ціллю. Це має особливе значення для українських органів правосуддя в їхньому розслідуванні геноциду в контексті злочинів, скоєних російськими силами в Україні. У статті представлено алгоритм, що включає кілька етапів, де фільтрація масиву основоположних діянь є першим необхідним кроком, спрямованим на розмежування діянь, що мають дискримінаційний характер, від тих, які за своєю суттю є небірковими та позбавлені ознак спеціального наміру. Далі, у статті підкреслюється важливість встановлення спрямованості ймовірного наміру на групу повністю або, альтернативно, на групу частково, а також оцінки істотності частини, на яку спрямованій намір. У статті представлено методологію оцінки істотності як за допомогою кількісного (тобто числового), так і якісного підходів, причому останній включає оцінку важливості цільової частини. Застосовуючи призму міжнародної судової практики, у статті детально розглядається важливість різних контекстуальних факторів для аналізу ймовірного існування геноцидного наміру. Перший з факторів для аналітичного фокусу стосується способу скоєння основоположних діянь. У ній висвітлюється вивчення різних обставин, як-от повторюваність та послідовність моделі поведінки, жорсткість діянь, організований та скоординований спосіб їх вчинення. Крім того, у статті підкреслюється важливість ретельної оцінки особи потерпілих від основоположних діянь, зокрема їх значення для виживання групи. Серед них лідери групи відіграють істотну роль, особливо у випадках, коли національні групи є ціллю знищення. Стаття завершується аналізом ролі соціально-культурних нападів, риторики та висловлювань ймовірних виконавців, а також існування плану або політики для встановлення наміру.

**Ключові слова:** міжнародне кримінальне право, кримінальне право, Конвенція про геноцид, геноцид, геноцидний намір, *dolus specialis*, національна група.

### **Problem statement**

The crime of genocide is distinguished by a special *mens rea* requirement represented by the intent to destroy a protected group (e.g., a national group) in whole or in part [1, Art. 2]. The *dolus specialis* element makes the proof of the crime of genocide a particularly complicated process requiring a comprehensive overview of the whole range of contextual factors capable of supporting or refuting the special intent's existence. Since direct evidence of the perpetrator's state of mind is most often difficult, if not impossible, to obtain, the proof of the intent can be based on the circumstantial evidence [2, p. 125]. When this is the case, such inference must be the only reasonable one [3, P. 14]. It implies that the evidence must clearly and unequivocally exclude any alternative explanation of the perpetrator's actions that would undermine the existence of the intention to destroy a protected group. At the same time, various indicators fundamental for the intent's assessment and inference remain scattered in international jurisprudence and doctrine.

### **Purpose of the study**

This article aims to supplement the existing framework with a concise and accessible outline of indicators relevant to the assessment of the intent. In particular, it will describe several stages and sets of indicators based on which the existence of genocidal intent or its absence should be evaluated. Given the context of the atrocities committed by the Russian Federation forces since 2014, and particularly since the 2022 full-scale invasion, directed against the Ukrainian national identity, the article will focus specifically on the intent to destroy a national group in whole or in part in light of the genocide allegations in the Ukrainian context. This is particularly relevant for the investigative and legal evaluation conducted by the Ukrainian justice actors in the course of criminal proceedings related to the genocide allegations.

### **The state of the study of the issue**

Many distinguished legal commentators have previously engaged in the rigorous analysis of multiple contours of *dolus specialis*, including C.J. Tams, L. Berster, B. Schiffbauer, C. Kreß, P. Gaeta, W. Schabas, and many others [4, p. 93-115; 5, p. 484-499; 6, p. 105-110; 7, p. 213-278]. In particular, the aforementioned authors engaged in a careful analysis of the nature of genocidal intent and multiple legal layers pertaining to its evaluation when viewed through the lenses of other elements of the crime. At the same time, the international law doctrine is often lacking a comprehensive practical toolkit merging together various considerations stemming from international and domestic case-law, as well as academic work.

### **Presentation of the main material**

The first step of the analysis inevitably requires evaluating the scope of the underlying acts. The crime of genocide is limited by the exhaustive list of five underlying acts, namely killing of the protected group's members, infliction of serious bodily or mental harm, creation of deadly conditions of life calculated to destroy group members, prevention of births and transfer of children to another group [1, Art. 2]. Respectively, each must be accompanied by the special intent to destroy in order to amount to the crime of genocide.

