

Understanding Russia's Actions in Ukraine as the Crime of Genocide

Denys Azarov,* Dmytro Koval,**
Gaiane Nuridzhanian*** and Volodymyr Venher****

Abstract

The new wave of Russia's aggression against Ukraine that began on 24 February 2022, and the intensification of the armed conflict accompanied by grave breaches of international humanitarian law, has received significant scholarly attention. Many academic interventions have examined the developments in Ukraine through the frameworks of jus ad bellum and jus in bello. Some, however, have applied a genocide lens to make sense of reported numerous and widespread violations of international humanitarian and human rights law. This article contributes to the latter stream of scholarship by contextualizing the arguments for the existence of genocidal intent behind the seemingly unrelated crimes committed by the armed forces of the Russian Federation all over Ukraine. The authors pay particular attention to the language and pseudo-historical references used by Russia's leaders as a justification for the invasion of Ukraine and argue that these statements and expressions indicate the existence of genocidal intent. This article also reflects on the issue of the systematic destruction of cultural heritage of Ukraine as further evidence of the intent to destroy the Ukrainian nation understood as a protected national group under the Genocide Convention, at least in part. Finally, the authors analyse the genocidal acts that have apparently been committed, including killings; the causing of serious bodily or mental harm; the forcible transfer of Ukrainian children to Russia, and the

* Dean, Faculty of Law, National University of Kyiv-Mohyla Academy, Ukraine. [azarov@ukma.edu.ua]

** Associate Professor, National University of Kyiv-Mohyla Academy, Ukraine. [d.koval@ukma.edu.ua]

*** Associate Professor, National University of Kyiv-Mohyla Academy, Ukraine; Postdoctoral Research Fellow at UiT-The Arctic University of Norway. [g.nuridzhanian@ukma.edu.ua]

**** Associate Professor, National University of Kyiv-Mohyla Academy, Ukraine. [venherm@ukma.edu.ua]

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deliberate infliction of conditions of life aimed at the physical destruction of the Ukrainian nation. It is stressed that there are reasonable grounds to believe that the destruction of the Ukrainian nation by Russia has been pursued through commission of these prohibited acts. Their nature and large-scale character serve as further evidence of genocidal intent to destroy the Ukrainian nation.

1. Introduction

Russia's aggression against Ukraine began in 2014, when Russia unlawfully annexed Crimea and started the proxy war in the Donbas and Luhansk regions in the east of Ukraine.¹ On 24 February 2022, Russia commenced its overt full-scale invasion of Ukraine, thus escalating the war that had been ongoing for eight years. In that time, the quantity and gravity of crimes allegedly committed by the Russian Federation armed forces and armed units acting under Russia's control has spiked dramatically.² The scenes of mass atrocities in Bucha, Irpin, Borodyanka and other liberated areas of Ukraine prompted politicians and parliaments of several countries to make statements and declarations about the genocide of the Ukrainian nation.³

On 14 April 2022, the national parliament of Ukraine, the Verkhovna Rada, adopted a declaration, calling the acts of Russia's armed forces and its political and military leadership during the full-scale invasion of Ukraine a genocide.⁴ This was more than a political statement on genocide in Ukraine; taken together with the accompanying explanatory note, the declaration advanced a legal understanding of Russia's actions as genocide.⁵ The declaration aimed, first, to unpack the multi-layered historical and cultural context of the criminal acts that may constitute genocidal acts. Second, it attempted to prevent genocide (or its further escalation) in accordance with the state obligation enshrined

- 1 C. Krefß, 'The Ukraine War and the Prohibition of the Use of Force in International Law', *TOAEP Occasional Paper Series* No. 13 (2022), available online at <https://www.toaep.org/ops-pdf/13-kress/>, at 3–4.
- 2 'Russia Causes Damage to Ukrainian Infrastructure Worth of US\$138 billion', *Ukrainska Pravda*, 24 January 2023, available online at <https://www.pravda.com.ua/eng/news/2023/01/24/7386357/>; Office of the United Nations High Commissioner for Human Rights (hereafter OHCHR), *Report on the Human Rights Situation in Ukraine, 1 February to 31 July 2022*, 27 September 2022, available online at <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-09-23/ReportUkraine-1Feb-31Jul2022-en.pdf>.
- 3 E. Whatcott, 'Compilation of Countries' Statements Calling Russian Actions in Ukraine "Genocide"', *Just Security*, 20 May 2022, available online at <https://www.justsecurity.org/81564/compilation-of-countries-statements-calling-russian-actions-in-ukraine-genocide/>.
- 4 Про Заяву Верховної Ради України 'Про вчинення Російською Федерацією геноциду в Україні': Постанова Верховної Ради України від 14 квітня 2022 року № 2188-IX (On the Genocide Committed by the Russian Federation in Ukraine, Declaration of the Verkhovna Rada of Ukraine No. 2188-IX of 14 April 2022) (hereafter Declaration). The English-language version of the Declaration is available online at <https://zakon.rada.gov.ua/laws/file/text/97/f515139n154.pdf>.
- 5 The English-language version of the Explanatory Note to the Declaration is available online at <https://zakon.rada.gov.ua/laws/file/text/97/f515139n152.pdf>.

in Article 1 of the UN Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). This obligation ‘of conduct’⁶ urges the state to take preventive actions without awaiting a formal declaration of genocide by an external body.⁷

The present article, written by the authors of the text of the declaration and the accompanying explanatory note, develops these legal arguments further. It demonstrates that genocidal intent can be established not only based on direct evidence and certain characteristics of the prohibited genocidal acts. The case of Ukraine shows that it is important to consider the historical and political contexts, as well as to properly understand narratives that, whilst originating in the last century, still dominate Russia’s ideology and propaganda.

This article begins by discussing the relevance and importance of context in establishing genocidal intent (Section 2). It then shows that Ukrainians fall under the definition of a protected national group for the purpose of the crime of genocide (Section 3). Examination of the evidence that we believe shows an intent to destroy the Ukrainian nation as such (at least in part) follows. This evidence is found in dehumanization and the rhetoric of ‘denazification’ of the Ukrainian nation as well as in destruction of its cultural heritage (Section 4). It is also found in the nature and character of the genocidal acts that have been committed against Ukrainians (Section 5).

2. The Relevance of Context in Establishing Genocidal Intent

The issue of whether atrocities committed in Ukraine amount to the crime of genocide has already generated a vivid scholarly debate.⁸ Academic discussion of the topic is timely and essential. At the same time, it must be recognized that the analysis of an issue of such importance as the potentially ongoing crime of genocide must be carried out with due understanding and consideration of the local — in this case Ukrainian — context. Some academic contributions on the topic clearly demonstrate the need for in-depth exploration of such context. For instance, when discussing whether Ukrainians fall under one

6 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007 (*Bosnia and Herzegovina v. Serbia and Montenegro* judgment), at § 430.

7 M.T. Kamminga, ‘The Scope for and the Significance and Desirability of the Use of the Term ‘Genocide’ by Politicians: Joint Advisory Report by the Netherlands Advisory Committee on Issues of Public International Law and the External Advisor on Public International Law’, 65 *Netherlands International Law Review* (2018) 83–101, at 96.

8 D. Irvin-Erikson, ‘Is Russia Committing Genocide?’, *Opinio Juris*, 24 April 2022, available online at <https://opiniojuris.org/2022/04/21/is-russia-committing-genocide-in-ukraine/>; N. Quéniwet, ‘The Conflict in Ukraine and Genocide’, 25 *Journal of International Peacekeeping* (2022) 141–154; I. Marchuk and A. Wanigasuriya, ‘Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine’s Prospects in its Pursuit of Justice at the ICJ’, *Journal of Genocide Research* (2022) 1–23; W.A. Schabas, ‘Genocide and Ukraine: Do Words Mean What We Choose them to Mean?’, 20 *Journal of International Criminal Justice* (‘JICJ’) (2022) 843–857.

of the protected groups, Noëlle Quénivet writes that ‘[t]he claim made that de-Nazification and de-Ukrainization are tautological in Russia’s state of mind would warrant further investigation’.⁹ The author also mentions that Russia’s leadership have called for ‘the extermination of Ukrainian radicals though not all Ukrainians’ when examining the issue of genocidal intent.¹⁰

Another author, William Schabas, makes no serious attempt to understand the true meaning and pervasiveness of Russia’s official narrative denying the existence of Ukrainians as a separate nation, and the significance of the fact that this narrative is being used to justify and fuel atrocities in Ukraine. The author asks, ‘How can the crime of destruction of a group exist if the perpetrator denies its very existence?’¹¹ The mere posing of this question can indicate that Schabas ignores many circumstances of Russia’s aggressive war against Ukraine. Therefore, he does not understand why the laws of formal logic, upon which the above question is built, cannot be applied in this situation. However, in-depth familiarization with the context is a well-established practice of international tribunals,¹² which Schabas himself repeatedly refers to. Such familiarization should not be particularly difficult owing to the well-known and accessible works of many authors, a few which we mention in this article.¹³ These works shed light on the true meaning of Putin’s rhetoric and Russian state propaganda, which Schabas leaves out of focus.

Furthermore, some authors tend to examine atrocities committed by Russian soldiers in Ukraine in isolation, which inevitably leads them to a conclusion that these are random instances of violence.¹⁴ Such analysis overlooks the circumstances that may indicate the existence of genocidal intent. Just like the whole picture of a puzzle can be seen once all the pieces are put together, so the genocidal intent behind Russia’s war against Ukraine reveals itself when prohibited acts of genocide are considered in their appropriate context and together with other relevant factors.

It is now well-established in the jurisprudence of ad hoc tribunals that a compartmentalized analysis obscures the proper inquiry into the existence of genocidal intent.¹⁵ Instead, to determine genocidal mental state, the totality of evidence must be examined.¹⁶ In *Karadžić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed that the genocidal intent can be

9 Quénivet, *supra* note 8, at 149.

10 *Ibid.*, at 152.

11 Schabas, *supra* note 8, at 852–853.

12 The International Criminal Tribunal for Rwanda (ICTR) acknowledged the importance of historical context for the understanding of events in Rwanda in 1994 and its relevance for cases examined by it. See Judgment and sentence, *Nahimana and others* (ICTR-99-52-T), Trial Chamber I, 3 December 2003 (*‘Nahimana and others Trial Judgment’*), § 106.

13 See, for instance, T. Snyder, ‘Russia’s Genocide Handbook’, 8 April 2022, available online at <https://snyder.substack.com/p/russias-genocide-handbook>; M. Mälksoo, ‘The Postcolonial Moment in Russia’s War Against Ukraine’, *Journal of Genocide Research* (2022) 1–11.

14 Quénivet, *supra* note 8, at 153.

15 Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006 (*‘Stakić Appeal Judgment’*), § 55.

16 *Ibid.*

inferred from ‘the general context, the scale of atrocities, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy’.¹⁷ Furthermore, political doctrine giving rise to genocidal acts may serve as an indication of genocidal intent.¹⁸ So too may propaganda, derogatory language, and the context and environment in which these public utterances are made.¹⁹ It is therefore our opinion that understanding that Russian propaganda labels as ‘Nazi’ any Ukrainian who wishes to assert his or her Ukrainian identity and supports Ukraine’s independence is crucial for any discussion of genocidal intent. Other contextual factors are relevant to the determination of existence of genocidal intent.²⁰ Genocidal intent can be inferred from the systematic nature of the crimes outlined in Section 5, especially when these acts are examined in their totality and against the backdrop of the political ideology that has provoked them.

The authors do not doubt the value of the contributions of outsiders on the situation in Ukraine. However, analysis of the potentially genocidal situation cannot be based only on accounts detached from the Ukrainian context, not least because of the dangers of the much-debated ‘West(s)plaining’ and the limits it imposes on the research of legal issues related to Ukraine.²¹ This is why we see this article as a crucial contribution to the discussion on the crimes being committed in Ukraine.

