It is very hard to evaluate this situation while knowing so few details. Indeed, Article 111 GC III foresees such an option – to transfer POWs to a third, neutral state. Special agreements supplementing protection on an *ad hoc* basis are also foreseen as instruments in the common articles of the GC. Such agreements concerning the transfer of POWs to a third country cannot be concluded without the third country's consent. Therefore, such a turn of events might suggest that either Turkey did not honour the previous agreement or that official statements about the agreement were not true. In the case of Turkey's breach, this might lead to Russia's future unwillingness to conclude agreements of this nature.

2.2.12. Interim findings

Russia's aggression against Ukraine has raised many legal issues. However, some of these issues are clearly artificial, such as Russia's use of the term 'special military operation' rather than 'war' or 'conflict'. Without any doubt, under the IHL, Russia's war against Ukraine is an international armed conflict, and Ukraine's territories (including Crimea) are under military occupation – despite Russia's annexations or the creation of puppet states. Most of the personnel involved in active fighting should be regarded as combatants and, consequently, prisoners of war upon capture. Moreover, Russia's constant attempts to deny combatant rights to international volunteers, the Azov regiment, and members of territorial defence units are illegal. Finally, personnel of the Wagner private military security company should be recognised as part of Russia's armed forces, and Russia must accept responsibility for their actions.

2.3. The Problem of Genocidal Intent: A Historical Perspective for Ukraine

2.3.1. State Responsibility vs Individual Responsibility

This chapter discusses genocidal intent as the *mens rea* for the crime of genocide in light of the UNGC and recent ECHR case law regarding Soviet crimes in Lithuania, analysing relevant recent Russian sources for potential proof of genocidal intent in Ukraine since February 2022. The focus of this chapter is on one element of genocidal intent – the perpetrator state's plan to destroy a national group, in whole or in part, as established in genocidal declarations or speech. The issue of individual criminal responsibility for genocide is not covered in this chapter.

Since 24 February 2022, Russia has violated international law many times, but the massacre at Bucha, which went public on 1 April after Russian forces

withdrew from this city near the Ukrainian capital of Kiev, accelerated debates about the ongoing genocide of Ukrainians to the highest level. On the US Senate floor on the evening of 6 April 2022, US Senate Majority Leader Chuck Schumer directly accused Russia of waging a genocidal war in Ukraine (Vytvytsky 2022a). However, not everybody agreed with Schumer's interpretation at that time (Vytvytsky 2022b). Just a few days earlier, in Brussels, NATO Secretary General Jens Stoltenberg and US Secretary of State Antony Blinken demurred when asked the genocide question. Within a week the debate reached its peak, when US President Joe Biden accused Putin of committing genocide in Ukraine on 13 April (Borger 2022a); however, French leader Emmanuel Macron declined to follow Biden's example, arguing that an 'escalation of words' would not help bring peace (Borger 2022b). Another US ally, Australian Prime Minister Scott Morrison, also stopped short of using the term 'genocide', though he said that Putin should be 'held to account' for war crimes and atrocities in Ukraine.

Politicians' caution around declaring the crime of genocide can be affected by many factors; however, the problematic notion of genocidal intent adopted in the UNGC would likely be the main reason from a legal perspective (UN Convention on the Prevention and Punishment of the Crime of Genocide 1951). Article II of the UNGC states that in the present Convention, genocide means 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' The intent of the crime of genocide has three basic components, which are challenging to prove: the offender must intend to destroy the group; the offender must intend that the group be destroyed in whole or in part; and the offender must intend to destroy a group that is defined by nationality, race, ethnicity, or religion (Schabas 2000, pp. 228–241).

Clearly, Ukrainians are a national group that the Russian regime is attempting to destroy. However, since 'case law has associated intent with the existence of a State or organizational plan or policy', the question then becomes: does the Russian regime have such a plan or policy? (Motyl 2022). While searching for an answer, one should bear in mind the difference between state responsibility for genocide and individual criminal responsibility for genocide: the latter emphasises the need to prove that the perpetrators themselves acted with genocidal intent; while for the former, no such proof is necessary – demonstrating the collective genocidal intent of the Russian state would be enough (Bosnia and Herzegovina v. Serbia and Montenegro, ICJ 2007). The Court further examines the question of whether it may make a finding of genocide by a State in the absence of a prior conviction of an individual for genocide by a competent court on page 68 of the judgment.

