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TARGETING OF THE PROTECTED GROUP'S LEADERSHIP AND OTHERWISE REPRESENTATIVE MEMBERS AS AN INDICATOR OF GENOCIDAL INTENT

Abstract

Genocide, i.e., acts committed with the intent to destroy a national, ethnic, religious or racial group, does not require the complete annihilation of every individual member of the group. Instead, genocidal intent can manifest in two forms: to destroy the group in whole or in part. The notion of "partial destruction" remains one of the most complex concepts in the law of genocide. Among other scenarios, it can occur through the destruction of the group's representative members, selected because of the impact their disappearance would have on the group's survival. Leaders of the group can qualify as representative individuals; therefore, their complete or partial destruction can be a strong indicator of genocidal intent (the so-called 'leadership factor').

This article examines the origins and essence of the leadership factor in the law of genocide. Based on the analysis of all international case law relevant to defining the leadership factor, it concludes that the definition of leadership may include various individuals (e.g., political, administrative, religious, cultural, or intellectual figures) who, due to their position or special characteristics, can significantly influence the group's actions or opinions. The significance of leadership for the group's functioning and existence, as well as the composition of leadership, will vary depending on the specific protected group targeted for destruction.

*The article also highlights criticism of the leadership factor by certain commentators for its vague nature, which opens the door to speculative assessment. Finally, the article analyses the loopholes in applying the leadership factor in international jurisprudence and reaches three key conclusions. First, it is important to assess the impact of the leaders' disappearance on the existence of the group as a social unit, not just the physical survival of its members. Second, although leaders as a standalone category may, in some instances, potentially qualify a substantial part of the group, their destruction more often should be seen as an indicator of an intent to destroy a territorially limited substantial part of the group (e.g., a community), whose substantiality must be assessed in relation to the group as a whole. Third, the finding of genocide does not necessarily require an *ex post facto* assessment of the impact that the destruction of leaders had on the survival of the group; depending on the context, assessing the potential impact may suffice to evaluate the intent.*

Keywords: international criminal law, genocide, genocidal intent, intent to destroy a group in part, leadership.

Introduction. The finding of the crime of genocide, i.e., acts committed with intent to destroy one of the four protected groups (i.e., national, ethnic, racial, or religious group) as such, does not require perpetrators to aim at completely annihilating the group "from every corner of the globe".¹ Instead, the well-established international definition of the crime establishes that genocidal intent can manifest in two forms: to destroy the group in whole *or*

in part.² While the intent to eliminate the group in whole may sometimes be easier to comprehend

¹ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, Yearbook of the International Law Commission, 1996, vol. II, Part Two, 45, para. 8 (hereinafter — 'ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries').

² 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 II (hereinafter — "Genocide Convention"). See also Rome Statute of the International Criminal Court, UNTS 3, vol. 2187 (17 July 1998), Article 6; UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia adopted by Security Council Resolution 827 (1993) (25 May 1993), Article 4; UN Security Council, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by Security Council resolution 955 (1994) (8 November 1994), Article 2.

(e.g., in the context of ethnic or religious communities, small in number, that are subjected to complete annihilation by perpetrators), the notion of partial destruction remains one of the most complicated and multilayered juridical concepts in the law of genocide.

Contemporary jurisprudence and commentators seem to agree on two major issues related to partial destruction. First, to establish the intent to destroy a part of the group, it must be demonstrated that the targeted part was *substantial*, which is dictated by the very nature of the crime of genocide directed at the existence of human groups as such (hereinafter — ‘substantiality requirement’).³ Second, substantiality can be assessed based on two approaches: quantitative/numeric (i.e., based on the number of persons targeted in absolute terms or relative to the entirety) or qualitative (i.e., given the special significance and prominence of the targeted part, e.g., it being emblematic of the group or essential to its survival).⁴

In other words, genocidal intent may be manifested in either elimination of a large number of group members (*en masse* destruction) or the selective destruction of a limited section of the group members targeted due to “the impact that

their disappearance would have on the survival of the group as such”.⁵ Among the latter, legal authorities sometimes refer to a protected group’s leadership as an example of persons whose destruction may be a strong indicator of genocidal intent due to their significant impact on the group (hereinafter — ‘leadership factor’).⁶

Yet, the origins, significance, implications, and loopholes of the application of the leadership factor as a potential indicator of genocidal intent have so far largely gone unexplored in international case law and doctrine. Likewise, thorough attempts to analyze the place of the leadership factor in the overall methodology of assessing genocidal intent, and associated criticisms of the previously adopted jurisprudential approaches, have been rather infrequent among commentators, only a few of whom — such as L. Berster,⁷ O. Uraz,⁸ and W. Schabas⁹ — have provided more expansive views on relevant issues.

This article describes the roots and evolution of the leadership factor throughout the history of the Genocide Convention. It analyzes international jurisprudence related to defining the leadership factor and further summarizes the key characteristics of its essence and its place among the indicators relevant for assessing genocidal intent. Lastly, the article outlines the main inconsistencies and loopholes in the application of the leadership factor and endeavors to provide the soundest possible interpretation of the factor to remedy them.

³ ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 45, para. 8.

⁴ *Prosecutor v. Goran Jelišić* (Trial Judgement), IT-95-10-T, 14 December 1999, para. 82, <https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/33140> (hereinafter — ‘*Jelišić* Trial Judgement’); *Prosecutor v. Radislav Krstić* (Appeal Judgement), IT-98-33-T, 19 April 2004, para. 12, <https://www.refworld.org/jurisprudence/caselaw/icty/2004/en/33340> (hereinafter — ‘*Krstić* Appeals Judgement’), upheld in *Prosecutor v. Vujadin Popović* (Trial Judgement), IT-05-88-T, 10 June 2010, para. 832, <https://www.refworld.org/jurisprudence/caselaw/icty/2010/en/33661>; *Prosecutor v. Zdravko Tolimir* (Trial Judgement), IT-05-88/2-T, 12 December 2012, para. 749, <https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf> (hereinafter — ‘*Tolimir* Trial Judgement’); *Prosecutor v. Radovan Karadžić* (Trial Judgement), IT-95-5/18-T, 24 March 2016, para. 555, https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf; *Prosecutor v. Ratko Mladić* (Trial Judgement), IT-09-92-T, 22 November 2017, para. 3437, <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-09-92/JUD275R0000516226.pdf>; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, I.C.J. Reports 2007, p. 43, para. 200, <https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgement, I.C.J. Reports 2015, p. 3, para. 142, <https://www.icj-cij.org/sites/default/files/case-related/118/118-20150203-JUD-01-00-EN.pdf>; *Prosecutor v. Duško Jević et al.* (Verdict), X-KR-09/823-1, 22 August 2012, paras. 938–39, <https://www.legal-tools.org/doc/288d85/pdf/>; Christian J. Tams, Lars Berster, and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck — Hart — Nomos, 2014), 148–52 (hereinafter — “Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary*”); Guenaël Mettraux, *International Crimes: Law and Practice: Volume I: Genocide* (2019; online edn, Oxford Academic), 182–83, 188–90; Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (2009; online edn, Oxford Academic), 109–10.