3. Ukrainians as a Protected National Group

Article II of the Genocide Convention and Article 6 of the ICC Statute define genocide as any of the following acts committed with the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

17 Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016 (‘*Karadžić* Trial Judgment’), § 550.

18 Judgment, *Muvunyi* (ICTR-00-55A-T), Trial Chamber III, 11 February 2010, § 29.

19 *Nahimana and others* Trial Judgment, *supra* note 12, § 1022; *Stakić* Appeal Judgment, *supra* note 15, § 52.

20 G. Mettraux, *International Crimes: Law and Practice, Volume I: Genocide* (Oxford University Press, 2019), at 230–235.

21 P.I. Labuda, ‘On Eastern Europe, “Whataboutism” and “West(s)plaining”: Some Thoughts on International Lawyers’ Responses to Ukraine’, *EJIL:Talk! Blog of the European Journal of International Law*, 12 April 2022, available online at <https://www.ejiltalk.org/on-eastern-europe-whataboutism-and-westsplaining-some-thoughts-on-international-lawyers-responses-to-ukraine/>. See also the debate on the Amnesty International report on Ukraine, ‘Amnesty Ukraine Office Not Involved in Preparing Scandalous Report on Ukrainian Armed Forces’, *Ukrainska Pravda*, 4 August 2022, available online at <https://www.pravda.com.ua/eng/news/2022/08/4/7361910/>.

The crime of genocide is in essence denial of the right to existence to one of the protected groups. In the situation of Ukraine, it is Ukrainians as a national group that are being targeted. Different understandings of the term ‘national group’ for the purpose of crime of genocide exist. Some believe that the meaning of the term is national minority, and that the term should essentially be interpreted synonymously with the terms ethnic, racial and religious groups.²² Such understanding, however, denies the term ‘national’ a distinct meaning, which is contrary to the basic canon of treaty interpretation that each term of the treaty ought to be interpreted to have a distinct meaning.²³

The ordinary meaning of the term ‘nation’ is ‘a large body of people united by common descent, history, culture, or language, inhabiting a particular state or territory’.²⁴ A nation is therefore a distinct entity united by common traits, be it history, culture, traditions, language, ethnicity or race. At the same time, it has been suggested that a modern nation does not necessarily coincide with the same race and ethnicity; indeed, it may encompass several different ethnic, racial or religious groups.²⁵

In *Akayesu*, the International Criminal Tribunal for Rwanda (ICTR) defined a ‘national group’ to mean a ‘collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties’.²⁶ This definition builds upon the understanding of nationality as an expression of a legal bond between an individual and the state. At the same time, a nation is more than a group of people that hold the same formal nationality.²⁷ A nation ‘is characterized by a common wish to live together, a common ideal, a common goal and common aspirations’.²⁸ A parallel can be drawn with a broader understanding of nationality emerging from the law of armed conflict’s definition of the protected persons.²⁹ It is the effective allegiance, rather than a formal legal bond, to a party to an armed conflict that determines an individual’s nationality.³⁰

22 W.A. Schabas, *Genocide in International Law* (2nd edn., Cambridge University Press, 2009), at 136–137.

23 C. Kreß, ‘The Crime of Genocide under International Law’, 6 *International Criminal Law Review* (2006) 461–502, at 475.

24 A. Stevenson (ed.), *Oxford Dictionary of English* (3rd edn., Oxford University Press, 2015).

25 *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, 11 March 1986, § 57.

26 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber I, 2 September 1998 (‘*Akayesu* Trial Judgment’), § 512.

27 C. Kreß, *The Crime of Genocide under International Law*, *supra* note 23, at 467; C. Lingaas, ‘Conceptualizing the National Group for the Crime of Genocide: Is Law Able to Account for Identity Fault Lines?’, 49 *Nationality Papers* (2021) 240–261, at 242.

28 *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, 11 March 1986, § 57.

29 Art. 4 Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Geneva Convention IV).

30 Decision on the confirmation of charges, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-717), Pre-Trial Chamber I, 30 September 2008, § 291 with further references to the ICTY jurisprudence.

The current practice of the international criminal courts and tribunals favours a combination of objective and subjective approaches to the definition of a protected group for the purposes of the crime of genocide.³¹ The protected group can be identified by relying on the perpetrator's perception of the victim as belonging to the group that is targeted on the basis of its perceived national, ethnical, racial or religious characteristics.³² The victim's own perception of himself or herself as a member of the targeted protected group has also been considered relevant.³³

Modern Ukraine is diverse. It comprises different ethnic, religious and language groups. All these groups are united into one nation — Ukrainians — by their allegiance to the Ukrainian state and the shared belief in the independence of their state and nation.³⁴ The Constitution of Ukraine similarly defines the Ukrainian nation as citizens of Ukraine of *all nationalities*, nationality here used in the sense of ethnic origin, residing in Ukraine.³⁵ That Ukrainians responded to the attack on their right to existence in a consolidated manner clearly shows that they perceive themselves as one nation.

It must be noted that the Declaration uses the term '*Український народ*' — [Ukrainiskyi narod], in the original Ukrainian-language version, when referring to the Ukrainian nation as protected group. The same term is used in the Constitution of Ukraine, and it is sometimes translated into English as 'Ukrainian people'. However, the term '*народ*' — [narod] which is the Ukrainian word for 'people', especially as used in the Constitution and the Declaration, corresponds to the term 'nation', meaning the collection of all the citizens and population of a state whatever their ethnic origin. Conversely, Ukrainian terms '*natsiya*' (*нація*) and '*natsionalnist*' (*національність*), literally translated into English as 'nation' and 'nationality' respectively, refer first and foremost to ethnicity and ethnic origin. For this reason, the original Ukrainian text of the Declaration uses the Constitutional term '*Український народ*' — [Ukrainiskyi narod], while its translated version refers to 'Ukrainian nation' as a protected national group for the purposes of establishing the crime of genocide.³⁶

In addition to constituting a national group based on objective characteristics and self-perception, Ukrainians are also perceived as a distinct group by the attacker. Russia's political leadership has repeatedly denied Ukraine's right to exist as a separate state and a nation.³⁷ Statements to this effect also

31 C. Fournet, 'The Actus Reus of Genocide', in P. Behrens and R. Henham (eds), *Elements of Genocide* (Routledge, 2013) 53, at 57–58; C. Lingaas, 'Defining the Protected Groups of Genocide Through the Case Law of International Courts', *International Crimes Database*, Brief 18, December 2015.

32 Judgment, *Brđanin* (IT-99-36-T), Trial Chamber II, 1 September 2004, § 683

33 *Ibid.*

34 "'Rating": The Number of Supporters of Independence in Ukraine Reached Almost 100%', *Babel*, 24 August 2022, available online at <https://babel.ua/en/news/83378-rating-the-number-of-supporters-of-independence-in-ukraine-reached-almost-100>.

35 Constitution of Ukraine of 28 June 1996, Preamble, para. 1.

36 The English-language version of the Declaration, *supra* note 4; the English version of the Explanatory Note to the Declaration, *supra* note 5.

37 В. Путин, 'Об историческом единстве русских и украинцев' (V. Putin, 'On the Historical Unity of Russians and Ukrainians'), President of Russia, 12 July 2021, available online at <http://>

accompanied Russia's full-scale invasion of Ukraine on 24 February 2022.³⁸ It is precisely the characteristic of Ukrainians as a separate nation that the attacker seeks to annihilate by means of physical destruction of members of the group, forced removal and russification of Ukrainian children, ruination of the country's basic infrastructure and erasure of Ukrainian culture. In other words, Ukrainians are being attacked because of their membership in the Ukrainian nation, a distinct nation entitled to form its own separate state and to exist independently from Russia.

4. The Intent to Destroy the Ukrainian Nation

Establishing intent to destroy a protected group in whole or in part is a challenging aspect of proving the crime of genocide. Genocidal intent can be manifested in the direct and explicit statements of the perpetrators.³⁹ But it can also be disguised in the terms and ideology created and propagated by the perpetrators. In addition, genocidal intent can be inferred from the general context and the nature of the acts committed by the perpetrators.⁴⁰

For this reason, this section explores the context of Russia's full-scale aggression against Ukraine and demonstrates that it is fuelled by the language of dehumanization and demonization of the Ukrainian nation. We also demonstrate that the true purpose of Russia's campaign of 'denazification' of the Ukrainian nation is in fact its destruction, which among other things is carried out through the destruction of Ukraine's cultural heritage.

This article does not aim to attribute *dolus specialis* to specific individuals. Still, it is essential to indicate that most of the information discussed in this article points to the political leadership of the Russian Federation and, more specifically, Russian President Vladimir Putin. His public statements and those of his lieutenants; falsification of history; setting out the goals of the war against Ukraine, and generally orchestrating the military offensive may be taken as evidence of the genocidal intent to destroy the Ukrainian national group as such, at least in part. This, however, does not testify to the absence of the genocidal intent in the acts of other political and military leadership representatives and the lower-level members of the Russian armed forces and occupation administrations. They may well also possess the requisite *dolus specialis*. Alternatively, their role may be of accomplices or accessories who

kremlin.ru/events/president/news/66181. The English version of this article which may not however fully reflect the original meaning is available online at <http://en.kremlin.ru/events/president/news/66181>. See also Mälksoo, *supra* note 13.

38 'Обращение Президента Российской Федерации' (Address by the President of the Russian Federation), 21 February 2022, available online at <http://kremlin.ru/events/president/news/67828>. The English version of the text of the address is available online at <http://en.kremlin.ru/events/president/news/67828>. Note that the translation may not fully reflect the original meaning of the text.

39 Karadžić Trial Judgment, *supra* note 17, § 550.

40 *Ibid.*

perpetrated the acts of genocide with the knowledge of the genocidal intent of others but did not necessarily share it.⁴¹

A. Dehumanization of the Ukrainian Nation

In her essay for *The Atlantic* on the comparison of the Holodomor and today's Russian assault on Ukraine, Anne Applebaum rightly stresses that 'while not every use of genocidal hate speech leads to genocide, all genocides have been preceded by genocidal hate speech'.⁴² This observation of a historian is corroborated by the courts' commentaries on international crimes. The District Court of Jerusalem acknowledged the power of hate speech and dehumanization in the *Eichmann* case, saying that '[o]ut of this soil of hatred for the Jews grew the actions of the Accused'.⁴³ The hatred was expressed among others through the particular terms that the Nazis used to refer to Jews, such as 'rats' or 'lice'.

In Rwanda, the Tutsi, the ethnic group that suffered from the genocidal attacks, were labelled *Inyenzi*, which literally means 'cockroaches'. The ICTR paid significant attention to the use of this term, which had 'negative, even abusive connotations', as a tool of dehumanization.⁴⁴ The Tribunal looked at the historical transformation of the word, used in the 1960s for mostly Tutsi anti-revolutionary insurgents and 30 years later applied as a derogatory term for the whole ethnic group of Tutsi.⁴⁵ In *Nahimana, Barayagwiza and Ngeze*, the ICTR stressed the importance of considering 'the context in which the statement is made A statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement'.⁴⁶ In *Muhimana*, the ICTR explicitly named the use of derogatory language as a factor from which specific genocidal intent may be inferred.⁴⁷

ICTY's practice on derogatory language is not uniform.⁴⁸ That being said, in *Tolimir*, the Tribunal pronounced that permitting the use of and using the

41 *Akayesu* Trial Judgment, *supra* note 26, § 485; Second Instance Verdict, *Stupar and others* (X-KRZ-05/24), Court of Bosnia and Herzegovina, 9 September 2009, §§ 570–571, 573 cited by the Investigation Manual for War Crimes, Crimes Against Humanity and Genocide in Bosnia and Herzegovina (2013), OSCE, available online at <https://www.osce.org/bih/281491>.