It appears that more and more politicians are convinced that there is such a plan, and thus genocidal intent. Since early spring of 2022, the perception of Russia's violations of international law have changed dramatically due to the emergence of many pieces of evidence. Thus, some countries (Whatcott 2022) have already declared Russia's genocide of Ukrainians, including Lithuania (Anon 2022), Latvia, Estonia (Sytas 2022), Ireland, Poland, Canada (Treisman 2022), and the Czech Republic (Jack 2022). The US Congress also joined this list in June 2022 (Mackinnon 2022). Debates over the claim of genocide are being refreshed with renewed intensity alongside new developments in the war of aggression, such as the International Criminal Court's warrant of arrest (Law 2023) or the anniversary of the war (Hinton 2023). The reason for this is that 'genocide monopolises people's moral imaginations' (Moses 2022).

While political declarations have little impact on the legal debate as genocide cannot be presumed (Harb 2022), the question in the legal field of the genocidal intent of Russia as a state remains open. The problem here is that politicians 'seem to be using the term genocide in a demagogic and provocative manner, a way to stigmatize their enemy in the eyes of public opinion'.(Schabas 2022, p. 854) However, many prominent scholars have already communicated the idea that the war in Ukraine represents potential genocide, including non-legal scholars such as Eugene Finkel (Finkel 2022), Timothy D. Snyder (Snyder 2022a), and Gregory Stanton (Wright 2022), and legal experts such as Otto Luchterhandt (Blyk 2022), and Zakhar Tropin (Trofimov and Marson 2022). A comprehensive report by the Raoul Wallenberg Centre for Human Rights claimed that, along with the acts required to meet the definition of genocide, there is genocidal intent in Ukraine, together establishing genocide (New lines Institute 2022). However, recent legal analysis, i.e., that of William Schabas (2022), Kevin Jon Heller (2023) or Iryna Marchuk and Aloka Wanigasuriya (2022), is not so clear-cut.

In this study, the suggestion is to include the additional historical perspective of Soviet crimes in countries formerly occupied by the USSR (including Ukraine) in an attempt to prove the current Russian genocide in Ukraine. The recent case law of the ECtHR regarding the Soviet genocide against Lithuanian partisans could serve as a background to indicate that at least some elements of genocide exist in the current Russian war of aggression against Ukraine. The main problem in the Lithuanian cases was that the Lithuanian national courts needed to prove Soviet genocidal intent from indirect sources, as one part of the relevant archival data on this issue was destroyed in 1990 and the other part remains in Moscow and is not available to the public. The Lithuanian national courts failed to prove genocide in the first case (2015) but succeeded in the second (2019). It is believed that the strategies of proving the genocidal intent of the USSR in the

Lithuanian cases at the ECtHR could benefit the various ongoing legal investigations into current Russian atrocities in Ukraine (Armstead 2022).

2.3.2. The Challenging Concept of Genocidal Intent: The Role of a Motive

Genocidal intent has been a crucial legal problem since the adoption of the UNGC, and concept is still under crucial development (Ambos 2009, pp. 833–858). From its initial codification in 1948 to its inclusion in the Rome Statue in 1998, the international crime of genocide has been defined as involving the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'(Greenawalt 1999, pp. 2259–2294). However, when Lemkin, a Polish lawyer who emigrated to the US, first coined the term *genocide*, there was little emphasis on intent (Goldsmith 2010, p. 247). He saw genocide as a coordinated plan of different actions aiming at the destruction of the essential foundations of the life of a national group:

> Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group (Lemkin 1944).

Still, from legal perspective the reference to 'intent' in the UNGC indicates that the prosecution must go beyond establishing that the offender meant to engage in the conduct, or meant to cause its consequences. The offender must also be proven to have had a 'specific intent', or *dolus specialis*. Where specific intent is not established, the act remains punishable, but not as genocide – it may be classified as a crime against humanity or it may simply be a crime under ordinary criminal law (Schabas 2000, p. 214). The Trial Chamber of the International Criminal Tribunal for Rwanda (hereafter – the ICTR) in the *Akayesu* judgement described genocidal intent as the 'key element' of an intentional offence, which is 'characterized by a psychological relationship between the physical result and the mental state of the perpetrator' (The Prosecutor v. Jean-Paul Akayesu, ICTR 1998, para.518). The subsequent case law of the ICTR essentially followed the *Akayesu* findings, requiring, in addition, that the aim of destroying one of the

protected groups be proven. The case law of ICTY took the same approach. The ICJ also refers, citing the ICTY, to 'special or specific intent' as an 'extreme form of willful and deliberate acts designed to destroy a group or part of a group' (Bosnia and Herzegovina v. Serbia and Montenegro, ICJ 2007, para.188 cited The Prosecutor v. Kupreškić *et al.* ICTY 2000, para.636).

