

FROM HOMO SOVIETICUS TO RUSSKIY MIR

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LACHOWSKI

THE KREMLIN'S GENOCIDAL POLICY AGAINST THE UKRAINIAN NATION IN THE LIGHT OF INTERNATIONAL LAW AND THE THOUGHT OF RAPHAEL LEMKIN

When Russian crimes in Bucha, Borodianka and Irpin were discovered towards the end of March 2022, the world began to ponder what name should be given to the criminal acts committed by the Russian troops. The parliaments in Poland, the Czech Republic, Canada and the Baltic states recognized the aggressive war waged by the Russian Federation against Ukraine as an act of genocide. But it is not these political proclamations or even the very savagery of the Russian occupiers that justify the legal qualification of the acts committed by the representatives of Russia as genocide under international law. What matters here is the intent to destroy the Ukrainian national group, demonstrated in numerous public appearances by the highest political leadership of the Russian Federation and implemented by Russian soldiers operating on the Ukrainian territory. This paper aims to show that Russian crimes in Ukraine can be qualified as genocide under the UN Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and that in fact they constitute a continuation of the Kremlin's policies towards the Ukrainian nation. In order to better present this thesis, the text refers to the work of the author of the notion of genocide – Raphael Lemkin.

In the wake of events resulting from the Russian aggression on Ukraine, experts on international law started a discussion on the legal qualification of acts committed by Russia. Although it is relatively easy to qualify a vast majority of crimes committed by the representatives of the Russian Federation as war crimes or crimes¹ against humanity², at least in an academic sense, the legal category of the crime of genocide raises numerous doubts. Firstly, these result from the very nature of the definition of genocide in the UN Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. Secondly, they stem from recognizing the difficulties of applying the convention in practice, as evidenced by a relatively low number of convictions for the crime of genocide handed down by international or hybrid (internationalized) criminal courts functioning since the 1990s³.

In order to fulfill the task stated in the introduction to the present paper – i.e. to qualify contemporary Russian crimes as genocide – it is helpful to refer to the thought of Raphael Lemkin, the author of the concept of genocide in international law. Especially in the 1950s, the lawyer argued that the crimes committed by the USSR against the nations of East-Central Europe, chief among them the Great Famine, could be classified as genocide not contrary to, but very much in accordance with the UN Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force on 12 January 1951.

MAN SUBORDINATED TO THE CRIMINAL IDEA OF A TOTALITARIAN STATE

Considerations on the Russian genocide against Ukrainians cannot escape the problem of the ideological foundation of the Kremlin's criminal activities in Ukrainian territory. The tragic outcome of several weeks of Russian occupation in parts of the Kyiv, Chernihiv and Sumy Oblasts, as well as of the months-long ordeal of the bombing of Mariupol or the Ukrainian towns and villages in the Donbas that are still being attacked, comprises mass graves containing thousands of innocent victims. They were brutally murdered only because they considered themselves members of the Ukrainian nation – importantly, regardless of their ethnic origin. This should open the eyes of the world to the fact that the Russian state shows complete disregard for human life. Vladimir Putin's overriding aim, i.e. the restoration of the Russian Empire based on the ideology of *russkiy mir*, seems to "justify the means" employed by the Kremlin.

It should be stressed that to a large extent, the concept of *russkiy mir* constitutes a continuation of the historical idea of a "new Soviet man" (*Homo sovieticus*). This claim seems justified despite apparent differences: while the communist ideology was officially based on the idea of internationalism and atheism, the concept of *russkiy mir* is founded on Russian nationalism and chauvinism, as well as on the orthodox faith which, under the guidance of the Russian Orthodox Church with direct ties to the Kremlin, serves as an important cementing factor of a religious nature⁴. The common denominator of the two is providing an ideological foundation for imperial (neo-imperial) policies pursued by the Kremlin with regard to its closest neighbors, former prisoners of the Russian tsardom and later the Soviet Union. Moreover, as far as internal affairs are concerned, in both cases man is fully subordinated to an overriding idea controlled by the totalitarian state.

