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CONSTRUING NATIONAL AND ETHNIC GROUPS UNDER THE GENOCIDE CONVENTION THROUGH SOVIET AND RUSSIAN NARRATIVES ON THE UKRAINIAN IDENTITIES

Abstract

Debates on the genocidal nature of Russian atrocities in Ukraine have uncovered various grey zones of the law on genocide. While most contemporary commentaries have focused on the essence and scope of the crime's central element – the intent to destroy the group in whole or in part – little analysis has been dedicated to defining and understanding the alleged object of the destruction, i.e., protected groups themselves. Even beyond the Ukrainian context, this problem is endemic to contemporary doctrine and jurisprudence, providing a rather cursory or even contradictory analysis of the notions of protected groups seemingly without recourse to other fields studying human identities, such as anthropology. This article aims to address this lacuna by exploring the dichotomy between national and ethnic groups under the Genocide Convention through Soviet and Russian identity narratives. The article summarises the state of contemporary law and jurisprudence relevant to the definition of the protected groups, as well as associated gaps and inconsistencies. It further addresses challenging issues of the groups' definition and delimitation through the lenses of modern anthropology, where the law is silent. The article stresses the importance of multidisciplinary and contextualised application of the legal concepts under the law of genocide in light of the meaning ascribed to them by other fields of study focusing on group identities and inter-group dynamics. Finally, the article applies relevant findings to the context of Soviet and further Russian narratives on the Ukrainian identities, illustrating the dichotomy between national and ethnic groups.

Keywords: international criminal law, genocide, protected groups, national groups, ethnic groups.

Introduction. Out of various international crimes qualifications of Russian atrocities in Ukraine, allegations of genocide have probably raised the most heated debates amongst international law scholars and practitioners. Full of interpretative nuances, the crime of genocide rests among the most complex constructions in contemporary international criminal law. Apart from the five prohibited underlying acts forming the crime's *actus reus*, it also requires proof of the intent to physically or biologically destroy one of the four protected groups, i.e., national, ethnic, racial or religious.¹

To date, the lenses of the Genocide Convention have been employed to insightfully analyse Russian actions in Ukraine from multiple perspectives.²

Regardless of whether the evidence on the ground eventually supports the genocide qualification,

7395377/; Denys Azarov, Dmytro Koval, Gaiane Nuridzhanian, and Volodymyr Venher, "Understanding Russia's Actions in Ukraine as the Crime of Genocide," *Journal of International Criminal Justice* 21, no. 2 (2023): 233–64, <https://doi.org/10.1093/jicj/mqad018>; Iryna Marchuk and Aloka Wanigasuriya, "Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ," *Journal of Genocide Research* 25, no. 3–4 (2022): 256–78, <https://doi.org/10.1080/14623528.2022.2143528>; Yuliia Ioffe, "Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?," *Journal of Genocide Research* 25, no. 3–4 (2023): 315–51, <https://doi.org/10.1080/14623528.2023.2228085>; New Lines Institute for Strategy and Policy and Raoul Wallenberg Centre for Human Rights, *An Independent Legal Analysis of the Russian Federations' Breaches of the Genocide Convention in Ukraine and the Duty to Prevent* (May 2022), <https://newlinesinstitute.org/wp-content/uploads/An-Independent-Legal-Analysis-of-the-Russian-Federations-Breaches-of-the-Genocide-Convention-in-Ukraine-and-the-Duty-to-Prevent-1-2.pdf>; Myroslava Antonovych, "The Holodomor-Genocide and the Ongoing Russian Genocide in Ukraine: Intent, Victims and Perpetrators," *Saar Expert Papers* (2023), https://jean-monnet-saar.eu/wp-content/uploads/2023/02/Genocide_Ukraine.pdf.

¹ United Nations (UN) General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, UN Treaty Series 277, vol. 78 (9 December 1948), Article 2.

² Wayne Jordash, "Genocide in Ukraine," *Ukrainska Pravda*, March 28, 2023, <https://www.pravda.com.ua/columns/2023/03/28/>

ensuing debates remain critical to clarifying the nuanced essence of the law, especially the issues under-explored or overlooked in the jurisprudence of previous decades.

Construction of the four groups protected under the Convention remains one of such matters. Most focus on the analysis to date has been put on how victims and their communities in the Ukrainian context were targeted, not on what the group can or cannot be in the analysed context. While such tendency can be explained by the centrality of the special intent element (to destroy the group in whole or in part), the intent can only be comprehensively analysed upon understanding who it might have been directed against.

This tendency is not novel to the Ukrainian context specifically. Traditionally, in legal commentaries to the Genocide Convention, the notions and delineation of the four protected groups (i.e., national, ethnic, religious and racial) have been discussed in a rather cursory fashion if compared to other elements of the crime. Some of the most prominent commentaries on the matter (e.g., by W. Schabas,³ C. J. Tams, L. Berster, B. Schiffbauer,⁴ C. Kreß,⁵ G. Mettraux,⁶) despite outlining a general framework to the understanding of protected groups, do not provide a comprehensive guidance to the issue of the groups' delimitation. Even when provided, proposed frameworks do not adopt a multidisciplinary approach accounting for the groups' constituent features explored in other social and humanitarian studies, including anthropology. Only a few remarkable studies attempted to explore these lenses connecting law to other fields of study while trying to establish the essence of every protected group as a unique concept⁷ or contextualising it to historical cases that are often overlooked.⁸

³ William Schabas, *Genocide in International Law. The Crime of Crimes* (2nd ed., Cambridge University Press, 2009).

⁴ Christian J. Tams, Lars Berster, and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck, 2014).

⁵ Claus Kreß, "The Crime of Genocide under International Law," *International Criminal Law Review* 6 (2006): 473–79.

⁶ Guenael Mettraux, *International Crimes: Law and Practice. Volume I: Genocide* (Oxford University Press, 2019).