The specific intent necessary for a genocide conviction is very demanding. Unable to rely on the number of victims as evidence of genocidal intent (i.e., the meaning of the definition of the phrase 'in whole or in part'), the prosecution is required to introduce other proof (Bryant and Jones 1975, p. 692). Proof of genocidal intent includes: (a) some sort of genocidal declaration or speech; (b) the context of the crime, its massive scale, and elements of its perpetration that suggest hatred of the group and a desire for its destruction; (c) a very high number of atrocities committed against the group; and (d) proof of attacks directed against cultural institutions or monuments committed in association with killing, which may prove important in establishing the existence of genocidal rather than merely homicidal intent (Schabas 2000, pp. 222–223).

Other indicators to detect the intent to commit genocide could include situations in which: (a) potential perpetrators are agents of the state or rival authorities, for example, military or police units, or militias authorised by the state or by a revolutionary leader; (b) elites and groups linked to them often use hateful propaganda and attack ethnic and political opponents of the state; (c) government repression in response to opposition activities is greatly disproportionate to opposition acts; and (d) authorities and security forces ignore isolated killings and the abuse of ethnic and political group members. In 1996, Genocide Watch Director G. H. Stanton presented eight stages of genocide to explain genocidal intent. He argued that intent can be directly proven from statements or orders by perpetrators, but more frequently it must be deduced from the *systematic pattern* of their acts, a pattern that could only arise out of specific intent. In addition, a plan for genocide does not need to be written out. An act of genocide may arise in a culture that considers members of another group to be less than human, where killing members of that group is not considered murder (Stanton 1996–2023).

The ICTR in *Akayesu* declared that genocidal intent could be inferred from physical acts, and specifically 'the massive and/or systematic nature or their atrocity'. According to the Trial Chamber:

> This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.

> Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act (The Prosecutor v. Jean-Paul Akayesu, ICTR 1998, para.477).

Some scholars suggest that the role of motive in the elements of the crime of genocide cannot be dismissed, as it is clear that genocide cannot be committed without a degree of planning and preparation, and it is unlikely that courts will convict in the absence of proof of a plan (Bassiouni and Manikas 1995, p. 527). Genocide is, by its nature, a collective crime that is committed with the cooperation of many participants. It is, moreover, an offence generally directed by the state. The organisers and planners must necessarily have the motive of destroying the target group – that is, a genocidal motive, taken as a whole. Where this is lacking, the crime cannot be genocide (Schabas 2000, p. 255). Individual players may also be driven by a variety of motives, such as monetary gain, jealousy, or political ambition. In other words, hatred of the group must be the driving force behind the crime. Genocide was made a crime in order to be punished as such, not to serve as a proxy for crimes of mass slaughter carried out for other reasons.

The ICTR in *Akayesu* at some point also stated that specific intent is essentially a motive requirement – the members of the victim group were targeted because of their membership in the group:

> On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act. […] (The Prosecutor v. Jean-Paul Akayesu, ICTR 1998, para.523; Amobs 2009, pp. 833–859).

Thus, the existence of a genocidal plan – and, consequently, of a genocidal purpose – can prove a destructive motive. However, the utility of a plan is evidential; it is not legally required following the definition of genocide. In other words, such a plan or policy is not a formal requirement of genocide: it is simply extremely difficult to prove the necessary specific intent without evidence of a plan or policy.

To sum up, according to relevant legal doctrine the indication of genocidal intent requires strong evidence, but only some types of evidence are assessed in the case law of genocide trials. As the definition of genocide seeks to address systematic actions against a specific group, the majority of potential evidence of genocidal intent leads to the need to prove the existence of a general genocidal plan by the perpetrator state. This can then prove the essence of the crime of genocide: a destructive motive. Historical cases on Soviet crimes in Lithuania could contribute to this cause.