Therefore, the initial step in the intent's assessment is to analyse a pool of underlying acts with the purpose of establishing whether their accumulation – as such – may plausibly point to the intent's existence. Moving from the contrary, it also requires singling out acts or clusters of acts which technically qualify as one of the underlying acts but are – by their very nature – incapable of being attributed *dolus specialis*. Genocidal intent is, at its core, a discriminatory intent, distinguished from other forms of discriminatory intent (e.g., the one inherent to the crime against humanity of persecution) by its ultimate destructive degree. However, the fact remains that genocidal intent is *discriminatory* in its essence.

Hence, acts that lack a discriminatory character cannot, by their very character, be accompanied by the intent to destroy a protected group. In the Ukrainian context, it relates to several clusters of atrocities, e.g., indiscriminatory shelling and blatant destruction of frontline settlements, villages and towns, drone terror against the civilian population, long-range missile strikes against the civilian infrastructure, particularly energy infrastructure, etc.

While these clusters of acts can be directed at the civilian population as such and may even intend to cause the civilian population's blatant destruction, they are capable of affecting members of the civilian population belonging to various groups, including pro-Russian individuals who do not belong to the Ukrainian national group. Such acts may qualify as war crimes or crimes against humanity (provided that they were committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" "pursuant to or in furtherance of a State or organisational policy to commit such attack") [8, Art. 7(1),(2)(1)]. Yet, the conduct that is by its very character indiscriminate will fall short of manifesting the intent to destroy a particular group.

A proposed counterargument may suggest treating the Ukrainian civilian population as a group in itself, uniting, e.g., Ukrainian citizens of different identities. However, this approach would be erroneous: it will not represent any of the four protected groups – national, ethnic, racial or religious – protected by the Convention. For example, it will not represent a Ukrainian ethnic group (uniting individuals based on the Ukrainian language and culture) or national group (uniting individuals based on a deep level of collective self-identification with the Ukrainian nationhood and national projects, thus excluding Ukrainian citizens who do not self-identify themselves as such or actively oppose such national idea) [for more explanation see: 9, p. 18-23].

Having distinguished acts that *prima facie* can and cannot plausibly be accompanied by the discriminatory intent, the next step of the analysis would entail determining the direction of the potential intent. Genocidal intent may exist in two alternative forms and aim at the destruction of the group, either in whole or in part. International jurisprudence links the definition of the national group "in whole" to members of the group within a particular state [see, e.g., 3, p. 5].

Alternatively, a part may be geographically limited but, in order to establish a qualification of conduct as genocide, such part must be "substantial" [3, P. 4]. The Appeals Judgment of the International Criminal Tribunal for the former Yugoslavia in the case of *Radislav Krstić* is particularly illustrative in laying out the methodology for the substantiality assessment which was subsequently readopted by various other chambers.

First, substantiality would require targeting of the part to affect the whole in a significant way, although the standard for such influence remains relatively blurred [3, p. 2-3]. Second, substantiality can be measured based on two approaches. The first and essential step of the analysis requires a quantitative evaluation [3, p. 4]. The quantitative approach involves the numerical analysis of the targeted part, either in absolute terms or relative to the overall number of group members [3, p. 4]. When quantitative assessment does not assist in establishing substantiality, qualitative evaluation can be of special relevance. Substantiality of a targeted part may be established in a qualitative sense, if such a part is "prominent" [3, p. 4].

In turn, prominence involves considering whether a targeted part was emblematic of the group or essential to its survival [3, p. 4]. For example, considerations such as strategic importance of a

territorially limited part for the overall group and/or perpetrators, eminence of the targeted part in the eyes of the international community and among a broader victim group, as well as symbolic fate of the targeted part to the victim group in whole, may be relevant for evaluating the prominence [3, p. 5-6].

Another important consideration relates to the area of perpetrator forces' control, the extent of their reach, and the destructive opportunities presented [3, p. 5]. For example, it is important to consider whether, within the existing scope of limited territorial control and perpetrator forces' capacities, perpetrators made use of the opportunity to target group members for destruction, or, conversely, did not embark on a destructive course.

As an illustration, in *Croatia v. Serbia*, the International Court of Justice reached a conclusion that Serb forces did not possess genocidal intent to destroy the Croats under their control, particularly because of the fact that Croat civilians were evacuated, while combatants were given the prisoner-of-war status and spared [10, p. 127]. Therefore, in the Court's view, the Serb forces did not exercise an opportunity to target the alleged victim group's members under their control despite the opportunities to do so. Additionally, the Court also evaluated the number of victims of underlying acts of physical and biological destruction to the size of the overall part of the group that was alleged to be targeted and concluded that the proportion was insignificant, which as well undermined the finding of genocidal intent [10, p. 127].