⁷ See, e.g., Carola Lingaas, "Conceptualizing the National Group for the Crime of Genocide: Is Law Able to Account for Identity Fault Lines?," *Nationalities Papers* 49, no. 2 (2021): 240–61, <https://doi.org/10.1017/nps.2020.5>; Carola Lingaas, "Imagined Identities: Defining the Racial Group in the Crime of Genocide," *Genocide Studies and Prevention* 10, no. 1 (2016): 79–106, <http://dx.doi.org/10.5038/1911-9933.10.1.1377>; Carola Lingaas, "Religious Group Identities in Genocide: Social Identity Theory as a Tool for Disentangling Law and Religion," *Nordic Journal of Human Rights* 39, no. 4 (2021): 440–57, <https://doi.org/10.1080/18918131.2021.2015148>.

⁸ David Lisson, "Defining "National Group" in the Genocide Convention: A Case Study of Timor-Leste," *Stanford Law Review* 60, no. 5 (2008): 1459–96.

This article omits any preliminary conclusions as to the commission of the crime of genocide in Ukraine and rests on the premise that any allegations remain to be proved or disproved in the court of law. Yet, it employs the lenses of the Genocide Convention to illustrate how Soviet and Russian identity narratives tend to demonstrate the dichotomy between the two groups most relevant in the Ukrainian context, i.e., national and ethnic. It highlights the importance of the contextualised application of the Convention's terms and the need to define their autonomous meaning given the diversity of historical precedents. The article summarises the approaches to characterising protected groups and associated gaps in contemporary law and jurisprudence. It further offers an explanation for their interplay reconciling the existing inconsistencies in light of modern anthropology using the Soviet and Russian identity narratives as an illustration.

Predominant legal approaches to defining national and ethnic groups under the Genocide Convention. Uncertainty related to the distinction between national and ethnic groups emanates from the early drafting stages of the Genocide Convention. While the references to the concepts "nation" and "nationality" were rather frequent during the negotiation process, delegates of several states stressed that the "national group" concept remained vague.⁹ In the attempts to introduce clarity and distinguish national groups from communities with a mere political desire to form a separate entity, the Swedish delegation proposed to add ethnic groups to the Convention's protected list,¹⁰ arguably trying to stress a socio-cultural rather than politico-legal essence of the protected groups' identity.

Despite this addition, the distinction between national and ethnic groups nevertheless remained blurred. One view of state delegates and commentators argued that ethnic groups could be sub-divisions of national groups, thereby national groups could comprise different ethnicities.¹¹ Another perspective

⁹ See positions of the Swedish and Egyptian delegates in Hired Abtahi and Philippa Webb, *The Genocide Convention: the travaux préparatoires* (Leiden: Martinus Nijhoff Publishers, 2008), 1389 and 1392 citing the UN Doc. Nos A/C.6/SR.73 and A/C.6/SR.74.

¹⁰ *Ibid.*, 1389.

¹¹ *Ibid.*, 1400, citing UN Doc. A/C.6/SR.74; Demba Thiam, *Fourth report on the draft Code of Offences against the Peace and Security of Mankind*, UN Doc. A/CN.4/398, 11 March 1986, para. 57, <https://digitallibrary.un.org/record/117074>. Similar observations were made by state delegations during the drafting of the International Convention on the Elimination of All Forms of Racial Discrimination, e.g., by Polish delegate: "There were nations that were made up of different ethnic groups": see UN General Assembly, 20th session, 3rd Committee, Official Records of the 1304th Meeting UN Doc. A/C.3/SR.1304 (14 October 1965), p. 83, <https://digitallibrary.un.org/record/806678?v=pdf>.

perceived ethnic groups as more closely aligned with racial groups,¹² although the former remained more bound by “cultural” ties in contrast to common “physical” traits differentiating the latter.¹³

For fifty years after the Convention’s adoption these were the only fragmented indicators guiding the determination of the essence of protected groups. The International Criminal Tribunal for Rwanda (ICTR) undertook the first attempt to clarify the inter-group distinction in the *Akayesu* case. It ruled that national groups constituted “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”¹⁴ In contrast, ethnic groups were primarily based on “common language or culture.”¹⁵ Yet, these definitions did not come as unproblematic and attracted two major critical or dissenting views.

The first view relates to the very attempt to search for the groups’ autonomous meaning; the core which distinguishes them from each other. In its subsequent jurisprudence, the International Criminal Tribunal for the Former Yugoslavia (ICTY) argued that four protected groups were supposed to constitute “a single phenomenon” rather than “several distinct prototypes of human groups.”¹⁶ Thus, differentiating them on the basis of “scientifically objective criteria [...] would be inconsistent with the object and purpose of the [Genocide] Convention.”¹⁷ Some commentators further echoed this view claiming that attributing autonomous meaning to every protected group will distort their sense taken as a whole under the Convention and weaken their intended protection.¹⁸

Such an aggregate perspective can be helpful where targeted groups are defined by several overlapping identities (e.g., arguably Bosnian Muslims possessing distinct national, ethnic and religious identity as a whole) eliminating the need for clear demarcations of groups. Yet, in cases where one group – as a standalone entity – is allegedly

targeted for destruction, this framework fails to provide indicators for group determination, making it a somewhat arbitrary process. Although protected groups’ identities can overlap based on similar attributes, each group has a distinct clear core, not identical to the others.¹⁹ For instance, while national and ethnic, or racial and ethnic groups may rest on common pillars (e.g., language, traditions or culture), each forms a separate social distinct entity in modern anthropology, as will be discussed below.