2.3.3. A Lithuanian Strategy to Prove Soviet Genocidal Intent

The issue of Soviet genocidal intent was neglected for decades in academic scholarship, as was the idea of potential Soviet genocide itself. Only in the 2000s did several scholars begin to argue that new genocidal trials could contribute to efforts to identify Soviet crimes as genocide. The ICTY found in the *Jelisić* case that 'genocidal intent can take two forms': on the one hand, the intent to exterminate a very large number of members of a group; on the other, the intent to pursue a more selective destruction targeting only certain members of a group because of the impact that their disappearance would have on the survival of the group as such' (The Prosecutor v. Jelisić, ICTY 1999, para.82; Verdirame 2000, p. 587). As Lauri Malksoo stated regarding the target group, the context of the Soviet repressions in the Baltic states seems to indicate genocidal intent in the second sense, because repressive actions in the Baltic states were directed towards 'liquidating' the people who would be most determined to carry on the will for independent statehood based on 'non-Soviet' principles of government (Mälksoo 2001, pp. 784–785). However, the question of the role of the Soviet leadership in committing genocide is even more complicated due to the absence of direct proof of genocidal intent. In short, evidence from both the Soviet Union and elsewhere suggests that Stalin's deranged personality was probably only a secondary factor in explaining the crimes of his regime (Somin 2010). Moreover, the genocidal intent of the Soviet leadership does not automatically prove that, for instance, a particular official had *dolus specialis* regarding the crime of genocide when obeying their superior's orders, nor the intent to *destroy* a group or a part of it. Such intent must be proven separately in each individual case (Mälksoo 2001, pp. 784–785; Kinetz *et al.* 2022).

In recent ECtHR judgments concerning the killing of Lithuanian partisans by Soviet officers, one of the main issues was the genocidal intent of the particular perpetrators and their link to the general genocidal plan of the USSR in the occupied countries. In the ECtHR case *Vasiliauskas v. Lithuania*, former Ministry of State Security (hereafter – the MGB, 1946–1953) officer Vytautas Vasiliauskas

(born 1930) complained that his conviction for genocide by the domestic courts was in breach of Article 7 of the ECHR, in particular because the national courts' broad interpretation of that crime had no basis in international law (Vasiliauskas v. Lithuania, ECtHR 2015). On 2 January 1953, Mr. Vasiliauskas took part in an operation against two Lithuanian partisans who had been hiding in the forest. The goal of the operation was to capture or eliminate the partisans (the Soviets used the phrase 'liquidate the bandits'). Several soldiers were involved and the applicant was part of the operation. During the attempt to apprehend them, the partisans resisted by opening fire on the MGB officers and the Soviet soldiers. The partisans were shot and killed. In this case, the question that the ECtHR had to answer was whether the applicant's conviction for genocide in 2005 by domestic courts was reasonably foreseeable in light of international law as it stood in 1953, when the crime was committed.

The ECtHR Grand Chamber of 17 judges came out split on the outcome, ruling by 9 votes to 8 that the conviction for the genocide of a political and social group according to post-Soviet Lithuanian legislation was not foreseeable and that it was in violation of ECHR Article 7, which states that one cannot be held criminally accountable for something which is not a crime at the time when it is committed. Numerous dissenting opinions criticised the majority, arguing that it ruled too formally and failed to address the justice desired by Soviet victims. In the case of *Drėlingas v. Lithuania*, former KGB (State Security Committee, 1954–1992) officer Stanislovas Drėlingas (born 1931) complained to the ECtHR on the same grounds (Drėlingas v. Lithuania, 2019 ECtHR). In 2014, Mr. Drėlingas was charged by domestic courts with being an accessory to genocide for having taken part in an operation on 11–12 October 1956 during which the last partisan leader, Vanagas (meaning 'The Hawk', a cryptonym), was captured, tortured, sentenced to death and executed. His wife, Vanda, was also captured and sentenced to deportation afterwards. Once again, the main question was whether the applicant could have sufficiently foreseen that he was involved in committing genocide in 1956. In the judgment, which was delivered in March 2019, the ECtHR held that Mr. Drėlingas must have been aware in 1956 that he could be prosecuted for the genocide of a national group for taking part in the detention of two partisans, and that his conviction had been foreseeable. The judgment entered into force on 10 September 2019, when the defendant's request for referral to the Grand Chamber of the ECtHR was rejected.

The Lithuanian national courts in both cases needed to demonstrate the link between the state's ideology, which included some aspects of a genocidal plan, and the officers who executed that plan using a clear methodology and

instructions. The intent of Soviet repressions in Lithuania was summarised by the Lithuanian Constitutional Court in 2014, clarifying the goal and the plan of the USSR regarding Lithuanians:

> the repressions against the residents of Lithuania were not in any manner coincidental and chaotic, but rather such repressions sought to exterminate the basis of the political nation of Lithuania, inter alia, the former social and political structure of the State of Lithuania. Those repressions were directed against the most active political and social groups of the residents of the Republic of Lithuania: participants of the resistance against the occupation and their supporters, civil servants and officials of the State of Lithuania, Lithuanian public figures, intellectuals and the academic community, farmers, priests, and members of the families of those groups.

