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Факультет правничих наук

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на тему:

“СИСТЕМАТИЧНИЙ ХАРАКТЕР ВОЄННИХ ЗЛОЧИНІВ ЯК ДОКАЗ ГЕНОЦИДАЛЬНОГО УМИСЛУ”

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Виконала:

Студентка 2-го року навчання магістерської програми “Право”

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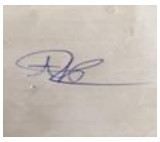

National University of "Kyiv-Mohyla Academy"

Faculty of Law

department of International and European Law

MASTER'S THESIS

on the topic:

"SYSTEMATIC CHARACTER OF WAR CRIMES AS EVIDENCE OF THE GENOCIDAL INTENT"

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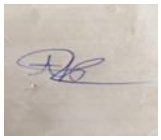
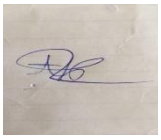


DECLARATION OF ACADEMIC INTEGRITY

Я, Крицька Олена Ігорівна, студентка 2 року навчання магістерської програми за спеціальністю “Право” факультету правничих наук НаУКМА підтверджую таке:

- Написана мною кваліфікаційна (магістерська) робота на тему “Систематичний характер воєнних злочинів як доказ геноцидального умислу” (англійською мовою: “Systematic character of war crimes as evidence of the genocidal intent”) відповідає вимогам академічної доброчесності та не містить порушень, передбачених п. 3.1 Положення про академічну доброчесність здобувачів освіти у НаУКМА, зі змістом якого я ознайомлена;
- Заявляю, що надана мною для перевірки електронна версія роботи є ідентичною її друкованій версії.



10 травня 2023 року Крицька О. І.

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Introduction

The topic of the master's thesis was chosen based on the circumstances taken place nowadays. The decision of exploring the possibility of qualifying systematic war crimes as those ones which have the genocidal intent is dictated by the striving to establish the truth.

The object of study is researching the possibility of transition of war crimes into the crime of genocide which is based on the goal of creating the foundation for further proving the crime of genocide in the acts of the representatives of the Russian Federation against Ukrainians.

The subject of study is the judicial practice concerning proving existence of the genocidal intent and the crime of genocide at all, legal norms and the specific facts within this issue.

The main goal of the work is researching the possibility of transition of war crimes into the crime of genocide, and based on it, creating the foundation for further proving the crime of genocide in the acts of the representatives of the Russian Federation against Ukrainians.

There were set the following main tasks to reach the mentioned aim:

- to research the nature and the specificity of the crime of genocide;
- to explore the elements of the crime of genocide, including mental element;
- to research existing elements of the crime of genocide, including mental element, in the Russia-Ukraine international armed conflict;
- to explore the issue of complicity in International Criminal Law and the modes of liability;
- to research the possibility of crime commitment by different categories of persons, including superiors and commanders.

The source base of the graduate work is formed by the judicial practice, particularly the largest share of the findings from the judgments is consists of the outcomes of the

Chambers of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 and the Chambers of the International Criminal Tribunal for Rwanda.

A significant part of the source base of the second section is consisted of the facts of war crimes which were taken from the open sources.

Also, there were researched the norms of Legal Acts and the provisions of the doctrine.

The methodological base of the graduate work is consisted of general scientific and special scientific methods.

We need to emphasize that general scientific and special scientific methods are interrelated, using the general scientific methods made possible to apply the special scientific methods.

We can highlight such general scientific methods which were used during the research: analysis (it was applied, in particular, within the researching the elements of the crime of genocide), abstraction (it was used in closely relation to the method of analysis) and concretization (it was applied to explore the theoretical findings in the specific context, particularly, we used this method in the second section).

We can point out the following special scientific methods used during the exploration: comparative legal method (it was used during exploration of the sources, especially judicial practice, used during writing the work) and formal legal method (it was used within the research of applying legal norms and the principles of law in the judgments of courts).

The part of the research proposed in the second section of the master's thesis is going to be published in the second part of the Handbook series of the University Network for children in armed conflict by Gambini University press on children in September.

Another part of the research proposed in the second section of the master's thesis is also going to be published, however, for the present, there is no data concerning the edition of the work, including the date of publishing.

Section 1. The nature of the crime of genocide and its difference from other crimes under the Rome Statute

1.1. The nature, the specificity of the crime of genocide and its difference from war crimes and the crimes against humanity

The concept of the crime of genocide was proposed by Raphael Lemkin. The necessity to differ the analyzed crime from other ones and give it a separate name has raised from discrepancy of such terms as "mass murder" and "denationalization" to the elements which Raphael Lemkin has selected from the crime: "Would mass murder be an adequate name for such a phenomenon? We think not, since it does not connote the motivation of the crime, especially when the motivation is based upon racial, national or religious considerations. An attempt to destroy a nation and obliterate its cultural personality was hitherto called denationalization. This term seems to be inadequate, since it does not connote biological destruction"[1].

To explain the main aim of the crime of genocide, the lawyer has used the word "eradicate" which points out the specific intent of a perpetrator: "In the case of Germany, it would be ridiculous to speak about the Germanization of the Jews or Poles in western Poland, since the Germans wanted these groups eradicated entirely"[2].

Here we need to raise such an important issue which flows from the sense of the crime of genocide laid down by Raphael Lemkin – the concept of the cultural genocide. It was not recognized neither politically, nor legally, meanwhile, this concept, in our opinion, is inseparable from the crime of genocide enshrined by the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute.

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[1] Genocide, Raphael Lemkin, American Scholar, Volume 15, no. 2 (April 1946), p. 227-230 (http://www.preventgenocide.org/lemkin/americanscholar1946.htm)
[2] Ibid.

The scholar described the cultural genocide in the following way: “prohibiting or destroying cultural institutions and cultural activities; by substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking” and selected such techniques to realize it: “forbidding use of a group’s language; substituting German education (this technique was proposed within the case of Nazism, the author meant substituting education with a perpetrator`s one)*; banning or discouraging liberal arts education in preference for trade schools; rigid control of all cultural activities, including arts of all kinds; and destruction of national monuments, libraries, archives, museums, and galleries”[3].

However, it should be noted that notwithstanding the absence of recognition of the concept of cultural genocide politically and legally, the part of it, still, was codified as the crime of genocide – forcibly transferring children of the group to another group (Article 6 (e) of the Rome Statute).

The draft based on which was created the Convention on the Prevention and Punishment of the Crime of Genocide contained the following notion of cultural genocide: “Destroying the specific characteristics of the group by (a) forced transfer of children to another human group; or (b) forced and systematic exile of individuals representing the culture of the group; or (c) prohibition of the use of the national language even in private intercourse; or (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersal of documents and objects of historical, artistic, or religious value and objects used in religious worship”[4].

In keeping with Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, this crime 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

[3] Cultural Genocide and the Protection of Cultural Heritage, Edward C. Luck, J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy, Number 2, 2018 (https://www.getty.edu/publications/occasional-papers-2/2/)
[4] Encyclopedia.com, Forcible Transfer (https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/forcible-transfer)

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[5].

How we can see from the mentioned notion of the crime of genocide, the main characteristic of this crime is intent to destroy a group as such. The wording “as such”, precisely, distinguishes the analyzed crime from the persecution against any identifiable group or collectivity as the crime against humanity which is provided by Article 7 (1)(h) of the Rome Statute: "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court[6].

To understand the essence of the formulation “as such” we can apply to the case law. For instance, the Trial Chamber of the International Criminal Tribunal for Rwanda in the case “Prosecutor v. Ignace Bagilishema” has referred to the position of the International Law Commission that “the intention must be to destroy the group as such, meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group”. As we can see from the proposed statement, the International Law Commission and the Trial Chamber in this case, since it has cited the position of the Commission, highlight the diversity between the crime of genocide and the crimes against humanity over using the wording “a separate and distinct entity” for the term “a group”.

Also, The Chamber has added the forementioned position of the International Law Commission with its own clarification: “although the destruction sought need not be

[5] Convention on the Prevention and Punishment of the Crime of Genocide, UNGA (adopted December 09, 1948)
[6] Rome Statute of the International Criminal Court (adopted July 17, 1998)

directed at every member of the targeted group, the Chamber considers that the intention to destroy must target at least a substantial part of the group"[7].

Therefore, the Tribunal has emphasized that to consider acts of a perpetrator as the crime of genocide, there should be intent to destroy "a substantial part of the group". But what does this formulation mean? Which dimension we need to use to define a part of the group as a substantial?

The answer on these questions we also can get from the judgments of the International Tribunals. Thus, the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 states that "given the goal of the Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a substantial part of the group. The Tribunal for Rwanda appears to go even further by demanding that the accused have the intention of destroying a "considerable" number of individual members of a group. In a letter addressed to the United States Senate during the debate on Article II of the Convention on genocide, Raphaël Lemkin explained in the same way that the intent to destroy "in part" must be interpreted as an desire for destruction which "must be of a substantial nature [...] so as to affect the entirety". A targeted part of a group would be classed as substantial either because the intent sought to harm a large majority of the group in question or the most representative members of the targeted community. The Commission of Experts specified that "[i]f essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others - the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed

[7] Prosecutor v. Ignace Bagilishema. Case No. ICTR-95-1AT, Judgment (TC), June 7, 2001 (https://www.refworld.org/cases,ICTR,48abd5170.html), para. 64

or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose". Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group "selectively" in the case "The prosecutor v. Goran Jelisic"[8].

The Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 in the case "Prosecutor v. Radislav Krstic" has formulated the following approach which reveals the above-mentioned position from the judgment "The prosecutor v. Goran Jelisic": "finally, the Trial Chamber has concluded that, in terms of the requirement of Article 4(2) of the Statute that an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively, the military aged Bosnian Muslim men of Srebrenica do in fact constitute a substantial part of the Bosnian Muslim group, because the killing of these men inevitably and fundamentally would result in the annihilation of the entire Bosnian Muslim community at Srebrenica. In this respect, the intent to kill the men amounted to an intent to destroy a substantial part of the Bosnian Muslim group. Having already played a key role in the forcible transfer of the Muslim women, children and elderly out of Serb-held territory, General Krsti} undeniably was aware of the fatal impact that the killing of the men would have on the ability of the Bosnian Muslim community of Srebrenica to survive, as such. General Krsti} thus participated in the genocidal acts of "killing members of the group" under Article 4(2)(a) with the intent to destroy a part of the group"[9].

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[8] The prosecutor v. Goran Jelisic. ICTY, Case No. IT-95-10-T, Judgment (TC), December 14, 1999 (https://www.icty.org/x/cases/jelisic/tjug/en/), para. 82

[9] Prosecutor v. Radislav Krstic. ICTY, Case No. IT-98-33-T, Judgment (TC), August 02, 2001 (https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf), para. 634

In addition, in contradistinction to the crime of persecution, the crime of genocide has exhaustive list of possible grounds based on which the groups can be destroyed what arising from the legal definition of the last one.

