

СУЧАСНА СИСТЕМА МІЖНАРОДНОГО ПРАВА

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INDIVIDUAL AND COLLECTIVE INTENT IN THE CRIME OF GENOCIDE (ON THE EXAMPLE OF THE HOLODOMOR-GENOCIDE AGAINST THE UKRAINIAN NATION)

СПІВВІДНОШЕННЯ ІНДИВІДУАЛЬНОГО ТА КОЛЕКТИВНОГО НАМІРУ В ЗЛОЧИНІ ГЕНОЦИДУ (НА ПРИКЛАДІ ГОЛОДОМОРУ- ГЕНОЦИДУ ПРОТИ УКРАЇНСЬКОЇ НАЦІЇ)

СООТНОШЕНИЕ ИНДИВИДУАЛЬНОГО И КОЛЕКТИВНОГО УМЫСЛА В ПРЕСТУПЛЕНИИ ГЕНОЦИДА (НА ПРИМЕРЕ ГОЛОДОМОРА-ГЕНОЦИДА ПРОТИВ УКРАИНСКОЙ НАЦИИ)

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Abstract. *The article deals with the definition of the concept of intent to commit genocide in the Statute of the International Criminal Court, in the document "Elements of Crimes" adopted by the International Criminal Court, as well as in decisions of the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, International Criminal Court and in practice of the International Court of Justice. The author reveals constitutive elements of the concept of intent to commit genocide: intent to be engaged in the conduct which would cause destructive consequences for a national, ethnic, religious or racial group as such; intent to reach these consequences; or awareness that they will occur as a result of this conduct in the ordinary course of events. The author indicates slightly different approaches of the international criminal tribunals and courts to knowledge of the consequences as a result of destruction of a group. It is stated that the intent should not necessarily be fixed in documents or formulated in public oral speeches, but may also be certified by facts and circumstances of a crime. The author analyzes different circumstances which may evidence the intent to commit genocide. Special attention is paid to differentiation between individual and collective intent to commit genocide. The author examines the intent to commit genocide in the Holodomor organized against the Ukrainian national and ethnic group.*

Key words: *Genocide, the intent to commit genocide, collective and individual intent, the Holodomor-genocide.*

Анотація. *У статті розглядається питання визначення поняття «намір» вчинити геноцид у Статуті Міжнародного кримінального суду, в документі «Елементи злочинів», прийнятому Міжнародним кримінальним судом, а також у рішеннях Міжнародного кримінального трибуналу щодо колишньої Югославії, Міжнародного кримінального*

трибуналу щодо Руанди, Міжнародного кримінального суду та в практиці Міжнародного Суду ООН. Розкриваються складові поняття «намір» вчинити геноцид, а саме намір вчинити дію, яка спричинить руйнівні наслідки для певної національної, етнічної, релігійної чи расової групи, як такої; намір досягти цих наслідків або усвідомлення, що такі наслідки неминуче настануть в результаті цієї дії. Авторка вказує на децю відмінні підходи в позиціях зазначених трибуналів і судів до елементу усвідомлення наслідків (обізнаності з наслідками) знищення вказаних груп. Зазначається, що намір вчинити геноцид не обов'язково повинен бути зафіксований в документах чи висловлений у публічних промовах, але може також бути виведений із фактів і обставин злочину. Розглядаються обставини, які можуть свідчити про намір вчинити геноцид. Акцентується увага на розмежуванні та співвідношенні колективного та індивідуального намірів, які мають місце у злочині геноциду. Проаналізовано намір вчинити геноцид в Голодоморі проти української національної та етнічної групи.

Ключові слова: Геноцид, намір вчинити геноцид, колективний та індивідуальний намір, Голодомор-геноцид.

Аннотация. В статье рассматривается вопрос определения понятия «намерение» совершить геноцид в Уставе Международного уголовного суда, в документе «Элементы преступлений», принятом Международным уголовным судом, а также в решениях Международного трибунала по бывшей Югославии, Международного трибунала по Руанде и в практике Международного Суда ООН. Раскрываются составные понятия «намерение» совершить геноцид, а именно намерение совершить действие, которое вызовет разрушительные последствия для определенной национальной, этнической, религиозной или расовой группы как таковой; намерение достичь этих последствий или осознание, что такие последствия неминуемо будут иметь место в результате этого действия. Автор указывает на несколько отличные подходы в позициях указанных трибуналов и судов к элементу осознания последствий (ознакомления с последствиями) уничтожения указанных групп. Намерение совершить геноцид не обязательно должно быть зафиксировано в документах или высказано в публичных речах, но может быть выведено из фактов и обстоятельств преступления. Рассматриваются обстоятельства, которые могут свидетельствовать о намерении совершить геноцид. Акцентируется внимание на размежевании и соотношении коллективного и индивидуального намерений, которые имеют место в преступлении геноцида. Проанализировано намерение совершить геноцид в Голодоморе против украинской национальной и этнической группы..