To be precise, during the first Soviet occupation of Lithuania (1940–1941) at least 23 different categories of people were considered a threat to the Soviet regime (Vižulis 1985, p. 101). The Lithuanian Constitutional Court also concluded that actions which took place before the 2003 national legislation and which had been directed against certain political and social groups might constitute genocide if it could be proved that the aim of such actions was to destroy groups that represented a significant part of the Lithuanian nation and whose destruction had an impact on the survival of the entire Lithuanian nation. The Court indicated that Lithuanian partisans constituted such a group, considering their activity during the 1944–1953 partisan war (Sagatienė 2021, p. 781).

However, the Supreme Court of Lithuania's finding that Mr. Vasiliauskas, when taking genocidal actions, had known of the Soviet regime's goal of eradicating all Lithuanian partisans was rejected by the ECtHR. According to the Supreme Court of Lithuania,

> the actions of Vasiliauskas also correspond to the subjective element of genocide – direct intent [lith. *tiesioginė tyčia*]: Vasiliauskas, when taking those actions, had known the goal of the Soviet Government – to eradicate all Lithuanian partisans. He knew that the brothers J.A. and A.A. were partisans, and understood that during the operation they would be killed or arrested and then tortured, tried as 'traitors to the homeland' and [possibly] sentenced to death, and [Vasiliauskas] wished that to happen.

Vasiliauskas was able to assess the partisans as a significant part of the national group because he was an MGB officer, an organisation which had been carrying out these tasks since 1945–1946 against partisans as a national group in order: to eliminate the remains of 'political banditism' and other anti-Soviet activities; to eliminate sabotage intelligence and other enemy groups as well as individuals; to eliminate 'anti-Soviet elements', traitors, traitors to the homeland and other enemy proteges and supporters; to confiscate illegally held weapons; to perform the tasks of the USSR and the MGB-MVD to guarantee the security of USSR; and

to protect special objects approved by the MVD (Starkauskas 1998, p. 29). The prosecutor stated that

> He knew that the LSSR MGB's main purpose was to physically eradicate part of the Lithuanian population belonging to a separate political group, namely, the Lithuanian partisans, participants in the resistance to the Soviet occupation. The applicant had been active in fulfilling that main goal of the LSSR MGB by killing some of the inhabitants of Lithuania belonging to the aforementioned political group (Starkauskas 1998, p. 29).

The prosecutor found it to be established that, as of 15 September 1951, the applicant had served as an operational agent in the Kaunas region, Šakiai district branch of the LSSR MGB. For the prosecutor, the applicant's guilt was proved on the basis of his service record, the applicant's superiors' commendation for his persistence when executing search measures, managing the operation and personal participation when apprehending the bandits. The evidence examined by the prosecutor included statements by witnesses, minutes of the meetings of the Šakiai district MGB unit which were obtained from the Lithuanian Special Archive and the Genocide and Resistance Research Centre of Lithuania and translations of those documents, which mentioned the applicant, the tasks he had been assigned with regard to the liquidation of banditry, bandits' assistants and contact persons. Other evidence included [MGB] reports about the liquidated bandits J.A. and A.A.

This argument was further developed in the case of *Drėlingas v Lithuania*, where the ECtHR concluded that national courts brought clarification to the need to establish intent (para.108), and approved the domestic interpretation that

> the annihilation of the participants in the armed national resistance, namely Lithuanian partisans, their connections and supporters, by the occupying power and its repressive bodies, was systematic, consistent, based on a clear methodology and instructions. The acts of repression were directed against the most active and advanced part of the Lithuanian nation as a national, ethnic group. Such extermination had the clear aim of influencing the demographic changes of the Lithuanian nation and its very survival, as well as at facilitating the sovietisation of the occupied Lithuania. The extermination of the resistance participants not only meant the elimination of obstacles to the objectives of the occupying regime; it also had another purpose, namely to intimidate the residents of Lithuania by showing what destiny awaited those who refused to obey the occupying power. (para.25) (Starkauskas 1998, p. 54)

Regarding the applicant's conviction for genocide, the Supreme Court found it established that by 1956, when the crime was committed, the applicant had already been working for the MGB, which he had joined 'consciously and voluntarily', for four years. Before that, he had completed the Vilnius School of MGB Operational Staff Training, where he studied for two years. It was noteworthy that

the applicant had studied at the security service school and started his service in the security structure during the period when the national resistance movement against the occupying power was active. He was not an ordinary officer: from 1952 he was a member of the USSR Communist party, and after graduating from the MGB school he was granted the rank of officer-lieutenant. The applicant worked at the Lithuanian MGB/KGB 2-N board, the main function of which was the fight against the national resistance movement. It was also noteworthy that the division where the applicant had worked carried out surveillance of the members and leadership of the Lithuanian national underground movement'.