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1. FOR EXAMPLE WHEN THE CIVILIAN POPULATION IS INTENTIONALLY ATTACKED OR WHEN HOSPITALS, SCHOOLS AND RESIDENTIAL AREAS ARE BOMBED (ART. 8 OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT). THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ADOPTED IN ROME ON 17 JULY 1998.
 2. I.E. ACTS "COMMITTED AS PART OF A WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST ANY CIVILIAN POPULATION, WITH KNOWLEDGE OF THE ATTACK", AS SPECIFIED UNDER ART. 7 OF THE ROME STATUTE.
 3. THE DEFINITION OF THE CRIME OF GENOCIDE WAS, HOWEVER, "COPIED" FROM THE 1948 CONVENTION TO THE STATUTES OF VARIOUS TRIBUNALS. SEE E.G. ART. 6 OF THE ROME STATUTE OF THE ICC.
 4. SEE Т. КУЗЬО, ВІЙНА ПУТІНА ПРОТИ УКРАЇНИ. РЕВОЛЮЦІЯ, НАЦІОНАЛІЗМ І КРИМІНАЛІТЕТ, ДУХ І ЛІТЕРА: КИЇВ 2018, ПР. 71–132.

Although the Gulag system that claimed the lives of hundreds of thousands of “enemies of the Soviet rule” functioned until 1987, and repression was used basically until the dissolution of the Soviet Union in 1991, it was the first phase of the introduction of the concept of the “new Soviet man” – which ended with the death of Joseph Stalin in 1953 – that proved to be the most criminal in nature⁵. The majority of Soviet crimes were committed in two periods: from the 1920s through the 1930s and from the 1940s through the 1950s. In the first period, the crimes were aimed against the nations that found themselves living on the Soviet territory in the interwar period as a result of the subjugation of their countries by the Bolsheviks, an example of which may be the Holodomor famine in the years 1932–1933. Among these first crimes was also a campaign against national minorities, one of its examples being the so-called Polish Operation in 1937–1938, as well as actions aimed against the “enemies of the people” (the Great Purge in the years 1934–1939). The second period covers crimes committed during the Second World War (including the Katyń Massacre and mass deportations of inhabitants of the Baltic states and Crimean Tatars, among others, deep into the Soviet Union) and as part of the fight against the independence underground of various nations who, following the Yalta Conference, ultimately found themselves under Soviet rule. In order for the idea of Homo sovieticus to be implemented, free nations living in the USSR had to be destroyed, which meant both physical extermination and the complete political subjugation that involved first and foremost a radical re forging of national identity into a class identity. It is estimated that between 20 and 60 million people died at the hands of the Soviet functionaries, the highest numbers being reported under Stalin⁶. Some scholars consider these data a confirmation of the genocidal character of the Soviet system under Stalin’s rule, even though individual perpetrators of the crime of genocide managed to escape justice⁷.

During more than 20 years of Vladimir Putin’s rule in the Russian Federation, its system evolved towards first an authoritarian, and then a totalitarian state. The destruction of the internal political opposition in recent years (epitomized by the imprisonment of Alexei Navalny) and the dismantling of the remnants of civil society and independent institutions (such as the closure of Memorial International on 28 February 2022) simply sealed the process. Even though Putin himself prefers to invoke the figure of Tsar Peter the Great, his policies tend to follow the mode of governance employed by Stalin and subsequent Soviet GenSecs. Just like the leaders of the USSR, the Russian president reserves for himself the right to armed intervention outside his country’s borders aimed at securing the Kremlin’s interests and “protecting” the populations included in the concept of russkiy mir, formerly the Homo sovieticus idea. And, just as in the past, he uses mass murder as a tool for reinforcing his criminal ideology.

GENOCIDE IN THE THOUGHT OF RAPHAEL LEMKIN

Raphael Lemkin (1900–1959), a Polish lawyer of Jewish origin, became interested in the problem of mass crimes relatively early on in his life. As a teenager he started thinking about the tragedy of Armenians in the Ottoman Empire, and later on he pondered over the crimes committed by European metropolises in their colonies, among others in Congo, and the destruction of native peoples in both Americas. Subsequent years brought the formation of the Soviet Union, a totalitarian state which, especially in the 1930s, set about a criminal

5. Ю. КАГАНОВ, КОНСТРУЮВАННЯ «РАДЯНСЬКОЇ ЛЮДИНИ» (1953–1991): УКРАЇНСЬКА ВЕРСІЯ, ІНТЕР-М: ЗАПОРІЖЖЯ 2019, P. 11.