42 A. Applebaum, 'Ukraine and The Words That Lead to Mass Murder', *The Atlantic*, 25 April 2022, available online at <https://www.theatlantic.com/magazine/archive/2022/06/ukraine-mass-murder-hate-speech-soviet/629629/>.

43 Cited by W. Timmermann, 'Counteracting Hate Speech as a Way of Preventing Genocidal Violence', 3 *Genocide Studies and Prevention* (2008) 353–374, at 354.

44 *Akayesu* Trial Judgment, *supra* note 26, §§ 148–149.

45 *Nahimana and others* Trial Judgment, *supra* note 12, § 179.

46 *Ibid.*, § 1022.

47 Judgment and sentence, *Muhimana* (ICTR-95-1B-T), Trial Chamber III, 28 April 2005, § 496.

48 See, for instance, Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004 ('*Krstić* Appeal Judgment'), § 130; Judgment, *Popović and others* (IT-05-88-T), Trial Chamber II, 10 June 2010 ('*Popović and others* Trial Judgment'), § 1399. For critical assessment of these decisions, see P. Dojčinović, *Propaganda and International Criminal Law: From Cognition to Criminality* (Routledge, 2021).

dehumanizing terms, such as ‘Turks’ or ‘Balijas’ (which may be roughly translated as ‘dirty Muslims’), may demonstrate genocidal intent.⁴⁹ In her separate and partly dissenting opinion in *Al-Bashir*, Judge Anita Ušacka reiterated that the use of derogatory language, like, in the case of the Fur, Masalit, and Zaghawa tribes, the terms ‘nuba’ (‘blacks’) and ‘zurga’ (‘blacks’ or ‘slaves’), may signal the existence of genocidal intent.⁵⁰ Simultaneously, it may attest to the fact that the perpetrators see the group as a unitary entity.⁵¹

The derogatory nature of some terms used in genocidal campaigns is more intuitively comprehensible than others, such as the use of words such as ‘rats’ or ‘cockroaches’. These derogatory words aim to dehumanize and humiliate. It is not as obvious when expressions of hate speech are camouflaged by seemingly normal designations. The ICTY struggled to see the derogatory nature of the term ‘balijas’, which was indeed sometimes used without the negative connotation.⁵² The ICC also required consultations from the victims to comprehend the derogatory tones in the words ‘nuba’ and ‘zurga’.⁵³

The situation is even more complex in Ukraine, where the representatives of the Russian Federation label Ukrainians as ‘Nazis’.⁵⁴ Nazism, without doubt, was a criminal ideology that enabled the most brutal and large-scale crimes in human history. Probably because of the negative connotations of this word, the use of the word ‘Nazi’ by the Russian Federation creates a trap that aims at preventing intellectuals and politicians worldwide from seeing the pretext and character of the criminal acts that have been committed by Russian armed forces on the territory of Ukraine since 24 February 2022.

The historical misuse of the term ‘Nazi’ and ‘Nazism’ by the Soviet Union and later Russia did not begin in 2022. Right after World War II, while negotiating the text of the Universal Declaration of Human Rights, the USSR and its satellites tried to insert the condemnation of Nazism into the provisions of the Declaration, primarily into the text of Articles 19 and 20 dealing with the freedoms of opinion and association.⁵⁵ The reason for such condemnation was twofold. On the one hand, the USSR, as with many other states, wanted to blame the Nazis for their onslaught on human dignity. On the other, they wanted to advance a limited, positivist and state-controlled understanding of

49 Judgment, *Tolimir* (IT-05-88/2-T), Trial Chamber II, 12 December 2012 (‘*Tolimir* Trial Judgment’), §§ 1168–1169.

50 Separate and Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Omar Hassan Al Bashir, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber I, 4 March 2009 (‘Separate and Partly Dissenting Opinion of Judge Anita Ušacka, *Al-Bashir*’), § 53.

51 *Ibid.*, § 25.

52 M. Bergholz, ‘Sudden Nationhood: The Microdynamics of Intercommunal Relations in Bosnia-Herzegovina after World War II’, 118 *The American Historical Review* (2013) 679–707, at 696. See also *Popović and others* Trial Judgment, *supra* note 48, § 1331.

53 Separate and Partly Dissenting Opinion of Judge Anita Ušacka, *Al-Bashir*, *supra* note 50, § 55.

54 I. Nuzov, ‘Legislating Propaganda: Russia’s Memory Laws Justify Aggression Against Ukraine’, 20 *JICJ* (2022) 805–818, at 811–815.

55 J. Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999), at 23.

human rights.⁵⁶ Therefore, 'Nazism' as a concept was instrumentalized by the USSR. It became nothing more than an excuse to add a backdoor to the international human rights instruments that could allow the USSR and its satellites to silence opponents and strengthen the totalitarian regime.

In a sense, nothing has changed since the first post-World War II years. Russian appeals to fight Nazism in the 21st century is a reinvented attempt to find a seemingly decent explanation for the indecent and dishonourable impulse to control the political discourse on the territories that once were a part of the Russian empire. On top of that, since 2014 and more explicitly since 2022, Russia has been referring to Nazism to demonize the Ukrainian nation and create a picture of an enemy that deserves neither a place at the negotiating table nor a right to decide its future.

B. 'Denazification' as a Manifestation of Genocidal Intent

The imperialistic rhetoric of Russia's political elite is not only a way to demonize and dehumanize the Ukrainian nation. Putin's article 'On the Historical Unity of Russians and Ukrainians';⁵⁷ the texts of his public speeches dated 21 and 24 February 2022,⁵⁸ and transcripts of his press-conferences⁵⁹ give grounds to assume that this rhetoric is evidence of the existence of the motive, goal and intent to destroy the Ukrainian nation at least in part, so as to have Ukraine under the undivided power of Russia, as it used to be in the former Soviet Union. Therefore, Putin's rhetoric deserves to be analysed in detail and explained in light of the relevant historical and political contexts.

Putin made several key statements which may seem unrelated to the genocidal character of Russia's military aggression. However, upon closer reading, they confirm the existence of genocidal intent. Their content and logical inter-connection therefore need deciphering, especially for a Western reader. The following statements merit particular attention:

1. Putin stated that 'Russians and Ukrainians are one nation, they are one whole' and that Ukrainian territories are historically Russian territories.⁶⁰ By this, he implied that the Ukrainian nation does not even exist.

⁵⁶ *Ibid.*

⁵⁷ Putin, *supra* note 37.

⁵⁸ Address by the President of the Russian Federation of 21 February 2022, *supra* note 38; Обращение Президента Российской Федерации от 24 февраля 2022 года (Address by the President of the Russian Federation of 24 February 2022) available online at <http://kremlin.ru/events/president/news/67843>. The English version of the text of the address is available online at <http://en.kremlin.ru/events/president/news/67843>. Note that the translation may not fully reflect the original meaning of the text.

⁵⁹ 'Большая пресс-конференция Владимира Путина' (Vladimir Putin's annual news conference), 23 December 2021, available online at <http://kremlin.ru/events/president/news/67438>. The English version is available online at <http://en.kremlin.ru/events/president/news/67438>. Note that the translation may not fully reflect the original meaning of the text.

⁶⁰ Putin, *supra* note 37.

2. According to Putin, ‘Ukraine was created by Lenin, when he established the Soviet Union in 1922’.⁶¹ This means that, in Putin’s mind, Ukraine did not exist before that moment.
3. In Putin’s view, the right of a nation for self-determination and its right to secede from the USSR were included in the Declaration on the Creation of the USSR in 1922⁶² as a concession to the nationalists made by the Bolsheviks to keep power at any cost. Putin calls it ‘not only a mistake, it was, so to say, worse than a mistake’ and believes that these rights are ‘utopian’ fantasies and their existence is ‘repulsive’.⁶³
4. He reproaches Ukrainians for being unthankful to Lenin for ‘creating Ukraine’ and for Ukraine to have maintained ‘a national state formation’ within the USSR without being integrated into Russia as an administrative unit: ‘Now “the thankful descendants” have demolished the monuments of Lenin. They call it decommunization.’⁶⁴
5. Putin threatens Ukrainians with a ‘real’ decommunization: ‘Do you want decommunization? We are totally fine with it. But one should not stop halfway. We are ready to show you what real decommunization of Ukraine means.’ Within this context, talking about the ‘halfway’ Putin must have meant that together with the monuments of Lenin they will ‘demolish’ the approach of the USSR to the formal status of republics, the declarative right for self-determination and the right to leave the USSR.⁶⁵
6. Apart from the ‘real decommunization’, he mentions Stalin’s dictatorship and the Red Terror that managed to correct Lenin’s ‘mistake’ and create the USSR as a ‘strictly centralized state, absolutely unitarian by its character’.⁶⁶ It is worth mentioning that it was under Stalin’s rule that the genocide of the Ukrainian people, also known as the Holodomor of 1932–1933⁶⁷ and the deportation of the Crimean Tatars of 1944,⁶⁸ were organized.
7. Putin emphasizes that nationalism was the main cause of the collapse of the Soviet Union: ‘Bacilli of nationalistic ambitions have not disappeared, and the mine planted initially was only waiting for its time to explode. This mine was, I say it again, the right to leave the USSR.’ This demonstrates Putin’s attitude to the phenomenon of nationalism which, in his belief, prevented the USSR from keeping different nations within the USSR by force. Putin calls the right of nations for self-determination ‘a

61 Vladimir Putin’s annual news conference, *supra* note 59.

62 Декларация об образовании Союза Советских Социалистических Республик (Declaration on the Creation of the Union of Soviet Socialist Republics), 30 December 1922.

63 Address by the President of the Russian Federation of 21 February 2022, *supra* note 38.

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 Holodomor Museum, *Holodomor History*, available online at <https://holodomormuseum.org.ua/en/the-history-of-the-holodomor/>.

68 Human Rights Watch, *Punished Peoples’ of the Soviet Union: The Continuing Legacy of Stalin’s Deportations* (1991), available online at <https://www.hrw.org/reports/pdfs/u/ussr/ussr.919/ussr919full.pdf>, at 33.

- destructive fantasy for any normal nation'.⁶⁹ In Putin's and the Soviet-and-Russian understanding, nationalism boils down to the exercise of the right of nations to self-determination.
8. Putin claims that 'the Ukrainian society faced a growth of extreme nationalism which gained features of aggressive Russophobia and neo-Nazi movement'.⁷⁰ He claims, providing no arguments or evidence whatsoever, that 'the leading nations of the NATO support extreme Ukrainian nationalists and neo-Nazi to reach their own goals'.⁷¹
 9. Finally, immediately after the full-scale aggression against Ukraine had begun, Putin declared that 'denazification and demilitarization' of Ukraine⁷² was the goal of the so-called 'special military operation'.

The above-mentioned statements in their totality provide evidence that Russia's political leadership do not recognize the existence of the Ukrainian nation, its right to self-determination and statehood, and that they consider Ukraine part of Russian territory. Medvedev — the former president (2008–2012), former Prime Minister of Russia (2012–2020) and today's Vice Chairman of the Security Council of the Russian Federation — writes straightforwardly that 'the Ukrainian nation and its identity is one big fake, the phenomenon never existed in the history, and does not exist now'.⁷³ Such a worldview results in the aim to return Ukrainian territories under Russian control, which is impossible without what Putin calls 'denazification'. We consider the statement on the 'denazification' of Ukraine, by carrying out a so-called 'special military operation' which is in reality an open military aggression against Ukraine, to be one of the main proofs of the genocidal intent of the military and political leadership of the Russian Federation.