We can see the exploration of the mentioned legal approach in the case "The prosecutor v. Goran Jelisic" – the Trial Chamber has stated that "article 4 of the Statute protects victims belonging to a national, ethnical, racial or religious group and excludes members of political groups. The preparatory work of the Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting "stable" groups objectively defined and to which individuals belong regardless of their own desires"[10].

Also, the Trial Chamber of the International Criminal Tribunal for Rwanda has made the following conclusion in this matter: "[…] It appears, from a reading of the travaux préparatoires of the Genocide Convention, that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "mobile groups" which one joins through individual, political commitment. That would seem to suggest a contrario that the Convention was presumably intended to cover relatively stable and permanent groups"[11].

International Commission of Jurists, referring to the provisions of the Judgment in the Akayesu case, provides the following definitions of each group: "a national group could be defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties; an ethnic group is generally defined as a group whose members share a common language or culture; the conventional definition of a racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors; and,

[10] The prosecutor v. Goran Jelisic. ICTY, Judgment (TC), para. 69
[11] The Prosecutor versus Georges Anderson Nderubumwe Rutaganda, ICTR, Case No. ICTR-96-3-T, Judgment (TC), December 06, 1999 (https://www.legal-tools.org/doc/f0dbbb/pdf), para. 57

finally, a religious group is one whose members share the same religion, religious denomination or mode of worship"[12].

In relation to the war crimes, in obedience to Article 8 of the Rome Statute, such crimes are (a) grave breaches of the Geneva Conventions of 12 August 1949; (b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law; (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause; (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. The Article prescribes an exhausted list of violations within each of the mentioned categories of war crimes.

The question which should be raised here flows from the name of the graduate work: can systematic character of war crimes be evidence of the genocidal intent?

Raphael Lemkin stated that "genocide can be carried out through acts against individuals, when the ultimate intent is to annihilate the entire group composed of these individuals"[13].

The Elements of Crimes by the International Criminal Court reveals the thought of the scholar and state that "existence of intent and knowledge can be inferred from relevant facts and circumstances" (p. 3 of the General Introduction)[14].

At the same time, the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in the case

[12] Questions and Answers on the Crime of Genocide, Legal Briefing Note, August 2018, ICJ Global Redress and Accountability Initiative (https://www.icj.org/wp-content/uploads/2018/08/Universal-Genocide-Q-A-FINAL-Advocacy-analysis-brief-2018-ENG.pdf), p. 15
[13] Genocide, Raphael Lemkin
[14] Elements of Crimes of the International Criminal Court (adopted in 2011)

"Prosecutor v. Goran Jelisi]" stated that: "As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts"[15].

As we can see from the quotations proposed above, the systematic character of war crimes against members of a particular group can be evidence of the genocidal intent.

To conclude, we need to form the following outcomes of this part of the research.

The crime of genocide was selected as a separate crime because it is contained from the material and mental components.

We can note that the main characteristic of this crime is intent to destroy a group as such (dolus specialis). A group is considered as "a separate and distinct entity" in the case law. The wording "as such" distinguishes the analyzed crime from the persecution against any identifiable group or collectivity as the crime against humanity.

Important point is that there is no requirement that every member of the targeted group must be destroyed to qualify the acts as the crime of genocide – it is enough a desire to eliminate a substantial part of the group.

A part of group can be recognized as substantial either based on numerically or qualitatively characteristics. The main feature of a substantial part of the group is to have effect on existing of the entire group.

The second difference between the crime of genocide and the crime of persecution is exhaustive list of possible grounds based on which the groups can be destroyed within the concept of the crime of genocide.

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[15] Prosecutor v. Goran Jelisi], ICTY, Case No.: IT-95-10-A, Judgement (AC), July 05, 2001 (https://www.icty.org/x/cases/jelisic/acjug/en/jel-aj010705.pdf), para. 47

* The note of the author of the Graduate work

Regarding war crimes, we can state that there is no provision that their systematic character is the evidence of existing the genocidal intent, however the doctrine, the norms of Legal Acts and the case practice maintain the approach that the genocidal intent can be proven through unlawful acts systematically directed against a particular group.

Therefore, we can reach a conclusion that systematic character of war crimes can be the evidence of the genocidal intent.

1.2. The elements of the crime of genocide

The crime of genocide consists of a perpetrator`s acts and the specific intent to destroy a particular group as such.

Article 6 of the Rome Statute provides the following crimes that are recognized as genocide: (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.

In accordance with the Elements of Crimes by the International Criminal Court, the mentioned crimes have some similar elements: belonging a person to a particular national, ethnical, racial or religious group; intending destroy, in whole or in part, that national, ethnical, racial or religious group, as such; existing this conduct in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

In relation to belonging a person to a particular national, ethnical, racial or religious group should be noted that the definition of the mentioned groups was provided above in the work. Here we can refer to the judicial practice to explore how to prove the existence of a particular group of one of the forementioned categories.

The nationality or ethnicity of a group can be recognized when they are prescribed in a constitution or legal act of the state where this group is. Thus, there was stated in the case "Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević" of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 that "the Trial Chamber notes that Bosnian Muslims were recognized as a "nation" by the Yugoslav Constitution of 1963, and that other Chambers have considered that Bosnian Muslims are a protected group within the meaning of Article 4 of the Statute. The Trial Chamber agrees with this analysis and accepts the conclusion"[16].

At the same time, the International Criminal Tribunal for Rwanda in the case "The Prosecutor versus Georges Anderson Nderubumwe Rutaganda" emphasized the recognizing the separate ethnical group and belonging people to it by the means of enshrinement of it in the national law: "The Chamber concurs with the Akayesu Judgement, that the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population. However, the Chamber finds that there are a number of objective indicators of the group as a group with a distinctidentity. Every Rwandan citizen was, before 1994, required to carry an identity card which included an entry for ethnic group, the ethnic group being either Hutu, Tutsi or Twa. The Rwandan Constitution and laws in force in 1994 also identified Rwandans by reference to their ethnic group. Moreover, customary rules existed in Rwanda governing the determination of ethnic group, which followed patrilineal lines. The identification of persons as belonging to the group of Hutu or Tutsi or Twa had thus become embedded in Rwandan culture, and can, in the light of the travaux preparatoires of the Genocide Convention, qualify as a stable and permanent group, in the eyes of both the Rwandan society and the international community. In Rwanda in 1994, the Tutsi constituted an ethnic group"[17].

[16] Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević, ICTY, Case No. IT-05-88-T, Judgment (TC), June 10, 2010 (https://www.legal-tools.org/doc/481867/pdf), para. 840

[17] The Prosecutor versus Georges Anderson Nderubumwe Rutaganda, ICTR, Judgment (TC), para. 374

There can be proposed the thoughts of the International Commission of Inquiry on Darfur to the United Nations Secretary-General concerning the reference of people to a particular ethnical group within the case of the Darfur Genocide: "Do members of the tribes victims of attacks and killing make up objectively a protected group? The various tribes that have been the object of attacks and killings (chiefly the Fur, Massalit and Zaghawa tribes) do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim). In addition, also due to the high measure of intermarriage, they can hardly be distinguished in their outward physical appearance from the members of tribes that allegedly attacked them. Furthermore, inter-marriage and coexistence in both social and economic terms, have over the years tended to blur the distinction between the groups. Apparently, the sedentary and nomadic character of the groups constitutes one of the main distinctions between them. It is also notable that members of the African tribes speak their own dialect in addition to Arabic, while members of Arab tribes only speak Arabic"[18].

Also, we can separate other important findings from the forementioned report – regarding the distinction of different groups and identification of persons belonging to them: "The question of genocidal acts against groups that do not perfectly match the definitions of the four above mentioned groups. The genocide perpetrated in 1994 in Rwanda vividly showed the limitations of current international rules on genocide and obliged the Judges of the ICTR to place an innovative interpretation on those rules. The fact is that the Tutsi and the Hutu do not constitute at first glance distinct ethnic, racial religious or national groups. They have the same language, culture and religion, as well as basically the same physical traits. In Akayesu the ICTR Trial Chamber emphasized that the two groups were nevertheless distinct because (i) they had been made distinct by the Belgian colonizers when they established a system of identity cards differentiating between the two groups (§ 702), and (ii) the distinction was confirmed by the self-perception of the members of each group. As the Trials Chamber pointed out, "all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor

[18] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, UN Doc. S/2005/60, 25 January 2005 (https://www.legal-tools.org/doc/1480de/pdf/), para. 508

regarding their ethnic identity" (ibidem). The Trial Chamber also insisted on the fact that what was required by the international rules on genocide was that the targeted group be "a stable and permanent group", "constituted in a permanent fashion and membership of which is determined by birth", and be identifiable as such (§§ 511 and 702). The objective criterion of a "stable and permanent group", which, if considered per se, could be held to be rather questionable, was supplemented in the ICTR case law (and subsequently in that of the ICTY) by the subjective standard of perception and self-perception as a member of a group. According to this case law, in case of doubt one should also establish whether (i) a set of persons are perceived and in fact treated as belonging to one of the protected groups, and in addition (ii) they consider themselves as belonging to one of such groups"[19].

The next element we need to research is intending destroy, in whole or in part, that national, ethnical, racial or religious group, as such. It should be noted that the special intent to destroy a group as such (dolus specialis) is the most difficult to prove. For example, this conclusion flows from the words of National Security Advisor Jake Sullivan at a White House press conference concerning the aggression of the Russian Federation against Ukraine: "Based on what we have seen so far, we have seen atrocities. We have seen war crimes. We have not yet seen a level of systematic deprivation of life of the Ukrainian people to rise to the level of genocide"[20]. We can understand that the Advisor has highlighted that there are facts of war crimes committed by the representatives of the Russian Federation, however there is no evidence of the genocidal intent. Therefore, systematic character of war crimes committed at that time did not point out the genocidal intent (at least, in opinion of some persons)*.

So, how to prove the special intent to destroy a group as such?

Two main points which flow from the judicial practice are the following ones. First, the existence of the genocidal intent can be manifested in the systematic war crimes (also we can assume that the systematic character of the crime against humanity, namely –

[19] Ibid., para. 498

[20] At what point do Russian war crimes in Ukraine qualify as genocide? Bohdan Vitvitsky, published on April 11, 2022 (https://www.atlanticcouncil.org/blogs/ukrainealert/at-what-point-do-russian-war-crimes-in-ukraine-qualify-as-genocide/)

persecution against any group or collectivity, if it takes place against persons of a particular group – this inference we can make from the wording "repetition of discriminatory acts" in the next quotation): "the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts"[21].

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in the case "Prosecutor v. Vujadin Popovi], Ljubi[a Beara, Drago Nikoli], Radivoje Mileti], Vinko Pandurevi]" refers to the deduction mentioned above – it states that "with respect to Popovi}'s arguments concerning the Trial Chamber's inference of his genocidal intent, the Appeals Chamber recalls that in the absence of direct evidence, genocidal intent may be inferred from the factual circumstances of the crime. The Appeals Chamber further recalls that: proof of specific intent [may] be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts. The Appeals Chamber observes that the Trial Chamber inferred Popovi}'s genocidal intent from such factors"[22].

The Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in the case "Prosecutor v. Radovan Karadžić" adheres the same position. Moreover, it emphasizes that the words pronounced at public speech also can form a part of the evidence which together with other facts can prove the existence of the genocidal intent: "In assessing evidence of genocidal intent, a

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* The press conference took place on April 4, 2022

[21] Prosecutor v. Goran Jelisi], ICTY, Judgement (AC), para. 47

[22] Prosecutor v. Vujadin Popovi], Ljubi[a Beara, Drago Nikoli], Radivoje Mileti], Vinko Pandurevi], ICTY, Case No. IT-05-88-A, Judgment (AC), January 30, 2015 (https://www.icty.org/x/cases/popovic/acjug/en/150130_judgement.pdf), para. 468

Chamber should consider whether "all of the evidence, taken together, demonstrates a genocidal mental state", instead of considering separately whether an accused intended to destroy a protected group through each of the relevant acts of genocide. Where direct evidence of genocidal intent is absent, the intent may still be inferred from all the facts and circumstances. Factors relevant to this analysis may include, but are not limited to, 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. Display of intent through public speeches or in meetings may also support an inference as to the requisite specific intent"[23].

Secondly, the genocidal intent can be contained in the destruction of a substantial group. We will consider this point in the second section of the work.

Regarding the element "existing this conduct in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction", we need to note that it is interrelated with the forementioned one.

This element can be proved through the systematic war crimes committed against people of a particular group, also – the systematic character of the crime against humanity, namely – persecution against a particular group or collectivity if they contain any acts which point out any manifestation of the crime of genocide. We can make this deduction from the position of Roy S. Lee, the editor of the book "The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence". The Case Matrix Network published it in the following way: "this question was discussed during drafting and it was considered sufficiently clear that the term "similar" would refer to any of the five types of genocidal act listed in article 6"[24].

[23] Prosecutor v. Radovan Karadžić, ICTY, Case No. IT-95-5/18-T, Judgment (TC), March 24, 2016 (https://www.legal-tools.org/doc/173e23/pdf), para. 550

[24] Case Matrix Network (https://www.casematrixnetwork.org/cmn-knowledge-hub/proof-digest/art-6/common-elements/3/), para. 3

Now, when we have considered similar elements of the crimes recognized as genocide, we should explore the elements which differ one crime from another – those ones that characterize the acts of a perpetrator.

There is clear how the genocide by killing manifests. At the same time questions may be raised when it comes to the identification of serious bodily or mental harm within the genocide by causing such harm.

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 has proposed the profound definition of serious bodily or mental harm in the case "Prosecutor v. Zdravko Tolimir" based on the case law: "Article 4(2)(b) of the Statute provides that genocide can be committed by "causing serious bodily or mental harm to members of the [protected] group" with intent to destroy, in whole or in part, the group as such. "Serious bodily or mental harm" is not defined in the Statute. Drawing on the case law of the ICTY and the ICTR, the Trial Chamber held that serious bodily or mental harm: must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group; although it need not be permanent or irreversible, it must go "beyond temporary unhappiness, embarrassment or humiliation" and inflict "grave and long-term disadvantage to a person's ability to lead a normal and constructive life". The Trial Chamber also stated that the determination of the seriousness of the harm in question "must be made on a case-by-case basis"[25].

Also, we need to highlight the importance of the footnote to Article 6 (b)(1) of the Elements of Crimes which states that causing serious bodily or mental harm may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment. Here we should mention the article "The Furundzija judgment and its continued vitality in international law", author of which states that the Furundzija judgment impacted at prescribing the prohibition against torture as a norm jus cogens[26].

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[25] Prosecutor v. Zdravko Tolimir, ICTY, Case No. IT-05-88/2-A, Judgment (AC), April 08, 2015 (https://www.legal-tools.org/doc/010ecb/pdf), para. 201

[26] The Furundzija judgment and its continued vitality in international law. Chad G. Marzen. Creighton Law Review, Vol. 43, 2010.

The Trial Chamber in the mentioned case describes the crime of torture within the armed conflict in the following way: “The Trial Chamber considers that the elements of torture in an armed conflict require that torture: (i)consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority- wielding entity. As is apparent from this enumeration of criteria, the Trial Chamber considers that among the possible purposes of torture one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such important international treaties as the Geneva Conventions and Additional Protocols, which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from "outrages upon personal dignity". The notion of humiliation is, in any event close to the notion of intimidation, which is explicitly referred to in the Torture Convention's definition of torture”[27].

Another important finding of this case is recognition rape (at least, some of its manifestations) as the acts which constitute “a most humiliating and degrading attack upon human dignity”. Actually, the Tribunal equated rape to torture[28].

The issue of deliberately inflicting conditions of life calculated to bring about physical destruction will be considered in the second section of the work.

(https://deliverypdf.ssrn.com/delivery.php?ID=203111070087070014001100111103071075015044057006032032065030120076013066081006029028002059037127043063028105071103110116091026103023040033028125108087089126021068095003079014022119022002104116075012106025010101077023105103030074075006112008105101008127&EXT=pdf&INDEX=TRUE), p. 511

[27] Prosecutor v. Anto Furundzija, ICTY, Case No. IT-95-17/1, Judgment (TC), December 10, 1998 (https://www.icty.org/x/cases/furundzija/tjug/en/), para. 162

[28] The Furundzija judgment and its continued vitality in international law. Chad G. Marzen, p. 512 – 513

Within the issue of imposing measures intended to prevent births, we can state that there can be such measures (but not only) as coercion of women to have abortions[29], mention of which is contained in the case "Attorney-General of Israel v. Adolf Eichmann" of the District Court of Jerusalem. Another measure which is mentioned in this case is forcible sterilization[30].

The elements of the forcibly transferring children of the group to another group will be considered in the second section of the work.

Therefore, we can propose the following findings of this part of the work.

The crimes which are defined as genocide by Article 6 of the Rome Statute have some similar elements: belonging a person to a particular national, ethnical, racial or religious group; intending destroy, in whole or in part, that national, ethnical, racial or religious group, as such; existing this conduct in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

The nationality or ethnicity of a group can be recognized when they are prescribed in a constitution or another legal act of the state where this group is.

Also, a group can be recognized as a separate one based on the self-perception of it and on perception of it in the mentioned way by other persons.

Regarding the element of intending destroy, in whole or in part, that national, ethnical, racial or religious group, as such, we can conclude that existence of the genocidal intent can be manifested in the systematic war crimes and through the systematic character of the crime against humanity, namely – persecution against any group or collectivity, if it takes place against persons of a particular group.

In addition, important finding is that, according to the case practice, the words pronounced at public speech also can form a part of the evidence which together with other facts can prove the existence of the genocidal intent.

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[29] Attorney-General of Israel v. Adolf Eichmann, Judgement (District Court of Jerusalem), Criminal Case No. 40/61, 1968 (https://www.legal-tools.org/doc/aceae7/pdf), para. 159

[30] Ibid., para. 199

The element “existing this conduct in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction” is closely related to the forementioned element and can be proved in like manner.

Concerning the special elements inherent to separate crimes which are recognized as genocide, we paid attention to the identification of serious bodily or mental harm, the main feature of which is to be so serious to have an effect on the preservation of the entire group. Also, in accordance with Legal Acts, serious bodily or mental harm can include acts of torture, rape, sexual violence or inhuman or degrading treatment.

Within the issue of imposing measures intended to prevent births, we made a conclusion that there can be such measures (but not only) as coercion of women to have abortions and forcible sterilization.

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To conclude, we need to form the next outcomes of this section.

The crime of genocide was selected as a separate crime because it is contained from the material and mental components.

We can note that the main characteristic of this crime is intent to destroy a group as such (dolus specialis). A group is considered as “a separate and distinct entity” in the case law. The wording “as such” distinguishes the analyzed crime from the persecution against any identifiable group or collectivity as the crime against humanity.

Important point is that there is no requirement that every member of the targeted group must be destroyed to qualify the acts as the crime of genocide – it is enough a desire to eliminate a substantial part of the group.

A part of group can be recognized as substantial either based on numerically or qualitatively characteristics. The main feature of a substantial part of the group is to have effect on existing of the entire group.

The second difference between the crime of genocide and the crime of persecution is exhaustive list of possible grounds based on which the groups can be destroyed within the concept of the crime of genocide.

Regarding war crimes, we can state that there is no provision that their systematic character is the evidence of existing the genocidal intent, however the doctrine, the norms of Legal Acts and the case practice maintain the approach that the genocidal intent can be proven through unlawful acts systematically directed against a particular group.

Therefore, we can reach a conclusion that systematic character of war crimes can be the evidence of the genocidal intent.

The crimes which are defined as genocide by Article 6 of the Rome Statute have some similar elements: belonging a person to a particular national, ethnical, racial or religious group; intending destroy, in whole or in part, that national, ethnical, racial or religious group, as such; existing this conduct in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

The nationality or ethnicity of a group can be recognized when they are prescribed in a constitution or another legal act of the state where this group is.

Also, a group can be recognized as a separate one based on the self-perception of it and on perception of it in the mentioned way by other persons.

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Within the issue of imposing measures intended to prevent births, we made a conclusion that there can be such measures (but not only) as coercion of women to have abortions and forcible sterilization.

Section 2. Possible transition of systematic war crimes into the crime of genocide in the case of unlawful transfer of population (children) from Ukraine

Can we say about the crime of genocide against Ukrainians in such acts of the representatives of the Russian Federation as forcible transferring Ukrainian children to the Russian Federation? Can we state that it is the manifestation of the crime of genocide, and not only war crimes?

To be an act qualified as the crime of genocide a specific case of forcibly transferring children should include the following elements under Article 6 (e) of the Elements of Crimes by the International Criminal Court: (1) the perpetrator forcibly transferred one or more persons; (2) such person or persons belonged to a particular national, ethnical, racial or religious group; (3) the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; (4) the transfer was from that group to another group; (5) the person or persons were under the age of 18 years; (6) the perpetrator knew, or should have known, that the person or persons were under the age of 18 years; (7) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

So, are the elements of forcibly transferring children of the group to another group appropriate to the current events in Ukraine? We propose to go after each element of this crime of genocide under the aforementioned Legal Act.

Significant fact for proving the genocidal intent in the acts of forcibly transferring children to the Russian Federation by its representatives is that such children are belonged to a particular national group – they are Ukrainians.

We need to make a remark here that Ukrainians compose a separate national group according to the case practice mentioned in the first section concerning the methods of

identifying it. The Constitution of Ukraine in its Preamble contains the term "Ukrainian nation" within the statement of exercising the right to self-identification[31].

We can propose the following evidence of the fact that children kidnapped and transferred to the Russian Federation were belonged to Ukrainian national group: (1) stealing precisely Ukrainian children from Austria to the Russian Federation[32]; (2) grabbing Ukrainian children from the occupied territories of Ukraine. Particularly, Russian children's rights ombudswoman Maria Lvova-Belova said more than 1,000 children from Ukraine were in Russia[33].