Failure to acknowledge this difference will disrupt historical contexts and artificially set the law apart from other disciplines whose primary focus is studying human groups’ and identities’ dynamics. It also risks depriving the groups of conventional protection, where their nuanced identity features are overlooked or mistaken, where courts and judges are granted an arbitrarily broad discretion to determine the group’s existence and membership in it without clear guidance.²⁰

The second criticism of *Akayesu*’s approach does not dispute the need to attribute autonomous meaning to every group *per se*. Rather it challenges *how* groups, particularly national ones, should be defined. It claims that defining national groups with the link to citizenship is erroneous²¹ since it confuses two meanings of the term “nationality” under international law: nationality in its political (i.e., citizenship) and socio-cultural (i.e., a sense of belonging to a particular nation) understanding.²²

This criticism is strongly supported by several arguments. Firstly, associating national groups with citizenship goes against clear reservations of the original Convention’s drafters who indicated that legal nationality (i.e., citizenship) should not be confused with national origin when defining membership in the protected groups.²³ Subsequent commentators corroborated this view by claiming that national groups are defined by common national origin, i.e., nationality in its sociological rather than politico-legal sense.²⁴

¹² For example, positions of Egypt and Uruguay in Abtahi and Webb, *The Genocide Convention: the travaux préparatoires*, 1414, citing UN Doc. A/C.6/SR.75; Thiam, Fourth Report (UN Doc. A/CN.4/398), para. 58.

¹³ Thiam, Fourth Report (UN Doc. A/CN.4/398), para. 58.

¹⁴ *Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998, para. 512, <https://www.refworld.org/cases,ICTR,40278fbb4.html>.

¹⁵ *Ibid.*, para. 513.

¹⁶ *Prosecutor v. Radislav Krstić* (Trial Judgment), IT-98-33-T, 2 August 2001, para. 556, <https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

¹⁷ *Ibid.* See also *Prosecutor v. Goran Jelisić* (Trial Judgement), IT-95-10-T, 14 December 1999, para. 70, <https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/33140>; Mettraux, *International Crimes: Law and Practice: Genocide*, 206.

¹⁸ Schabas, *Genocide in International Law*, 131.

¹⁹ *Prosecutor v. Jević* (Verdict), X-KR-09/823-1, 22 August 2012, para. 949, <https://www.legal-tools.org/doc/288d85/pdf/>; Thiam, Fourth Report (UN Doc. A/CN.4/398), para. 56.

²⁰ Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary*, 102.

²¹ Mettraux, *International Crimes: Law and Practice: Genocide*, 209, especially fn 186-187; Schabas, *Genocide in International Law*, 134-35.

²² Robert Jennings and Arthur Watts, *Oppenheim’s International Law. Volume 1: Peace* (9th ed., Oxford University Press, 2008), 857.

²³ UN Economic and Social Council, Ad Hoc Committee on Genocide, *Commentary on Articles Adopted by the Committee*, UN Doc. No. E/AC.25/W.1 (26 April 1948) in Abtahi and Webb, *The Genocide Convention: the travaux préparatoires*, 980.

²⁴ Nicodème Ruhashyankiko, UN Economic and Social Council, *Study of the question of the prevention and punishment of the crime of genocide*, UN Doc. No. E/CN.4/Sub.2/416 (4 July 1978), paras 59-61, <https://digitallibrary.un.org/record/663583?v=pdf>.

Secondly, confining the essence of national groups merely to formal links with a state transforms the membership in a group into a purely political matter that is easily amendable by a simple fact of acquisition, deprivation of or withdrawal from citizenship. This approach sets national groups apart in the conventional list as the only ones founded on a technical question of the possession of a passport rather than complex and intrinsic socio-cultural traits uniting members of other groups together and deeply rooted in identities that cannot emerge or disappear overnight. After all, nations as groups are historically independent of states, and national identity is not necessarily always dependent on the construction of nation-states.²⁵

Anthropological lenses: construction of human ethnic and national identities. If not citizenship, what determines the core of national groups making them distinct from other communities, including ethnic ones? Where international law is lacking answers, it cannot ascribe meaning to concepts without due regard to their origins rooted in other fields of social and humanitarian studies that are primarily focused on studying human identities. Lawyers, particularly international lawyers, should not be the sole arbiters defining the terms in isolation from their foundations as distinct social, cultural and political entities. The term “national groups” should thus be defined based on the most semantically closest, yet consistently overlooked by jurisprudence and scholarly opinion, concept of a nation.

The roots of linking “national groups” to modern nations appear in some of the rare early commentaries to the Genocide Convention elaborating on the topic of protected groups. They claimed that national groups were defined by “a common wish to live together, a common ideal, a common goal and common aspirations.”²⁶ This was contrasted with ethnic groups whose foundation was more closely rooted in “cultural values and is characterized by a way of life, a way of thinking, and the same way of looking at life and things.”²⁷ As will be argued below, this distinction managed to grasp the trending interpretations of contemporary anthropological, political and social sciences rather accurately.

Some legal commentators today indeed argue that “a common culture, history, way of living, language or religion” may serve as denominators

for both national and ethnic groups.²⁸ While this assertion is justified, the concept of “nations” goes beyond this baseline. Modern anthropology recognises a dichotomy between the two ways in which nations can be seen and defined. Nations can be ethnically or culturally centred, which brings them closer to the notion of ethnic groups, i.e., whereby membership in the nation is defined by the shared “system of ideas, signs and associations, and ways of behaving and communicating,”²⁹ as well as (presumed) descent and their inherited ancestrally related identity.³⁰ In other words, “cultural nations” are united by “a common relation to some combination of historical memory, geography, kinship, tradition, mores, religion, and language”³¹ that are inherited and unchosen.³²

In contrast, another approach to defining nations has been labelled as civic, contractual or consensual.³³ It perceives nations as voluntary communities of individuals established as a result of a consensual social “covenant”, members’ chosen convictions and loyalties, their mutual rights and duties, as well as recognition of each other as members of the nation.³⁴

In reality, this dualism of perceptions merely illustrates “ideal models”, and every nation inevitably combines both cultural and consensual elements.³⁵ Every nation – to a varying degree – can thus be based on inherited or developed, objective or imagined cultural peculiarities (e.g., unifying history, language, traditions and heritage), combined with the ideology of voluntary commitment to forming a distinct entity with mutual recognition of each other as nation’s members.³⁶ The former element is what distinguishes national groups from political ones that were excluded from the Genocide Convention during the drafting stages. A mere desire to form a separate group does not suffice to establish a nation.