These ECtHR cases illustrate how closely genocidal intent by a particular officer executing an act of genocide is linked to the general ideology of the perpetrator state. In the case of the USSR, Soviet repressions were part of systematic Sovietization and arose in a much broader ideological context, as the goal of the Soviet regime was to transform human existence and create an entirely new kind of human being – the New Soviet man. Thus, nationality was not important anymore, and a new socialist nation had to emerge (Lebed 1958, pp. 4–5). In mid-June 1940, the USSR presented the Baltic governments with a demand for the total occupation of their territories, backed by a warning that military resistance would be repressed. The Baltic governments capitulated and the Soviet forces invaded. Shortly thereafter, hasty 'elections' were held, in which only candidates approved by the Communist Party could run. The resulting 'parliaments' immediately petitioned Moscow to admit the Baltic states into the Soviet Union, a wish that was promptly granted, and the Baltic states were annexed to the USSR in early August 1940. Thus, 'within three months, the three states had been transformed from independent sovereign republics into union republics, constituent parts of a latter-day empire' (Plakans 2011, pp. 293–307; Kasekamp 2010, pp. 95–105). What happened next had something to do with a particular Soviet interpretation of history (Liivoja 2013, p. 249). The USSR took the view that the post-1917 governments in the Baltic states with which they had negotiated peace treaties in 1920 had not been legitimate, but had instead been Bolsheviks who had been toppled by 'bourgeois democratic' regimes. Accordingly, everyone involved in governing the Baltic states between 1918 and 1940 was seen as having played a role in the illegal usurpation of Soviet power. As a result, Lithuanians, together with Latvians and Estonians, were considered as persons belonging to 'untrustworthy' or 'unreliable' nationalities which interfered with the Soviet plan of successful Sovietization (Anušauskas 1996, p. 385).

In the Baltic states, Sovietization was a systematic and comprehensive project which was comprised of the following elements: (a) the introduction of the USSR's administrative and economic systems; (b) the subjugation of states to the

economic and political needs of the USSR; (c) militarisation; (d) the colonisation of states (especially Latvia) by hundreds of thousands of Russian-speaking immigrants; (e) the destruction of the traditional social structure through genocide and Russification; (f) total control over the internal means of communication and contact with foreign countries; and (i) the destruction of established political, economic and cultural traditions (Strods 2005, p. 209). The partisan movement in Lithuania was destroyed by the USSR after almost 10 years using this strategy, which contained a system of various methods delivered by different Soviet organs that were all mobilised to systematically destroy resistance in Lithuania. All of these methods were subordinated towards achieving the ultimate goal: killing the members of the Lithuanian partisan movement.

Thus, the Lithuanian legal strategies at the ECtHR, which mainly followed the ICTR's *Akayesu* formula, demonstrate the importance of the link between a state's ideology and its officers in proving genocidal intent when specific – in this case, Soviet – genocidal declarations are not available. The genocidal intent of the USSR against Lithuanian partisans was mainly proved by clarifying the ideological background of the USSR and the structural system of implementing communist ideology: both the MGB as institution and its individual officers implemented some part of the Sovietization plan in order to destroy undesirable nationalities using clear methodologies and instructions.

2.3.4. Proving Russian Genocidal Intent in Ukraine

As previously mentioned, a genocidal plan can be traced through specific genocidal declarations by the perpetrator state, which in the case of Soviet crimes are still absent from academic discourse. In the context of Russia's crimes in Ukraine, however, they can be observed directly – especially since February 2022. This makes a significant difference for the prosecutor when proving genocidal intent; however, as recent ECtHR case law suggests, even public genocidal declarations by Russian officials may not be sufficient to prove the country's current genocidal intent in Ukraine. ECtHR case law regarding the Soviet genocide against Lithuanian partisans indicates that a strong link between executors and the ideology of the state is crucial in order to establish genocidal intent. The independent report produced by genocide scholars in May 2022 regarding Russian crimes in Ukraine indicated that genocidal intent can be attributed to a state through evidence of a general plan (derived from official statements, documents, or policy), or can be inferred from a systematic pattern of atrocities targeting the protected group (New Lines Institute 2022, p. 2). These scholars argued that genocidal intent can be traced in official or officially endorsed Russian statements denying

the existence of the Ukrainian nation, expressing the vague goal of 'denazifying' Ukraine, and characterising a significant undefined segment of the population (or 'them') as Nazis or mortal threats, thus rendering this group a legitimate target for destruction. This report also revealed many public cases of high-ranking Russian officials denying Ukraine's right to exist or calling for its destruction (New Lines Institute 2022, pp. 12–20).