Therefore, we can highlight from the mentioned facts that children transferred to the Russian Federation **are belonged to a particular national group** – Ukrainian. Can we state that there took place precisely **forcibly** and not voluntary **transferring children?**

First, to answer this question, we should pay attention to the footnote to Art. 6 (1)(e) of the Elements of Crimes which emphasizes that the term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that 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.

To understand better what the word "forcibly" in the formulation of the analyzed crime means we need to refer to the specific cases and explore how the term "forcibly transferring" is interpreted there.

For instance, the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 in the case "Prosecutor v. Milorad Krnojelac" highlighted that "the essential element is that the displacement be involuntary in nature, where the relevant persons had no real choice"[34]. Hence, we can note that the main

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[31] Constitution of Ukraine, The Official Bulletin of the Verkhovna Rada of Ukraine, 1996, № 30, p. 141, para. 3 of the preamble
[32] Melaniya Podolyak`s twit on February 8, 2023 (https://twitter.com/MelaniePodolyak/status/1623365050445492224?s=20)
[33] How Moscow grabs Ukrainian kids and makes them Russians. Sarah El Deeb, Anastasiia Shvets, Elizaveta Tilna (published on March 17, 2023) (https://apnews.com/article/ukrainian-children-russia-7493cb22c9086c6293c1ac7986d85ef6)
[34] Prosecutor v. Milorad Krnojelac, ICTY, Case No. IT-97-25-T, Judgement (TC), March 15, 2002 (https://www.legal-tools.org/doc/1a994b/pdf), para. 475

point of the position of the Trial Chamber regarding the definition "forcibly transferring" in this case is absence of free will which is a consequence of the privation of real choice of a person who is transferred.

Another example of forcibly transferring is given in the case "Prosecutor v. Radislav Krstić": "Despite the attempts by the VRS to make it look like a voluntary movement, the Bosnian Muslims of Srebrenica were not exercising a genuine choice to go, but reacted reflexively to a certainty that their survival depended on their flight". The meaningfulness of this provision appears in the recognition of, at first glance, voluntary displacement as a forcible transferring because of its necessity for surviving[35].

In addition, it should be mentioned one more case – "Prosecutor v. Vidoje Blagojević and Dragan Jokić" which reveals the forcibly transferring because of destruction of people` homes. There is mentioned that "the manner in which the transfer was carried out – through force and coercion, by not registering those who were transferred, by burning the houses of some of the people, sending the clear message that they had nothing to return to, and significantly, through its targeting of literally the entire Bosnian Muslim population of Srebrenica, including the elderly and children – clearly indicates that it was a means to eradicate the Bosnian Muslim population from the territory where they had lived"[36].

We can allege that in the current events in Ukraine exactly forcibly, and not voluntary transferring children takes place. This conclusion can be made from the following facts.

As it was mentioned in the judgments above, forcibly transferring people includes creation of the situations when people have no real choice, are enforced to transfer out of necessity, including destruction of homes, consequence of what is impossibility to live on the territory where these people` home has been. There are examples of such results of the Russian representatives` acts. The journalists describe how the Russian soldiers have destroyed all infrastructure that is necessary for living: "For almost a week now, the city has been without power, water and heating. A six-year-old girl died from dehydration, and this

[35] Prosecutor v. Radislav Krstić, ICTY, Judgement (TC), para. 530
[36] Prosecutor v. Vidoje Blagojević and Dragan Jokić, ICTY, Case No. IT-02-60-T, Judgement (TC), January 17, 2005 (https://www.legal-tools.org/doc/7483f2/pdf), para. 675

is just one of the many tragic stories of Mariupol, which has been surviving the blockade for eight days now. The Russian occupiers destroyed all base stations, leaving almost no mobile reception in the city and mining roads for civilian vehicles or humanitarian convoys"[37]; "Literally in the first week of the war, the electricity supply was cut off and the water supply disappeared. Local authorities had to turn off the gas because the pipeline was badly damaged and utilities feared detonation. The city returned to the Stone Age, and people began to draw water from wells. Only two water carriers traveled around the city - a drop for a city of half a million. The beginning of March was very cold, to -12. Windows flew in houses, people moved to basements. A lot of people began to get sick, there was no medicine, including insulin"[38]. Therefore, there was a necessity to leave homes since the vital infrastructure was destroyed by the Russian soldiers.

Besides, the researchers of Humanitarian Research Lab of Yale school of public health highlighted that there were cases of force when parents stood against sending their children to "'recreation' camps in Russia": "In several cases, officials persuaded or pressured parents who were reluctant to send their children to Russia"[39].

Here we can raise the next question – may we consider the events happened as **transferring** Ukrainian **children from their native** national **group to another group?**

There should be analyzed some facts. First, the representatives of the Russian Federation blocks evacuation of Ukrainians from the occupied territories to the territories controlled by Ukraine, hence, people are able to "evacuate" only to the territory of the Russian Federation. At the beginning of the full-scale invasion the Russian Federation has already had intent to transfer Ukrainian people, including children, to its territory or the territory of the state assisted in conducting aggression: "On the night of March 7, Ukraine received a letter from the aggressor country proposing to open humanitarian corridors for

[37] Russian military fires on "green corridors" in Ukraine. How is Russia once again violating agreements and international law? (published on March 08, 2022) (https://spravdi.gov.ua/en/russian-military-fires-on-green-corridors-in-ukraine-how-is-russia-once-again-violating-agreements-and-international-law/)
[38] Two automatic queues for a car with women leaving the "green corridor" from Mariupol – evidence. Mykhailo Shtekel (published on March 24, 2022) (https://www.radiosvoboda.org/a/journalistka-mariupol-zeneniy-koridor-obstril/31767307.html)
[39] Russia's systematic program for the re-education & adoption of Ukraine's children. A conflict observatory report. Humanitarian Research Lab of Yale school of public health, p. 11 (published on February 14, 2023) (https://hub.conflictobservatory.org/portal/sharing/rest/content/items/97f919ccfe524d31a241b53ca44076b8/data)

the evacuation of civilians in Belarus and Russia. Of course, Ukraine considers such a proposal unacceptable and further emphasizes its vision of possible ways to evacuate people inside Ukraine" [40]. As we can see from the following stories, the representatives of the Russian Federation have realized their intent to transfer Ukrainian people to its territory through blockade ways from the territories where vital infrastructure was demolished to the territories controlled by Ukraine: "On March 16, my driver and I left Mariupol in a car and took one of our families with us. They were taken to Berdyansk, where another family was taken - they walked and voted on the road. It was a grandmother, a mother and two daughters. They also had two cats, turtles and hamsters. The family sat in the back seat, and I took the cats in my arms. We rode in a column in the "green corridor". They passed a checkpoint near the town of Tokmak and drove another two kilometers. The flag of the so-called "DNR" fluttered above him, and the one who was standing at the checkpoint fired two rounds at our car. The first one came to the front door - the bullet went over my head and came out over the driver's head. He received several fragments in the eye, he was operated on at the Dnieper Military Hospital, he would not lose his eye. The second line passed through the back door and seriously injured one of the girls. Now she is in a stable critical condition in the Zaporizhzhya hospital, she does not come to her senses"[41]; "Finally, a local doctor from Mariupol arranged an evacuation to elsewhere in Ukraine. But pro-Russia forces at a checkpoint refused to recognize the children's documents, photocopies of official papers identifying them and their parents. Timofey's pleas went nowhere. Instead, the children ended up in a hospital in the Donetsk People's Republic, or DPR, a separatist Russian-controlled area in Ukraine"[42].

Secondly, we need to pay attention to the Russian children's rights ombudswoman Maria Lvova-Belova`s words concerning not already territorial but political and legal transferring Ukrainian children to the Russian Federation: "Over the summer, she said 120 Russian families had applied for guardianship, and more than 130 Ukrainian children had

[40] Russian military fires on "green corridors" in Ukraine. How is Russia once again violating agreements and international law?
[41] Two automatic queues for a car with women leaving the "green corridor" from Mariupol – evidence. Mykhailo Shtekel
[42] How Moscow grabs Ukrainian kids and makes them Russians. Sarah El Deeb, Anastasiia Shvets, Elizaveta Tilna

received Russian citizenship. Many more have come since, including a batch of 234 in early October"[43].

Also, there should be noted about the adoption of the legal act of the State level which legalizes political and legal transferring Ukrainian children to the Russian Federation by the following provision: "Establish that orphans and children left without parental care, incapacitated persons who are citizens of the Donetsk People's Republic, Lugansk People's Republic or Ukraine, temporarily staying, permanently or temporarily residing on the territory of the Russian Federation, acquire citizenship of the Russian Federation in a simplified manner in accordance with part eight of Article 14 of the Federal Law of May 31, 2002 No. 62-FZ "On Citizenship of the Russian Federation" (p. b Article 2)[44].

And, finally, we need to refer to the research of Humanitarian Research Lab of Yale school of public health, namely – to the facts of sending Ukrainian children to "'recreation' camps in Russia" which were already mentioned in this section. The Lab made the next findings from its exploration: "78% of the camps included an identified component of Russia-aligned re-education, which at times included military training"[45].

Another issue which requires to be discussed within the qualification of such deeds as the crime of genocide – were the persons transferred to the territory of the Russian Federation **under the age of 18 years** and, if yes, did the representatives of the Russian Federation who displaced such persons **know or could they know that the persons transferred by them were under the age of 18 years?**

We can answer approvingly both questions. In relation to the first one, since, as we know, the International Criminal Court has issued arrest warrants against Vladimir Putin, President of the Russian Federation, and Maria Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation, for the war crime of unlawful

[43] Ibid.
[44] The Decree of the President of the Russian Federation of 30 May 2022 № 330 On Amendments to the Decree of the President of the Russian Federation of 24 April 2019 No. 183 "On the definition for humanitarian purposes of the categories of persons entitled to apply for admission to the citizenship of the Russian Federation in a simplified manner" and the Decree of the President of the Russian Federation of 29 April 2019 No. 187 "On certain categories of foreign citizens and stateless persons who have the right to apply for admission to the citizenship of the Russian Federation in a simplified manner"
[45] The report of Humanitarian Research Lab of Yale school of public health, p. 12

deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation on March 17, 2023[46]. The International Criminal Court has highlighted that arrest warrants are issued for the war crime of unlawful deportation of children. According to "Policy on Children" adopted by The Office of the Prosecutor of the International Criminal Court in 2016, the Office considers "children" to be persons who have not yet attained the age of eighteen[47].

In addition, there should be noted that Maria Lvova-Belova herself adopted the fifteen-year-old Ukrainian boy[48].

Therefore, we can reach a conclusion that persons transferred to the territory of the Russian Federation are under the age of 18 years, so, they are under protection of article 6 (e) of the Rome Statute.

Respecting the second question, there was pointed out the provision of the Decree of the President of the Russian Federation[49] which contained the term "children". As we can see from the legislative of the Russian Federation, this notion provides that a child is a person under the age of 18 years (Article 1 of the Federal Law "On Basic Guarantees of the Rights of the Child in the Russian Federation")[50]. Consequently, there was a direct intent to transfer politically and legally precisely Ukrainian children to the Russian Federation.