⁵ *Jelišić* Trial Judgement, para. 82.

⁶ See, e.g., Economic and Social Council (“ECOSOC”), UN Special Rapporteur on Prevention and Punishment of the Crime of Genocide, B. Whitaker, Revised and updated report on the question of the prevention and punishment of the crime of genocide, UN Doc. E/CN.4/Sub.2/1985/6 (1985), p. 16, para. 29, <https://digitallibrary.un.org/record/108352?ln=en>; UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 (25 May 1994), para. 94, https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf (hereinafter — “1994 Commission of Experts’ Report”), cited in *Jelišić* Trial Judgement, para. 82; *Prosecutor v. Sikirica, Damir Dosen, Dragan Kolundžija* (Judgement on Defence Motions to Acquit), IT-95-8-T, 3 September 2001, paras. 76–7, <https://www.refworld.org/jurisprudence/caselaw/icty/2001/en/19633> (hereinafter — “*Sikirica et al.* Judgement on Defence Motions to Acquit”); *Prosecutor v. Vidoje Blagojević and Dragan Jokić* (Trial Judgement), IT-02-60-T, 17 January 2005, para. 663, <https://www.refworld.org/jurisprudence/caselaw/icty/2005/en/91971>; *Tolimir* Trial Judgement, para. 749, footnote 3138, and para. 777; *Prosecutor v. Zdravko Tolimir* (Appeals Chamber), IT-05-88/2-A, 8 April 2015, paras. 262–63, <https://www.legal-tools.org/doc/010ecb/pdf> (hereinafter — “*Tolimir* Appeals Chamber”).

⁷ Tams, Berster, and Schiffbauer, *Genocide Convention: A Commentary*, 150–52.

⁸ Onur Uraz, *Classifying Genocide in International Law. The Substantiality Requirement* (Routledge, 2023), 46–9, 96–7, 158–61 (hereinafter — “Uraz, *Classifying Genocide in International Law. The Substantiality Requirement*”).

⁹ William Schabas, *Genocide in International Law. The Crime of Crimes* (2nd ed., Cambridge University Press, 2009) (hereinafter — “Schabas, *Genocide in International Law*”), 281–85.

The Origins of the Leadership Factor.

Explicit references to the leadership factor as one of many potential indicators of genocidal intent can be found nowhere in the *travaux préparatoires* to the Genocide Convention. As such, the essence of the notion of the intent to destroy the group 'in part' did not receive much extensive discussion by experts or state delegates in the process of the Convention's drafting, despite its repeated inclusion both in the preliminary drafts¹⁰ and in the final text of the Convention.¹¹ Where state delegates attempted to clarify the meaning of the notion of 'partial destruction', infrequent references were made only to quantitative — not qualitative — factors determining the intent to destroy the group in part.¹²

However, three documents in the *travaux préparatoires* showcase indicia as to how delegates and experts nevertheless saw certain categories of persons as vital to the group's functioning and existence. One of the earliest drafts of the Convention, prepared by three experts on behalf of the United Nations (hereinafter — 'UN') Secretariat, contained a reference to "cultural genocide" as one of the three potential forms of destruction alongside physical and biological elimination.¹³ As one of the underlying acts of "cultural genocide", the draft included "forced and systematic exile of individuals representing the culture of a group",¹⁴ such as "chiefly scholars, writers, artists, teachers and educators, ministers of religion, doctors of medicine,

engineers, lawyers, administrators, etc."¹⁵ The commentary described these individuals as sustaining "the cultural and moral life of a group", so upon their removal, "the group is no more than an amorphous and defenseless mass".¹⁶ Although the concept of "cultural genocide" (and thus the underlying act of forced and systematic exile) was subsequently excluded from the final text of the Convention,¹⁷ the commentary can be seen as a very early indicator of the significance of certain categories of individuals (particularly various group leaders) within the group as such.

Later, during the debates on whether political groups should be granted the Convention's protection, the Polish delegation objected, arguing that unlike racial, national, or religious groups, political groups lacked stability and could "disappear simply because [their] head was eliminated or as a result of reprisals against [their] leaders".¹⁸ Although highlighting the essential role of leadership for the continuity and survival of some human groups, the statement rather undermines this role in the cases of the other groups, implying a higher potential for survival even when leadership is destroyed.

Finally, during one of the infrequent and brief recorded debates on the meaning of partial destruction in the UN General Assembly's Sixth Committee, the delegation of New Zealand stated that the commission of genocide did not require the intention to destroy the whole group.¹⁹ Instead, New Zealand's delegate recalled examples where groups were destroyed when older members were physically eliminated, while younger members survived and were ideologically converted.²⁰ The statement again serves as one of the early indicators of the emblematic nature of certain strata of society — not necessarily depending on their specialization or position — for the group's survival.

The final text of the Convention was thus adopted with little guidance available in the *travaux préparatoires* as to what factors were considered relevant to evaluate and establish the intent to destroy a group in part, particularly what would

¹⁰ See *Draft resolution relating to the crime of genocide proposed by the delegation of Cuba, India and Panama*, UN Doc. A/BUR/50, 2 November 1946; UNGA Sixth Committee, *Draft protocol for the prevention and punishment of the crime of genocide, proposed by the delegation of Saudi Arabia*, UN Doc. A/C.6/86 (26 November 1946), (referring to destruction "carried out either gradually against individuals or collectively against the whole group"); ECOSOC, *Draft Convention on the Crime of Genocide*, UN Doc. E/447 (26 June 1947), p. 5 (Article I(II)) and p. 22, <https://digitallibrary.un.org/record/611058?v=pdf>. See also UNGA, *Resolution 96(1) 'The Crime of Genocide'*, UN Doc. No. A/RES/96(I) (11 December 1946), <https://digitallibrary.un.org/record/209873?v=pdf>.

¹¹ Genocide Convention, Article II.