The use of the term 'denazification' surprised a lot of researchers and journalists in the West. Several historians, including Timothy Snyder, Jeffrey Veidlinger and Omer Bartov, expressed an opinion about the misuse of the term and explained that it could be applied only to certain processes that had taken place in Germany after World War II.⁷⁴ The authors of a recent report mention that the statements about denazification are heard only within the context of the language of dehumanization applied for the public calls for genocide.⁷⁵ However, the use of the term 'denazification' is not only a linguistic means of dehumanization or a 'rhetorical device to justify unprovoked war and genocidal

69 Address by the President of the Russian Federation of 21 February 2022, *supra* note 38.

70 *Ibid.*

71 *Ibid.*

72 Address by the President of the Russian Federation of 24 February 2022, *supra* note 58.

73 Д. Медведев, 'О фейках и настоящей истории' (D. Medvedev, 'On the Fakes and Real History'), *Telegram Channel*, 5 April 2022, available online at https://t.me/medvedev_telegram/34.

74 O.B. Waxman, 'Historians on What Putin Gets Wrong About 'Denazification' in Ukraine', *Time*, 3 March 2022, available online at <https://time.com/6154493/denazification-putin-ukraine-history-context/>.

75 New Lines Institute/Raoul Wallenberg Institute for Human Rights, *An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent*, May 2022, at 15–18.

policies'.⁷⁶ The use of this term has many more hidden senses. As we explain below, the invocation of 'denazification' provides evidence of the genocidal intent behind Russia's military attack on Ukraine and the acts taken in pursuit of its genocidal policies aimed at destroying the Ukrainian nation at least in part.

Timothy Snyder comes to a generally correct conclusion regarding 'the special Russian definition of "Nazi": a Nazi is a Ukrainian who refuses to admit being a Russian'.⁷⁷ We used a similar approach in the Explanatory Note for draft Declaration submitted to the Ukrainian parliament on 6 April 2022. To show that 'denazification' proves the existence of genocidal intent, it is necessary to take account of the historical and political context.

Russia has been distorting and appropriating Ukraine's history, engaging in the destruction and theft of Ukrainian national heritage artifacts, and suppressing and prohibiting the Ukrainian language for the past 400 years.⁷⁸ Over the past hundred years, Russia has developed the concept of 'denazification' of Ukrainians. This manifested itself in Soviet and then Russian state propaganda, accusing Ukrainian patriots of being Nazis. The logic is as follows: a person who is a Ukrainian patriot and wants Ukraine to be an independent state is a nationalist, and nationalists are Nazis. Propagandists do not care that 'nationalist' and 'the Nazi' are totally different notions, taking advantage of the similarity of the words which sound almost identical in Russian: 'nazionalizm' and 'nazizm'. For Russians the root of these words is the same: 'nazi'. As one can see, the key notion of this chain is 'nationalism'. It is a bridge for the Russian logic to turn Ukrainian patriots into Nazis.

Originally, the doctrine of nationalism 'pretends to supply a criterion for the determination of the unit of population proper to enjoy a government exclusively its own, for the legitimate exercise of power in the state, and for the right organization of a society of states'.⁷⁹ Currently, there are different understandings of the concept of 'nationalism'. Experts from various fields consider it from three different perspectives: in doctrine, in politics and in human sentiments.⁸⁰ The lack of an unambiguous definition of the term 'allows it to be used in a multitude of ways, both positive and negative'.⁸¹

The term 'nationalism' was used and abused in the Soviet Union and continues to be used in Russia in the same way as the term 'fascism'. It was given different meanings and covered 'all shades of political opinions, ranging from national communists through to liberal democrats and nationalists in Ukraine;

⁷⁶ Snyder, *supra* note 13.

⁷⁷ *Ibid.*

⁷⁸ Y. Dashkevych, 'How Moscow hijacked the history of Kyivan Rus', *Euromaidan Press*, 14 May 2014, available online at <https://euromaidanpress.com/2014/05/14/how-moscow-hijacked-the-history-of-kyivan-rus>; 'A Short Guide to the Linguicide of the Ukrainian Language', *Euromaidan Press*, 22 February 2017, available online at <https://euromaidanpress.com/2017/02/22/a-short-guide-to-the-linguicide-of-the-ukrainian-language-infographics>.

⁷⁹ E. Kedourie, *Nationalism* (Hutchinson, 1961), at 9.

⁸⁰ J. Breuille 'Approaches to Nationalism', in G. Balakrishnan (ed.), *Mapping the Nation* (Verso, 1996), at 146.

⁸¹ W. Schnee, 'Nationalism: A Review of the Literature', 29 *Journal of Political and Military Sociology* (2001) 1–18, at 2.

[those] who oppose the Soviet Stalinist-Brezhnevite and Russian designation of Ukrainians as a branch of the Russian nation with Russians being the “elder brothers”; do not support Ukraine’s place within the Russian World and instead back Ukraine’s integration into Europe’.⁸² The attitude of the Soviet authorities towards nationalism could change depending on what was advantageous at a particular moment. It was a progressive movement in the colonial and semi-colonial world, but ‘nationalism became retrogressive when it threw up obstacles to the advance of socialism, when it was the ideology of bankrupt capitalist expropriators, unjustly resisting their own expropriation’.⁸³

Soviet authorities promoted the myth of the ‘proletarian internationalism’ and ‘friendship of peoples’, which envisaged that under full communism, national distinctions would disappear, and nations would merge; that Russian culture and language are superior and inviolable; that the culture and language that will remain as a result of the merger of the nations of the USSR will be the Russian language and Russian culture.⁸⁴ In the USSR, a wide spectrum of opinions and beliefs was recognized as Ukrainian nationalism ‘ranging from demands for the increased use of the Ukrainian language, to complete secession from the USSR and a rejection of Communism’.⁸⁵ ‘Anyone who had elementary national dignity, who was concerned about the fate of Ukrainian culture and language, could be called a nationalist’.⁸⁶

In our opinion, the essence of modern Ukrainian nationalism was very aptly conveyed by Kenneth C. Farmer. His interpretation was that ‘it represents a reactive cultural revival and the reassertion of national identity and communalism on the part of representative groups that are convinced that group values and identity are threatened with engulfment by those of another group — in particular, a group whose disproportionate influence, privilege, and even presence, are perceived as illegitimate’.⁸⁷

The tradition of Ukrainian nationalism of the modern era is mainly connected not with the assertion of national exceptionalism, but with the desire for national liberation, the creation of an independent Ukrainian state; that is, in a certain sense, with the national emancipation of Ukrainians.⁸⁸ However, identifying the true meaning of the term ‘nationalism’, if such one universal definition exists at all, is not relevant for the purposes of this article. What is crucial is to determine how Russians understand and Russian propaganda uses this term when portraying Ukrainians.

82 T. Kuzio, ‘Soviet and Russian anti-(Ukrainian) Nationalism and Re-Stalinization’, 49 *Communist and Post-Communist Studies* (2016) 87–99, at 88.

83 Kedourie, *supra* note 79, at 90–91.

84 K.C. Farmer, *Ukrainian Nationalism in the Post-Stalin Era: Myth, Symbols, and Ideology in Soviet Nationalities Policy* (Springer, 1980), at 40, 44–45.

85 J. Birch, *The Ukrainian Nationalist Movement in the USSR since 1956* (Ukrainian Information Service, 1971), at 1–2.

86 I. Dzyuba, *Internationalism or Russification?* (Sučasnist Publishers, 1968), at 24.

87 Farmer, *supra* note 84, at 7.

88 S. Kvit, ‘Ukraine in the Struggle for Independence in the Age of Post-truth’, *Kyiv Post*, 13 June 2019, available online at <https://www.kyivpost.com/article/opinion/op-ed/serhiy-kvit-ukraine-in-the-struggle-for-independence-in-the-age-of-post-truth.html>.

The Russian Federation, which claims to be the ‘continuator’ (‘gosudarstvo-prodolzhatel’) ⁸⁹ of the USSR, follows the Soviet policy reflected in now unclassified KGB textbooks, which have shaped the imperial worldview of today’s Russian leaders: ‘The nationalism is striving to set the superiority and privileges of one nation by suppressing other nations. Nationalism rejects friendly collaboration and mutual help between nations.’ ⁹⁰ In fact, Putin’s rhetoric communicates the above-mentioned textbooks, except he does not use epithets, such as ‘bourgeois’, ‘capitalistic’, ‘socialistic’ and ‘Soviet’. It is important that Russians choose to use the term ‘nationalists’ only for those people who fight for the existence of independent national states, independent from Russia (or the Soviet Union) and see a threat in strong ‘friendship of peoples’ in their KGB understanding: ‘The target of the nationalists attacking the Soviet state is within the relations between nationalities, they are trying to undermine the integrity and unity of the Soviet people by artificially warming up the nationalistic feelings.’ ⁹¹

The Russian government never considered Ukrainians as a separate nation: rather, they were seen as a branch of the Russian people speaking dialects of the Russian language. ⁹² Russia has always viewed Ukrainian desire for independence as a threat to the empire in a broad sense of the word, including the former Soviet Union. Given that the Ukrainian national movement was a significant factor that led to the collapse of the USSR, the Kremlin has systematically and insistently tried to cast a shade on the Ukrainian nationalist movement spreading a distorted concept of it as if it was the Nazi movement.

89 О государственной собственности бывшего Союза ССР за рубежом: Указ Президента Российской Федерации (Decree of the President of the Russian Federation ‘On state property of the former USSR abroad’ of 8 February 1993, No. 201), available online at <https://docs.cntd.ru/document/9003857>. § 1.

90 Б.С. Шульженко, И.В. Хамазюк, В.Т. Данько, *Украинские буржуазные националисты* (Высшая школа КГБ при Совете Министров СССР им. Ф. Э. Дзержинского, 1963) (B.S. Shulzhenko, I.V. Khamaziuk, and V. T. Danko, *Ukrainian Bourgeois Nationalists* (Higher School of the KGB under the Council of Ministers of the USSR named after F. E. Dzerzhinsky, 1963)), at 83.

91 Я.И. Оловянный и другие, *Особенности борьбы советской контрразведки с идеологической диверсией зарубежных буржуазно-националистических организаций и подрывной деятельностью враждебных националистических элементов* (Высшая краснознаменная школа КГБ при Совете Министров СССР им. Ф. Э. Дзержинского, Москва, 1978) (Y.I. Oloviannikov and others, *Specific Features of the Struggle of the Soviet Counter-Intelligence with Ideological Sabotage of Foreign Bourgeois Nationalistic Organizations and the Acts of Subversion of Enemy Nationalistic Elements* (Higher School of the KGB under the Council of Ministers of the USSR named after F.E. Dzerzhinsky, 1978)), at 63; М.И. Гришунев и другие, *Литовские, латышские и эстонские буржуазные националисты* (Высшая школа КГБ при Совете Министров СССР, 1961) (M.I. Grishunov and others, *Lithuanian, Latvian, and Estonian Bourgeois Nationalists* (KGB Higher School under the Council of Ministers of the USSR, 1961)); В.М. Бойченко, П.П. Ерёмин *Белорусские буржуазные националисты* (Высшая краснознаменная школа КГБ при Совете Министров СССР, 1957) (V.M. Boychenko and P.P. Yeremin, *Belorussian Bourgeois Nationalists* (The Higher Red Badge School of the KGB under the Council of Ministers of the USSR, 1957)).

92 T.R. Weeks, ‘Separatist Nationalism in the Romanov and Soviet Empires’, in J. Breuilly (ed.), *The Oxford Handbook of the History of Nationalism* (Oxford University Press, 2013) 199–219, 201.

Several days after Bucha was liberated in April 2022, while the whole world saw the atrocities that the Russian army committed there, an article entitled *What Russia Must Do with Ukraine* was published in Russia.⁹³ It explicitly said that Ukrainian nationalism is a Nazi movement, and ‘the burden of the war’ is the punishment for it. This article was published in one of the main Russian governmental media outlets, which indicates that the publication represents the politics of the Russian state.