6. SEE S. COURTOIS, THE CRIMES OF COMMUNISM, [IN:] THE BLACK BOOK OF COMMUNISM. CRIMES, TERROR, REPRESSION, K. BARTOŠEK, S. COURTOIS, J.-L. MARGOLIN, A. PACZKOWSKI, J.-L. PANNÉ, N. WERTH, LONDON 1999, P. 4; R. RUMMEL, LETHAL POLITICS: SOVIET GENOCIDE AND MASS MURDER SINCE 1917, TRANSACTION PUBLISHERS: NEW JERSEY 1990.

7. FOR A BROADER ACCOUNT SEE N. M. NAIMARK, STALIN’S GENOCIDES, PRINCETON UNIVERSITY PRESS: PRINCETON AND OXFORD 2010.

implementation of its idea of a “new Soviet man”, which also did not escape Lemkin’s attention⁸.

In the interwar period, the Polish lawyer advocated the inclusion in national legislations of new types of crime and the adoption of an international agreement that would help harmonize and align the wording of legal solutions already extant in various countries. In his famous paper drafted for the 5th Conference for the Unification of Penal Law in Madrid in 1933, Lemkin proposed among others two new types of crime: barbarity and vandalism. They referred to acts aimed at the extermination of a racial, religious or social collectivity, such as murder or actions undertaken to ruin the economic existence of an individual as a member of a given group (barbarity), as well as to the destruction of the works of art and culture of this collectivity (vandalism) – both of which Lemkin described as hate crimes. In the next decade, both concepts served in his formulation of the notion of the crime of genocide. The key was to focus on a given collectivity as such, which becomes the object of the perpetrator’s criminal intent, and not just on individuals, as is the case in “classic” criminal acts punishable under penal law.

After the outbreak of the Second World War, Lemkin emigrated from Poland. During his stay in the United States, he completed his most important book, *Axis Rule in Occupied Europe*, in which he defined genocide as follows:

“By ‘genocide’ we mean the destruction of a nation or of an ethnic group (...) genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group. (...) Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor.”¹⁰

Lemkin understood genocide in a universal manner – as a crime of an imperial-totalitarian nature committed under the circumstances of a peculiar asymmetry of capabilities between the perpetrators and the victims and the wish to implement a “great social project” in which, according to the perpetrators, there would be no place for the victims who, in order to survive, would have to accept the rules imposed by the executors of the genocidal policy. For Lemkin, genocide was not limited to physical or biological extermination, because the “coordinated plan of different actions”¹¹ comprised various aspects of genocide against a given national or ethnic group: its nature could be political, social, cultural, economic, biological, physical, religious or moral.

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8. ALTHOUGH FOLLOWING THE END OF THE FIRST WORLD WAR THE INTERNATIONAL COMMUNITY BEGAN TO ADOPT LEGAL INSTRUMENTS AIMED AT PROSECUTING THE PERPETRATORS OF WAR CRIMES AND CRIMES AGAINST HUMANITY (THIS NOTION FIRST APPEARED IN A JOINT DECLARATION BY GREAT BRITAIN, FRANCE AND RUSSIA IN 1915 WITH REGARD TO THE MASSACRES OF ARMENIANS), THERE STILL WAS NO NAME FOR THE GREATEST CRIME – “THE CRIME OF ALL CRIMES” AIMED AT THE DESTRUCTION OF A GIVEN HUMAN GROUP AS SUCH.
 9. R. LEMKIN, PRZESTĘPSTWA POLEGAJĄCE NA WYWOŁANIU NIEBEZPIECZEŃSTWA MIĘDZYPANSTWOWEGO JAKO DELICTA IURIS GENTIUM, “GŁOS PRAWA. PRZEGLĄD PRAWNICZY ALLERHANDA” 2018, VOL. 1, ISSUE 1–2, PP. 130–137.
 10. R. LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS*, CARNEGIE ENDOWMENT FOR WORLD PEACE: WASHINGTON 1944, P. 79.
 11. *IBID.*, P. 79.