²⁸ Kreß, *The Crime of Genocide under International Law*, 476.

²⁹ Ernest Gellner, *Nations and Nationalism* (Oxford, UK and Cambridge, USA: Blackwell, 1983), 7.

³⁰ Renaud-Philippe Garner, “Nationalism,” *Oxford Research Encyclopedia of Politics* (2022, May 18), <https://doi.org/10.1093/acrefore/9780190228637.013.2039>.

³¹ Brian C. J. Singer, “Cultural versus Contractual Nations: Rethinking Their Opposition,” *History and Theory* 35, no. 3 (1996): 311.

³² Garner, “Nationalism”.

³³ Gellner, *Nations and Nationalism*, 7; Garner, “Nationalism”; Singer, “Cultural versus Contractual Nations,” 310–311.

³⁴ Ibid.

³⁵ Garner, “Nationalism”; Singer, “Cultural versus Contractual Nations,” 316.

³⁶ John Breuilly, *Nationalism and the State* (Manchester, UK: Manchester University Press, 1982), 35–36 cited in Douglas Woodwell, *Nationalism in International Relations: Norms, Foreign Policy, and Enmity (Advances in Foreign Policy Analysis)* (Palgrave Macmillan, 2007), 15. See similar contentions in Geoff Eley, Ronald Grigor Suny, eds., *Becoming National: A Reader* (New York: Oxford University Press, 1996), 9 cited in Castells, *The Power of Identity*, 31.

²⁵ Manuel Castells, *The Power of Identity*, 2nd ed. (Hoboken, NJ: Wiley-Blackwell, 2010), 32 referring to Michael Keating, *Nations against the State: The New Politics of Nationalism in Quebec, Catalonia, and Scotland* (New York: St. Martin’s Press, 1995).

²⁶ Thiam, Fourth Report (UN Doc. A/CN.4/398), para. 57.

²⁷ Ibid., para. 58.

The element and degree of mutual self-recognition and self-determination is what differentiates ethnic and national groups making the latter a far more complicated mixture of identity layers. While ethnic identity is arguably more stable than many others, often defined by origin, national identity is more fluid, voluntarist, and merges both cultural and political self-identification with the members who developed a “collective preference to pursue higher levels of group self-determination.”³⁷ Other lenses to view it through suggest that ethnicity relates primarily to who a person *is*, while nationality additionally considers what they *want* too.³⁸ National groups are often built upon a complicated mixture of deep subjective communications about the nation’s foundations, including shared ideology, memories and cultural significations or “invention of a shared past.”³⁹

These features of voluntarism and fluidity may attract criticism from the proponents of the view that the Genocide Convention was intended to protect permanent and stable groups only, membership in which is defined by birth and unalterable.⁴⁰ This argument, however, does not have a solid legal basis neither in the preparatory works to the Convention nor in the state practice.⁴¹ In reality, all groups are relatively lasting and unstable at the same time: one can decide to abandon or change religion, or sever cultural bonds uniting a person with an ethnic group, or change national affiliation. While all these scenarios constitute complicated identity transformations, they nevertheless remain possible undermining the argument on the groups’ permanence and stability as defining features under the Genocide Convention.

Lastly, ethnicity can undoubtedly form some national groups’ core but can also be a secondary consideration. For example, some groups, such as Scottish or Kurds, can arguably be qualified as a national group with a clear ethnic core.⁴² At the same time, a nation can also be ethnically heterogeneous and comprise people of various

ethnicities (e.g., the United States) being united by “a shared history and a shared project, and their historical narratives build on an experience, socially, ethnically, territorially, and genderly diversified, but common to the people of each country on many grounds.”⁴³

These considerations help to define the attributes of the modern Ukrainian nation and delimit it from the Ukrainian ethnic group. Firstly, while cultural elements defining Ukrainian ethnicity (e.g., culture, language, traditions) may be important for shaping the national project, membership in the national group extends beyond them. Secondly, Ukrainian nation arguably encompasses people of different ethnic origins (e.g., ethnic Ukrainians, Crimean Tatars, etc.) or different languages (e.g., both Ukrainian and Russian-speaking) united by the shared values of independent statehood, visions of the future and the past (e.g., highlighting the subjective importance of certain historical events, such as the Ukrainian 1917-1921 Revolution, the Holodomor, the Orange Revolution and the Revolution of Dignity, and the Russian war).⁴⁴

Such features in combination point to both cultural and consensual/civic dimensions of the Ukrainian nation. Arguably, with the events in the political arena of the last century, the essence of the national project gradually moved from relatively ethnocultural to civic, whereby prerequisite ethnic origin does not define membership in the nation. Lastly, Ukrainian citizenship *per se* does not define membership in the national group: Ukrainian citizens may or may not necessarily share national sentiments and adherence to the common project. Ukrainian citizens or even people of ethnic Ukrainian origin may support the national project, be neutral, indifferent, or even hostile towards it.

Soviet and Russian identity narratives and national-ethnic groups dichotomy. What may first seem like a theoretical or academic dichotomy

³⁷ Castells, *The Power of Identity*, 32.

³⁷ Woodwell, *Nationalism in International Relations*, 13, 15–16.

³⁸ *Ibid.*, 15.

³⁹ Armin von Bogdandy and Stefan Häußler, “Nations,” *Max Planck Encyclopedia of Public International Law* (2019), para. 9, citing, among others, Gellner, *Nations and Nationalism*; Karl W. Deutsch, *International Political Communities: An Anthology* (Doubleday Garden City, 1966); Eugen Lemberg, *Nationalismus. Bd. 1: Psychologie und Geschichte* (Rowohlt Reinbek, 1964).