Another important point within the analyzed issue is the approach formed in the case practice – we can use by analogy the practice concerning the war crimes where the courts researched the issue of the knowledge of the age of a person within the cases of using the victim to participate actively in hostilities.

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[46] Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova. Press Release from March 17, 2023 (https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and)

[47] Policy on Children, The Office of the Prosecutor of the International Criminal Court (adopted in November 2016) (https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF)

[48] Russian Children's Ombudswoman 'adopts' child from Donbass. CNE.news (published on February 20, 2023) (https://cne.news/article/2604-russian-children-s-ombudswoman-adopts-child-from-donbass)

[49] The Decree of the President of the Russian Federation of 30 May 2022 № 330

[50] Federal Law No. 124-FZ of July 24, 1998 (as amended on December 29, 2022) "On Basic Guarantees of the Rights of the Child in the Russian Federation"

Thus, the International Criminal Court in the case "The prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui" within the investigation of the Situation in the Democratic Republic of the Congo made a conclusion that awareness of the age of the person is the liability of a perpetrator: "The negligence standard of "should have known" is met when the perpetrator: (i) did not know that the victim was under the age of fifteen years at the time he used the victim to participate actively in hostilities, and (ii) lacked such knowledge because he did not act with due diligence in the relevant circumstances (i.e the perpetrator "should have known" and his lack of knowledge resulted from his failure to comply with his duty to act with due diligence)"[51].

The Special Court for Sierra Leone adheres to a similar position – the Trial Chamber in the case "Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao" has stated that "the Chamber is of the opinion that the perpetrators are estopped from pleading lack of knowledge, having regard to these factors. The Chamber accordingly finds that where doubt may have existed as to whether a person abducted or trained was under the age of 15, it was incumbent on the perpetrators to ascertain the person's age"[52].

Now, when we have considered five of the seven elements of forcibly transferring children of the group to another group, we need to move to those that are the most difficult to prove – which are interrelated with the mental element.

In accordance with Article 30 of the Rome 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. At the same time the mentioned provision of the Legal Act considers existence of intent in the following situations: (a) In relation to conduct, that person means to engage in the conduct, and (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. Also, the forementioned norm states that

[51] The prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC, ICC-01/04-01/07, Decision on the confirmation of charges (Pre-Trial Chamber), September 30, 2008 (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF), para. 252

[52] Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao, SCSL, Case No. SCSL-04-15-T, Judgment (TC), March 02, 2009 (http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf), para. 1704

"knowledge" means awareness that a circumstance exists, or a consequence will occur in the ordinary course of events.

Elements of Crimes by the International Criminal Court contains the following provision concerning proving the mental element of a crime: “existence of intent and knowledge can be inferred from relevant facts and circumstances” (p. 3 of the General Introduction).

So, can we state that such elements of the forcibly transferring children as the crime of genocide are taken place in the current events in Ukraine: (1) intent to destroy, in whole or in part, that national, ethnical, racial or religious group, as such, and (2) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction?

Here we should return to the case of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 cited earlier, which reveals the forcibly transferring since destruction of people` homes [53]. The Tribunal reached a conclusion that “the manner in which the transfer was carried out – through force and coercion, … by burning the houses of some of the people, sending the clear message that they had nothing to return to … clearly indicates that it was a means to eradicate the Bosnian Muslim population from the territory where they had lived”. The choice of the word “to eradicate”, which the Tribunal has used in the cited position, has the great value – it points out complete destruction. As there was considered earlier, the manner in which the transfer of Ukrainian children is carried out brings to mind the mentioned methods and messages[*].

We need to add that a lot of people were obliged to leave the territories where they lived and transfer to the territory of the Russian Federation because of mass destruction of a significant part of infrastructure of all types. Kyiv School of Economics published statistics of damage caused to Ukraine’s infrastructure by the Russian Federation. We can see from the provided information that there were demolished different types of Ukrainian

[53] Prosecutor v. Vidoje Blagojević and Dragan Jokić, ICTY, Judgement (TC), para. 675

* Please see the argumentation of forcibly and not voluntary transferring children provided in the work

infrastructure, including energy and healthcare ones which are those that are necessary for living[54].

There should be presented the process of the forcibly transferring Ukrainian people to the territory of the Russian Federation, published on the cite of BBC: “Mariupol's deputy mayor Serhiy Orlov told the BBC that in his city "some are dying from dehydration and lack of food; some are dying from lack of medicine, insulin"; “Russian soldiers just open [enter] this shelter and tell them: 'look, you have five minutes to evacuate in this direction. Just go, walk five or three or seven kilometres and the buses will transfer you to temporarily controlled territory [by Russia]. If you don't go this house will be bombed in an hour'"; “After passing the filtration camps Ukrainians are sent to economically depressive areas of the Russian Federation. A number of northern regions are called as a final destination, in particular - Sakhalin. Ukrainians are 'offered' official employment through employment centres. Those who agree receive documents banning leaving Russian regions for two years"[55].

We can see from the quotations mentioned above and those which were provided during the whole section that there were made steps to transfer people and, particularly, children from the territory of Ukraine to the Russian Federation. There is applicable the position of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 in the case Prosecutor v. Vidoje Blagojević and Dragan Jokić cited earlier concerning eradicating the people of a particular group: “… through its targeting of literally the entire Bosnian Muslim population of Srebrenica, including the elderly and children – clearly indicates that it was a means to eradicate the Bosnian Muslim population from the territory where they had lived”[56]. As we can see from the mentioned facts, the Russian Federation also targets to eradicate the entire Ukrainian population. It follows from

[54] The total amount of damage caused to Ukraine’s infrastructure due to the war has increased to almost $138 billion. Kyiv School of Economics (published on January 24, 2023) (https://kse.ua/about-the-school/news/the-total-amount-of-damage-caused-to-ukraine-s-infrastructure-due-to-the-war-has-increased-to-almost-138-billion/)
[55] Russia transfers thousands of Mariupol civilians to its territory. BBC News. Laurence Peter (published on March 27, 2022) (https://www.bbc.com/news/world-europe-60894142)
[56] Prosecutor v. Vidoje Blagojević and Dragan Jokić. ICTY, Judgement (TC), para. 675

the acts of the Russian Federation on the territories that were occupied: besides the actions on the territories described earlier in the work, we should remind that the part of citizens of Irpin, Gostomel and other settlements of Kyiv region were forcibly transferred to Belarus when these places were under the control of the Russian Federation. "Currently, people are in Mozyr, Gomel region, without documents and means of communication, and have been housed in a dormitory"[57], - journalists wrote. As it was mentioned above, those Ukrainians who was got to the territory of the Russian Federation "are 'offered' official employment through employment centres. Those who agree receive documents banning leaving Russian regions for two years"[58].

Another important fact is that the Russian Federation restricts Ukrainian men to exit its territory after they were transferred there out of necessity[59]. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 in the case "Prosecutor v. Radisav Krstic" stated that "forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica"[60].

At the same time, there were constructed such conditions when a lot of people died. It seems that there was deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (Article 6 (c) of the Rome Statute). This conclusion flows from the comparison of the Russian representatives` acts provided in the work with the interpretation of the mentioned crime of genocide by the Trial Chamber of the International Criminal Tribunal for Rwanda in the case "The Prosecutor v. Jean-Paul Akayesu": "The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should

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[57] Life in occupation. Forced deportation, destruction of everything Ukrainian and desperate resistance to the occupiers (published on March 25, 2022) (https://visitukraine.today/blog/228/life-in-occupation-forced-deportation-destruction-of-everything-ukrainian-and-desperate-resistance-of-ukrainians-to-the-occupiers)

[58] Russia transfers thousands of Mariupol civilians to its territory. BBC News

[59] Returned children stolen by the Russian Federation. Part 1, Popova (https://www.youtube.com/watch?v=mkIMJqQmTmY&ab_channel=%D0%9F%D0%9E%D0%9F%D0%9E%D0%92%D0%90), min. 19:35 – 19:45

[60] Prosecutor v. Radisav Krstic, ICTY, Case No: IT-98-33-A, Judgment (AC), April 19, 2004 (https://www.icty.org/x/cases/krstic/acjug/en/), para 31

be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction. For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement"[61]. There were led some examples of expulsion of Ukrainians from homes and the Mariupol's deputy mayor Serhiy Orlov`s quotation that "some are dying from dehydration and lack of food; some are dying from lack of medicine, insulin"[62].

At the same time, the Elements of Crimes provides such elements of the genocide by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction: (1) The perpetrator inflicted certain conditions of life upon one or more persons; (2) Such person or persons belonged to a particular national, ethnical, racial or religious Group; (3) The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; (4) The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part; (5) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction. Significant value has the footnote to Article 6 (4)(c) which states that "the term "conditions of life" may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes". Therefore, we can say that the Judgment of the Trial Chamber in the case "The Prosecutor v. Jean-Paul Akayesu" cited before reveals the mentioned provision of the Legal Act, and the examples of the Russian representatives` acts provided to compare the current events in Ukraine and this case should be correlated with the cited legal norm.

[61] The Prosecutor v. Jean-Paul Akayesu, ICTR, Case No. ICTR-96-4-T, Judgment (TC), September 02, 1998 (https://www.refworld.org/cases,ICTR,40278fbb4.html), paras. 505 – 506

[62] Russia transfers thousands of Mariupol civilians to its territory. BBC News. Laurence Peter

In our opinion, **this conduct is that one which is directed against the Ukrainian group and could itself effect such destruction.**

Regarding **the intent to destroy, in whole or in part, the Ukrainian group, as such,** the forcibly transferring children, evidence of which were provided during the work, can be proof of this intent. Thus, the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 in the case "The prosecutor v. Goran Jelisic" stated that "given the goal of the Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a substantial part of the group. The Tribunal for Rwanda appears to go even further by demanding that the accused have the intention of destroying a "considerable" number of individual members of a group. In a letter addressed to the United States Senate during the debate on Article II of the Convention on genocide, Raphaël Lemkin explained in the same way that the intent to destroy "in part" must be interpreted as an desire for destruction which "must be of a substantial nature [...] so as to affect the entirety"[63].

Also, The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 in the case "Prosecutor v. Radisav Krstic" noted: "It is well established that where a conviction for genocide relies on the intent to destroy a protected group "in part," the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole"[64].

In relation to this issue, the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 in the case "Prosecutor v. Radislav Krstić" stated: "The Genocide Convention itself provides no indication of what

[63] The prosecutor v. Goran Jelisic, ICTY, Judgment (TC), para. 82
[64] Prosecutor v. Radisav Krstic, ICTY, Judgment (AC), para. 8

constitutes intent to destroy "in part". The preparatory work offers few indications either. The draft Convention submitted by the Secretary-General observes that "the systematic destruction even of a fraction of a group of human beings constitutes an exceptionally heinous crime". Early commentaries on the Genocide Convention opined that the matter of what was substantial fell within the ambit of the Judges' discretionary evaluation. … Pieter Drost remarked that any systematic destruction of a fraction of a protected group constituted genocide"[65]. Pieter Drost continues his thought in the book dedicated to the crime of genocide: "Acts perpetrated with the intended purpose to destroy various people as members of the same group are to be classified as genocidal crimes although the victims amount to only a small part of the entire group present within the national, regional or local community"[66].