Since Lemkin's monograph appeared during the Second World War, which was started by the German state, the identification and description of the new concept in international law was directly linked with the occupation policies pursued by the Third Reich in subjugated countries. In accordance with the paper's thesis, Lemkin's universal understanding of genocide enables subsuming all genocidal actions under the definition of this crime, which on the one hand caused the great powers to exercise the utmost caution at the time of adopting the Genocide Convention after the Second World War, but on the other hand allowed Lemkin to assess Soviet crimes as genocide in his works written during the 1950s¹².

FROM THE TRAGEDY OF THE SECOND WORLD WAR TO THE ADOPTION BY THE UN OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN 1948

Following the London Agreement between the four powers on the prosecution and punishment of the major war criminals of the European Axis, signed on 8 August 1945, the International Military Tribunal (IMT) with its seat at Nuremberg was established. Article 6 of the Charter of the IMT, which was annexed to the London Agreement, stipulated crimes falling within the jurisdiction of the Tribunal: crimes against peace, war crimes and crimes against humanity (systemically connected with war crimes) – but there was no separate category for the crime of genocide. It was a kind of a personal defeat for Lemkin, who came to Nuremberg as an adviser to Judge Robert H. Jackson, the Chief United States Prosecutor at the Trials. After the Second World War, Lemkin participated as an expert in the work of the UN General Assembly, which on 11 December 1946 adopted Resolution 96 (I). The document contains key phrases authored by the lawyer: "genocide is a crime under international law" which can be committed against "racial, religious, political and other groups". The Resolution served as a basis for intergovernmental negotiations aimed at the adoption of a legally binding convention on the crime of genocide – Lemkin again participated in preparatory work as a UN expert. Despite his efforts to include cultural genocide in the definition set out in the convention, his proposal did not meet with the approval of the majority of the states involved. After two years of tumultuous negotiation, on 9 December 1948 the UN adopted the Convention on the Prevention and Punishment of the Crime of Genocide.

In Art. II of the 1948 Convention the crime of genocide was defined as follows:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group".¹³

Thus genocide consists of both the subjective element (*mens rea*), i.e. the perpetrator's special intent to destroy one of the four protected groups (national, ethnical, racial or religious) as such, in whole or in part, and the objective element (*actus reus*), i.e. particular genocidal acts through which the perpetrator seeks to achieve their aims. These acts can be qualified as physical genocide (e.g. killing members of the group) or biological genocide (e.g. measures intended to prevent births within the group).

12. OF PARTICULAR NOTE IS: R. LEMKIN, SOVIET GENOCIDE IN UKRAINE, [IN:] РАФАЕЛЬ ЛЕМКІН: РАДЯНСЬКИЙ ГЕНОЦИД В УКРАЇНІ. СТАТТЯ 28 МОВАМИ, Р. СЕРБІН (ED.), КИЇВ 2009. RAPHAEL LEMKIN REPEATEDLY RAISED THESE ISSUES IN HIS PUBLIC SPEECHES WHICH, HOWEVER, WERE NEVER PUBLISHED. SEE R. SZAWŁOWSKI, RAFAŁ LEMKIN. BIOGRAFIA INTELEKTUALNA, WARSZAWA 2020, PP. 491–496.

13. THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 9 DECEMBER 1948.

The definition of genocide adopted in the Convention differed markedly not only from Lemkin's original concept presented in *Axis Rule in Occupied Europe*, but also from the UNGA Resolution 96 (I). First of all, so-called cultural genocide was dropped – some of the negotiating countries insisted that the definition of genocide be consistent with the popular (social) understanding of the crime, i.e. physical and biological extermination. Moreover, political groups were eventually excluded from among the protected groups. These decisions resulted primarily from the position taken by the great powers. Western countries feared that their colonial crimes against native peoples could be qualified as genocide (hence the omission of cultural genocide). Mindful of its own interests – not to be blamed for the crime of genocide – the Soviet Union worked to have political groups removed. According to its sham logic, all “tragedies” that happened in the USSR (in reality – crimes of the Kremlin) were experienced by different political groups (such as “the kulaks”) not by national groups (which was not true).¹⁴ Although not all his proposals met with sufficient support from the negotiating countries, Lemkin wielded considerable influence over the drafting of the document, and he certainly felt satisfied on 9 December 1948 when the Genocide Convention was unanimously adopted.