⁴⁰ See, e.g., *Akayesu Trial Judgment*, para. 511.

⁴¹ William A. Schabas, “Groups Protected by The Genocide Convention: Conflicting Interpretations From The International Criminal Tribunal For Rwanda,” *ILSA Journal of International & Comparative Law* 6 (2000): 382.

⁴² See, e.g., Lingaas, *Conceptualizing the National Group for the Crime of Genocide*: 244 referring also to Castells, *The Power of Identity*, 32.

⁴⁴ See some of the relevant discussions of the Ukrainian national identity/project in Volodymyr Kulyk, “National Identity in Time of War: Ukraine after the Russian Aggressions of 2014 and 2022,” *Problems of Post-Communism* (2023), <https://doi.org/10.1080/10758216.2023.2224571>; Timothy Snyder, “Ukraine Holds the Future,” *Foreign Affairs*, September 6, 2022, <https://www.foreignaffairs.com/ukraine/ukraine-war-democracy-nihilism-timothy-snyder>; Yuval Noah Harari, “Why Vladimir Putin has already lost this war,” *The Guardian*, February 28, 2022, https://www.theguardian.com/commentisfree/2022/feb/28/vladimir-putin-war-russia-ukraine?utm_source=dlvr.it&utm_medium=%5Btwitter%5D&utm_campaign=%5Brogue_corq%5D; “Historian Timothy Snyder: ‘History Is Always Plural,’” *RFERL*, June 20, 2015, <https://www.rferl.org/a/russia-ukraine-interview-bloodlands-timothy-snyder-history/27082683.html>; Timothy Snyder, “The War in Ukraine Has Unleashed a New Word,” *The New York Times Magazine*, April 22, 2022, <https://www.nytimes.com/2022/04/22/magazine/ruscism-ukraine-russia-war.html>.

between national and ethnic identities, becomes more apparent when juxtaposed against the Soviet narratives related to the Ukrainian identities whose logic was further readopted by the modern Russian state and mirrored in the atrocities on the ground.

Previously described dichotomy between ethnic and national groups was rather intuitively grasped by Raphael Lemkin, the father of the term “genocide”, in his 1953 public address “Soviet genocide in Ukraine”, where Lemkin’s specifically referred to the Soviet atrocities against the Ukrainian *nation* as a “classic example” of genocide.⁴⁵

In Lemkin’s words, the Ukrainians differed from the Russians not only by culture, temperament, language, religion (i.e., features that, according to the above-described methodology, are more relevant to ethnic identities).⁴⁶ Ukrainians also maintained a sense of national unity, thought of themselves as Ukrainians and sought independence⁴⁷ (i.e., where the self-identification element of nations comes into play). For as long as this element is preserved – Lemkin argued – the Ukrainians posed a serious threat to the very idea of the Soviet state and the Russification process (i.e., imposition of the superior and dominant Russian identity) it foisted.⁴⁸ Soviet authorities openly declared that the existence of what the Soviet leaders labelled as “nationalism” was the “chief danger” for the Soviet Union.⁴⁹

However, as Lemkin proceeds, to eliminate this danger, the Soviets could not act in the way the Nazis acted against the Jews.⁵⁰ Since the Ukrainian nation was “too populous” for the blank efficient extermination, the Soviets needed to adopt a more sophisticated method of destruction.⁵¹ It involved targeting the segments that were critical for the survival of the nation, national idea and nationhood. Essentially, the plan encompassed the targeting of the three essential pillars: the nation’s brain (intelligentsia), its soul (clergy) and its body (peasantry) as those who were the main guardians of the national spirit (traditions, folklore, language and literature).⁵²

Coupled with the nation’s fragmentation by mixing identities, this tactic would have inevitably led to the absorption of the rest of the group into a new imagined “Soviet nation” or “Soviet people” with the

underlying Russian “master” identity absorbing or replacing the others.⁵³ If emblematic segments of the national group that preserved its culture, beliefs, common ideas, and a shared national project had been successfully eliminated, it would have resulted in the disappearance of the national group turning its members into merely “a mass of people.”⁵⁴

Lemkin’s contextualised analysis of the logic behind the Soviet tactics provides cues to the importance of distinguishing between national and ethnic identities. In this light, one can hardly argue that the Soviet regime aimed at eliminating the Ukrainians as an ethnic group. It can explain why, e.g., some Soviet leaders were of Ukrainian origin – an argument exploited by Russian President Putin to support the narrative of “historical unity” between Ukrainians and Russians.⁵⁵ It can also explain why – despite culturally suppressing the Ukrainian language and culture – the Soviets did not try to eradicate them or their holders instantly and entirely. Even during the most notorious years of the Soviet terror in the 1930s, Ukrainian education was still provided at schools, and the Ukrainian language was used in culture. This was only possible when viewed through the lens of “Soviet Ukrainianism,” i.e., exploiting Ukrainian ethnic attributes for the purposes of constructing the “Soviet nation” framework.

Its foundation was well summarised by the then First Secretary of the Communist Party of the USSR, Nikita Khrushchev, who described the Soviet Union as “a new historical community of people of different nationalities” forming “a new Soviet people” united by their “common socialist Motherland [...], a common economic base [...], a common social and class structure, a common outlook – Marxism-Leninism, a common goal – the construction of communism.”⁵⁶ This illustrates a Soviet attempt to construe a pseudo-national identity, a superstructure of preexisting ethnic identities, based on a “shared” Soviet communist project. Eliminating ethnic identities, including their linguistic and cultural features, then was not necessary for as long as they fit into or did not contradict the prevailing Soviet pseudo-national narrative taking Russian linguistic and cultural variables as a master basis.