Ключевые слова: Геноцид, намерение совершить геноцид, коллективное и индивидуальное намерение, Голодомор-геноцид.

Introduction. The concept of the intent to commit genocide as the key issue in qualification of this crime is determined in the Rome Statute of the International Criminal Court (ICC) and in the “Elements of Crimes”, adopted by the ICC. This concept has been further developed in the case law of the International Court of Justice (ICJ), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). However, elements of intent, distinction between collective and individual intent to commit genocide have not been sufficiently investigated by scholars. Moreover, elements of the collective and individual intent in the Holodomor-genocide in Ukraine have not been investigated at all.

The purpose of research is to determine correlation of the collective and individual intent elements in the crime of genocide, in particular in the Holodomor-genocide of the Ukrainian nation in the first half of the XX century.

Recent literature review. There are many works of historians, sociologists, demographers and lawyers analyzing separate cases of genocide and different aspects of the crime of genocide. The main element of this crime – intent to commit genocide (*dolus specialis*) has been researched by M. C. Bassiouni, M. Boot, I. W. Charny, R. Lemkin, J. Quigley, W. A. Schabas, and other

scholars. L. May has paid special attention to the correlation of individual intent elements and a collective intent element in the crime of genocide [May: 2010]. Human Rights Watch has prepared Topical Digests of the Case Law of the ICTY and ICTR which include chapters on special intent or *dolus specialis* of genocide on the examples of cases of these Tribunals.

The case of the Holodomor-genocide against the Ukrainian national group has been analyzed mainly by historians [Mace: 1988; Naimark: 2010; Serbyn: 2010]. Of great importance for the qualification of the Holodomor as a crime of genocide was R. Lemkin's paper "Soviet Genocide in Ukraine" which placed the destruction of the Ukrainian nation by the leaders of the Soviet Union among three main genocides of the first half of the XX century [Lemkin: 2009].

Main research results. Under article 30 of the ICC Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge, unless otherwise provided. A person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events [2].

Article 30 of the ICC Statute also foresees that 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events [2]. Where no reference is made in the "Elements of Crimes" to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies [3].

The special intent (*dolus specialis*) to destroy, in whole or in part, any national, ethnic, religious or racial group as such is the key issue for the qualification of a crime as genocide, and for determining if a state has violated its obligations under the UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) [1]. The ICJ has paid special attention to this, when, in particular, answering the request of the Federal Republic of Yugoslavia in 1999 for the indication of provisional measures, stated in its order of 2 June 1999 that the Court at the present stage of the proceedings does not consider that "the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision quoted above' (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J., Reports 1996 11) , p. 240, para. 26)" [17, para. 35].

In a number of cases the ICTR stated that a special intent of a crime of genocide which demands that the perpetrator clearly seeks to produce the act charged is required as a constitutive element of the crime. The Trial Chamber found in *Prosecutor v. Akayesu Case* that "the offender is culpable only when he has committed one of the offences charged under article 2(2) ... with the clear intent to destroy, in whole or in part, a particular group" [11, para. 522]. In *Rutaganda Case* ICTR ruled that "A person may only be convicted of genocide if he committed one of the enumerated acts with the specific intent to destroy, in whole or in part, a particular group" [19, para. 59].

The ICTY also emphasized in its cases that "Genocide is a unique crime where special emphasis is placed on the specific intent. The crime is, in fact, characterized and distinguished by a 'surplus' of intent. The acts proscribed in Article 4(2) of the Statute, sub-paragraphs (a) to (c) are elevated to genocide when it is proved that the perpetrator not only wanted to commit those acts but also intended to destroy the targeted group in whole or in part as a separate and distinct entity" [20, para. 520].

What concerns knowledge of the consequences as a result of destruction of a group, positions of ICTR and ICTY slightly defer. While ICTR ruled in *Prosecutor v. Akayesu Case* that "The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group [11, para. 520], ICTY stated in *Blagojevic and Jokic Case* that "[i]t is not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group. The destruction, in whole or in part, must be the aim of the underlying crime(s)" [13, para. 656]. ICC indicated in the "Elements of Crimes" that "[n]otwithstanding the normal requirement for a mental element provided for in article 30, and

recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis” [3].