So, as we can see, there is a position that even the part of a group is not substantial, the acts against it can be recognized as the crime of genocide – systematic character of acts to destroy a fraction of a protected group is enough. The Appeals Chamber in one of the judgments of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 stated that: "As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts"[67]. Systematical character of the acts of the representatives of the Russian Federation was described earlier in the work.

But returning to the question concerning establishing children the substantial part of a group, we need to understand why the forcibly transferring children of the group to another group was recognized as the crime of genocide. This act is a part of the cultural genocide,

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[65] Prosecutor v. Radislav Krstić, ICTY, Judgment (TC), para. 585

[66] Case Matrix Network (https://www.casematrixnetwork.org/cmn-knowledge-hub/proof-digest/art-6/common-elements/2/#_Toc167022886), para.1298

[67] Prosecutor v. Goran Jelisi], ICTY, Judgement (AC), para. 47

concept of which has been formulated by Raphael Lemkin[68]. Forcibly transferring children of the group to another group is the only manifestation of the cultural genocide enshrined in the Law – all other crimes named genocide by Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide[69] imply to physical destruction of a group, and the analyzed one – not only physical but also cultural, political, or legal. We can assume that forcibly transferring children of the group to another group was prescribed as the crime of genocide since it affects the entirety of a group because no group can preserve its physical and mental existence which, in turn, affects physical existence of a group as such (since a group in understanding of the mentioned Convention is not only a physical collectivity, it is the totality of people who identify themselves in a particular way) without the next generation which is consisted of children.

Olha Yerokhina, the Press Secretary of NGO Save Ukraine which returns Ukrainian children from the Russian Federation, told that children had to learn Russian literature and history and, also, sing the hymn of the Russian Federation in so-called 'recreation' camps.[70] In addition, it should be noted that children were detained on the territory they were transferred: "we went to the camp for two weeks but it turned out that we stayed there for a half of a year", - the returned boy said[71]*. Such conduct of the representatives of the Russian Federation is the manifestation of an attempt to create the cultural assimilation of the children from another group with the group to which they were transferred.

So, the aim of the analyzed crime of genocide is similar to the goal of the crime of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. Still, as it was mentioned, forcibly transferring children of the group to another group affects not only physical but also mental existence which, in turn, affects physical existence of a group as such.

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[68] Encyclopedia.com, Forcible Transfer

[69] Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Res. 260 A (III) of 9 December 1948

[70] How do return children stolen by the Russian Federation? Popova (https://www.youtube.com/watch?v=nEnlyZnP0eI&ab_channel=%D0%9F%D0%9E%D0%9F%D0%9E%D0%92%D0%90), min. 06:56 – 07:32

[71] Ibid., min. 3:45 – 3:49

* The events took place on the territory of Crimea which was occupied by the Russian Federation in 2014

As the encyclopedia cited earlier mentions, “it must, however, be conceded that the forcible transfer and isolation of children from their original group frequently makes it difficult for them when they become of age to marry people of their original group, for they may no longer share the linguistic, religious, cultural, or social traditions with that group. They are thus unable to reproduce their own kind and to perpetuate their group. As a direct result, the group itself will gradually dwindle in number and ultimately become extinct”. Therefore, the act of forcibly transferring children of the group to another group is calculated on physical destruction of a group in the future.

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As a conclusion, we need to say that Ukrainians compose a separate national group, the evidence of which we can find in the Preamble of the Constitution of Ukraine. Children transferred to the Russian Federation are belonged to this national group.

To answer the question whether the transferring children was forcible, and not voluntary, we have referred to the case law. Thus, we can state that the term “forcibly” means absence of free will which is a consequence of the privation of real choice of a person who is transferred. Another significant point within this issue is that the Tribunals recognize, at first glance, voluntary displacement as a forcible transferring because of its necessity for surviving.

So, after studying the facts, we can allege that in the current events in Ukraine exactly forcibly, and not voluntary transferring children takes place.

Concerning the element of transferring children from their native national group to another group, we can state that both physical and mental transferring took place.

Regarding the elements concerning the age of the transferred persons, we can note that such persons were under the age of 18 years, so, they are under protection of Article 6 (e) of the Rome Statute, and that the perpetrators knew that the persons whom they transferred were under the age of 18 years.

At the same time, it should be noted that according to the case law, awareness of the age of the person is the liability of a perpetrator.

There was formulated deduction based on the argumentation proposed within the section that war crimes committed against Ukrainians and its character point out conduct which is directed against the Ukrainian group and could itself effect such destruction.

Also, in our view, forcibly transferring Ukrainian children can be proof of the intent to destroy, in whole or in part, the Ukrainian group, as such. We can reach the mentioned conclusion based on the finding of the case law that there is no requirement that every member of the targeted group must be destroyed to qualify the acts as the crime of genocide – it is enough a desire to eliminate a substantial part of the group.

We concluded that children compose a substantial part of the group, since no group can preserve its physical and mental existence without the next generation which is consisted of children.

Therefore, the act of forcibly transferring children of the group to another group is calculated on physical destruction of a group in the future.

Section 3. Complicity in International Criminal Law

3.1. Complicity in International Criminal Law and the modes of liability

It should be noted that there are different variants of committing crimes. There is not necessary that it will be committed by only one person or that there will be no other persons engaged in different roles. So, it is important to explore the issue of complicity in International Criminal Law and its forms.

Complicity in International Criminal Law is a form of cooperation of persons with a purpose for committing a crime. Miles Jackson in his work "Complicity in international law" considers this phenomenon in terms of morality. He states that "the case for complicity rules is a moral case. It rests on the claim that if it is wrong to do something, it is wrong to help or encourage others to do it"[72].

Interesting thought was proposed by John Gardner, Professor of Jurisprudence at University of Oxford. He also appealed to morality, however he considered it through the perception of the liability by a person only in relation to his/her acts, and not acts of other people. The author formulated the question in the following way: "So shouldn't I give the avoidance of my own wrongdoing, all else being equal, more weight in my reasoning than the avoidance of wrongdoing by others?"[73]. As a situation that reveals his point, the professor says about choice given to a person by another one – to commit a crime, otherwise there will be committed more crimes to more persons[74]. As we can see, here is pictured the situation of "choice without choice". The author lightens the problem of proving the coercion, especially psychological, according to a person who was subjected to the mentioned violence. It is obviously that there is difficult to find out the scheme of the

[72] Complicity in international law, Miles Jackson, University College, University of Oxford, 302 p., (https://ora.ox.ac.uk/objects/uuid:4f6db506-c5a7-43d6-af49-fec9ad2d7461/download_file?file_format=application%2Fpdf&safe_filename=THESIS02&type_of_work=Thesis), p. 12
[73] Complicity and Causality, John Gardner, 26 p. (https://johngardnerathome.info/pdfs/complicity.pdf), p. 5
[74] Ibid., p. 4

criminal plan and understand the roles used to realize it and people who personate it, especially when we are talking about an organizer.

Within the issue of responsibility, the author highlights that "keeping my promise is something that only I can do"[75] which means that any person keeps only his/her promise. It can be concluded that any person should only monitor his/her compliance with the law and, respectively, take responsibility only for his/her actions.

It should be noted that the mentioned conclusion belongs only to the situations with coercion to make some deeds, like in the situations described by Mr. Gardner. Another situation is drawn up when persons have a common purpose to do something. And here should be pasted the remark of the Rome Statute concerning this point: "Such contribution shall be intentional and shall either: be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or be made in the knowledge of the intention of the group to commit the crime" (Art. 25 (d)). And, also, there is a separate norm in relation to complicity in the crime of genocide which states that in accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: in respect of the crime of genocide, directly and publicly incites others to commit genocide (Art. 25 (e)).

To understand the issue of the modes of liability which we can observe within committing crimes in complicity, we need to refer to the interpretation of it by the International Criminal Court and the International Criminal Tribunals which had a significant effect on evolution of International Criminal Law – the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 and the International Criminal Tribunal for Rwanda.

[75] Ibid., p. 9

According to the above-mentioned sources, we can define the following modes of liability in International Criminal Law which are applicable, particularly, in the case of the crime of genocide.

Firstly, we need to mention planning, since it is the initial stage in most cases the commission of crimes: one or several persons design the commission of a crime.

Also, we should note about instigation which means "prompting" or "urging or encouraging" another person to commit a crime"[76]. It should be stated that this mode of liability is inherent to superiors within conducting the crime of genocide. We can make this conclusion according to the thesis from the survey "Genocide committed by the Russian Federation in Ukraine: legal reasoning and historical context" concerning committing genocide during Russian invasion to Ukraine – the explorers write about the words of superiors and its value. As example, it can be given the quote of Dmitriy Medvedev, the former President of the Russian Federation, the former Prime Minister and Chairman of the Security Council – today: "the Ukrainian nation and its identity is one big fake, the phenomenon never existed in the history, and does not exist now"[77]. Such public statements cannot provoke respect to the mentioned nation in the consciousness of the citizens of a State. Every official person takes responsibility for his/her words because of its weight for society.

Another example of instigation to genocide by superiors is dehumanization of people of the nations suffered from the crime of genocide as it was with Tutsi who were named "Inyenzi", which means cockroaches, and with Ukrainians named "Nazi"[78]. In the first case the aim was to equalize people with the nasty creatures who cannot be perceived as people, to whom there is no pity, and in the second case – it is equalization of people with those

[76] Modes of Liability: Commission & Participation. International Criminal Law & Practice Training Materials. Module 9: Modes of Liability: Commission and Participation. International Criminal Law Services. 84 p. (https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-9-modes-of-liability.pdf), p. 5 – 7

[77] Azarov D., Koval D., Nuridzhanian G., Venher V. Genocide committed by the Russian Federation in Ukraine: legal reasoning and historical context. Authors' Original Version (preprint). SSRN. 2022. 47 p. (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4217444), p. 19

[78] Ibid., p. 12 – 14

who make other people afraid and, therefore, to create the desire to defend themselves from such people.

Another mode of liability is ordering which means that "someone in a position of de jure or de facto authority uses that authority to instruct another person to commit an offence"[79]. It is also inherent to superiors and commanders.

Of course, we need to mention committing (direct perpetration) a crime which includes joint criminal enterprise as a form of it within the Tribunals practice, and co-perpetration (joint perpetration) – within the approach of the International Criminal Court. The first form of crime committing means that "anyone who contributes to the criminal activity in order to carry out a common criminal purpose"[80]. Hence, we can say about collective responsibility through the individual one in this case. The International Criminal Law Services in its International Criminal Law & Practice Training Materials brilliant describe it by the next thesis: "The group of persons must be identified. However, it is not necessary to identify every person by name. It is not necessary that the people in the group know one another. Circumstance permitting, it can be sufficient to refer to categories or groups of persons (such as "members of the ABC armed forces" or "members of Unit X of the police force")"[81].