⁴⁵ Raphael Lemkin. *Soviet Genocide in Ukraine* (The article in 33 languages) (Kyiv: Marko Melnyk Publishing House, 2020), 47, <https://holodomormuseum.org.ua/wp-content/uploads/2022/12/Lemkin.pdf>.

⁴⁶ Ibid., 48.

⁴⁷ Ibid., 47.

⁴⁸ Ibid.

⁴⁹ Ibid., 50.

⁵⁰ Ibid., 48.

⁵¹ Ibid.

⁵² Ibid., 48–50.

⁵³ Ibid., 50–51.

⁵⁴ Ibid., 51.

⁵⁵ “Article by Vladimir Putin “On the Historical Unity of Russians and Ukrainians,” *President of Russia*, July 12, 2021, <http://en.kremlin.ru/events/president/news/66181>.

⁵⁶ Cited in “How Ukraine was made Soviet (and how Ukrainians resisted). The history of a nation that has not lost its identity in the “family of nations,” *The Village Ukraine*, February 7, 2024, <https://www.village.com.ua/village/knowledge/podcast/347523-ukrainian-history-street-2023-s02e15>.

While pretending to mimic the attributes of the national project, the “Soviet national identity” was pseudo-national since it lacked the two foundations defining the existence of a genuine national identity – consensual self-identification and cultural bedrock. It was not consensual due to its forceful – and most often violent – imposition on the holders of other national identities by the Soviet leadership. This identity originated not from a gradual and natural formation of the collective consciousness and self-identification which is typical to the formation of nations in the most usual historical settings, but rather from an imposed policy of a totalitarian government. The USSR did not aim at building a collective identity that was *supranational* whereby every national groups’ right to self-determination would be respected within the broader “Soviet” project. Soviet pseudo-national identity was primarily predatory in its essence: driven by the rule “replace other national identities or be ready to be displaced by them.” Neither was it based on the inherited cultural attributes shared by the group members: its central unifying idea was always limited to an essentially political ideology of communism. Cultural attributes could only survive when exploited for the support of this political ideology.

What was essential for the survival of this pseudo-national project was the elimination of competing genuine national projects that arose throughout the 19th-20th centuries. This included Ukrainian national aspirations that started to emerge, gaining momentum in the 19th century, and materialised and culminated in the Ukrainian independent statehood in 1917-1921 upon the collapse of the Russian empire.⁵⁷

In the Soviet leaders’ perception, Ukrainian nationalism posed a direct threat to the project of the construction of the “Soviet people”: one could not coexist while another was alive. Because the Ukrainian 20th century’s national aspirations were closely connected with a story of the short-lasting independence and struggle for the Ukrainian state (including active struggle against the Bolsheviks), sooner or later allowing for national aspirations to be cherished would have put the Soviet dominance of Ukraine under threat. This is arguably the reason why the policy of *Korenizatsiia* (“indigenisation”) and Ukrainisation implemented so actively during the first decade of the USSR’s existence, was later suspended, repealed and used to purge its most active promoters accused of fueling nationalism.⁵⁸

⁵⁷ See more about the Ukrainian revolution in Taras Hunczak, ed., *The Ukraine, 1917-1921: A Study in Revolution* (Harvard Ukrainian Research Institute, 1978), v, <https://diasporiana.org.ua/wp-content/uploads/books/22264/file.pdf>.

⁵⁸ Hennadii Yefimenko, “Korenization, Ukrainization, Nationalism,” *Suchasnist* 11 (2008): 46–52.

Once the USSR’s nationality policies started leading to not merely “the awakening of ethnic consciousness but the creation of an increasingly spontaneous and uncontrollable national assertiveness,” Soviet leadership realised the danger of the fall of the Soviet project and reacted by targeting any potential roots of the national aspirations.⁵⁹

Hence, in the Soviet leaders’ mindset, Ukrainian ethnic identity was not a threat of itself. For as long as Ukrainian culture, language, or traditions could be exploited for the promotion of the Soviet pseudo-national project and did not threaten it by promotion of the Ukrainian national aspirations, they did not create a danger and could be gradually brought in line with the dominant Russian narrative. The target was what differentiates nations from ethnic groups: preventing or eliminating the formation of any aspirations to pursue self-determination of the group members and their mutual identification with a shared national project (e.g., Ukrainian nationhood and independent statehood).

Effectively this Soviet vision was inherited by the Russian leadership and adjusted to the modern realities. Before launching the full-scale invasion of Ukraine on 24 February 2022, Russian President Vladimir Putin and his clique engaged in a complicated game of identities attempting to depict Russia’s expansionist narrative as having deep and “just” historical roots.⁶⁰ In the first place, Putin has consistently denied Ukrainians’ right, but even more – ability – to form and operate an independent state.⁶¹ In Putin’s vision, Ukrainians only possess the right to exist as a part of the “large Russian nation, triune people” uniting Russians, Malorussians [connotation of Ukrainians during the Russian empire times as being “inferior” to the Russians] and Belarussians [i.e., “White Russians”, Belarussians].⁶² Ukraine thus was regarded as “an inalienable part of [Russia’s] history, culture and spiritual space.”⁶³ Anyone trying to lay a claim to Ukrainian independence and self-determination separate from Russia was then labelled as infected

⁵⁹ George Liber, “Korenizatsiia: Restructuring Soviet nationality policy in the 1920s,” *Ethnic and Racial Studies* 15, no. 14 (1991): 21.

⁶⁰ See the analysis of this evolution in Clara Apt, “Russia’s Eliminationist Rhetoric Against Ukraine: A Collection,” *Just Security*, January 11, 2024, <https://www.justsecurity.org/81789/russias-eliminationist-rhetoric-against-ukraine-a-collection/>.

⁶¹ “Extracts from Putin’s speech on Ukraine”, *Reuters*, February 21, 2022, <https://www.reuters.com/world/europe/extracts-putins-speech-ukraine-2022-02-21/>.