SOVIET CRIMES AS SEEN BY RAPHAEL LEMKIN

The Genocide Convention entered into force on 12 January 1951. The Soviet Union signed it on 16 December 1949 and ratified it on 3 May 1954. It allowed Lemkin, who was nearing the end of his life, to finally discuss Soviet crimes under the label of genocide in an open and public manner. Still in the United States, the lawyer began active cooperation with representatives of national groups from East-Central Europe who, as a result of the decisions made at Yalta, found themselves in the Soviet sphere of influence, thus becoming the target of the Kremlin's policies aimed at creating a “new Soviet man”. Lemkin started to work with Polish organizations in the United States, such as the Polish American Congress and the Polish Women's Alliance of America, especially in the context of the Katyń Massacre. One of the results of these efforts was the establishment by the United States House of Representatives of the committee of inquiry into the Katyń Massacre, which convened in the years 1951–1952. In addition to the Polish diaspora, Raphael Lemkin also supported Balts and Ukrainians, and additionally addressed the founding convention of the Assembly of Captive European Nations, a non-governmental organization established in 1954.

Mention should also be made of the famous though long-forgotten speech “Soviet Genocide in Ukraine”, which Lemkin delivered in New York in 1953 during a rally to commemorate the 20th anniversary of the Great Famine. The lawyer described the policies pursued by the Kremlin in the 1920s and 30s with regard to the Ukrainian nation as “perhaps the classic example of Soviet genocide, its longest and broadest experiment in Russification – the destruction of the Ukrainian nation”.¹⁵ It was not only the two tragic years of the Great Famine (which claimed the lives of at least 3,941,000 victims in the years 1932–1933), but also the entirety of the Soviet policy against Ukrainians that Lemkin referred to as genocide. He also named four stages of the Kremlin's genocide. The first was the destruction of “the national brain”, achieved through repression against the Ukrainian intelligentsia. The next Soviet blow was aimed at “the national soul”, i.e. the Ukrainian Orthodox Autocephalous Church. The third phase was the starvation of the peasant population – “the body of the nation”, which at the time was the main carrier of Ukrainian national identity (what Lemkin called “the repository of the tradition, folklore and music, the national language and

14. FORTUNATELY, THE SOVIETS FAILED TO ESTABLISH AN INTEGRAL CONNECTION BETWEEN GENOCIDE AND THE NAZI-FASCIST IDEOLOGY ON THE BASIS OF THE 1948 CONVENTION, WHAT THEY WERE STRIVING FOR.
15. R. LEMKIN, *SOVIET GENOCIDE IN UKRAINE...*, P. 31.

literature, the national spirit, of Ukraine"). The last step was the settling of other nationalities, including ethnic Russians, primarily in the south and east of Ukraine.¹⁶ In his 1953 paper, Lemkin additionally pointed out that the Soviet Union was also responsible for the destruction of the nations of Lithuania, Latvia and Estonia, as well as of Crimean Tatars and Ingrians (a Finnish nation) – all to implement the idea of a "new Soviet man".¹⁷

The lawyer argued that the Kremlin's protracted genocidal policy against the Ukrainians combined physical or biological genocide with cultural and political genocide (the "coordinated plan of different actions", as he wrote in *Axis Rule*), thus constituting an example of an imperial-colonial crime¹⁸. At the same time, it was clear for Lemkin that this policy was aimed against the Ukrainian national group (and not a political group – "the kulaks", i.e. wealthy peasants – as Soviet propaganda claimed). The Ukrainians were subjected to acts falling under the definition of genocide from the 1948 Convention: "killing members of the group", "causing serious bodily or mental harm to members of the group", as well as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part". Lemkin reconstructed the intent to destroy the group in whole or in part on the basis of the nature of the four stages of genocide – the deliberate elimination of Ukrainian identity and its replacement with the imposed Soviet identity. It can be assumed, therefore, that Lemkin's own concept of cultural and political genocide served him to demonstrate the parameters of intent.