¹² See, e.g., ECOSOC, Ad Hoc Committee on Genocide, *Summary Record of the Thirteenth Meeting, Lake Success, New York, Tuesday, 20 April 1948, at 2 p.m.*, UN Doc. E/AC.25/SR.13 (29 April 1948), p. 6, <https://digitallibrary.un.org/record/601786?ln=ru&v=pdf>, where Polish delegation inquired whether destruction of the half of the protected group would suffice to qualify as a crime. See also Ad Hoc Committee on Genocide, *Commentary on Articles adopted by the Committee*, E/AC.25/W.1 (26 April 1948), p. 2, <https://digitallibrary.un.org/record/601993?v=pdf>, where in its commentary to the draft convention of the Ad Hoc Committee on Genocide tasked with the preparation of the draft stating that genocidal intent can be manifested in seeking to reduce the group "by a third or a quarter of the number of its members" may be a potential manifestation of the intent to destroy the group.

¹³ ECOSOC, *Draft Convention on the Crime of Genocide*, UN Doc. E/447 (26 June 1947), Article I(II)(3)(b), <https://digitallibrary.un.org/record/611058?v=pdf>.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 76.

¹⁶ *Ibid.*

¹⁷ UNGA, Sixth Committee, *Eighty-third meeting, Palais de Chaillot, Paris, Monday, 25 October 1948, at 3 p.m.*, UN Doc. A/C.6/SR.83 (25 October 1948), p. 206, <https://digitallibrary.un.org/record/604635?v=pdf>.

¹⁸ ECOSOC, Ad Hoc Committee on Genocide, *Summary Record of the Thirteenth Meeting, Lake Success, New York, 15 April 1948, at 2 p.m.*, UN Doc. E/AC.25/SR.4 (15 April 1948), p. 10, <https://digitallibrary.un.org/record/601703?v=pdf>.

¹⁹ UNGA, 6th Committee, *Seventy-third meeting, Palais de Chaillot, Paris, Wednesday, 13 October 1948, at 3.15 p.m.*, UN Doc. A/C.6/SR.73 (13 October 1948), p. 94, <https://digitallibrary.un.org/record/604081?v=pdf>.

²⁰ *Ibid.*

later become known as qualitative assessment of the substantiality requirement. Early commentaries to the Genocide Convention also predominantly focused on the quantitative evaluation of the substantiality requirement. For example, in the 1960 commentary, Nehemiah Robinson concluded that a part of the group targeted for destruction must involve a “substantial” number of group members “either within a country, within a region, or within a single community”, since the Convention was intended to apply to acts against large numbers of individuals, with the numerical threshold to be determined on a case-by-case basis.²¹

However, two decades later, in 1985, Benjamin Whitaker, a special rapporteur of the Human Rights Commission on the crime of genocide, proposed an expanded interpretation of the substantiality requirement. Whitaker introduced the dichotomy between quantitative and qualitative assessment of substantiality, stating that intent to destroy ‘in part’ requires either a “reasonably significant number” of group members targeted relative to the entirety of the group or “*a significant section of a group such as its leadership*” [emphasis added].²²

While Whitaker’s source of inspiration remains unknown, one can only assume — speculatively — that he drew it from the statements made by Adrian Fisher, Legal Adviser with the United States (‘US’) Department of State, during the 1950 US Senate Hearings on the matters pertaining to the Genocide Convention.²³ Addressing the issue of partial destruction, Fisher provided a hypothetical example in which perpetrators’ plan encompassed the killing of “all of the Catholic priests in a particular country”, with the goal of destroying the Catholic religious group.²⁴ While the plan did not entail the elimination of every Catholic, the disappearance of priests as group leaders would lead to the group’s dissolution and disappearance.²⁵ Some authors indeed claim that Fisher’s remarks are the first reference to the qualitative assessment of the substantiality requirement in the history of

the Genocide Convention²⁶ (albeit missing out on the New Zealand delegation’s remarks at the preparatory stage).

Regardless of whether Whitaker drew inspiration from Fisher or other sources, his introduction of the leadership factor (or reintroduction, if Fisher is taken as a primary source) took hold in later authorities. In 1994, the Commission of Experts established pursuant to Security Council Resolution 780 (1992) to analyze and examine allegations of international law violations committed in the territory of the Former Yugoslavia elaborated on the leadership factor even more extensively (hereinafter — “1994 Commission of Experts’ Report”). The Commission stated that genocide can be manifested in targeting of “essentially the total leadership of a group”, i.e., political, administrative, religious, academic, intellectual, and business leaders.²⁷ In such a case, the targeted “totality *per se* may be a strong indication of genocide regardless of the actual numbers killed”.²⁸

According to the Commission, the fate of the remainder of the group, alongside the targeting of the leadership, can serve as a corroborating argument for genocidal intent.²⁹ For example, if the destruction of leadership is accompanied by a relatively large number of killings or other heinous acts (e.g., deportations), the acts taken as a whole can be indicative of genocidal intent.³⁰ Likewise, the Commission stated that law enforcement and military personnel might qualify as “a significant section of a group” since their removal “renders the group at large defenseless against other abuses of a similar or other nature, particularly if the leadership is being eliminated”.³¹ The Commission concluded that genocidal intent could take a form of “the intent to destroy the fabric of a society through the extermination of its leadership” when accompanied by other eliminationist acts against a segment of society.³²

The Commission did not cite Whitaker, leaving it unclear (like with Whitaker and Fisher) whether it arrived at the leadership factor independently or through inspiration from other authorities. However, the Commission’s interpretation became the first extensive elaboration of the leadership factor that was later taken into consideration by several chambers in the judgments of the International Criminal Tribunal for the Former Yugoslavia (hereinafter — ‘ICTY’).

²¹ Nehemiah Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, World Jewish Congress, 1960), 63.

²² UN ECOSOC, UN Special Rapporteur on Prevention and Punishment of the Crime of Genocide, B. Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, UN Doc. E/CN.4/Sub.2/1985/6 (1985), p. 16, para. 29, <https://digitallibrary.un.org/record/108352?ln=en>.

²³ United States Senate, *Hearings before a subcommittee of the Committee on Foreign Relations, United States Senate, Eighty-first Congress, second session, on Executive O, the International Convention on the Prevention and Punishment of the Crime of Genocide* (US Government Printing Office, 1950).

²⁴ *Ibid.*, 262–63.

²⁵ *Ibid.*

²⁶ Uraz, *Classifying Genocide in International Law. The Substantiality Requirement*, 46.