As the legal doctrine indicates that genocidal declarations are the most powerful evidence of genocidal intent, it is useful to analyse them in light of recent ECtHR case law dealing with historical cases of Soviet genocide in order to establish a link between the executors of these crimes and the current Russian ideology towards Ukrainians. Perhaps the most notable high-level public declarations which could be considered as genocidal are the following: (a) Putin's essay of July 2021; (b) Putin's speech before the invasion on 21 February 2022; (c) an RIA Novosti editorial entitled 'What Russia should do with Ukraine' published on 3 April 2022; and (d) a Telegram post by Dmitry Medvedev of 5 April 2022.

In July 2021, Putin published an essay entitled 'On the Historical Unity of Russians and Ukrainians', in which he reasserted that Ukrainians and Russians are 'one people, a single whole', and added that his position is 'not driven by some short-term considerations or prompted by the current political context' (Putin 2022a). In this essay, Putin argued that 'modern Ukraine is entirely the product of the Soviet era' and that the 'true sovereignty of Ukraine is possible only in partnership with Russia'. He further suggested that when the Ukrainian government rejects the idea that Russians and Ukrainians are the same people, they are indulging neo-Nazis and Nazism. On 21 February 2022, 3 days before the start of the full-scale invasion, Putin gave a speech insisting that 'modern Ukraine was entirely created by Russia or, to be more precise, by Bolshevik, Communist Russia', and that Russia was 'ready to show what real decommunisation would mean for Ukraine' (Putin 2022b). In his speech announcing the invasion of Ukraine, Putin urged Ukrainians to reject their elected officials in order to strengthen Ukraine and Russia 'from within as a single whole, despite the existence of state borders' (Putin 2022c).

In an RIA Novosti editorial published on 3 April 2022 entitled 'What Russia should do with Ukraine', author Timofey Sergeytsev referred to Ukrainians in the following terms: 'a considerable portion of the population – very likely, a majority of it – has been subjected to the Nazi regime and dragged into its agenda …', one that is 'a bigger threat … than German Nazism in the style of Hitler'. He also suggested that 'significant part of the masses … are passive Nazis and accomplices', and pointed to 'a nazified bulk of the population' and 'a Nazi society'. In addition, he asserted that Ukraine's elites 'must be liquidated as re-education

is impossible', that 'denazification will inevitably include de-ukrainization', and that 'Ukrainism is … a subordinate element of a different and alien civilization' (Rodionov 2022). Putin claims that American-led slaughter shattered Ukraine's national pattern, denying it agency, and that Russian extermination would eradicate this Americanised trend by improving Ukraine's ruined state so that it could become like Russia. Thus, any genocide would simply undo the preceding genocide, and therefore would not be genocide (Etkind 2022).

On 5 April 2022, the deputy chairman of Russia's Security Council, Dmitry Medvedev, posted the following on Telegram: 'Ukrainian-ness, which is fuelled by anti-Russian poison and is consumed by the lie concerning its own identity – this is all one big fake. This phenomenon has never existed in history. And it does not exist now' (2022). Medvedev used fictitious rhetoric – though vivid and detailed, which tends to make it more believable – to justify violence against an entire generation of Ukrainians that he described as Nazis:

> For the past 30 years, a passionate segment of Ukrainians has prayed for the Third Reich. Literally. Nazi symbolism that provokes disgust can be found on photos from practically every military unit in Ukraine taken by our army — there are banners, literature, posters. Even cups with swastikas! … It's no wonder that, having transformed itself into the Third Reich, and having written into its history textbooks the names of traitors and Nazi henchmen, Ukraine will suffer the same fate. This kind of Ukraine gets what it deserves!… These difficult tasks cannot be completed instantaneously. And they will not only be decided on battlefields (2022).

Each of these pieces contribute to establishing the Russian state ideology towards Ukraine, and each can be considered as elements of the Russian genocidal plan. For this reason, the political structure and ideology might be crucial in proving Russian genocide in Ukraine; however, there is still a gap in defining it.