Circumstances which may evidence the intent to commit genocide are different, and intent may be inferred from the following factors: “the scale of atrocities committed”; the “general nature” of the atrocities committed; the fact of deliberately or systematically targeting victims on account of their membership of a particular group, “the general political doctrine which gave rise to the acts; “the repetition of destructive and discriminatory acts” and others [11, para. 523-524]. In *Kayishema and Ruzindana Case*, ICTR Trial Chamber stated that as intent might be difficult to determine “the perpetrator’s actions, including circumstantial evidence, however may provide sufficient evidence of intent”, and that “intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action” [15, para. 93, 527].

ICC also explained in the “Elements of Crimes” that “[e]xistence of intent and knowledge can be inferred from relevant facts and circumstances” [3]. It means that the intent should not necessarily be fixed in documents or formulated in public oral speeches, but may also be certified by facts and circumstances of a crime. Moreover, as ICJ ruled in *Bosnia-Herzegovina v. Yugoslavia case*, it is “sufficient that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed” [12].

Each genocidal act, enumerated in the Genocide Convention, includes an element of the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, namely, genocidal acts of killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

As stated by Lauri Mälksoo, a crime of genocide may have two levels of intent. First of all, it is “an individual crime in which case the question is whether this particular person acted with the intent to destroy the particular group. However, genocide may also have a “state level” – it might be planned and organized by a few individuals who are acting as highest state organs. Their – “state’s” – intent does not necessarily imply the genocidal intent of the lower state officials [Mälksoo, 2001: 780]. L. Mälksoo makes a reference to James E. Mace who suggested in the context of Stalinist repressions that “[i]n such circumstances, subordinates might well be unaware as to the rationale for a given action or the official reason might not be the real one. We have little choice, in such a situation, but to attempt to extrapolate intent from circumstantial evidence” [Mace, 1988: 118]. L. Mälksoo gives examples of court cases in Latvia and Lithuania in which the general “circumstantial evidence” in the context of the Soviet repressions in the Baltic states indicated the crime of genocide.

The concept of “collective intent” is not clearly determined in international law. As stated by Larry May, “[s]ometimes the term is used to mean that a number of people are working loosely toward the same end, perhaps unbeknownst to one another. To say that there is a collective intent in this sense is just to say that a number of individuals all have roughly the same intent to accomplish the same end. Sometimes the term is used to mean that there is concerted action in that the individual acts of many people are coordinated so as to achieve a single end [May, 2010: 115-116]. L. May considers this second view to be kind of collective intent that the crime of genocide depends on – “[it] is not mere aggregation of intents, but some type of nonaggregated collective intent that is contemplated in the international crime of genocide” [May, 2010: 116].

Following L. May’s view, if to see genocide on the model of the Holocaust, the collective intent element seems to be easily met by showing that Hitler and his henchmen planned the extermination of the Jews in great detail and then initiated their plan. “The plan plus the initiation is a form of collective intent in that the plan organizes the acts of many people and directs those acts toward the destruction of a group” [May, 2010: 116].

However, the ICTR found in *Kayishema and Ruzindana Case*, that “although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out

a genocide without such a plan, or organization” [15, para. 94]. ICTY also ruled in a number of cases that “the existence of a plan or policy is not a legal ingredient of the crime” of genocide [14, para. 48; 16, para. 225; 13, para. 656].

It is worth mentioning that the Ruling of the Kyiv Court of Appeal on 13 January 2010 confirmed the conclusion of the pre-trial investigatory body – Chief Investigation Department of the Security Service of Ukraine upon the fact of the crime of genocide committed in Ukraine in 1932-1933 pursuant to section 1, art. 442 of the Criminal Code of Ukraine. The Court ascertained that the Communist Party of the USSR and the Communist Party of Ukraine (Stalin, Molotov, Kaganovich, Postyshev, Kossior, Chubar, and Khatayevich) with the purpose of suppressing the national liberation movement in Ukraine and preventing the restoration and consolidation of an independent Ukrainian State, masterminded the genocide of a part of Ukrainian national group by creating conditions of life calculated to bring about its destruction through the Holodomor of 1932-1933 [18, pp. 294, 356].