²⁷ 1994 Commission of Experts’ Report, para. 94.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

The Leadership Factor in Contemporary Jurisprudence. In *Jelisić*, the first ICTY's judgment dealing with the crime of genocide, the Trial Chamber cited legal findings of the 1994 Commission of Experts' Report on the leadership factor.³³ The Trial Chamber concluded that genocidal intent can be manifested in two forms, namely the intent to target either "a large majority of the group" (i.e., "a very large number" of its members), or "the most representative members of the targeted community" selected for the impact such targeting "would have upon the survival of the group as such".³⁴

In *Sikirica*, the Trial Chamber cited *Jelisić* to confirm that genocidal intent can take the form of selected targeting of "persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimisation [...] would impact upon the survival of the group, as such".³⁵ In defining who may belong to the leadership, the *Sikirica* Trial Chamber referred to persons:

"who, whether by reason of their official duties or by reason of their personality, had this special quality of directing the actions or opinions of the group in question, that is those who had a significant influence on its actions".³⁶

The Trial Chamber established that alleged victims of crimes were "taxi-drivers, schoolteachers, lawyers, pilots, butchers and café owners", but no specific evidence identified them as community leaders, i.e., persons with special significance to the community.³⁷ The very fact that certain victims were active defenders of their communities or members of the resistance movement was, in itself, insufficient to establish their status as leaders whose removal would significantly impact the group's survival.³⁸ According to the Trial Chamber, to consider otherwise would render the concept of leadership "so elastic as to be meaningless".³⁹

Further, in *Krstić (Trial)*, the Trial Chamber also referenced both Whitaker's and the 1994 Commission of Experts' reports concerning the leadership factor when summarizing the existing state of law related to the substantiality requirement in the context of the meaning of partial destruction.⁴⁰ The prosecution in

Krstić (Trial) applied an argument reminiscent of the leadership factor by stressing the significance of certain strata of the Srebrenica community (i.e., Bosnian Muslim men) within the targeted group. The prosecution argued that, in the context of the killing of more than 7,000 Bosnian Muslim men in Srebrenica, combined with the deportation of women and children, the perpetrators must have known that the elimination of all military-aged men "would profoundly disrupt the bedrock social and cultural foundations of the group" in a patriarchal society where "men had more education, training and provided material support to their family".⁴¹ The prosecution concluded that by killing men as the group's leaders and defenders, combined with the deportation of the remaining population, Bosnian Serb forces ensured that the Bosnian Muslim community of Srebrenica would not reconstitute itself either in Srebrenica or anywhere else.⁴²

Although the Trial Chamber did not base its evaluation on the leadership factor, it nevertheless established genocidal intent in the acts of Bosnian Serb forces and stressed that selective destruction of men would have a lasting and catastrophic impact on the group, hindering or precluding its survival as a traditionally patriarchal society.⁴³ *Krstić (Trial)* thus demonstrated that leaders are not the only persons who can be representative of the group, and — depending on the context — various other social strata can qualify as significant in terms of the impact their disappearance would have on the group's survival.

In *Krstić (Appeal)*, the Appeals Chamber also referenced Whitaker's report in its discussion of the substantiality requirement.⁴⁴ However, the Appeals Chamber did not evaluate the leadership factor, instead focusing on other considerations of substantiality in its qualitative dimension.⁴⁵ In the words of the Appeals Chamber, a qualitative assessment of substantiality would entail evaluating the prominence of the targeted part of the overall group, which can be manifested through it being emblematic of the overall group or essential to its survival.⁴⁶

However, unlike the Trial Chamber, the Appeals Chamber did not focus on the prominence of the *Bosnian Muslim men within the Srebrenica community* as a substantial part of the group. Instead, it focused on the prominent nature of the *Srebrenica community* itself as a part of the group. The reason

³³ *Jelisić* Trial Judgement, para. 82.

³⁴ *Ibid.*

³⁵ *Sikirica et al.* Judgement on Defence Motions to Acquit, paras. 76–7.

³⁶ *Ibid.*, para. 78.

³⁷ *Ibid.*, para. 80.

³⁸ *Ibid.*, para. 81.

³⁹ *Ibid.*

⁴⁰ *Prosecutor v. Radislav Krstić* (Trial Judgement), IT-98-33-T, 2 August 2001, para. 587, <https://www.refworld.org/jurisprudence/caselaw/icty/2001/en/40159> (hereinafter — "*Krstić* Trial Judgement").

⁴¹ *Ibid.*, para. 592.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Krstić* Appeal Judgement, para. 11, footnote 21.

⁴⁵ *Ibid.*, para. 12.

⁴⁶ *Ibid.*

seemed to lie in the defense's claim that the Trial Chamber erred in evaluating the substantiality of Bosnian Muslim men as a part of the group relative to Bosnian Muslims in Srebrenica (i.e., evaluating substantiality of the sub-part towards the part of the whole group), not Bosnian Muslim men in relation to the group as a whole (i.e., evaluating substantiality of the sub-part relative to the whole).⁴⁷

The Appeals Chamber stated that the defense misread the Trial Judgment.⁴⁸ According to the Appeals Chamber, the Trial Judgment treated Bosnian Muslims in Srebrenica as the only part of the group targeted for destruction, whereas the killed men were not considered as a separate (sub-)part: instead, their killing merely constituted evidence for the inference of the intent to destroy Bosnian Muslims of Srebrenica as the part of the group.⁴⁹

The Appeals Chamber further explained why Bosnian Muslims in Srebrenica constituted a prominent part of the group. According to the Appeals Chamber, despite the small percentage of Srebrenica's population in relation to the overall Bosnian Muslim group in Bosnia and Herzegovina, Srebrenica's prominence was highlighted by its "immense strategic importance" to both sides of the armed conflict in their plans to build viable political entities, including for the "continued survival of the Bosnian Muslim people".⁵⁰ Additionally, Srebrenica was prominent both in the eyes of Bosnian Muslims and the international community for its role as a safe area created by the UN Security Council's resolution, which is why its elimination "would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces".⁵¹

Although these considerations were linked to the emblematic nature of Srebrenica *as a community* rather than a particular stratum of a human group (such as leadership), they can nevertheless be relevant to understanding and defining the leadership factor if leadership qualifies as a substantial (prominent) part of the group itself. Yet, as will be explained in the next section, such an interpretive framework presents its own challenges.