⁶² “Article by Vladimir Putin “On the Historical Unity of Russians and Ukrainians,” *President of Russia*, July 12, 2021, <http://en.kremlin.ru/events/president/news/66181>; “Address by the President of the Russian Federation,” *President of Russia*, February 21, 2022, <http://en.kremlin.ru/events/president/news/67828>.

⁶³ “Article by Vladimir Putin “On the Historical Unity of Russians and Ukrainians,” *President of Russia*, July 12, 2021, <http://en.kremlin.ru/events/president/news/66181>.

by “the virus of nationalist ambitions” that Putin seemed to see as an existential threat to Russia that needs to be eliminated.⁶⁴

Already after the beginning of the invasion, Putin laid out his vision more expansively denying that Russia was attacking or eradicating Ukrainian linguistic or cultural attributes. In the first days of the full-scale invasion, Putin stated that he “[would] never give up his convictions that Russians and Ukrainians are one people, although [many Ukrainians] were duped by Nazi nationalist propaganda.”⁶⁵ Later Putin added that Ukrainian culture had “nothing to do with [the war]” and that “many [Russian] families know, hear and love Ukrainian songs, Ukrainian culture.”⁶⁶

In his vision, Ukrainian culture is to be distinguished from the policies of the incumbent Ukrainian government “supporting neo-Nazis.”⁶⁷ This position was echoed by Russian representatives before in the international fora, e.g., by the Russian delegation in the United Nations Security Council declaring that “[Russian] positive attitude to the Ukrainian people, culture and language [had] not changed” “since Ukrainians are [Russian] brothers and friends.”⁶⁸ Instead, according to them, what Russia is trying to “cauterize in Ukraine is its burgeoning neo-Nazism and nationalism.”⁶⁹

Therefore, to promote plausible deniability of targeting the Ukrainian national identity, Russian authorities exploit the use of Ukrainian cultural symbols, e.g., traditional clothes or folk songs in propaganda campaigns,⁷⁰ and construct the narrative of the “inevitable spiritual unification” of the Russian and Ukrainian peoples.⁷¹ Yet, for as long as Ukrainian

national aspirations exist independently, they create a threat to be eliminated both culturally and physically. In the words of Dmitry Medvedev, the Deputy Chairman of the Russian Security Council, the existence of Ukraine, “absolutely any form of Ukraine” “on the historical Russian territories,” “not just “the Banderite political regime,” “is deadly for Ukrainians [since it] will be a constant pretext for the resumption of hostilities.”⁷²

Therefore, the modern Russian regime’s vision of the Ukrainian identities’ interplay is reminiscent of the Soviet logic. Both are based on several postulates. Ukrainian national identity, project, and group respectively have no right to exist since they threaten Soviet and Russian (neo-)colonial projects. Instead, genuine national identity has to be replaced by pseudo-national identities (either of the “Soviet nation or people” or “triune Russian people,” i.e., “Greater Russia) lacking both cultural foundations and members’ consensus (being imposed by authoritarian rule) – the two lenses through which modern nations are viewed. Ukrainians can only subsist as an ethnic sub-component of the pseudo-national project for as long as the attributes of their ethnicity (e.g., language, culture, traditions) promote or at least do not threaten the survival of the colonial and pseudo-national projects. As soon as they become emblematic of nationhood or – objectively or perceivably – are exploited for its promotion, such attributes come under the attack too (e.g., Ukrainian language as a symbol of resistance versus Ukrainian language for the Russian propaganda purposes).

These lenses illustrate how – when contextualised in particular situations on the ground – the notions of protected groups under the Genocide Convention should be distinguished. The object of Soviet and Russian violence can only be properly understood and characterised through the dichotomy of ethnic and national identities. This, in turn, highlights the relevance of a multidisciplinary approach to defining legal concepts rooted deeply in anthropology and studied by other non-legal disciplines.

Conclusion

Defining and delimitating protected groups remains one of the most challenging interpretative endeavors related to the elements of the crime of genocide. Not only have these challenges been often omitted in the debates on the genocide indicators in Ukraine and in legal commentaries more broadly, but the legacy of disciplines outside the legal field,

⁶⁴ “Article by Vladimir Putin “On the Historical Unity of Russians and Ukrainians,” *President of Russia*, July 12, 2021, <http://en.kremlin.ru/events/president/news/66181>; “Address by the President of the Russian Federation,” *President of Russia*, February 21, 2022, <http://en.kremlin.ru/events/president/news/67828>.

⁶⁵ “Meeting with permanent members of the Security Council,” *President of Russia*, March 3, 2022, <http://kremlin.ru/events/president/news/67903>.

⁶⁶ “Vladimir Putin answered questions from journalists,” *President of Russia*, October 14, 2022, <http://kremlin.ru/events/president/news/69604>.

⁶⁷ *Ibid.*

⁶⁸ UN Security Council, *The Record of the 9069th Meeting* (21 June 2022), UN Doc. No. S/PV.9069, p. 21, <https://undocs.org/en/S/PV.9069>.

⁶⁹ UN Security Council, 9069th meeting notes (21 June 2022), UN Doc. No. S/PV.9069, p. 21, <https://undocs.org/en/S/PV.9069>.

⁷⁰ Anastasia Platonova and Svyatoslav Khomenko, “A Ukrainian woman found a photo of herself with children wearing embroidered shirts on a billboard in support of the annexation of Kherson,” *BBC*, August 26, 2022, <https://www.bbc.com/russian/features-62687256>; “Traitor Povaliy sang a Ukrainian folk song to the day of “Military Glory of the Russian Federation,”” *RBK Ukraine*, September 20, 2023, <https://www.rbc.ua/rus/stylert/zradnitsya-povaliy-zaspivala-ukrayinsku-narodnu-1695222469.html>.