After 1989 and the collapse of the USSR in 1991, the countries of East-Central Europe invoked the legal category of the crime of genocide. It can be said that these actions constituted an example of a "dispersed Nuremberg 2.0" for Soviet crimes, which was never held on an international level¹⁹. In Poland, for example, prosecutors from the Institute of National Remembrance launched an investigation into the Katyń Massacre as a crime against humanity "in its gravest form – that of genocide" (a splinter of the jurisdiction of the IMT in Nuremberg). In the Baltic states, mostly in Lithuania, to this day criminal proceedings against former functionaries of the Soviet regime make use of the category of genocide (in the context of crimes committed especially against members of the Lithuanian anti-Soviet independence underground, the so-called Forest Brothers). Finally, special proceedings were held in Kyiv in 2010, during which the local court determined that the Holodomor (understood here as a synonym of the Great Famine in the years 1932–1933) should be qualified as a crime of genocide under international law and under Ukrainian national law²⁰ (though some questions of a legal nature arose as regards the retrospective application of the 1948 Convention to the events from the years 1932–1933)²¹. In 2006, the Verkhovna Rada of Ukraine passed a law declaring the Holodomor from the years 1932–1933 an act of genocide against the Ukrainian nation, which became the staple of the new politics of history in this regard.²² Interestingly, some experts considered the limited application of the term genocide to only two years of the Great Famine a kind of mistake, which all the more shows the rectitude of Lemkin's judgment as presented in his 1953 paper, in which he understood the Soviet genocide against the Ukrainian nation in much broader terms.²³

16. *IBID.*, P. 32–25.

17. *IBID.*, P. 31.

18. *IBID.*, P. 35; CF. G. POBEREŻNY, TOTALITARNO-KOLONIALNY WYMIAR SOWIECKIEGO LUDOBÓJSTWA NARODU UKRAIŃSKIEGO W ŚWIETLE MYŚLI RAFAŁA LEMKINA. ANALIZA POLITOLOGICZNA, "WŁADZA SĄDZENIA" 2021, ISSUE 20, PP. 53–73.

19. FOR A BROADER ACCOUNT SEE T. LACHOWSKI, FROM USSR TOTALITARISM TO PUTINISM – IS NUREMBERG-2 TRIAL POSSIBLE CONCERNING SOVIET CRIMES?, [IN:] SURVIVING NEAR THE EMPIRE: PRICE OF THE MODERN KREMLIN'S AGGRESSION, (ED.) P. LODYN, IVANO FRANKIVSK 2021, PP. 149–167.

20. DECISION OF THE COURT OF APPEALS IN KYIV, 13.01.2010, CASE REF. NO. 1-33/2010.

21. *IBID.*, PP. 158–159; CF. M. ANTOŃOVICH, ГОЛОДОМОР 1932-1933 РОКІВ В УКРАЇНІ В КОНТЕКСТІ РАДЯНСЬКОГО ГЕНОЦИДУ ПРОТИ УКРАЇНСЬКОЇ НАЦІЇ, [IN:] ГОЛОДОМОР 1932-1933 РОКІВ В УКРАЇНІ ЯК ЗЛОЧИН ГЕНОЦИДУ ЗГІДНО З МІЖНАРОДНИМ ПРАВОМ, (ED.) В. ВАСИЛЕНКО, М. АНТОНОВИЧ, КИЇВ 2016, PP. 92–93.

22. ЗАКОН УКРАЇНИ «ПРО ГОЛОДОМОР 1932–1933 РОКІВ В УКРАЇНІ», 28.11.2006, ВІДОМОСТІ ВЕРХОВНОЇ РАДИ УКРАЇНИ (ВВР), 2006, ISSUE 50, P. 504.

23. CF. P. СЕРБИН, ОСМИСЛЕННЯ ГОЛОДОМОРУ У СВІТЛІ КОНВЕНЦІЇ ООН ПРО ГЕНОЦИД, „АРХІВИ УКРАЇНИ” 2008, VOL. 261, ISSUE 3–4, PP. 53–62; G. POBEREŻNY, TOTALITARNO-KOLONIALNY WYMIAR SOWIECKIEGO LUDOBÓJSTWA NARODU UKRAIŃSKIEGO W ŚWIETLE MYŚLI RAFAŁA LEMKINA..., PP. 67–70.