Further, *Tolimir* represented arguably one of the most illustrative incidents of the application of the leadership factor in the ICTY's jurisprudence. In *Tolimir (Trial)*, the Trial Chamber also cited the 1994 Commission of Experts' report discussing the

leadership factor⁵² in the context of the killing of three persons alleged to be leaders in the Žepa municipality. The persons in question were the Žepa municipality's mayor and president of the war presidency, the commander of the Bosnian army's brigade in the Žepa municipality, and the head of the local civil protection unit.⁵³ The Trial Chamber considered the mentioned persons to be "among the most prominent leaders of the enclave", evidently — due to their position.⁵⁴ By majority, the Trial Chamber found that the victims were targeted specifically because of their leading role in the locality populated by Bosnian Muslims, especially if viewed in the context of other Bosnian Serb attacks in the area (particularly in Srebrenica in the preceding days)⁵⁵ and removal of Žepa civilian population, combined with the destruction of their homes and mosque, precluding Bosnian Muslim community in Žepa from reconstituting itself.⁵⁶

The Trial Chamber ruled that while eliminated individuals might have been small in number, given the size of the Žepa municipality, they constituted the core of the community's civilian and military leadership, which was "key to the survival of a small community".⁵⁷ In particular, the Trial Chamber stated that the local commander at this time of killings possessed "a special status as the defender of the Bosnian Muslim population" of the municipality, which is why his killing "had a symbolic purpose for the survival of the Bosnian Muslims" in the area.⁵⁸ The Trial Chamber additionally stated that its findings were not refuted by the fact that not the entirety of the Bosnian Muslim leadership in the municipality was killed, which could be explained by public appearances of some leaders during negotiations with the Bosnian Serb leadership, the limited resources of perpetrators, ensuing fighting, and increasing media attention to Bosnian Serb forces' operations after Srebrenica.⁵⁹

The Appeals Chamber in *Tolimir* too referenced the previous authorities discussing the leadership factor, including the 1994 Commission of Experts' Report, and established no legal error in the previous finding of the Trial Chamber "that the selective targeting of leading figures of a community may amount to genocide and may be indicative of genocidal intent".⁶⁰ Moreover, the Appeals Chamber

⁴⁷ *Krstić Appeal Judgement*, para. 18.

⁴⁸ *Ibid.*, para. 19.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, para. 15.

⁵¹ *Ibid.*, para. 16.

⁵² *Tolimir Trial Judgement*, para. 749, footnote 3138, and para. 777.

⁵³ *Ibid.*, para. 778.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 779.

⁵⁶ *Ibid.*, para. 781.

⁵⁷ *Ibid.*, para. 780.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Tolimir Appeals Chamber*, paras. 262–63.

ruled that while targeting the totality of the leadership may be a strong indicator of genocidal intent, “the commission of genocide may be established even if not all leaders of a group are killed”.⁶¹

The Appeals Chamber further ruled that the commission of genocide through targeting the leadership must not suggest that the group's leaders “are subject to special, stronger protection than the other members”.⁶² To the contrary, recognizing that genocidal intent can take the form of targeting selected prominent members of the community aims at protecting the entire group, not its individual members (i.e., leaders).⁶³

However, while the Appeals Chamber did not dispute — and moreover, supported — the *legal* significance of the leadership factor in evaluating genocidal intent,⁶⁴ it rejected the Trial Chamber's *factual* finding that the killings of three leaders in Žepa amounted to genocide. The Appeals Chamber pointed to the absence of evidence regarding the impact that the disappearance of three leaders had “on the survival of the Bosnian Muslim population from Žepa”.⁶⁵ Specifically, the Appeals Chamber pointed to the absence of indicators that perpetrators intended to use the instances of three killings to intimidate Bosnian Muslims, or expedite their removal, prevent return, or otherwise impact the group's survival, e.g., their ability to reconstitute themselves as a group.⁶⁶ The loss of the leaders in itself could not imply a threat to the rest of the group or a likely contribution to the group's physical destruction.⁶⁷ The Appeals Chamber thus concluded that the three killings were not indicative of genocidal intent.

No subsequent judgments elaborated on the leadership factor any further. It can thus be summarised that contemporary jurisprudence has seen no successful application of the leadership factor resulting in a genocide conviction: *Tolimir (Trial)* was eventually quashed by the Appeals Chamber. However, the application of the leadership factor in the jurisprudence warrants several observations as to its essence, potential loopholes, and critical issues.

The Leadership Factor in the Broader Framework of the Assessment of Genocidal Intent: Jurisprudential Implications, Loopholes and Solutions. The jurisprudence defines the core of the leadership factor rather clearly: to establish

genocidal intent to destroy a group in part, the targeted part must be substantial. This can take the form of *en masse* targeting of a significant number of individuals or the selective targeted of persons whose disappearance would have an impact on the group as a whole (among them, leaders).

The category of “leaders” can be defined rather broadly. It is not merely linked to important political or administrative figures but can include representatives of various societal strata if, through their official duties or personal traits, they have “a special quality of directing the actions or opinions of the group” and “a significant influence on its actions”⁶⁸ (e.g., cultural leaders and intelligentsia). For example, in *Sikirica*, the mere fact that victims were “taxi drivers, schoolteachers, lawyers, pilots, butchers and café owners” by profession did not in itself refute their potential qualification as leaders: the evidence presented simply did not establish the special significance of these individuals within the targeted community.⁶⁹

Thus, hypothetically, nothing precludes representatives of *any* social stratum from qualifying as leaders depending on the group's internal dynamics: it is not only the official position that qualifies a person as a leader but also various other special characteristics that allow them to significantly influence the group. The aforementioned statement of New Zealand's delegation in the *travaux préparatoires* serves as an illustrative example: older members of an ethnic or religious community — despite having no formal or official position or status — may nevertheless qualify as leaders in their role as repositories of culture, tradition, folklore, etc.

Both conclusions can thus be true. Depending on the group's internal dynamics, persons occupying essential political or administrative positions within the group may qualify as leaders, but this is not always necessarily the case. Conversely, individuals whose role within the group is important for reasons other than their formal or official status may also qualify as leaders.

Nevertheless, while there is no fixed limitation on who can qualify as a leader, the definition of leadership must inherently be reserved for a relatively limited number of individuals to prevent it from becoming overly broad to the point of meaninglessness. The ICTY's refusal to consider every active combatant of the enemy forces a part of the leadership supports this conclusion.⁷⁰ For instance, in the context of an ongoing armed conflict,

⁶¹ *Tolimir* Appeals Chamber, para. 264.

⁶² *Ibid.*, para. 263.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, paras. 266–67.

⁶⁷ *Ibid.*, para. 267.

⁶⁸ *Sikirica et al.* Judgement on Defence Motions to Acquit, paras. 76–7.

⁶⁹ *Ibid.*, para. 80.