In Putin’s speeches, one can see his final aim of subduing Ukraine, taking it back under full control of Russia and then correcting ‘Lenin’s mistake’, and depriving Ukraine of any signs of statehood. Just as Stalin corrected this ‘mistake’ in the first half of the 20th century, Putin, under the guise of ‘denazification’, aims to destroy the nationally conscious, patriotic people of Ukraine who are fighting for their right of self-determination, and the independence of the Ukrainian state. In fact, ‘denazification’ of Ukraine is its ‘depatriotization’ with further ‘destatification’.

Russia failed to implement its plan to take over Ukraine in 10 days following its full-scale invasion in February 2022.⁹⁴ It could not therefore accomplish ‘denazification’ of Ukraine, in other words destruction of the Ukrainian nation as such. But this does not mean that the Russian leadership had no intent to achieve large-scale destruction of the Ukrainian nation. Of course, we can wait a long time until e-mail exchanges, minutes of meetings and other documents, proving that Putin and his colleagues have attacked Ukraine with the intent to destroy the Ukrainian nation comes to light.⁹⁵ However, we should not ignore the fact that the public statements of the leadership of the Russian Federation, if considered in their appropriate political and historical context, are in fact a confession of their genocidal intent.

At the same time, genocidal intent is manifested not only in official statements and propaganda but it can also be showed through the analysis of material acts committed by Russian forces in Ukraine, which will be discussed in Sections 4.C. and 5 below.

C. Destruction of Cultural Heritage as Evidence of Intent to Destroy the Nation

Raphael Lemkin, the author of the term genocide, years before he coined the name for the crime against groups, urged the Fifth International Conference for the Unification of Criminal Law, convened under the auspices of the League of

93 T. Сергейцев, ‘Что Россия должна сделать с Украиной’ (T. Sergeytsev, ‘What Russia Must Do with Ukraine’, *RIA Novosti*, 3 April 2022, available online at <https://ria.ru/20220403/ukraina-1781469605.html>).

94 M. Zabrodskyi and others, *Preliminary Lessons in Conventional Warfighting from Russia’s Invasion of Ukraine: February–July 2022*, Royal United Services Institute for Defence and Security Studies (RUSI), 30 November 2022, available online at <https://rusi.org/explore-our-research/publications/special-resources/preliminary-lessons-conventional-warfighting-russias-invasion-ukraine-february-july-2022>.

95 Schabas, *supra* note 8, at 849–850.

Nations, to criminalize crimes of barbarity and vandalism.⁹⁶ The latter, as the reference to the name of the Germanic tribe from ancient times suggests, was a crime against cultural heritage belonging to a specific group of people. A decade after the Conference, Lemkin made vandalism an integral part of his concept of genocide.⁹⁷ Thus, while enumerating the domains in which genocide may occur, he mentioned the cultural field, commenting that it may take the form of ‘prohibiting or destroying cultural institutions and cultural activities’.⁹⁸ Lemkin believed that education in the liberal arts was purposefully substituted with vocational education ‘in order to prevent humanistic thinking’ which was feared by the occupants because it promoted ‘national thinking’.⁹⁹

The Genocide Convention does not embrace Lemkin’s concept of genocide in its entirety. It omits to mention the cultural dimension of genocide and instead sets the premises for the narrow interpretation of the term.¹⁰⁰ Therefore, only acts that are aimed at the physical destruction of the group may qualify as a crime of genocide.

International criminal courts and their statutes mostly followed the restrictive, Convention-based reading of the term ‘genocide’. However, even accepting that paradigm, the international courts found space for considering attacks on cultural heritage, though not as acts of genocide per se. In *Krstić*, the ICTY observed that ‘where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group’.¹⁰¹ This conclusion was later endorsed by the International Court of Justice (ICJ) in *Bosnia and Herzegovina v. Serbia and Montenegro*¹⁰² and *Croatia v. Serbia*.¹⁰³

The ICC Office of the Prosecutor, in its Policy on Cultural Heritage, also took note of the significance of the attacks on cultural heritage as evidence of genocidal intent.¹⁰⁴ The Policy stresses that encroachments on cultural heritage may take the form of the attacks on buildings that hold cultural significance for the targeted group ‘occurring simultaneously with other acts

96 E.C. Luck, *Cultural Genocide and the Protection of Cultural Heritage*, J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy, No. 2 (2018), available online at <https://www.getty.edu/publications/occasional-papers-2/>.

97 *Ibid.*

98 R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, and Proposals for Redress* (Carnegie Endowment for International Peace, 1944), at xii, cited by Luck, *supra* note 96.

99 *Ibid.*

100 However, there are calls for a wider interpretation of the Genocide Convention. See, for instance, L. Berster, ‘The Alleged Non-Existence of Cultural Genocide: A Response to the *Croatia v. Serbia* Judgment’, 13 JICJ (2015) 677–692.

101 Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001 (‘*Krstić* Trial Judgment’), § 580.

102 *Bosnia and Herzegovina v. Serbia and Montenegro* judgment, *supra* note 6, § 344.

103 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, judgment of 3 February 2015 (‘*Croatia v. Serbia* judgment’), § 390.

104 Office of the Prosecutor of the International Criminal Court, *Policy on Cultural Heritage*, June 2021, available online at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2021-03-22-otp-draft-policy-cultural-heritage-eng.pdf>, at § 79.

targeting protected groups'.¹⁰⁵ This brings us back to Lemkin, who neatly pointed out that 'genocide has two phases: one, the destruction of the national pattern of the oppressed group, the other, the imposition of the national pattern of the oppressor'.¹⁰⁶ Destruction of cultural heritage is phase one. It is often followed by cultural assimilation and denial of the cultural distinctiveness of the oppressed group.

The first months of the full-fledged Russian war against Ukraine accommodated both phases of the cultural dimension of genocide. Ukrainian historical and fiction literature which does not fit the Kremlin vision of Ukraine was confiscated in the libraries of the temporarily occupied territories of Luhansk, Donetsk, Chernihiv and Sumy regions.¹⁰⁷ It was reported that the Russian military police had a list of authors' names, including Mazepa, Petliura, Bandera, Shukhevych and Chornovil, whose books should have been confiscated or immediately destroyed.¹⁰⁸

During the armed conflict, the Russian Federation's armed forces targeted Ukrainian museums, historical monuments and places of worship that are of special significance for the self-image of the Ukrainian nation.¹⁰⁹ On 23 January 2023, UNESCO stated that 236 cultural objects including 105 religious sites, 83 historical buildings, 18 museums, 19 monuments and 11 libraries were completely or partially destroyed as a result of war. This list is not complete, as some data are not verified yet.¹¹⁰ On 26 January 2023, the Ukrainian Ministry of Culture stated that the number of damaged cultural objects amounted to 553 on that date.¹¹¹ Many of them, including the Hryhoriy Skovoroda Literary Memorial Museum, Sviatohir Lavra Church, the Memorial for the Victims of Totalitarianism and historical buildings in the ancient city of Chernihiv to name but a few, were targeted without any visible military necessity.

Switching to Lemkin's second phase, the Russian Federation occupying forces have replaced signs with the names of the cities written in Ukrainian with Russian ones; banned the use of the Ukrainian language and Ukrainian-language books in education in favour of the Russian language and Russian

105 *Ibid.*, § 78.

106 Lemkin, *supra* note 98, at 79.

107 'Russians Confiscating and Destroying Ukrainian Literature and History Textbooks', *Chytomo*, 25 March 2022, available online at <https://chytomo.com/en/russians-confiscating-and-destroying-ukrainian-literature-and-history-textbooks/>.

108 *Ibid.*

109 Ministry of Culture and Information Policy of Ukraine, 'Members of the UN Security Council recognize Russia's actions as directed against Ukrainian identity', 16 July 2022, available online at <https://mkip.gov.ua/news/7416.html>; United States Mission to the United Nations, 'Remarks at a UN Security Council Arria-Formula Meeting on the Destruction of Cultural Heritage as a Consequence of Russia's War Against Ukraine', 15 July 2022, available online at <https://usun.usmission.gov/remarks-at-a-un-security-council-aria-formula-meeting-on-the-destruction-of-cultural-heritage-as-a-consequence-of-russias-war-against-ukraine/>.

110 UNESCO, 'Damaged Cultural Sites in Ukraine Verified by UNESCO', 22 March 2023, available online at <https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco>.

111 Ministry of Culture and Information Policy of Ukraine, 'Destroyed Cultural Heritage of Ukraine', available online at <https://culturecrimes.mkip.gov.ua/>.

books; pressured schoolteachers to stick to the Russian educational programme and remove such subjects as Ukrainian language, literature and history from school curricula, and brought Russian teachers to the occupied territories.¹¹²

These actions vividly evidence the existence of the discriminatory intent of targeting artefacts and practices that attest to the existence of the distinct Ukrainian culture, language and history. As noted by international courts, the existence of such discriminatory intent against the tangible cultural heritage of the national group may evince genocidal intent.¹¹³ The embracement of Lemkin's idea about the cultural domain of genocide, however, must go even further. Discriminatory attacks on the intangible heritage of the group, which includes its language, history and education traditions, manifest the genocidal intent to no lesser degree than attacks on historical or religious buildings.¹¹⁴ International and national courts dealing with genocide cases should therefore duly appreciate the importance of demonstrating existence of the genocidal intent through such potential techniques of genocide pointed out by Lemkin as the prohibition of the group's language and the destruction of books or the prohibition of publications.¹¹⁵ The policy of suppressing Ukrainian culture in occupied territories attests to the existence of genocidal intent as well as unlawful attacks on cultural institutions.

5. Genocidal Acts and Further Evidence of Intent to Destroy

The destruction of the Ukrainian nation as such by Russia has been pursued through commission of genocidal acts as outlined in the Convention, including: killing and causing serious bodily or mental harm (Section 5.A.); deliberately inflicting conditions of life aimed at physical destruction of Ukrainians (Section

112 'Русифікація українських дітей. РФ планує звозити до Херсонської та Запорізької областей вчителів із Новосибірська' ('Russification of Ukrainian children. The Russian Federation Plans to Bring Teachers from Novosibirsk to Kherson and Zaporizhzhia regions'), *New Voice*, 20 June 2022, available online at <https://nv.ua/ukr/world/geopolitics/rosiya-hoche-zvoziti-dohersonskoj-ta-zaporizkoji-oblastey-vchiteliv-iz-novosibirska-ostanni-novini-50250965.html>.

113 A.F. Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage', in M. Orlando and T. Bergin (eds), *Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives* (Routledge, 2016), available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676470, at 16–18.

114 See the discussion in S. Fobbe and others, 'Cultural Heritage Destruction during the Islamic State's Genocide against the Yazidis', 5 *The Asian Yearbook of Human Rights and Humanitarian Law* (2021) 111–144; J. Paauwe and J. Pittalwala, 'Cultural Destruction and Mass Atrocity Crimes: Strengthening Protection of Intangible Cultural Heritage', 13 *Global Responsibility to Protect* (2021) 395–402; M. Odello, 'Genocide and Culture: Revisiting their Relationship 70 years after the Genocide Convention', in M. Odello and P. Lubiński (eds), *The Concept of Genocide in International Criminal Law: Developments after Lemkin* (Taylor and Francis, 2020) 236–261.

115 Y. de Brito Góes, 'Rethinking the Cultural Genocide: The Destruction of Cultural Heritage in Syria' (2018) (Dissertation presented as a partial requirement for obtaining the title of Bachelor of Laws from the University of Brasilia), at 41.

5.B.); and forcibly transferring Ukrainian children to Russia or territories occupied by it (Section 5.C.). This shows that the *actus rei*, or the material elements, of the crime of genocide are met.