It was a collective special intent to destroy a Ukrainian national group in part. This plan has not appeared in 1931 or 1932 – the national liberation movement in the Ukrainian SSR has started immediately after joining Ukraine to the USSR. That is why the time frames of the Soviet genocide in Ukraine should be expanded to the period from beginning of 1920s with the culmination in 1932-1933, following the scheme of the Soviet genocide in Ukraine proposed by Rafael Lemkin, the author of the term “genocide” [Lemkin, 2009: 32-35], .

What concerns individual intent in genocide, L. May considers that a subjective side of genocide (*mens rea*) involves two distinct types of individual intent: the intent to kill or assault another person and additional special intent to destroy a group by his or her actions. “The question is not whether the individual has a genocidal intent, but whether there is a collective plan that the individual intends to participate in and knows the aims of, including the destruction of a group” [May, 2010: 121-122]. .

It is obvious that a person who plans, initiates or incites to commit genocide more clearly instantiates the collective intent than a person who is just participating in committing a crime. That is why, as L. May explains, the planners and inciters “should be more clearly responsible for the collective crime than are those who participate, although those who participate can also instantiate the collective intent as well” [May, 2010: 122-123]. Put it differently, “the planner plays a more significant role in the sharing of this intent than does the one who merely knows that he or she intends to contribute and knows of what is planned” [May, 2010: 123]. That means that share of participants is present in the intent, however lesser than share of organizers and inciters.

The connection between individual and collective intent is not always easy to establish. Answering the question if an individual intent can be the same as a collective intent, L. May analyzes putative and likely intentions of Hitler. “As he set out the plan of the Holocaust there seems to have been both a collective intent through establishing a master plan to destroy the Jewish people and also a personal intent to aim at the same end” [May, 2010: 124]. It is difficult to state whether one of the organizers of the Soviet Holodomor-genocide in Ukraine – Stalin was as personally committed to a plan to partially destroy the Ukrainian people during the Holodomor as Hitler was during the Holocaust. Stalin hardly had any personal motives, but a collective intent through planning and organizing the Holodomor is obvious.

Cases when an individual does not have the intention to destroy the group but knows that his acts will contribute to this end and knows that others are pursuing this aim are very difficult ones. As L. May considers, for being responsible for genocide it is sufficient that an individual aimed at participating in realization of such plan or campaign and at least understood what the aims of the plan or campaign are, but not necessarily pursue this aim by himself [May, 2010: 124]. As Trial Chamber of the ICTR stated in *Kayishema and Ruzindana Case* “it is unnecessary for an individual to have knowledge of all details of genocidal plan or policy” [15, para. 94].

What concerns the intent of the All-Union Communist Party of Bolsheviks (AUCPB) to selectively exterminate Ukrainians, according to Rafael Lemkin’s view, it appeared from the beginning of 1920s, when in 1920, 1926 and again in 1930-33, teachers, writers, artists, thinkers,

political leaders – the national brains – were liquidated, imprisoned, or deported. Later an offensive against the national churches – the ‘soul’ of Ukraine – was committed, when between 1926 and 1932, the Ukrainian Orthodox Autocephalous Church, its Metropolitan (Lypkivsky), and 10,000 clergy were liquidated. In 1945, when the Soviets established themselves in Western Ukraine, a similar fate was meted out to the Ukrainian Catholic Church. The next step was the starvation to death of a significant part of the Ukrainian peasantry – the repository of the national spirit of Ukraine; followed by the fragmentation of the Ukrainian people at once by the addition to Ukraine of foreign peoples and by the dispersion of the Ukrainians throughout Eastern Europe. In this way, ethnic unity was destroyed [Lemkin, 2009: 32-35].

All the stages of the Soviet Holodomor-genocide enumerated by Lemkin constituted actions committed in the context of a manifest pattern of similar actions directed against the Ukrainian national group or were actions which could themselves bring about such destruction. The term “the Holodomor” might thus be used in a broad sense to the whole Soviet genocide of the Ukrainians, and in a narrow sense to one of the stages of this genocide – famine of 1932-1933. That genocidal act – 1932-1933 man-made famine – was the culmination of the Soviet genocide against the Ukrainian national group, and on the other hand, that act itself constituted a crime of genocide.