⁷⁰ *Ibid.*, paras. 80–1.

it is insufficient for a victim of underlying acts to merely be part of the resistance movement or to express a hostile attitude toward an occupying power in order to qualify as a “leader”.

This finding, however, should be reconciled with the observation presented in the 1994 Commission of Experts’ Report regarding the leadership factor, which states that law enforcement and military personnel may be viewed as a significant “faction” of a group if their disappearance renders the group defenseless.⁷¹ The determining factor would thus always be the severity of the impact of individuals’ disappearance on the group.

The soundest conclusion in such a context would be that, although combatants or active resistance fighters *per se* do not qualify as leaders by default, they may if a sufficiently serious impact on the group is established. For example, in *Drélingas v. Lithuania*, the European Court of Human Rights (hereinafter — ‘ECTHR’) summarized the findings of the genocide conviction by the Lithuanian Supreme Court, stating that:

“Lithuanian partisans, their liaison persons and their supporters — had represented a significant part of the Lithuanian population, as a national and ethnic group, because the partisans had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation”.⁷²

The ECTHR did not dispute the legal qualification and found no violation of the principle of legality in this interpretation.⁷³ Although this represents only one of many domestic approaches to defining the elements of genocide (further adjudicated by an international human rights body whose role is not to determine criminal responsibility for genocide), it is nevertheless illustrative of the potential for the application of the leadership factor in light of varying contextual circumstances.

Particularly illustrative of the fluidity of the leadership factor is the 1953 speech by Raphael Lemkin, the father of the term “genocide”, titled “Soviet Genocide in Ukraine” and dedicated to the commemoration of the 1932–1933 Holodomor (i.e., Soviet-orchestrated famine) in Ukraine.⁷⁴ The

speech presents Lemkin’s analysis of the Soviet tactics in pursuance of the overall strategic objective of destroying the Ukrainian nation, in which the central tactic was the selective targeting of several categories of individuals who held special significance within the group.

Lemkin claimed that, while Soviet atrocities directed against the Ukrainian nation represented a “classic example” of genocide,⁷⁵ the methods of its extermination differed from previous notorious examples of genocide, such as the attempted complete annihilation of Jews in Nazi Germany.⁷⁶ The reason was the Ukrainian nation was “too populous to be exterminated completely with any efficiency”.⁷⁷ However, the nation’s religious, intellectual, and political leadership — as a select and determining constituent of the group — constituted a relatively small section that could be easily eliminated.⁷⁸

Hence, according to Lemkin, the Soviet eliminationist plan entailed the targeting of three pillars of the Ukrainian national group: intelligentsia as the nation’s brain, clergy as its soul, and peasantry as its body, which was essential for the preservation of the national spirit, language, and culture.⁷⁹ The annihilation of these segments of the national group would have turned the remaining part of the group into “a mass of people” resulting in the group’s destruction similar to a scenario in which every group member was killed.⁸⁰

Lemkin’s view is notable from several perspectives. First, it highlights the prominence of certain sections of the group that are not necessarily encompassed by the notion of leadership in a stereotypical sense (e.g., as in the previous example with the elderly). While intelligentsia is arguably more closely linked to the definition of leadership stemming from *Sikirica* (e.g., due to the special qualities they possess that shape the group’s opinions and actions), clergy and peasantry, in general, are not always necessarily associated with the notion of leadership (again, arguably with the exception of clergy within a religious group). One may claim that considering social categories such as peasantry to be leaders would overstretch the notion of ‘leadership’ into an overly elastic and meaningless concept, as seen in the aforementioned case of ordinary members of a resistance movement.

At the same time, the law does not define leadership as the sole social stratum whose selective elimination would have a lasting impact on the group. As *Krstić* shows, qualitative considerations

⁷¹ 1994 Commission of Experts’ Report, para. 94.

⁷² *Drélingas v. Lithuania*, Application no. 28859/16, 12 March 2019, para. 103, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-191702%22%7D>.

⁷³ *Ibid.*, paras. 103–111.

⁷⁴ *Raphael Lemkin: Soviet Genocide in Ukraine. The article in 33 languages*, ed. Roman Serbyn; compiled by Olesia Stasiuk (Kyiv: Marko Melnyk Publishing House, 2020), <https://holodomormuseum.org.ua/wp-content/uploads/2022/12/Lemkin.pdf>.

⁷⁵ *Ibid.*, 47.

⁷⁶ *Ibid.*, 51.

⁷⁷ *Ibid.*, 47.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, 48–50.

⁸⁰ *Ibid.*, 51.

extend beyond the leadership factor, and targeting certain significant categories of the population (as in the case of Bosnian Muslim men in Srebrenica) can serve as evidence of genocidal intent. If peasantry is essential for the survival of a human group, either in whole or in part (as Lemkin suggested in the case of the Ukrainian national group, given the peasants' role in maintaining the national spirit), targeting peasantry can likewise potentially be indicative of genocidal intent in the same way as attacking the leadership.

More broadly, Lemkin's considerations reflect how the significance of certain societal categories may vary in the context of their functioning, continuity, and survival of each of the four protected groups. For example, using Fisher's argument presented above, clergy may be essential for the survival of religious groups while arguably having far less (or perhaps none at all) significance to, e.g., racial groups. Within ethnic groups defined by cultural bonds,⁸¹ cultural or intellectual leaders may play a more significant role in preserving the group's cultural or linguistic patterns than, for instance, individuals holding administrative or political positions. For national groups distinguished by a higher degree of self-determination, which combines both cultural and civic elements (e.g., a shared vision of the national project),⁸² the range of individuals who may qualify as leaders with a significant impact on the group is comparatively broader, encompassing various societal segments essential for developing and maintaining the national idea (e.g., from political leaders to activists, clergy, and intellectuals). Arguably, the significance of leadership for groups defined by intangible features (i.e., national, ethnic, and religious groups) is often greater than for groups defined primarily by physical characteristics (i.e., racial groups⁸³).

At the same time, the practical application of the leadership factor raises several critical issues. First, the diversity of genocide contexts has led some scholars to argue that assessing the significance of certain parts of the group is "a speculative practice", while attempts to compile an exhaustive and objective list of indicators for determining such

significance are "an improbable task to achieve".⁸⁴ The leadership factor (as a prominence factor within the assessment of substantiality) can thus be criticized for its vagueness, allowing for broad interpretive discretion. Arguments supporting the leadership role can be made in relation to many different strata of the population. As *Krstić (Appeal)* shows, indicators pointing to the prominence of the group segment can arguably be deduced from facts of every particular case, viewed from different perspectives.