What is more, the character of these acts and the context in which they are committed serves as additional evidence of genocidal intent. According to the ICJ, 'the characterization of the [material] acts [of the crime of genocide] and their mutual relationship can contribute to an inference of intent'.¹¹⁶ In assessing whether the intent to destroy a protected group is present, all the available evidence must be taken together 'instead of considering separately whether an accused intended to destroy a protected group through each of the prohibited acts of genocide'.¹¹⁷ Individual war crimes and crimes against humanity can, taken together, amount to a crime of genocide 'if they are part of a wider pattern of attack that is aimed at destroying a [protected] group'.¹¹⁸

The following subsections demonstrate the deliberate, systematic and large-scale character of the acts committed by Russian forces in Ukraine. Coupled with the general context, the public statements of Russian leadership, and broadcasts and publications by Russian state-owned media, we argue that they display the genocidal intent to physically destroy Ukrainians as a national group.

A. Killings and Causing Serious Bodily or Mental Harm

The acts constitutive of the crime of genocide are not limited to physical extermination of the members of the protected group by killing. Genocide can also be committed by inflicting serious bodily or mental harm, in particular through torture, rape and sexual violence, forcible displacement and enforced disappearance, mistreatment and inhumane conditions inflicted in the course of detention.¹¹⁹ The ICC Elements of Crimes also recognize that acts such as torture, rape, sexual violence or inhuman or degrading treatment may amount to genocidal acts.¹²⁰

Since the very first hours of Russia's full-scale invasion in Ukraine, Russian military forces were engaged in a campaign of wilful killings and deliberate targeting of Ukrainians. Bucha, Borodyanka, Hostomel, Irpin and Vorzel located in the Kyiv region are only some of the settlements that witnessed mass executions, enforced disappearances, torture and rape of Ukrainians.¹²¹

116 *Croatia v. Serbia* judgment, *supra* note 103, § 130.

117 *Stakić* Appeal Judgment, *supra* note 15, § 55.

118 E. von Joeden-Forgey, *The Ten Patterns of Genocide*, Lemkin Institute for Genocide Prevention (2022), available online at https://www.lemkininstitute.com/_files/ugd/9bc553_dac7246a234442b69519064ac19853a8.pdf.

119 Fournet, *supra* note 31, at 61–62; Mettraux, *supra* note 20, at 263–264.

120 ICC Elements of Crime, at 2, fn 3.

121 Amnesty International, *Ukraine: Russian forces extrajudicially executing civilians in apparent war crimes – new testimony*, 7 April 2022, available online at <https://www.amnesty.org/en/latest/news/2022/04/ukraine-russian-forces-extrajudicially-executing-civilians-in-apparent-war-crimes-new-testimony/>.

In May 2022, it was reported that more than 1000 bodies of civilians were recovered in Bucha district alone.¹²² A Ukrainian senior police officer stated that 650 civilians were executed by shooting,¹²³ which suggests deliberate killing. Many bodies bore signs of torture.¹²⁴ Some bodies found in Bucha were found kneeling with heads down and hands bound behind their backs,¹²⁵ which also indicates wilful killings and executions. Human Rights Watch reports that in Bucha, Russian forces went door to door ‘hunting Nazis’.¹²⁶ Given that Russian propaganda uses the label ‘Nazi’ to refer to any Ukrainian who identifies himself or herself as Ukrainian and supports the cause of the Ukrainian state, the Russian forces were targeting civilians in Bucha precisely for their belonging to the Ukrainian nation. A journalistic investigation established that Russian authorities drew lists of influential Ukrainians, both at national and local levels, who were supposed ‘to be killed or sent to camp’,¹²⁷ which suggests the pre-planned and discriminatory character of Russia’s attack on Ukrainians.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) and the UN Independent International Commission of Inquiry on Ukraine (the UN Commission of Inquiry) also reported intentional and arbitrary executions and killings of civilians by the Russian soldiers in the Kyiv, Chernihiv and Sumy regions of Ukraine during their occupation by the Russian forces.¹²⁸ The victims numbered in the hundreds, with many of them being executed following detention and torture.

The large number of victims, their civilian status and hence vulnerable state, the gravity of the inflicted violence, the cruel, deliberate and repetitive manner of the killings accompanied by a plan to eliminate leaders of Ukrainian society and hate speech directed against Ukrainians as a nation indicates the existence of genocidal intent. Independent experts agree that mass executions of civilians

122 S. Rainsford, ‘Ukraine: The Children’s Camp that Became an Execution Ground’, *BBC*, 16 May 2022, available online at <https://www.bbc.com/news/world-europe-61442387>.

123 *Ibid.*

124 Human Rights Watch, *Ukraine: Russian Forces’ Trail of Death in Bucha*, 21 April 2022, available online at <https://web.archive.org/web/20220421062141/https://www.hrw.org/news/2022/04/21/ukraine-russian-forces-trail-death-bucha>.

125 Rainsford, *supra* note 122.

126 Human Rights Watch, *supra* note 124.

127 ‘Russia is Creating Lists of Ukrainians “to be killed or sent to camps”, US Claims’, *The Guardian*, 21 April 2022, available online at <https://www.theguardian.com/world/2022/feb/21/us-claims-russia-creating-lists-of-ukrainians-to-be-killed-or-sent-to-camps-report>; E. Kinetz, ‘“We will find you”: Russians Hunt Down Ukrainians on Lists’, *Associated Press*, 21 December 2022, available online at <https://apnews.com/article/russia-ukraine-europe-3ae1bccfb0ef34dbe363f7c289ce7934>.

128 OHCHR, *Report on the Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation, 24 February to 15 May 2022*, 29 June 2022, available online at <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf>, § 80; *Report of the UN Independent International Commission of Inquiry on Ukraine to the UN General Assembly, A/77/533*, 18 October 2022, at 13–14; OHCHR, *Killings of Civilians: Summary Executions and Attacks on Individual Civilians in Kyiv, Chernihiv, and Sumy Regions in the Context of the Russian Federation’s Armed Attack against Ukraine*, December 2022, available online at <https://www.ohchr.org/sites/default/files/2022-12/2022-12-07-OHCHR-Thematic-Report-Killings-EN.pdf>.

committed by Russian forces in occupied territories of the Kyiv, Chernihiv and Sumy regions of Ukraine reflect a genocidal pattern of destruction of Ukrainians.¹²⁹

It is reported that most of the victims of murder and executions by Russian forces are Ukrainian civilian men,¹³⁰ while Ukrainian women are subjected to rape and sexual violence.¹³¹ In October 2022, the Special Representative of the UN Secretary General on Sexual Violence in Conflict, Pramila Patten, stated that rape was part of Russia's military strategy.¹³² According to the Lemkin Institute for Prevention of Genocide, mass murder of military-aged men in combination with atrocities committed against women and children represents the most common form of genocide.¹³³ Indeed, the ICTY found in *Krstić* that the mass execution of military-aged Bosnian Muslim men by Bosnian Serb forces against the backdrop of forced transfer of Bosnian Muslim women, children and the elderly amounted to the crime of genocide.¹³⁴

In addition to executions and killings, evidence of torture, inhuman and degrading treatment and of enforced disappearance have been found in at least 17 villages and small towns of the Kyiv and Chernihiv regions to date.¹³⁵ Ill-treatment and torture also took place during the extended confinement of civilians in severely overcrowded premises in deplorable conditions with little to no access to water, food, fresh air or light.¹³⁶ Numerous cases of torture and ill-treatment were reported to be committed in the southern regions of Ukraine occupied by Russian forces.¹³⁷ According to the World Organisation Against Torture, the torture methods employed were 'severe beatings, disproportionate and punitive use of tasers, threats of executions and mock executions'.¹³⁸

129 New Lines Institute/Raoul Wallenberg Institute for Human Rights, *An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent*, May 2022, at 22.

130 Human Rights Watch, *supra* note 124; *Report on the Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation, 24 February to 15 May 2022*, *supra* note 128, § 80.

131 *Report of the Independent International Commission of Inquiry on Ukraine to the Human Rights Council*, A/HRC/52/62, 16 March 2023, §§ 78–85.

132 E.U. Ochab, 'United Nations: Rape Is Part Of Russia's Military Strategy', *Forbes*, 14 October 2022, available online at <https://www.forbes.com/sites/ewelinaochab/2022/10/14/united-nations-rape-is-part-of-russias-military-strategy/?sh=361ae19f36a0>.

133 von Joeden-Forgey, *supra* note 118.

134 *Krstić* Trial Judgment, *supra* note 101, § 595.

135 Human Rights Watch, *Ukraine: Executions, Torture During Russian Occupation*, 18 May 2022, available online at <https://www.hrw.org/news/2022/05/18/ukraine-executions-torture-during-russian-occupation>; World Organisation Against Torture, *Ukraine: Killings, Kidnappings and Torture of Civilians in Territories under Russian Control*, 6 May 2022, available online at <https://www.omct.org/en/resources/statements/ukraine-killings-kidnappings-and-torture-of-civilians-in-territories-under-russian-control>.

136 *Report of the UN Independent International Commission of Inquiry on Ukraine to the UN General Assembly*, *supra* note 128, at 14–15.

137 Human Rights Watch, *Ukraine: Torture, Disappearance in Occupied South*, 22 July 2022, available online at <https://www.hrw.org/news/2022/07/22/ukraine-torture-disappearances-occupied-south>.

138 World Organisation Against Torture, *supra* note 135.

Torture chambers were also discovered in the Kharkiv region after its liberation from Russian forces in September 2022.¹³⁹

It is reported that these acts of torture were directed at local leaders, activists, volunteers and those who Russian soldiers suspected of past affiliation with Ukrainian armed forces.¹⁴⁰ Some of the detainees said that the Russian authorities called them ‘nazis’ and ‘fascists’ and subjected them to what Russian authorities called ‘denazification sessions’ which in reality meant severe beatings.¹⁴¹ That any expression of support for and affiliation with the Ukrainian nation and state was punished by torture, and was apparently done so on the basis of information provided by the Russian intelligence service,¹⁴² indicates the existence of a policy and plan to suppress the Ukrainian identity of the population in the occupied territories.

Finally, Russian forces have systematically and deliberately targeted the civilian population of Ukraine. On 16 March 2022, the Russian forces bombed a theatre in Mariupol where hundreds of civilians were sheltering. Amnesty International’s investigation established that the theatre was deliberately bombed by the Russian forces despite the fact that it was clearly recognizable as a civilian object.¹⁴³ Often the Russian military deliberately attacked civilians evacuating on foot, buses or private vehicles bearing the sign ‘children’.¹⁴⁴ The attack on Kramatorsk train station where 4000 civilians, mostly women and children who were waiting to evacuate from the Donetsk Region, is another grave example of attacking evacuees.¹⁴⁵ A total of 59 civilians, including 7 children, died and more than 100 civilians were injured as the result of the attack.¹⁴⁶ Furthermore, repeated instances of indiscriminate attacks resulted in deaths and serious injuries of civilians sheltering in residential homes, schools, hospitals and other civilian buildings.¹⁴⁷ Amnesty International reports that

139 Human Rights Watch, *Ukraine: Russian Forces Tortured Izium Detainees*, 19 October 2022, available online at <https://www.hrw.org/news/2022/10/19/ukraine-russian-forces-tortured-izium-detainees>.

140 World Organisation Against Torture, *supra* note 135; *Report of the UN Independent International Commission of Inquiry on Ukraine to the UN General Assembly*, *supra* note 128, § 81.

141 *Report of the Independent International Commission of Inquiry on Ukraine to the Human Rights Council*, *supra* note 131, § 73.

142 World Organisation Against Torture, *supra* note 135.

143 Amnesty International, *Ukraine: ‘Children’: The attack on the Donetsk Regional Academic Drama Theatre in Mariupol, Ukraine*, 30 June 2022, available online at <https://www.amnesty.org/en/documents/eur50/5713/2022/en/>.

144 *Report of the Independent International Commission of Inquiry on Ukraine to the Human Rights Council*, *supra* note 131, §§ 57–58.

145 ‘Kramatorsk Station Attack: What We Know So Far’, BBC, 9 April 2022, available online at <https://www.bbc.com/news/world-europe-61036740>.