The similar position is reflected in Art. 9 of the Charter of the International Military Tribunal from 1945 which states that at the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization[82].

Regarding the co-perpetration, in accordance with the International Criminal Law Services in its International Criminal Law & Practice Training Materials, there should be proven the following elements: "(1) That two or more people shared a common plan; (2)

[79] Modes of Liability: Commission & Participation. International Criminal Law & Practice Training Materials. Module 9: Modes of Liability: Commission and Participation. International Criminal Law Services, p. 7
[80] Ibid., p. 12
[81] Ibid., p. 13
[82] Charter of the International Military Tribunal, London, 8 August 1945

Each of the co-perpetrators had been assigned an essential role in the execution of the plan; (3) The co-perpetrator acted with intent and knowledge; (4) The co-perpetrators were aware that: a. implementing the common plan may or will result in the commission of crimes; and b. that they were in a position to frustrate the commission of the crime by not fulfilling the role assigned to them"[83].

Returning to the modes of liability, we need to mention aiding and abetting that means "providing practical assistance, encouragement or moral support to a principal offender of a crime, which substantially contributes to the perpetration of crime"[84]. Superiors and commanders quite often take part in committing crimes in the mentioned way what leads us to such form of individual criminal responsibility as superior and command one.

Here should be considered the forms of committing crimes by aiding and abetting. First, we need to say about substantial contribution. The cited manual says that "the act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender"[85].

It should be noted that a significant step in evolution of law became consideration of inaction as committing a crime. Thus, we can highlight tacit approval and encouragement, and aiding and abetting by omission which are inherent to superiors and military commanders.

The handbook mention the following elements to recognize that a person is guilty of committing a crime by omission: "(1) the accused must have had a legal duty to act; (2) the accused must have had the ability to act; (3) the accused failed to act, intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (4) the failure to act resulted in the commission of the crime"[86]. Inaction of a person who knows about committing a crime and can prevent or avoid it, points out complicity of this person in the crime. There cannot be absence of such a form of committing

[83] Modes of Liability: Commission & Participation. International Criminal Law & Practice Training Materials. Module 9: Modes of Liability: Commission and Participation, International Criminal Law Services, p. 22
[84] Ibid., p. 9
[85] Ibid., p. 10
[86] Ibid., p. 8 – 9

crimes in complicity within committing mass, systematic war crimes. Therefore, we can say, at least, about knowledge and, credibly, about intent in understanding of Article 30 of the Rome Statute.

It should be noted that there was a significant case in the history of International Criminal Law – the Furundzija judgment had vital impact on further evolution of law. There are some achievements of this case but there is one which is important for the issue of complicity – the Yugoslavia Tribunal has distinguished the terms "perpetrator liability" and "aiding and abetting liability" for the crime of torture. There was expanded the scope of the first one to the persons who may not be a participant of the infliction of severe pain (physical or mental). In the situation of this case a commander attended during a soldier tortured a woman. So, according to the novel described above, he was liable for aiding and abetting by omission[87].

To sum up, we need to state that there are different forms of direct commission of crimes which lead to different modes of liability. The International Criminal Court highlights direct and indirect perpetration, direct and indirect co-perpetration. We can say that there was conducted direct perpetration when it is proved that a person "physically carried out all material elements of the offense with intent and knowledge"[88].

It is important to say concerning the existence of such a term as "indirect commission" – it is applied when a person uses another person as an instrument to commit a crime. As the manual cited above states, "this can also be applied to state leaders who control government organizations and use those organizations to commit crimes"[89].

Therefore, we can state that it is easier to investigate direct commission than indirect one, cause in the latest case we can say about distribution of roles and committing a crime "by the hands of another person". Some aspects of these forms of crime commitment will be considered below.

[87] The Furundzija judgment and its continued vitality in international law. Chad G. Marzen p. 514
[88] Modes of Liability: Commission & Participation. International Criminal Law & Practice Training Materials. Module 9: Modes of Liability: Commission and Participation, International Criminal Law Services, p. 20
[89] Ibid., p. 21

To sum up, we should mention the following provisions.

Complicity in International Criminal Law is a form of cooperation of persons with a purpose for committing a crime.

We can highlight the following modes of liability: planning, instigation, ordering, committing (direct perpetration) a crime, co-perpetration, aiding and abetting.

We can state that instigation, ordering, and aiding and abetting, especially in the forms of tacit approval and encouragement and aiding and abetting by omission, are most inherent to superiors and commanders.

Inaction of a person who knows about committing a crime and can prevent or avoid it, points out complicity of this person in the crime. There cannot be absence of such a form of committing crimes in complicity within committing mass, systematic war crimes. Therefore, we can say, at least, about knowledge and, credibly, about intent in understanding of Article 30 of the Rome Statute.

To sum up, we need to state that there are different forms of direct commission of crimes which lead to different modes of liability. The International Criminal Court highlights direct and indirect perpetration, direct and indirect co-perpetration.

Also, we need to say about the existence of such a term as “indirect commission” – it is applied when a person uses another person as an instrument to commit a crime.

3.2. **Crime commitment by different categories of persons**

Continuing the topic of modes of liability of superiors and commanders, we need to mention the respective provision of the Rome Statute which notes that it shall be applied equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a

person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence (Art. 27 (1)).

In addition, similar norm is constituted in the Principles of International Law. The third principle states that the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law[90].

It should be noted that the principles of law, in our case – the principles of International Criminal Law, are important source of law, since they have been formulating during all history of humanity and they reflect the experience acquired for all time. Because of this, principles of law are the basis on which legal acts are created.

We should recognize that the forementioned provision is important for defending human rights because it is a step to prevent violating norms of International Criminal and International Humanitarian Law. It should be stated that Heads of States or Governments can commit crimes, particularly by instigation, ordering, and aiding and abetting, especially in the forms of tacit approval and encouragement, and aiding and abetting by omission.

This possibility flows from the functions and powers such persons have. For instance, we can propose the provisions from the Constitution of the Russian Federation concerning the Head of State – a President. It states that (1) the President of the Russian Federation, in accordance with the Constitution of the Russian Federation and federal laws, determines the main directions of the domestic and foreign policy of the State (Art. 80 (3)), (2) the President of the Russian Federation as a Head of State represents the Russian Federation within the country and in international relations (Art. 80 (4)), (3) the President of the Russian Federation is the Supreme Commander-in-Chief of the Armed Forces of the Russian Federation (Art. 87 (1))[91].

[90] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, International Law Commission, UN, the 2nd session, adopted in 1950 (https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf)
[91] Constitution of the Russian Federation from 1993

Therefore, we can say about complicity in crime commitment by inaction when a person does not react on a perpetartion. As example of this situation, we can remind the Furundzija judgment where the Tribunal recognized the commander responsible for absence of the attempt to stop torture of woman during which he attended [92]. In the mentioned case the person was liable for aiding and abetting a crime by omission.

In addition, we need to cite one more judgment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 to understand the position of courts concerning aiding and abetting: "The Appeals Chamber reiterates that one of the requirements of the actus reus of aiding and abetting is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime. In this regard, it agrees with the Trial Chamber that proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required. It further agrees that the actus reus of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and that the location at which the actus reus takes place may be removed from the location of the principal crime"[93].

Can aiding and abetting by omission have a substantial effect upon the perpetration of the crime? We think yes, since otherwise crime commitment would be avoided.

Also, we need to state that abetting as well as instigation can be direct – when a person`s words exhort to acts. Within this case we can return to the dehumanization of people as it was with Tutsi who were named "Inyenzi", which means "cockroaches", and with Ukrainians named "Nazi"[94]. The authors of the work "Genocide committed by the Russian Federation in Ukraine: legal reasoning and historical context" aptly mentioned regarding the last one: "Nazism, without doubt, was a criminal ideology that enabled the most brutal and largescale crimes in human history. Probably because of the negative

[92] The Furundzija judgment and its continued vitality in international law. Chad G. Marzen p. 514

[93] Prosecutor v. Tihomir Bla[ki], ICTY, Case No: IT-95-14-A, Judgment (AC), July 29, 2004 (https://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf), para. 48

[94] Azarov D., Koval D., Nuridzhanian G., Venher V. Genocide committed by the Russian Federation in Ukraine: legal reasoning and historical context, p. 19

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 … On top of that, since 2014 and more explicitly since 2022 Russia is 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"[95].

Regarding Nazi Germany, we can give the next instance of dehumanization of people: Hitler wrote "these black parasites of the nation" in his work "Mein Kampf"[96]. Such wording was called to disgust Jews in Germans` eyes.

Here could be a remark concerning abidance the right to freedom of opinion and expression which is prescribed in Article 19 of the Universal Declaration of Human Rights which provides freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers[97], and Article 19 of the International Covenant on Civil and Political Rights which adds the forementioned provision with the pointing out forms of such expression: "either orally, in writing or in print, in the form of art, or through any other media of his choice"[98].

However, the mentioned Covenant also contains the provision regarding prohibiting propaganda for war and advocacy of hatred: (1) Any propaganda for war shall be prohibited by law; (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law (Article 20).

So, how can we understand where the right to freedom of opinion and expression is finished, and aiding and abetting a crime is started? Where is the border of turning the mentioned right into the speech which can contain the genocidal intent, since, as we know, in accordance with Article 3 (c) of the Convention on the Prevention and Punishment of the

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[95] Ibid., p. 14 – 15

[96] The Jewish Holocaust. Adam Jones (https://distedu.ukma.edu.ua/pluginfile.php/125508/mod_resource/content/1/Jones_holocaust.pdf), p. 236

[97] Universal Declaration of Human Rights, UNGA, Res. 217 A, adopted on December 10, 1948

[98] International Covenant on Civil and Political Rights, UNGA, Res. 2200A (XXI), adopted on December 16, 1966

Crime of Genocide, direct and public incitement to commit genocide is punishable as a crime of genocide?

To answer this question, we need to appeal to the Rabat Plan of Action adopted by experts on 4-5 October 2012. The main achievement of the Plan which can be applied to identify whether the speech starts to breach the law is, according to the information from the United Nations, "a six-part threshold test taking into account (1) the social and political context, (2) status of the speaker, (3) intent to incite the audience against a target group, (4) content and form of the speech, (5) extent of its dissemination and (6) likelihood of harm, including imminence"[99].

As we can see from the mentioned test and description of its components, analyzing the context of the speech is important for understanding whether the intent to "discrimination, hostility or violence against the target group" exists[100]. Also, the status of the speaker has a significant value what is momentous finding for such a form of individual criminal liability as superior and command one.

It should be noted that we can see the reflection of the mentioned points in the work "Genocide committed by the Russian Federation in Ukraine: legal reasoning and historical context" where the authors refer to the statements of Vladimir Putin, the President of the Russian Federation: "The imperialistic rhetoric of Russia's political elite, Putin's first of all, is not only a way to demonize and dehumanize the Ukrainian nation. Putin's article On the Historical Unity of Russians and Ukrainians, the texts of his public speeches dated 21 and 24 February 2022 and transcripts of his press-conferences give grounds to assume that this rhetoric is an independent and fundamental evidence of the existence of the motive, goal and general 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 Soviet Union"[101].