⁷¹ “Putin pointed to the inevitable spiritual reunification of Russia and Ukraine,” *Izvestia*, March 6, 2024, <https://iz.ru/1661359/2024-03-06/putin-nazval-neizbezhnym-dukhovnoevossoedinenie-rossii-i-ukrainy>.

⁷² Iryna Balachuk, “Medvedev states Russia will never leave Ukraine be,” *Ukrainska Pravda*, January 17, 2024, <https://www.pravda.com.ua/eng/news/2024/01/17/7437637/>.

including anthropology, has been consistently dismissed in the interpretative process.

Taking Ukrainian identities as a case study, this article highlighted nuances in distinguishing between two protected groups – national and ethnic. While contemporary international law commentaries and jurisprudence approach the definitions of both groups rather fragmentedly and inconsistently, their careful analysis warrants several major conclusions. First, while group identities may overlap and not require clear distinction in every case, autonomous interpretation of their essence remains relevant and necessary for interpreting the Genocide Convention effectively, avoiding gaps and preventing arbitrarily broad judicial discretion. Second, both national and ethnic groups can be defined by shared cultural bonds of traditions, languages, heritage, etc. At the same time, despite their similarities, each group possesses a clearly distinct core. For national groups, state citizenship must not be a factor defining its essence, and broader socio-cultural considerations must be taken into account.

Multidisciplinary approach involving an anthropological analysis can remedy the gaps in legal interpretations. Both national and ethnic groups, apart from being legal concepts under the Genocide Convention, also constitute living human communities evolving and functioning in historical, social and political settings and continuity. Therefore, contemporary anthropology views ethnic groups as culturally centered, while national groups are defined by a comparatively higher level of self-determination. Modern nations combine both cultural (origin,

traditions, way of living) and consensual or civic (shared vision and national projects, mutual recognition and self-identification) elements to varying degrees. National groups can emerge based on a shared ethnic core but can also view ethnic origin as irrelevant for defining the membership in a nation. In the context of Ukraine, Ukrainian ethnic and national identities, despite being inevitably connected, form distinguishable concepts. Modern Ukrainian national identity exploits the elements of ethnic attributes (such as language and culture) to shape a “national project”, yet also unites people of different ethnic or linguistic backgrounds.

This dichotomy of identities can be illustrated by the Soviet and Russian identity narratives. Neither the USSR, nor modern Russia seem to have aimed at the (complete) eradication of the Ukrainian ethnic attributes. Instead, both Soviet and Russian regimes have viewed the genuine Ukrainian national identity that has emerged and materialised throughout the last two centuries as a threat to the (neo-)colonial projects. This threat could be eliminated through forceful and usually violent displacement of genuine national aspirations by pseudo-national identities that have been neither culturally founded nor arose consensually. In this way, it was declared that Ukrainians might survive as an ethnic sub-component of the “Greater” Soviet or Russian people, yet do not possess a right to their own national self-determination. This interpretation of identity narratives explains how – despite common traits that national and ethnic groups may possess – the two form distinct entities as legal and anthropological concepts.

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ВИЗНАЧЕННЯ НАЦІОНАЛЬНИХ ТА ЕТНІЧНИХ ГРУП У КОНВЕНЦІЇ ПРО ЗАПОБІГАННЯ ЗЛОЧИНУ ГЕНОЦИДУ ТА ПОКАРАННЯ ЗА НЬОГО КРІЗЬ ПРИЗМУ РАДЯНСЬКИХ І РОСІЙСЬКИХ НАРАТИВІВ ПРО УКРАЇНСЬКУ ІДЕНТИЧНІСТЬ

Дискусії про геноцидний характер російських діянь в Україні допомогли виявити багато сірих зон і прогалин у правових елементах злочину геноциду. Однак сучасний правовий аналіз сконцентрований здебільшого на сутності та особливостях ключового елемента злочину, тобто на умислі (намірі) знищити групу повністю або частково. Питання ж визначення та осмислення ймовірного об'єкта знищення, тобто самих захищених груп, залишається значною мірою не дослідженим. Навіть поза українським контекстом ця проблема є типовою для сучасної доктрини та судової практики в міжнародному кримінальному праві, які надають доволі поверховий чи навіть суперечливий аналіз концепцій захищених груп без ретельного вивчення здобутків інших наук, що зосереджуються на людських ідентичностях, як-от антропология. Метою цієї статті є усунути такі прогалини, дослідивши дихотомію між національними та етнічними групами в Конвенції про запобігання злочину геноциду та покарання за нього крізь призму радянських і російських наративів стосовно української ідентичності.

У статті узагальнено стан сучасної міжнародно-правової доктрини та судової практики щодо визначення захищених груп, а також пов'язані з ними прогалини та неузгодженості. Крім того, у ситуаціях, де право нездатне дати характеристику захищеним групам, розглянуто складні питання визначення та розмежування груп крізь призму сучасної антропологии. У статті наголошено на важливості мультидисциплінарного та контекстуалізованого застосування правових концепцій щодо злочину геноциду, беручи до уваги значення, які їм надають інші галузі науки, зосереджені на груповій ідентичності та міжгруповій динаміці. Аналіз показує відмінність сутності націй та етнічних груп. Нації визначено як складні спільноти, що характеризуються не лише культурними зв'язками (як етнічні групи), а й суб'єктивним глибшим самоусвідомленням членів нації як частини єдиної спільноти і національного проекту. Врешті, автор застосовує наукові результати до контексту радянських і російських наративів про українську ідентичність, які демонструють дихотомію між національними та етнічними групами. За результатами дослідження автор пояснює, чому розуміння логіки та політики винищення, якими керувався радянський режим і які використовує Російська Федерація сьогодні, можливе лише крізь призму національної і псевдонаціональної ідентичності, у якій етнічна належність могла відігравати лише другорядну роль.

Ключові слова: міжнародне кримінальне право, геноцид, захищені групи, національні групи, етнічні групи.

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