146 C. Vakil, ‘Death Toll in Ukraine Train Station Bombing Reaches 59, Including 7 Children’, *The Hill*, 14 April 2022, available online at <https://thehill.com/policy/international/3269176-death-toll-in-ukraine-train-station-bombing-reaches-59-including-7-children/>.

147 Amnesty International, *Russian Military Commits Indiscriminate Attacks During the Invasion of Ukraine*, 25 February 2022, available online at <https://www.amnesty.org/en/latest/news/2022/02/russian-military-commits-indiscriminate-attacks-during-the-invasion-of-ukraine/>; Human Rights Watch, *Ukraine: Deadly Attacks Kill, Injure Civilians, Destroy Homes*, 18 March 2022, available online at <https://www.hrw.org/news/2022/03/18/ukraine-deadly-attacks-kill-injure-civilians->

Russian forces have relentlessly and indiscriminately bombarded residential buildings in Kharkiv, Ukraine's second biggest city, since the start of the full-fledged invasion causing at least 600 deaths and 1200 injuries among civilians.¹⁴⁸ The grave, widespread, deliberate and systematic nature of the crimes committed against the civilian population of Ukraine serve as further evidence of Russia's intent to destroy the Ukrainian nation.

B. Deliberately Inflicting Conditions of Life Aimed at the Physical Destruction of the Ukrainian Nation

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part¹⁴⁹ consists in pursuing 'methods of destruction that do not immediately kill the members of the group, but ultimately seek their physical destruction'.¹⁵⁰ According to ICTY and ICTR jurisprudence, such methods include, but are not limited to, 'subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes'.¹⁵¹ In general, creating conditions that would result in 'a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion' also falls within this category.¹⁵² The ICJ has adopted a similar view.¹⁵³ Furthermore, in *Al-Bashir*, ICC Pre-Trial Chamber I examined 'the acts of contamination of water pumps and forcible transfer coupled by resettlement by member of other tribes' as part of the charge of creating conditions calculated to bring physical destruction of the protected groups in pursuance of genocidal policy.¹⁵⁴

It is important to note that establishing this genocidal act does not require proof that the result in the form of ultimate physical destruction of the group in whole or in part was actually attained.¹⁵⁵ At the same time, it must be demonstrated that such conditions were inflicted deliberately and as a means

destroy-homes; Human Rights Watch, *Ukraine: Russian Strikes Killed Scores of Civilians in Chernihiv*, 10 June 2022, available online at <https://www.hrw.org/news/2022/06/10/ukraine-russian-strikes-killed-scores-civilians-chernihiv>.

148 Amnesty International, *Ukraine: 'Anyone can die at any time': Indiscriminate Attacks by Russian Forces in Kharkiv, Ukraine*, 13 June 2022, available online at <https://www.amnesty.org/en/documents/eur50/5682/2022/en/>.

149 Art. II(c) Genocide Convention; Art. 6(c) ICC St.

150 Judgment, *Tolimir* (IT-05-88/2-A), Appeals Chambers, 8 April 2015 ('*Tolimir* Appeal Judgment'), §§ 225 and 227.

151 *Ibid.*

152 *Ibid.*

153 *Croatia v. Serbia* judgment, *supra* note 103, § 161.

154 Second Decision on the Prosecution's Application for a Warrant of Arrest, *Al-Bashir* (ICC-02/05-01/09-94), Pre-Trial Chamber I, 12 July 2010, § 38.

155 *Tolimir* Appeal Judgment, *supra* note 150, § 225; *Karadžić* Trial Judgment, *supra* note 17, § 546.

of achieving the overall purpose of destruction of the group in whole or in part.¹⁵⁶ According to the ICTY, this can be done by evaluating objective probability of these conditions leading to the physical destruction of the group in part, taking into account such factors as ‘the actual nature of the conditions of life, the length of time that members of the group were subjected to them, and the characteristics of the group such as its vulnerability’.¹⁵⁷

Russian leadership has repeatedly declared its denial of Ukrainians’ right to exist as a separate and independent nation. In order to achieve this goal, in addition to the direct killing of Ukrainians, other systematic actions are used to create conditions calculated to bring about physical destruction of the Ukrainian nation in the future. Several practical forms of this Russian activity should be emphasized here.

Since the beginning of the full-scale invasion in February 2022, Russians systematically targeted, including by means of enforced disappearance, pro-Ukrainian leaders in local communities. There are numerous instances of causing serious physical and mental harm to the representatives of Ukrainian public authorities and local self-government,¹⁵⁸ representatives of non-governmental organizations and other local activists, journalists, clergy and other authoritative figures in Ukrainian society.¹⁵⁹ Abduction of pro-Ukrainian leaders and activists is a common practice in Russian-occupied territories.¹⁶⁰ This aims not only to intimidate specific activists but also to create an environment where any manifestation of Ukrainian identity will be impossible. This poses a real threat to the development and even the very existence of Ukrainian civil society.¹⁶¹ As has been seen in international criminal law jurisprudence, targeting of community leaders may evidence the existence of genocidal intent.¹⁶²

It is also important to stress the numerous facts that indicate the creation of conditions of life calculated to physically destroy the population of Ukraine. Besieging of settlements, destruction of civilian infrastructure electricity, water and heating supply in the areas under siege combined with blocking of humanitarian aid and obstructing the evacuation of civilians deprive the population of access to basic items indispensable for survival, namely water, food,

156 Mettraux, *supra* note 20, at 278.

157 *Karadžić* Trial Judgment, *supra* note 17, § 548.

158 ‘Kidnapped Ukrainian Mayor Freed in “special operation”, Officials Say’, *ABC News*, 17 March 2022, available online at <https://abcnews.go.com/International/kidnapped-ukrainian-mayor-freed-special-operation-ukrainian-government/story?id=83486933>.

159 ‘Russia Uses Abductions to Intimidate Ukrainians in Occupied Territories’, *France 24*, 29 March 2022, available online at <https://www.france24.com/en/europe/20220329-russian-forces-are-abducting-ukrainians-in-occupied-territories>.

160 *Ibid.*

161 Ukrainian Civil Society Organisations, *International Institutions Must Protect Ukrainians from Abductions and Executions*, 15 March 2022, available online at <https://khpg.org/en/1608810199>; Truth Hounds, *Enforced Disappearances and the Creation of ‘republics’ on the Territory Occupied by the Russian Armed Forces*, 26 March 2023, available online at <https://truth-hounds.org/en/enforced-disappearances-and-the-creation-of-republics-on-the-territory-occupied-by-the-russian-armed-forces/>.

162 Judgment, *Jelisić* (IT-95-10-T), Trial Chamber, 14 December 1999, § 82; *Krstić* Appeal Judgment, *supra* note 48, §§ 8–9; *Tolimir* Trial Judgment, *supra* note 49, § 749.

heating in cold season, medicines and medical care.¹⁶³ Some of the Russian bombing tactics and targets can be labelled as what some scholars describe as 'urbicide'.¹⁶⁴ This is designed to inflict great suffering and ultimately achieve the physical destruction of civilians in many settlements in Ukraine. The besieging of such large cities as Mariupol and Chernihiv testifies to the intent of the Russian Federation to achieve the physical destruction of at least part of the Ukrainian nation.

A number of actions of the Russian Federation are aimed at inflicting conditions of life calculated to bring about gradual destruction of the Ukrainian nation by undermining its economic capacity and security, which is manifested in the destruction of vital infrastructure and blocking the normal operation of various economic facilities.¹⁶⁵ There are a number of examples of damaging grain stores and farms in occupied territories and territories where active hostilities are taking place, as well as those located in the territory controlled by the Ukrainian government.¹⁶⁶ Russian forces have also been using weapons with incendiary effects to set crop fields on fire.¹⁶⁷ The sowing campaign in 2022 was put at serious risk, the work of agricultural machinery was constantly under the threat of bombing, and many land plots and fields have been mined by Russians.¹⁶⁸ Another tactic used by Russia is purposeful destruction of energy facilities, in particular destroying electricity, fuel and gas infrastructure. Russia attacked several oil refineries and many oil storage facilities throughout Ukraine, even in remote regions in Western Ukraine.¹⁶⁹ This

- 163 High Commissioner for Human Rights, 'High Numbers of Civilian Casualties in Ukraine Raise Concerns that Attacks by Russia are not Complying with International Humanitarian Law', 5 July 2022, available online at <https://www.ohchr.org/en/press-releases/2022/07/high-commissioner-human-rights-high-numbers-civilian-casualties-ukraine>.
- 164 A. Clement-Hunt, 'Russia's Campaign of Urbicide in Ukraine', New Lines Institute for Strategy and Policy, 7 June 2022, available online at <https://newlinesinstitute.org/power-vacuum/russias-campaign-of-urbicide-in-ukraine/>.
- 165 Kyiv School of Economics, 'Direct Damage Caused to Ukraine's Infrastructure During the War has Reached over \$94 billion', 10 May 2022, available online at <https://kse.ua/about-the-school/news/direct-damage-caused-to-ukraine-s-infrastructure-during-the-war-has-reached-over-94-billion/>.
- 166 The Yale School of Public Health Humanitarian Research Lab, 'Ukraine's Crop Storage Infrastructure: Post-Invasion Impact Assessment', 15 September 2022, available online at <https://hub.conflictobservatory.org/portal/home/item.html?id=281114778092459c90302901bb6698ae>; A. Donley, 'Report: War has Taken Toll on Ukraine Grain Storage Facilities', 19 September 2022, available online at <https://www.world-grain.com/articles/17480-report-war-has-taken-toll-on-ukraine-grain-storage-facilities>.
- 167 "'They're burning our crops on purpose": Ukraine says Russia Deliberately Torching Grain Fields', *France 24*, 20 July 2022, available online at <https://www.france24.com/en/europe/20220720-they-re-burning-our-crops-on-purpose-ukraine-says-russia-deliberately-torching-grain-fields>.
- 168 Human Rights Watch, *Background Briefing on Landmine Use in Ukraine*, 15 June 2022, available online at <https://www.hrw.org/news/2022/06/15/background-briefing-landmine-use-ukraine>.
- 169 'Russia Attacks Deep in Ukraine, Hitting Rail and Fuel Facilities', *PBS*, 25 April 2022, available online at <https://www.pbs.org/newshour/world/russia-attacks-deep-in-ukraine-hitting-rail-and-fuel-facilities>; Conflict and Environment Observatory, *Ukraine Conflict Environmental*

created a severe shortage of gasoline and diesel fuel which among other things put at high risk the implementation of the sowing campaign.

Russia's actions to block sea trade routes have made the transportation of Ukrainian goods such as steel, fertilizers, neon gas, grain, sunflower oil and other agricultural products impossible. Moreover, Russians are stealing Ukrainian products and selling them for their own benefit.¹⁷⁰ Russia's actions severely undermine Ukraine's economic potential,¹⁷¹ its access to markets and the prospects for the development of maritime trade in the future.

Furthermore, the unprecedented shelling of the big cities and targeted destruction of energy infrastructure which began in October 2022¹⁷² in the cold period of the year deprived people not only of electricity but also of water supply, heating and access to a functioning sewage system and put the health and life of a large part of the Ukrainian population at risk.¹⁷³

While it may be difficult to calculate the exact environmental damage caused by the Russian Federation in Ukraine, the first studies¹⁷⁴ and the monitoring carried out by the Ukrainian Government¹⁷⁵ indicate that environmental threats of Russia's war are very serious. The negative environmental impact of constant bombing, mining, damage to protected areas and protected ecosystems in the areas of active hostilities, in particular Kharkiv, Sumy, Donetsk, Luhansk, Zaporizhia, Kherson and Mykolaiv regions is likely to be long-term.¹⁷⁶ This 'toxic legacy' has a long-lasting impact for the next generations.¹⁷⁷

Briefing, November 2022, available online at <https://ceobs.org/ukraine-conflict-environmental-briefing-fossil-fuel-infrastructure/>.