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[99] OHCHR and freedom of expression vs incitement to hatred: the Rabat Plan of Action (https://www.ohchr.org/en/freedom-of-expression#:~:text=The%20Rabat%20Plan%20of%20Action%20on%20the%20prohibition%20of%20advocacy,Bangkok%20and%20Santiago%20de%20Chile))

[100] One-pager on "incitement to hatred", OHCHR (https://www.ohchr.org/sites/default/files/Rabat_threshold_test.pdf)

* Dmitriy Medvedev – the former President, the former Prime Minister, and Chairman of the Security Council – today

[101] Azarov D., Koval D., Nuridzhanian G., Venher V. Genocide committed by the Russian Federation in Ukraine: legal reasoning and historical context, p. 15

The main points of the speech, to which scholars referred, consisted of statements that Ukrainian nation was a part of the Russian one, and that there was no Ukrainian State before Lenin, the Soviet leader, "imaged" it[102].

Another political leader of Russia who also promotes genocidal sentiments is Dmitriy Medvedev*. The authors of the mentioned work cited him: "the Ukrainian nation and its identity is one big fake, the phenomenon never existed in the history, and does not exist now"[103].

The statements of these political leaders violate Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, namely, Part 6 which notes that all States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations[104].

Since one of the cited political leaders is the President of the Russian Federation, and another one – has been the President, and holds another high position now, these persons occupy high positions, therefore they have respective status.

Regarding the individual criminal liability of the persons who carry out orders of superiors and commanders, they must be responsible for their acts, excluding three occasions, according to the Rome Statute: (a) the person was under a legal obligation to obey orders of the Government or the superior in question; b) the person did not know that the order was unlawful; and (c) the order was not manifestly unlawful (Art. 33 (1)).

Also, the second part of the analyzed Article states that "for the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful". It

[102] Ibid., p. 16 – 17
[103] Ibid., p. 19
[104] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, adopted by the Resolution of the General Assembly 2131 (XX) at the 1408th plenary meeting, A/RES/20/2131 from 21 December 1965

means that all acts which contain characteristics of the crime of genocide or the crimes against humanity are presumed as illegal in any case.

Also, within the issue of responsibility of persons who carry out orders, we need to apply to the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. The fourth principle states that the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Comparing the mentioned principle and Article 33 of the Rome Statute, we can point that the first one is problematic for proving guilt of a person who carry out orders because of the wording "provided a moral choice was in fact possible to him". The subjective substance like moral choice is difficult to prove if it is possible at all. So, the provisions of the Rome Statute regarding the liability of the mentioned categories of persons are formulated better and are more applicable in practice.

Therefore, we can make the following conclusion.

The position of the Rome Statute concerning impossibility of exemption of the responsibility under the International Criminal Law by any person, including Head of State or Government, a member of a Government or parliament, an elected representative or a government official, is important step for human rights defending and preventing its violation.

Within the research of such a mode of liability as aiding and abetting, we have found that the case practice maintains the position that important element of it is that the support of the accused must have a substantial effect for the crime commitment. We conclude that aiding and abetting by omission have a substantial effect for crime commitment, since otherwise the perpetration would be avoided.

We need to state that abetting as well as instigation can be direct – when a person`s words exhort to acts which can violate human rights. Also, it should be noted that we can refer to the mentioned modes of liability formation of negative perception of other persons.

We need to differ the right to freedom of opinion and expression and propaganda for war and advocacy of hatred. It is important to take into consideration the context of the speech and the status of the speaker.

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To conclude, we need to mention the following findings.

Complicity in International Criminal Law is a form of cooperation of persons with a purpose for committing a crime.

We can highlight the following modes of liability: planning, instigation, ordering, committing (direct perpetration) a crime, co-perpetration, aiding and abetting.

We can state that instigation, ordering, and aiding and abetting, especially in the forms of tacit approval and encouragement and aiding and abetting by omission, are most inherent to superiors and commanders.

Inaction of a person who knows about committing a crime and can prevent or avoid it, points out complicity of this person in the crime. There cannot be absence of such a form of committing crimes in complicity within committing mass, systematic war crimes. Therefore, we can say, at least, about knowledge and, credibly, about intent in understanding of Article 30 of the Rome Statute.

To sum up, we need to state that there are different forms of direct commission of crimes which lead to different modes of liability. The International Criminal Court highlights direct and indirect perpetration, direct and indirect co-perpetration.

Also, we need to say about the existence of such a term as “indirect commission” – it is applied when a person uses another person as an instrument to commit a crime.

The position of the Rome Statute concerning impossibility of exemption of the responsibility under the International Criminal Law by any person, including Head of State or Government, a member of a Government or parliament, an elected representative or a government official, is important step for human rights defending and preventing its violation.

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We need to differ the right to freedom of opinion and expression and propaganda for war and advocacy of hatred. It is important to take into consideration the context of the speech and the status of the speaker.

Conclusion

The crime of genocide was selected as a separate crime because it is contained from the material and mental components.

We can note that the main characteristic of this crime is intent to destroy a group as such (dolus specialis). A group is considered as “a separate and distinct entity” in the case law. The wording “as such” distinguishes the analyzed crime from the persecution against any identifiable group or collectivity as the crime against humanity.

Important point is that there is no requirement that every member of the targeted group must be destroyed to qualify the acts as the crime of genocide – it is enough a desire to eliminate a substantial part of the group.

A part of group can be recognized as substantial either based on numerically or qualitatively characteristics. The main feature of a substantial part of the group is to have effect on existing of the entire group.

The second difference between the crime of genocide and the crime of persecution is exhaustive list of possible grounds based on which the groups can be destroyed within the concept of the crime of genocide.

Regarding war crimes, we can state that there is no provision that their systematic character is the evidence of existing the genocidal intent, however the doctrine, the norms of Legal Acts and the case practice maintain the approach that the genocidal intent can be proven through unlawful acts systematically directed against a particular group.

Therefore, we can reach a conclusion that systematic character of war crimes can be the evidence of the genocidal intent.

The crimes which are defined as genocide by Article 6 of the Rome Statute have some similar elements: belonging a person to a particular national, ethnical, racial or religious group; intending destroy, in whole or in part, that national, ethnical, racial or religious group, as such; existing this conduct in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

The nationality or ethnicity of a group can be recognized when they are prescribed in a constitution or another legal act of the state where this group is.

Also, a group can be recognized as a separate one based on the self-perception of it and on perception of it in the mentioned way by other persons.

Regarding the element of intending destroy, in whole or in part, that national, ethnical, racial or religious group, as such, we can conclude that existence of the genocidal intent can be manifested in the systematic war crimes and through the systematic character of the crime against humanity, namely – persecution against any group or collectivity, if it takes place against persons of a particular group.

In addition, important finding is that, according to the case practice, the words pronounced at public speech also can form a part of the evidence which together with other facts can prove the existence of the genocidal intent.

The element "existing this conduct in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction" is closely related to the forementioned element and can be proved in like manner.

Concerning the special elements inherent to separate crimes which are recognized as genocide, we paid attention to the identification of serious bodily or mental harm, the main feature of which is to be so serious to have an effect on the preservation of the entire group. Also, in accordance with Legal Acts, serious bodily or mental harm can include acts of torture, rape, sexual violence or inhuman or degrading treatment.

Within the issue of imposing measures intended to prevent births, we made a conclusion that there can be such measures (but not only) as coercion of women to have abortions and forcible sterilization.

As a conclusion, we need to say that Ukrainians compose a separate national group, the evidence of which we can find in the Preamble of the Constitution of Ukraine. Children transferred to the Russian Federation are belonged to this national group.

To answer the question whether the transferring children was forcible, and not voluntary, we have referred to the case law. Thus, we can state that the term “forcibly” means absence of free will which is a consequence of the privation of real choice of a person who is transferred. Another significant point within this issue is that the Tribunals recognize, at first glance, voluntary displacement as a forcible transferring because of its necessity for surviving.

So, after studying the facts, we can allege that in the current events in Ukraine exactly forcibly, and not voluntary transferring children takes place.

Concerning the element of transferring children from their native national group to another group, we can state that both physical and mental transferring took place.

Regarding the elements concerning the age of the transferred persons, we can note that such persons were under the age of 18 years, so, they are under protection of Article 6 (e) of the Rome Statute, and that the perpetrators knew that the persons whom they transferred were under the age of 18 years.

At the same time, it should be noted that according to the case law, awareness of the age of the person is the liability of a perpetrator.

There was formulated deduction based on the argumentation proposed within the section that war crimes committed against Ukrainians and its character point out conduct which is directed against the Ukrainian group and could itself effect such destruction.

Also, in our view, forcibly transferring Ukrainian children can be proof of the intent to destroy, in whole or in part, the Ukrainian group, as such. We can reach the mentioned conclusion based on the finding of the case law that there is no requirement that every member of the targeted group must be destroyed to qualify the acts as the crime of genocide – it is enough a desire to eliminate a substantial part of the group.

We concluded that children compose a substantial part of the group, since no group can preserve its physical and mental existence without the next generation which is consisted of children.

Therefore, the act of forcibly transferring children of the group to another group is calculated on physical destruction of a group in the future.

Complicity in International Criminal Law is a form of cooperation of persons with a purpose for committing a crime.

We can highlight the following modes of liability: planning, instigation, ordering, committing (direct perpetration) a crime, co-perpetration, aiding and abetting.

We can state that instigation, ordering, and aiding and abetting, especially in the forms of tacit approval and encouragement and aiding and abetting by omission, are most inherent to superiors and commanders.

Inaction of a person who knows about committing a crime and can prevent or avoid it, points out complicity of this person in the crime. There cannot be absence of such a form of committing crimes in complicity within committing mass, systematic war crimes. Therefore, we can say, at least, about knowledge and, credibly, about intent in understanding of Article 30 of the Rome Statute.

To sum up, we need to state that there are different forms of direct commission of crimes which lead to different modes of liability. The International Criminal Court highlights direct and indirect perpetration, direct and indirect co-perpetration.

Also, we need to say about the existence of such a term as “indirect commission” – it is applied when a person uses another person as an instrument to commit a crime.

The position of the Rome Statute concerning impossibility of exemption of the responsibility under the International Criminal Law by any person, including Head of State or Government, a member of a Government or parliament, an elected representative or a government official, is important step for human rights defending and preventing its violation.

Within the research of such a mode of liability as aiding and abetting, we have found that the case practice maintains the position that important element of it is that the support of the accused must have a substantial effect for the crime commitment. We conclude that

aiding and abetting by omission have a substantial effect for crime commitment, since otherwise the perpetration would be avoided.

We need to state that abetting as well as instigation can be direct – when a person`s words exhort to acts which can violate human rights. Also, it should be noted that we can refer to the mentioned modes of liability formation of negative perception of other persons.

We need to differ the right to freedom of opinion and expression and propaganda for war and advocacy of hatred. It is important to take into consideration the context of the speech and the status of the speaker.

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