CAN CONTEMPORARY RUSSIAN CRIMES IN UKRAINE BE QUALIFIED AND PUNISHED AS GENOCIDE?

The findings of investigators who for the past months have been collecting evidence of crimes committed in Ukraine will be of key importance for the follow-up prosecution and legal qualification of individual acts with reference to the category of crimes under international law – such as genocide, crimes against humanity and war crimes. The participation of the Office of the Prosecutor of the International Criminal Court in The Hague, Ukrainian investigators, as well as investigators from other countries, including Poland, demonstrate the Ukrainian state's openness to transparency and reliance on international standards.

At the same time, the jurisprudence of international (and hybrid) criminal courts – such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) or the Extraordinary Chambers in the Courts of Cambodia – in cases involving the charge of genocide is also of great importance. These courts developed the most important concepts contained in the definition of genocide: "intent", "protected group", "destruction of a group in whole or in part".²⁴ As demonstrated by the experience of these courts, the most difficult task is to reconstruct the perpetrator's intent, which causes many prosecutors to avoid risking failure at a genocide trial by choosing instead the charge of, for example, crimes against humanity, where no special intent on the part of the perpetrator has to be proved. This factor has to be taken into account as far as criminal proceedings into Russian crimes in Ukraine are concerned, especially as regards cases brought before international courts, including the ICC.

Nevertheless, an attempt to reconstruct the intent, as well as other elements of the definition of genocide, is still worth making. As follows from the jurisprudence of international courts, a special genocidal plan does not have to exist in order for the intent to be demonstrated (as the plan is not an element of the crime), but its existence can prove very helpful.²⁵ Vladimir Putin's statement from 21 February 2022, in which the president of Russia denied Ukraine its right to sovereignty and its own past and future, claiming that it is an artificial construct ("created by Lenin"), not only showed his great contempt for Ukrainians, but also demonstrated that in the rhetoric of the Kremlin's leader the Ukrainian nation is actually deprived of the right to independent existence (and can function only as part of a broader "Great-Russian nation").²⁶ Putin's narrative about "Ukrainian Nazis" purportedly committing genocide against the residents of the Donbas was generally recognized as absurd by the Western world (which was confirmed by a relevant order of the International Court of Justice in The Hague of 16 March 2022²⁷), but it has to be admitted that it was fully-thought out from the perspective of Russia itself. It was a continuation of the myth of the Great Patriotic War and the struggle against the Nazis/Fascists, among whom the representatives of the anti-Soviet independence underground in Ukraine or the Baltic countries were often counted. For the Russian head of state, each Ukrainian who does not identify with the Soviet tradition (*Homo sovieticus*) or the Russian imperial tradition (*russkiy mir*) is therefore a "Nazi", which means that the announcement of "de-Nazification" coming

24. FOR A BROADER ACCOUNT SEE K. WIERCZYŃSKA, POJĘCIE LUDOBÓJSTWA W KONTEKŚCIE ORZECZNICTWA MIĘDZYNARODOWYCH TRYBUNAŁÓW KARNYCH AD HOC, WARSZAWA 2010, PP. 108–112; 147–162.

25. AS WAS OBSERVED BY THE ICTY IN THE CASES OF JELISIC AND KRSTIC, AS WELL AS BY THE ICTR E.G. IN THE CASE OF KAYISHEMA. SEE *IBID.*, P. 76; 150–151; SEE ALSO W. SCHABAS, GENOCIDE IN INTERNATIONAL LAW. THE CRIME OF CRIMES, CAMBRIDGE 2009, PP. 245–246.

26. PUTIN'S SPEECH WAS THEORETICALLY AIMED AT PROVIDING JUSTIFICATION FOR THE NECESSITY TO RECOGNIZE INDEPENDENCE OF THE SO-CALLED DONETSK AND LUHANSK PEOPLE'S REPUBLICS (WHICH IN REALITY ARE ILLEGAL TERRITORIAL REGIMES WITHOUT THE RIGHT TO SELF-DETERMINATION). ОБРАЩЕНИЕ ПРЕЗИДЕНТА РОССИЙСКОЙ ФЕДЕРАЦИИ, "KREMLIN.RU", 21.02.2022, [HTTP://KREMLIN.RU/EVENTS/PRESIDENT/NEWS/67828](http://kremlin.ru/events/president/news/67828).