At the same time, international jurisprudence also accepts that the proof of genocidal intent does not require perpetrators to choose the most efficient methods to attempt to achieve the destruction of the targeted part of the group under their control [3, p. 10-11]. For example, perpetrators may often be driven by, e.g., sensitivity to public opinion or risk of retribution, which forces them to adopt more sophisticated and selective methods of destruction instead of blatant massive targeting via killing every group member under their control [3, p. 10-11]. Therefore, the proof of genocidal intent is not necessarily undermined by the fact that perpetrators did not employ what may otherwise seem as "the most effective" methods of targeting, thus leaving destruction "incomplete" [3, p. 11].

The next step in assessing the alleged intent would require evaluating a number of contextual factors surrounding the targeting of members of the protected group. Where the inference of genocidal intent is made from circumstantial evidence, international jurisprudence has consistently emphasised that the general context on the ground plays an important role [11, p. 18; 2, p. 125].

A myriad of factors can inform the analysis. First, the perpetrator forces' *modus operandi* can be an important indicator. The scale of atrocities, as well as their brutal or horrendous character, may support the inference of the intent to destroy [12, p. 64; 13, p. 2364-2365]. Second, the coordinated and concerted manner of the acts' execution, particularly through the cooperation of various units and types of forces, may point in the direction of the special intent [13, p. 2364-2365; 14, p. 200]. Third, the persistent pattern of conduct, as well as the atrocities' methodical, consistent, repetitive, planned and programmed manner can support the inference of intent [14, p. 200; 15, p. 328-329].

Fourth, contextual factors pertaining to the methodology of targeting used in every individual case can be highly relevant. This involves, for example, evaluating whether a victim was unarmed or whether killings targeted victims of various ages, genders, social profiles, health conditions, etc. [14, p. 198-199, 532; 3, p. 9]. The type of weapons used, as well as the extent of bodily injury, may form another category of useful indicia [14, p. 42-43].

In addition to *modus operandi*, the profile and identity of victims of underlying acts play an essential role in evaluating the presence of intent. For example, the International Criminal Tribunal for the former Yugoslavia in the case of *Radislav Krstić* put a significant focus on the fact that victims of underlying acts were 7.000-8.000 Bosnian Muslim men.

The Trial Chamber emphasised how perpetrators should have known of "the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society" [16, p. 211-212]. Respectively, the disappearance of the men precluded "any effective attempt by the Bosnian Muslims to recapture the territory", as well as the ability of the Bosnian Muslim community of Srebrenica to reconstitute itself [16, p. 211-212].

The Appeals Chamber supported the conclusion by stating that the disappearance of the men "had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction" [3, p. 10]. Therefore, the Chambers' argument goes, the victims' identity and their social profile indicated that their extermination increased the risk of the group's destruction, hence supporting the inference of the intent.

Beyond this, another factor that can support the inference of genocidal intent relates to targeting the group's leadership. Targeting the totality of the leadership of the protected group, viewed in combination with the fate of the remainder of the group, can serve as "a strong indication" of genocidal intent, "regardless of the actual numbers killed" [17, p. 25]. The category of "leaders" may encompass various strata of the group, such as political, administrative, religious, intellectual or business leaders [17, p. 25]. It may likewise include defenders of the group (e.g., law-enforcement or military personnel) if their extermination leaves the group defenceless [17, p. 25]. An especially important factor is the fate that faced the rest of the group. If the rest of the group were subjected to heinous acts (that do not qualify as one of the five underlying acts of genocide) in parallel to the targeting of leaders, this may strongly support the finding of the intent [17, p. 25].

The category of leaders should be viewed broadly as covering persons "who, whether by reason of their official duties or by reason of their personality, had this special quality of directing the actions or opinions of the group in question, that is those who had a significant influence on its actions" [18, p. 32]. For instance, in the case of *Duško Sikirica et al.*, although the International Criminal Tribunal for the former Yugoslavia established the insufficiency of evidence that victims who were "taxi-drivers, schoolteachers, lawyers, pilots, butchers and café owners" qualified as leaders, it did not refute the possibility that these categories of group members *might potentially* qualify as leaders under other circumstances [18, p. 32-33]. It cannot be excluded that regardless of the occupation, social profile or status, a person may qualify as belonging to the group's leadership given the level of influence they exercise on the group's actions and opinions.

At the same time, the definition of leadership cannot be overly flexible and loose. In the aforementioned case of *Duško Sikirica et al.*, the International Criminal Tribunal for the former Yugoslavia concluded that victims who were merely active in the defence and resistance during the combat should not be treated as "leaders" *per se* since acceptance of this premise "would necessarily involve a definition of leadership so elastic as to be meaningless" [18, p. 33].