Second, one of the contentious questions is whether the disappearance of leaders must impact the group's physical survival to qualify as genocide or whether, more broadly, it can affect the group's survival as a social unit.⁸⁵ In the narrower interpretation, commentators argued that individuals such as doctors or farmers could be recognized as essential for the group's survival⁸⁶ due to their role in maintaining its members' physical existence. In this example, targeting leaders through underlying acts of genocide (e.g., killing) may also serve as a *modus operandi* for committing another underlying act — imposing conditions of life calculated to bring about the group's physical destruction.

In turn, a broader interpretation (i.e., considering the group's destruction as a social unit) would significantly expand the definition of leadership, a position to which most of the aforementioned examples emanating from jurisprudence and other legal authorities seem to lean. It is hard to see how political, administrative, or religious leaders can be essential to the mere physical survival of the group. Yet, they are critical for the group's existence and survival as a social unit. The latter approach arguably better reflects the nature of genocide as a crime directed against *groups* rather than against individual members by attacking their physical survival. This dilemma seems to be part of a broader discussion on whether genocide law extends protection to the social existence of the group beyond mere psychobiological survival.⁸⁷

Third, the jurisprudence presents three different approaches to measuring the significance of leadership or other representative individuals: (i) leadership towards the targeted community; (ii) leadership as a prominent part of the group towards the group in whole; (iii) leadership towards the geographically limited part of the whole group

⁸¹ *Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, 2 September 1998, para. 513, <https://www.refworld.org/cases,ICTR,40278fbb4.html> (hereinafter — "*Akayesu* Trial Judgement").

⁸² Maksym Vishchyk, "Construing National and Ethnic Groups under the Genocide Convention through Soviet and Russian Narratives on the Ukrainian Identities," *NaUKMA Research Papers. Law* 13 (2024): 18–9, 23, <https://doi.org/10.18523/2617-2607.2024.13.15-25>.

⁸³ See the definition of racial groups in *Akayesu* Trial Judgement, para. 514: "The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factor".

⁸⁴ Uraz, *Classifying Genocide in International Law. The Substantiality Requirement*, 49.

⁸⁵ Tams, Berster, and Schiffbauer, *Genocide Convention: A Commentary*, 151.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, 81–3, 151.

(as an indicator of genocidal intent to destroy a prominent part, not the prominent part itself).

The first approach was applied by several ICTY Chambers that evaluated substantiality by measuring the impact of the disappearance of leaders on a particular community, not the entire group (e.g., *Tolimir*, *Sikirica*, and the same logic in *Krstić (Trial)* despite the Appeals Chamber's denial thereof). This approach seems to represent an impermissible compartmentalization of both the protected group and the intent to destroy, whereby leaders (or otherwise significant individuals) are treated as a *subpart* of the *part* of the *whole* group. It also paves the way for the potentially endless possibility of splitting various segments of the group into subsegments, evaluating substantiality on multiple levels. This could lead to a situation where, e.g., the isolated killing of only two claimed leaders in a village of 50 persons populated by one predominant ethnic group could in itself reach the level of genocide. In this scenario, the leaders may form a substantial part of a particular community, but not the whole group, and thus cannot be part of the substantiality assessment.

The second approach would, in turn, consider whether leaders — taken as a part themselves — meet the substantiality requirement towards the entire group (i.e., essential to the group's survival or emblematic of the group) and not just its geographically limited section in a targeted community. Certain commentators highlight the inherent contradiction in this approach. If jurisprudence suggests that the disappearance of leaders has to impact the survival of the whole, then where perpetrators attack leaders as a substantial part desiring to impact the existence of the entirety, the intent is necessarily directed at the group as a whole, not leaders as part of it.⁸⁸ Moreover, this approach may preclude the finding of genocide within a geographically limited area where perpetrators do not possess control over the entire group. In order for leadership to meet the substantiality requirement, the entire group's leadership has to be considered an evaluated part, not merely leadership in a particular community.

The third approach would treat the attack on leaders as an indicator of an intent to destroy a broader prominent part of the group (most likely geographically defined). This approach stems from *Krstić (Appeal)*, where the destruction of Bosnian Muslim men served as evidence to infer the intent to destroy Bosnian Muslims of Srebrenica as a part of

the group. Similarly, the destruction of leadership within a particular geographic locality can be viewed as an indicator of genocidal intent, not because of the prominent nature of leadership juxtaposed against the whole group, but because of the prominent nature of the geographically limited part targeted for destruction. This approach seems to be the soundest interpretation of the prominence requirement within the substantiality assessment. It would also dictate — contrary to the text of some aforementioned judgments⁸⁹ — that the impact of the leaders' targeting has to be assessed in relation to the targeted part of the group that is substantial (i.e., geographically limited community) — not the group as a whole. This approach would treat the leadership factor not as a substantiality consideration *per se* but rather as one of many potential circumstantial indicators of genocidal intent.

Finally, a separate issue is whether — to establish genocidal intent — the impact on the group resulting from the leaders' removal should be actual, or whether potential impact suffices as well. The Appeals Chamber in *Tolimir* stressed unequivocally that “the impact of the leaders' disappearance may, of course, be assessed only *after* the leaders are attacked” by evaluating the consequences for the remainder of the group “at the same time or in the wake of the attack on its leadership”.⁹⁰

However, it is hard to reconcile this remark with the fact that the proof of genocide does not require *actual destruction* of the whole group or its part to occur.⁹¹ What matters instead is the *intent* to destroy the group or its part. Thus, any underlying act committed with the intent to seek the partial destruction of the group would qualify as genocide, even without actual destruction being achieved.⁹² Neither does the finding of genocide requires proof that perpetrator chose the most efficient method of destruction that would make it complete.⁹³ Perpetrator's opportunities (and their limitations), area of activity and control, and extent of reach are also relevant considerations.⁹⁴

⁸⁹ See, e.g., *Jelisić Trial Judgement*, para. 82: “[genocidal intent] 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* [emphasis added]”; *Sikirica et al. Judgement on Defence Motions to Acquit*, para. 77: “The important element here is the targeting of a selective number of persons who, by reason of their *special qualities of leadership within the group as a whole*, are of such importance that their victimisation [...] would impact upon the *survival of the group, as such* [emphasis added]”.

⁹⁰ *Tolimir Appeals Chamber*, para. 265.

⁹¹ *Krstić Trial Judgement*, para. 584.

⁹² *Ibid.*, para. 584.

⁹³ *Krstić Appeal Judgement*, para. 32.