27. ORDER OF THE INTERNATIONAL COURT OF JUSTICE OF 16 MARCH 2022 ON UKRAINE V. RUSSIAN FEDERATION (ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE), [HTTPS://WWW.ICJ-CIJ.ORG/PUBLIC/FILES/CASE-RELATED/182/182-20220316-ORD-01-00-EN.PDF](https://www.icj-cij.org/public/files/case-related/182/182-20220316-ord-01-00-en.pdf).

from the Kremlin should rather be understood as a desire to “de-Ukrainize” Ukraine. This was confirmed a few weeks later by Dmitry Medvedev, former president and currently Deputy Chair of the Security Council of the Russian Federation, who appealed for the process of “de-Nazification” to continue and at the same time called for eliminating émigré Ukrainian politicians and independence activists.²⁸

The plan presented by the highest political leadership was put into practice by Russian soldiers in occupied Ukrainian territories. The currently available information suggests that for example in the Kyiv Oblast, it was first and foremost local community leaders – politicians, activists or Donbas veterans – who were searched for by the Russians. In the occupied south and east of Ukraine, the Orthodox churches, libraries and monuments are being destroyed, and there is an attempt to replace the Ukrainian education system with the Russian one. Again – like in the Soviet times – the Ukrainian language is being removed. Finally, Ukrainian children from the occupied territories are being deported to Russia for assimilation with the Russian nation, and the areas of the Donbas and the south of Ukraine may probably be soon settled by other nationalities, including ethnic Russians (as could be observed after 2014 in the annexed Crimea). These acts bear all the hallmarks of cultural and political genocide as described by Lemkin. Under the current legislation in force, they can be used for the reconstruction of intent.²⁹

The actions of the Russian troops encompass virtually all genocidal acts set forth in Art. II of the Genocide Convention, from the killing of individual persons only because they belong to the Ukrainian national group (regardless of their ethnic origin) to causing serious bodily or mental harm and forcibly transferring children of the Ukrainian group to the Russian group. As follows from the jurisprudence of the ICTR, rape can also be classified as a genocidal act, and there have been mass rapes in the occupied territories.

It would seem, then, that the Russians have embarked on another stage of genocide against the Ukrainian nation after the brutal Sovietization of Ukraine in the 1930s. Back then in the name of the Homo sovieticus ideology, and now in the name of the ruskiy mir and the restoration of the empire, the Kremlin destroys everything that is separate and independent. The Ukrainians began to rebuild their own national identity particularly after the Revolution of Dignity in the winter of 2013/2014, a process that was immediately and brutally interrupted by the Russian aggression towards the end of February 2014, which resulted in the seizure of the Crimea Peninsula and the outbreak of war in the east of Ukraine. Only time will tell whether any given court – e.g. the ICC in The Hague – will try the perpetrators for genocide, which also depends on the efficiency of the investigators in gathering evidence. Nevertheless, we can already speak of the implementation of a plan that can serve as an example of an imperial-totalitarian crime. Raphael Lemkin wrote about it seven decades ago with regard to the actions of the USSR, but unfortunately his words have lost none of their relevance.


 TRANSLATION BY
ALEKSANDRA
ARUMIŃSKA

28. ДМИТРИЙ МЕДВЕДЕВ НАПИСАЛ СТАТЬЮ, РАЗОБЛАЧАЮЩУЮ “ГЛУБИННОЕ УКРАИНСВО”, “НОВЫЕ ИЗВЕСТИЯ”, 5.04.2022, [HTTPS://NEWIZV.RU/NEWS/POLITICS/05-04-2022/DMITRIY-MEDVEDEV-NAPISAL-STATYU-RAZOBLACHAYUSCHUYU-GLUBINNOE-UKRAINSTVO](https://newizv.ru/news/politics/05-04-2022/dmitriy-medvedev-napisal-statyu-razoblachayuschuyu-glubinnoe-ukrainstvo).

29. CF. W. SCHABAS, GENOCIDE IN INTERNATIONAL LAW..., PP. 216–218.

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