The factor of targeting the leadership may be especially relevant in cases of national groups. Since national groups are highly dependent on the intangible mutual ties dedicated to the shared commitment to a national project [9, P. 19], targeting of leaders may significantly facilitate the group's destruction [19, p. 26-27]. Raphael Lemkin illustrated the importance of particular strata of the population for the overall group's survival in his 1953 speech dedicated to the remembrance of the Holodomor [20, p. 47-52]. Lemkin argued that Soviet destruction of the Ukrainian national group was premised on the idea of targeting three main pillars of the national identity, namely intelligentsia as the brain of the group, clergy as the group's soul, and peasantry as the group's body that was key and instrumental in preserving the group's culture and traditions [20, p. 48-49]. The effect of such selective targeting, according to Lemkin, would be analogous to the blatant physical elimination of the entirety of the group, since without these three pillars, the national group would become merely "a mass of people" [20, p. 51].

An additional set of factors relevant for the evaluation of the intent concerns acts of socio-cultural targeting of the group, which are not underlying acts of genocide *per se*, but bear the discriminatory character directed at the group's identity. On the one hand, the notion of "cultural genocide", i.e., "act[s] committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group [...] or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group", was excluded from the definition of genocide in the Genocide Convention [21, P. 46].

On the other hand, attacking cultural property and symbols of the group in parallel to the underlying acts representing physical and biological forms of destruction may be considered as evidence of genocidal intent [16, p. 203]. Therefore, even though acts of socio-cultural targeting do not fall under the category of underlying acts of genocide, their commission may serve as an important indicator of the intent, when accompanying underlying acts of physical and/or biological destruction targeting the group.

Furthermore, genocidal intent can be inferred from the statements of direct perpetrators, as well as the leadership of the perpetrator forces [15, p. 328-329], including those disseminated through propaganda. Such statements may assist in determining both how perpetrators viewed the targeted group and whether they indeed intended to achieve its destruction.

At the same time, and particularly in the context of an ongoing armed conflict, perpetrators' utterances, including the perpetrator forces' leadership's statements, have to be treated carefully and with due caution. They may serve various purposes, such as to demoralise the enemy, boost the morale

of one's own forces, or instil fear and panic, without necessarily displaying the intent to destroy the group at stake. International jurisprudence supported this caution, indicating that where public speeches may bear a discriminatory character, it should not necessarily be equated with manifesting genocidal intent [22, p. 321-322].

Lastly, according to a prevailing view in international jurisprudence, the commission of the crime of genocide does not require a plan or policy as a necessary legal ingredient to establish the crime's commission [11, p. 18]. At the same time, where such a plan or a policy exists and can be demonstrated through direct or circumstantial evidence, it can support the inference of genocidal intent [11, p. 18]. The existence of a plan or a policy must not necessarily be evidenced by direct and written sources: it can likewise be implied from the perpetrators' *modus operandi*, particularly the nature and scale of the committed acts, similar method of their commission, similar categories of victims targeted, consistency and repetition of the acts, etc.

### **Conclusions**

Special intent to destroy a protected group in whole or in part is a central element of the crime of genocide and, at the same time, remains a complex object for evaluation. In most cases, the proof of the intent through direct evidence will be impossible, prompting the analysis to focus on circumstantial evidence which may facilitate the inference of the intent's existence.

In cases where the targeting of national groups for destruction is alleged, the assessment of the intent's existence or absence should follow a methodology involving several stages. First, it is important to filter the pool of underlying acts to distinguish those bearing a discriminatory character from those that are, *per se*, incapable of showing discriminatory direction of the conduct. Second, establishing the scope of the object at which the intent is directed (i.e., group in whole or in part) remains fundamental. Where the intended destruction of the part is alleged, the analysis of the substantiality of the targeted part is imperative, both through quantitative and qualitative lenses. Third, the evaluation of the intent's existence will always depend on the contextual factors surrounding the commission of underlying acts. They involve various indicators, particularly the acts' *modus operandi*, their repetition, consistency, brutality, orchestrated and coordinated character, the dynamic and methodology of commission. Likewise, the identities of victims of underlying acts and the impact of their targeting on the remainder of the group are essential for the analysis. The inference of intent can be supported by the utterances of perpetrator forces, as well as by the existence of a plan or policy to target the group.

In cases where the national group is a target, some of these factors may bear an increased significance. For example, due to national identity's increased dependence on intangible ties uniting the group's members, targeting of the national group's leadership in combination with parallel use of various acts of socio-cultural targeting can facilitate the group's destruction when combined with physical and biological targeting through five underlying acts of genocide. At the same time, given the unique nature of each group's internal dynamic, this assessment will always remain context-dependent with every factor's significance varying according to the particularities of the targeted group and its identity.

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