⁹⁴ *Ibid.*, para. 13.

⁸⁸ Uraz, *Classifying Genocide in International Law. The Substantiality Requirement*, 96.

These considerations dictate that, while the *actual post-factum impact* of the leadership's elimination on the group can — without a doubt — be an important factor to consider, the assessment of *potential impact* can be of no lesser importance. It especially relates to cases where perpetrators do not possess control over the entire group, or where their resources to target the entire leadership are limited, or where the pattern of targeting part of the leadership has already proved systematic and consistent enough to demonstrate potential consequences for the entirety. Where the law does not require actual destruction to establish the existence of the intent to destroy a part of the group, it would be unreasonable to require the actual destruction of leadership for the evaluation of the impact on the group in all cases.

Conclusion. The commission of the crime of genocide does not require the perpetrators to intend to destroy the whole group or physically annihilate its every member. Genocidal intent can also aim at the destruction of the group's substantial part. The substantiality of the targeted part can be measured quantitatively (i.e., due to significant numbers of targeted individuals) or qualitatively (i.e., due to the representative character of persons selected for destruction). Among such representative persons, international jurisprudence has sometimes referred to the group's leadership, whose selected destruction may be indicative of genocidal intent (which can be labelled as “the leadership factor”). While there has been no final genocide conviction based on the leadership factor, international jurisprudence nevertheless provides for several important conclusions related to the leadership factor.

A group's leadership is defined relatively broadly and can include various societal strata who, due to their position or special features, can significantly influence the group, its members' actions or opinions, and whose elimination would impact the group's survival. Depending on the protected group, the composition of leadership and the relevance of the leadership factor would differ: for example,

leadership within the national groups would arguably be more inclusive than within religious groups. Leadership is not the only representative category of the group members: depending on the context, various persons (e.g., male members of the group, peasants, and farmers, etc.) can be considered “representative” given the impact their destruction would have on the group.

However, the relevance and significance of the leadership factor for the establishment of genocidal intent has been criticized in legal commentaries for its vagueness and risk of speculative application. The definition of the leadership factor has also left several loopholes in jurisprudence and doctrine that this article attempted to address. First, while to qualify as genocide, selected targeting of leadership has to impact the group's survival, international jurisprudence seems to imply that it is not only physical survival that can be affected but — more broadly — the group's existence as a social unit.

Second, while it is theoretically possible that leadership itself constitutes a substantial part of the group (i.e., emblematic of it or essential to its survival), considering that leadership's disappearance has to impact the survival of the entire group would contradict the nature of genocidal intent to achieve partial destruction, since the intent would always be directed at the group in its entirety, not in part. Likewise, considering leadership's substantiality towards a geographically limited community would represent an impermissible compartmentalization of both the protected group and the intent to destroy. The soundest approach would consider the selected targeting of leadership *as evidence of genocidal intent to destroy a geographically limited part of the group that, in itself, is substantial*. In such a case, it is the substantiality of the community that must be measured, not that of its leadership. Lastly, the impact of leadership's disappearance on the group should not necessarily be evaluated *only* after the leaders are targeted: depending on the context, a potential impact may suffice, too.

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ВЧИНЕННЯ ДІЯНЬ ПРОТИ ЛІДЕРІВ ЗАХИЩЕНОЇ ГРУПИ АБО ІНШИХ ЇЇ ЗНАКОВИХ ЧЛЕНІВ ЯК ІНДИКАТОР ГЕНОЦИДНОГО НАМІРУ

Злочин геноциду, тобто діяння, вчинені з наміром знищити одну з чотирьох захищених груп (національну, етнічну, релігійну або расову), не вимагає повного знищення кожного окремого члена групи. Геноцидний намір може набувати двох форм, а саме: прагнення повного або часткового знищення групи. Втім, концепція «часткового знищення» залишається однією з найскладніших правових категорій у визначенні елементів злочину геноциду. Серед потенційних форм і сценаріїв

часткового знищення міжнародна судова практика та коментатори згадують не лише випадки знищення чисельно істотної частини групи, а й менш чисельне вибіркоче знищення її знакових членів, обраних через вплив їхнього зникнення на виживання групи. Лідери групи є яскравим прикладом таких знакових осіб, а тому повне або часткове знищення їх може бути вагомим доказом геноцидного наміру (так званий «чинник лідерства»).

Метою цієї статті є дослідити витoki та зміст чинника лідерства в міжнародно-правовому регулюванні заборони злочину геноциду, а також потенційні правові прогалини в його тлумаченні в міжнародній судовій практиці. У статті узагальнено еволюцію бачення часткового знищення як у процесі прийняття Конвенції про запобігання злочину геноциду та покарання за нього, так і згодом, зокрема перші вказівки на чинник лідерства, а також проаналізовано всі міжнародні судові рішення, релевантні для визначення чинника лідерства.

Автор статті доходить висновку, що міжнародна судова практика визначає склад лідерів групи доволі широко. Це особи, які внаслідок своєї позиції, офіційної посади чи спеціальних навичок здатні чинити суттєвий вплив на дії та думки групи (наприклад, політики, управлінці, науковці, громадські, релігійні та культурні діячі). Значення лідерства для існування групи та його склад залежатимуть від конкретної захищеної групи. У статті цю варіативність проілюстровано, зокрема, на прикладі, застосованому Рафаелем Лемкіним, автором терміна «геноцид», для визначення осіб, яких радянська влада вважала ядром, кістяком української нації, а саме: інтелігенції, духовенства та селян-хліборобів.

Звернено увагу на критику чинника лідерства за його розмитий характер та широкий простір для спекулятивного оцінювання. У статті також розглянуто невизначені питання застосування чинника лідерства в міжнародній судовій практиці. Зроблено три головні правові висновки. По-перше, для доведення геноциду важливо оцінювати те, як зникнення чи знищення лідерів вплинуло на існування групи як соціальної одиниці, а не лише на фізичне виживання її членів. По-друге, хоча лідерів як окрему категорію потенційно можна вважати знаковою частиною групи в цілому, найчастіше їхнє знищення слід розглядати як індикатор наміру знищити територіально обмежену знакову частину групи (наприклад, громаду), істотність якої має оцінюватись стосовно групи загалом. По-третє, для доведення геноциду необов'язково постфактум оцінити вплив знищення лідерів на виживання групи: залежно від контексту для оцінювання геноцидного наміру може бути достатньо оцінити потенційний вплив.

Ключові слова: міжнародне кримінальне право, геноцид, геноцидний намір, намір знищити групу частково, лідерство.

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