There were all the enumerated genocidal acts in the Holodomor as (a) people who resisted were killed; (b) there was huge bodily and mental harm caused to all victims of the Holodomor (those who died and those who survived), (c) there were artificially created conditions of life calculated to destroy the Ukrainians, (d) all those measures prevented births within the Ukrainian national group and (e) famine caused transfer of children from their parents. It is worth mentioning that the list of genocidal acts in Article II of the Genocide Convention is exhaustive: (a) through (c) list the acts of physical genocide; (d) contains a concept of biological genocide; (e) includes an act of cultural genocide. Thus in the Holodomor there were acts of physical, biological and cultural genocide.

The intent of Stalin and his henchmen to exterminate Ukrainians in part was implicit. Indeed we cannot find a single Soviet document, where it were stated that there should be killing of Ukrainians, creation of appalling conditions of life for them, starvation to death, prevention of birth or transferring of children from the Ukrainian national group to another with the aim of destroying the group. However, this intent to commit genocide and knowledge can be inferred from relevant facts and circumstances [3]. As it was stated above, genocidal intent does not necessarily have to be fixed in documents or expressed in public speeches. Moreover, as ruled by the ICJ in *Bosnia-Herzegovina v. Yugoslavia* case, it is “sufficient that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed” [12]. The Soviet government was aware that millions of people including women and children were starving to death as there were plenty of documents from regional authorities and foreign diplomats informing about famine. In particular, the report of a secret officer of Odesa regional department of the GPU (State Political Department) from 9 June 1932 informed that there was famine among peasants who had no bread at all [21, p. 280]. Such evidences of the state’s awareness of murderous famine are more than enough.

Stalin and his henchmen knew what the consequences of the famine would be for the Ukrainians and they foresaw and planned these consequences. Even those scholars who deny that the famine in Ukraine was genocide stress, “Ukrainian nationalism was attacked because it was perceived as a threat to Stalin’s procurement policies” [Green, 2009: 194], which in legal terms means culpability, the intent to destroy people on the basis of their nationality.

The intent of the AUCPB to exterminate the Ukrainians in part may be inferred from its resolutions and directives, as well as from its actions and their consequences. On 22 January 1933, Stalin sent a secret directive ordering Ukraine, Belarus, and the neighboring regions of the RSFSR to prevent the exodus of peasants from the Kuban and Ukraine to the nearby regions of Russia and Belarus. The directive insisted that the exodus was organized by Polish agents and enemies of the Soviet regime in order to agitate against collective farms and the Soviet system. Local authorities and the OGPU were ordered to prevent mass departures and to immediately arrest the “peasants” of

Ukraine and North Caucasus who made their way north [Serbyn: 2010: 224; Green, 2009: 193]. Roman Serbyn considers this directive to be “perhaps the best available evidence of the dictator’s genocidal intent against the Ukrainian people” [Serbyn: 2010: 224].

Conclusions. Thus the intent to commit genocide as a key element of this crime was present in the Holodomor-genocide against Ukrainians. “The Ukrainian peasantry was also ‘doubly suspect’ to the center: as peasants, who were considered inherently counterrevolutionary and hopelessly backward by the Bolsheviks, and as Ukrainians, whose nationalism and attachment to their distinctiveness grated on Stalin and the Kremlin leadership. That the proponents of Ukrainian nationalism among the intelligentsia focused in their writing and speeches on the inherent characteristics of Ukrainian national culture that were preserved by the masses of Ukrainian peasants only increased Stalin’s suspicions of rural Ukrain” [Naimark, 2010: 71-72]. Those suspicions which most likely were at the basis of criminal intents of Soviet leadership resulted in martyr death of more than 7 million Ukrainians majority of whom were children and women. That was a collective intent of the USSR Communist Party of Bolsheviks to destroy Ukrainians as the main enemy to communist system.

To conclude with, as in any genocide, in the Holodomor a perpetrator – AUCPB – had intent to commit a genocidal act of destroying a national and ethnic group, to cause ruining consequences and was aware that the consequences would occur. The offenders who organized the Holodomor were ascertained to be culpable in genocide by the Kyiv Court of Appeals because they knew that the acts committed would destroy a Ukrainian national and ethnic group, and the destruction, in whole or in part, was their aim. Circumstances which evidence the intent of the AUCPB to commit genocide of Ukrainians are different: they may be inferred from numerous resolutions and directives, as well as may be certified by facts and circumstances of that crime. Individual intent of those persons who just participated in committing the Holodomor depends upon their aim at participating in realization of a genocidal plan or campaign and upon their understanding what the aims were, but not necessarily pursuing these aims by themselves. Such cases should be investigated on a case-by-case basis.

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