170 'Tracking where Russia is taking Ukraine's Stolen Grain', *BBC*, 27 June 2022, available online at <https://www.bbc.com/news/61790625>.

171 S. Matuszak, 'A Struggle To Survive. Ukraine's Economy in Wartime', Centre for Eastern Studies, 18 October 2022, available online at <https://www.osw.waw.pl/en/publikacje/osw-commentary/2022-10-18/a-struggle-to-survive-ukraines-economy-wartime>.

172 A. Rácz and C. Mölling, 'Massive Strikes on Civilian Infrastructure', German Council on Foreign Relations, 3 November 2022, available online at <https://dgap.org/en/research/publications/massive-strikes-civilian-infrastructure>.

173 UN Office for the Coordination of Humanitarian Affairs, *Ukraine: Situation Report*, 10 February 2023, available online at <https://reliefweb.int/report/ukraine/ukraine-situation-report-10-feb-2023-enruuk>; *Report of the Independent International Commission of Inquiry on Ukraine to the Human Rights Council*, *supra* note 131, §§ 40–43.

174 L. Malko and D. Nikolaenko, 'Military Ecology: Novelty of 2022 and Assessment of the Environmental Consequences of Russia's Aggression Against Ukraine', June 2022, available online at https://www.researchgate.net/publication/361262940_Military_ecology_novelty_of_2022_and_assessment_of_the_environmental_consequences_of_Russia's_aggression_against_Ukraine.

175 Ministry of Environmental Protection and Natural Resources of Ukraine, *Dashboard with Data on Environmental Threats*, available online at <https://ecozagroza.gov.ua/en>.

176 'Eco-chronicles of the War in Ukraine: the Main Consequences of Russian Aggression in May', *EcoPolitic*, 1 June 2022, available online at <https://ecopolitic.com.ua/en/news/ekohroniki-vijni-v-ukraini-golovni-naslidki-rosijskoi-agresii-za-traven-3/>.

177 K. Hulme, 'Using International Environmental Law to Enhance Biodiversity and Nature Conservation During Armed Conflict', 20 *JICJ* (2022) 1155–1190, at 1156.

Another dimension of the environmental impact of the Russian actions is nuclear and radiation safety threats. From the first days of the full-scale military aggression, Russian forces carried out dangerous manoeuvres in the Chernobyl Exclusion Zone.¹⁷⁸ In fact, this facility was used by them for a massive attack on Kyiv. Furthermore, Russian forces used the Chernobyl Nuclear Power Plant sarcophagus (Shelter Structure) with a serious violation of safety standards, which created a threat of nuclear contamination for the Dnipro River and large parts of Ukraine. The Zaporizhzhya Nuclear Power Plant, the largest in Europe, was under targeted fire of the Russian forces from the start and remains, at the time of writing, under constant threat of bombing.¹⁷⁹ Being under the occupation of Russian forces, the premises of the Zaporizhzhya power plant are now being used to store heavy weapons, missile systems and explosives.¹⁸⁰

The environmental damage caused by Russia's actions in Ukraine poses a serious threat to the health and well-being of the Ukrainian nation and its future generations. Moreover, the actions of the Russian Federation described in this section are aimed at creating preconditions for the gradual impoverishment of the Ukrainian nation, imposing severe shortages of food supplies and other vital resources indispensable for people's survival. In view of their systematic and purposeful character, these actions testify to the existence of the intent to bring about the destruction of the Ukrainian nation.

C. Forcible Transfer and Russification of Ukrainian Children

Article II(e) of the Genocide Convention and Article 6(e) of the ICC Statute recognize that genocide can be committed by forcibly transferring children of the protected group to another group. It is now well-established that the term 'forcible transfer' has a broader meaning than resort to physical force.¹⁸¹ The ICC Elements of Crimes clarify that the term 'forcibly' covers the threat of force or coercion which may be caused by 'fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment'.¹⁸² Furthermore, transfer of children in the environment of fear or desperation

178 'Inside Chernobyl: We Stole Russian Fuel to Prevent Catastrophe', *BBC*, 9 April 2022, available online at <https://www.bbc.com/news/world-europe-61048256>; M. Bearak and S. Morgunov, 'In Chernobyl's Delicate Nuclear Labs, Russians Looted Safety Systems', *The Washington Post*, 2 June 2022, available online at <https://www.washingtonpost.com/world/2022/06/02/ukraine-chernobyl-damage-done-by-russians/>.

179 M. Ratushna, 'War Against Nature: The Environmental Damage of Russia's Full-Scale Invasion of Ukraine', 17 June 2022, available online at <https://war.ukraine.ua/country-and-society/war-against-nature-the-environmental-damage-of-russia-s-full-scale-invasion-of-ukraine/>.

180 'Russian Vehicles Seen Inside Turbine Hall at Ukraine Nuclear Plant', *CNN*, 19 August 2022, available online at <https://edition.cnn.com/2022/08/19/europe/ukraine-zaporizhzhia-nuclear-plant-russian-vehicles-intl-hnk/index.html>.

181 *Akayesu* Trial Judgment, *supra* note 26, § 509.

182 ICC Elements of Crimes, at 3, fn 5.

which is inherent in the situation of armed conflict amounts to forcible transfer.¹⁸³

Forcible transfer of children of the protected group to another group has, in the words of the International Law Commission, ‘particularly serious consequences for the future viability of a [protected] group as such’.¹⁸⁴ According to the ICJ, the forcible transfer of children of the group to another group ‘can also entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group’s capacity to renew itself, and hence to ensure its long-term survival’.¹⁸⁵

Transfer and assimilation of children into a new group can result in the erasure of their identity as members of the protected group and consequently threaten the future existence of the protected group. For instance, in 2016 the Independent International Commission of Inquiry on the Syrian Arab Republic determined that the genocide against Yazidi community was committed by the forced transfer and separation of Yazidi children from their families and their placement with ISIS fighters, which led to cutting Yazidi children off from their religious community and erasure of their Yazidi identity.¹⁸⁶ Somewhat similarly, since the start of the full-scale invasion of Ukraine in 2022, Russia has systematically engaged in forcible transfer of Ukrainian children into the territories of Ukraine occupied by Russia or regions in Russia.

In June 2022, Russia itself said that they had transferred 330,000 Ukrainian children to various regions of Russia.¹⁸⁷ According to Ukrainian officials, about 16,000 children were transferred by the Russian authorities in the first year of the full-scale invasion.¹⁸⁸ The UN Commission of Inquiry reported that the transfer of Ukrainian children had not been justified by any relevant circumstances and appeared to have been carried out in breach of international humanitarian law.¹⁸⁹ On 17 March 2023, the ICC issued arrest warrants for Vladimir Putin, President of Russia, and Maria Alekseyevna Lvova-Belova, Commissioner for Children’s Rights in the Office of Russia’s President.¹⁹⁰ Both are wanted for unlawful deportation of children from the occupied areas

183 *Mutatis mutandis*, *Akayesu* Trial Judgment, *supra* note 26, § 688.

184 *Report of the International Law Commission on the work of its forty-eighth session*, 6 May–26 July 1996, UN Doc. A/51/10, at 46.

185 *Croatia v. Serbia* judgment, *supra* note 103, § 136.

186 Independent International Commission of Inquiry on the Syrian Arab Republic, ‘*They Came to Destroy*’: *ISIS Crimes Against the Yazidis*, UN Doc A/HRC/32/CRP.2, 15 June 2016, at 62.

187 ‘Russia Says More Than 300,000 Ukrainian Children “deported”’, *Ukrainska Pravda*, 19 June 2022, available online at <https://www.pravda.com.ua/eng/news/2022/06/19/7353366/>.

188 ‘Factbox: Who are the Ukrainian Children at the Heart of Putin Arrest Warrant?’, *Reuters*, 19 March 2023, available online at <https://www.reuters.com/world/europe/who-are-ukrainian-children-heart-putin-arrest-warrant-2023-03-19/>.

189 *Report of the Independent International Commission of Inquiry on Ukraine to the Human Rights Council*, *supra* note 131, § 98.

190 ICC Press Release, ‘Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’, 17 March 2023, available online at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

of Ukraine into the Russian Federation qualified as war crimes under Articles 8(2)(a)(vii) and 8(2)(b)(viii) ICC Statute.

While the ICC arrest warrants and UN Commission of Inquiry report indicate existence of persuasive evidence of war crime of unlawful deportation of civilians from Ukraine by Russia's officials, there are good reasons to believe that transfer of children also amounts to an act of genocide. Russian officials have openly expressed their intent to have the transferred Ukrainian children educated in the Russian language, adopted into Russian families and turned into Russian citizens.¹⁹¹ To this effect, a draft law was introduced in the Russian parliament which provides for a simplified procedure for adoption of forcefully displaced Ukrainian children by Russian families.¹⁹² In addition, Russia has been issuing Russian birth certificates to Ukrainian children in the territories under its control.¹⁹³ Furthermore, an investigation conducted by the Yale School of Public Health's Humanitarian Research Lab established that the deported Ukrainian children were kept in Russia-controlled re-education camps.¹⁹⁴ The statements and actions of Russian officials indicate the intent to separate Ukrainian children permanently from their families, national and ethnic group and thereby annihilate their Ukrainian identity.¹⁹⁵

6. Conclusion

Russia's full-scale invasion of Ukraine on 24 February 2022 came as a shock to the world. Many still struggle to understand the reason behind Russia's destructive attack on Ukraine and its people. The Ukrainian Parliament's Declaration 'On the Genocide Committed by the Russian Federation in Ukraine' adopted on 14 April 2022 and based on the draft text proposed by the authors of this article aimed to draw the world's attention to the genocidal intent motivating Russia's war in Ukraine.

In this article, the authors of the draft declaration explained the legal reasoning and historical context behind the statements on genocidal intent and acts contained in the parliamentary declaration. Most importantly, they clarify for outside observers the true meaning of the terms 'denazification', 'nazi' and 'nationalism' as used in Russian official rhetoric in respect of Ukraine and Ukrainians. Russian state ideology has long perceived any manifestation of

191 'UN's Bachelet Concerned Over Ukraine Orphans "deported" to Russia for Adoption', *UN News*, 15 June 2022, available online at <https://news.un.org/en/story/2022/06/1120412>.

192 *Ibid.*

193 X. Landen, 'Ukrainian Babies Issued Russian Birth Certificates as War Drags On', *Newsweek*, 29 April 2022, available online at <https://www.newsweek.com/ukrainian-babies-issued-russian-birth-certificates-war-drags-1702206>.

194 K. Khoshnood and others, *Russia's Systematic Program for the Re-education and Adoption of Ukraine's Children*, Humanitarian Research Lab at Yale School of Public Health, 14 February 2023, at 14–15.

195 New Lines Institute/Raoul Wallenberg Institute for Human Rights, *An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent*, May 2022, at 34.

Ukrainians' desire to live as a separate nation and an independent state as nationalism and nazism. The purpose of 'denazification' is essentially the annihilation of Ukrainians who identify themselves as members of the independent Ukrainian nation. The authors also bring readers' attention to systematic military attacks and the destruction of objects of Ukrainian cultural heritage, the russification carried out through bans on Ukrainian books and language in the Ukrainian territories occupied by Russia, and the systematic and discriminatory character of the mass atrocities committed by Russian armed forces in Ukraine.

Once one understands the context and meaning of the terms employed by Russian official rhetoric to accompany the murder, torture, ill-treatment and persecution of Ukrainians, russification of Ukrainian children and large-scale destruction of Ukraine's vital infrastructure, one cannot but see the genocidal intent behind the Russia's war against Ukraine and its people. The facts described in this article, in their entirety, provide grounds to believe that the actions of the Russian Federation committed during the full-scale invasion of Ukraine are indeed aimed at the destruction of the Ukrainian nation as such at least in part and therefore amount to genocide.