In the West, Putin's system of rule is still often described as a monolithic pyramid. In the eyes of society, Putin manages to present himself as an irreplaceable leader/statesman (a 'tsar', according to the West), solely making key decisions. However, such an understanding of the ruling processes in Russia is one of the main mistakes which prevents deeper insight into the regime's origins and foundations from being obtained. Since 2000, the style of making political decisions (its initial formation was influenced by various factors) has been shifting towards that of the USSR's Politburo (political bureau). Many analysts, public figures and even politicians focused on Russia have long been using the term 'collective Putin'. This fact reflects their belief that decisions in the country are not made by one person, and that Putin is just a symbol of this ruling system – though, obviously, he has not lost his role as an arbiter and moderator (Kasčiūnas *et al*. 2014; Anon 2020). In 2002–2003, a former member of the Council of the Russian

Federation, one of the richest people in the country, said that from 1996 to 2000 all important decisions were made by a small group of people called 'The Family' (Povilaitis 2022). The former Russian billionaire claimed that the so-called 'Family' continued to hold power when Yeltsin resigned as president and named Vladimir Putin as his replacement. Approximately 90 % of decisions were made by its representatives from 2000 to 2004, leaving only 10 % for Putin and his immediate circle, which was made up of old St. Petersburg-based co-workers. Putin has been making the majority of the decisions by himself and consulting with a very small group of individuals since 2012, when he genuinely won the elections.

Since the 2018 presidential election, the Politburo 2.0, an informal decision-making group that has grown around Vladimir Putin since 2012, has remained in place. As Russia's relations with the West continue to deteriorate, the Politburo 2.0 is compelled to choose the option of mobilisation. As a result, the SC's machinery will play a larger role, becoming Putin's fourth 'Big Government' component after the Presidential Administration, the general government, and the major state companies (Minchenko Consulting 2019). Speaking about the war in Ukraine, former supporter L. Nevzlins considered that the plan to attack the country arose in Putin's mind at the end of 2019, during the so-called Normandy Format meeting:

> When E. Macron, A. Merkel, V. Putin, V. Zelensky met, it was expected to sign an agreement on what was already discussed in Minsk. Suddenly V. Zelensky refused to sign; it seems that V. Putin was promised that V. Zelensky would definitely sign the agreement. When this plan failed, it seems that Putin decided that this was his last meeting with Zelensky and that only revenge awaited. And this is revenge not only for V. Zelensky personally, but also for the whole of Ukraine, V. Putin simply cannot do otherwise.

Thus, how can we indicate the current ideology of Russia and link it with the genocidal plan against Ukrainians when so many factors have still not been explored? The neologism of 'Rashism', a portmanteau of Russian fascism (Russian: *русский фашизм*), is a term used by a number of scholars, politicians and publicists to describe the political ideology and social practices of Russian authorities during the rule of Vladimir Putin. It is also used to refer to the ideology of Russian military expansionism (Marayev and Bilyk 2022; Samolenko *et al.* 2021, p. 367; Gaufman 2016, p. 107), and has been used as a label to describe an undemocratic system and nationality cult mixed with ultranationalism and a cult of personality (Snyder 2022c). This transformation was described based on the ideas of the 'special civilizational mission' of Russia, including notions such as Moscow as the third Rome and an expansionism (Gregor 1998, pp. 1–15; Motyl 2015; Stanley

2022) which manifests itself in anti-Westernism and supports regaining Imperial lands by conquest (Marayev and Bilyk 2022). Timothy Snyder believes that the ideology of Putin and his regime was influenced by Russian nationalist philosopher Ivan Ilyin (1883–1954) (Snyder 2022c). Another ideologist, Aleksandr Dugin, through books such as *The Fourth Political Theory*, published in 2009, has been cited as an inspiration for Russian policy in events such as the war in the Donbas region (Saunders 2014).

To conclude, since 2022 many high-level public genocidal declarations can be identified and highlighted as proof of a genocidal plan; however, the clarification of the political ideology in Russia can be also relevant in future legal cases. Having in mind that there is still a lack of definition surrounding the current Russian ideology and the country's governmental structure, prosecutors could be forced to enter the field of political science to develop an interdisciplinary approach to indicate those responsible for the potential crime of genocide against Ukrainians since 2022. Moreover, extra caution must be employed when proving genocidal intent in this particular case to ensure that state leaders do not avoid prosecution, and to avoid a situation where only low ranked Russian officers are accused of committing genocide.

2.3.5. Interim findings

The perpetrator state's unique genocidal declarations – which are observable in the context of Russia's atrocities in Ukraine, particularly from February 2022 – can be used to outline the formation of a genocidal plan, and essentially constitute a destructive motive for genocide. This makes a significant difference in the prosecutor's ability to demonstrate genocidal intent, but as the most recent ECtHR case law suggests, even public confessions of genocidal intent on the part of Russian officials might not be enough to demonstrate its current existence in Ukraine.

The Lithuanian strategy may be useful in demonstrating Russia's intent to commit genocide against the Ukrainian people, as the Soviet Union's intent to commit genocide against Lithuanian partisans was primarily established by demonstrating the ideological foundation of the Soviet Union and the institutional framework for implementing the communist ideology. In this way, both the MGB as an organisation and its individual officers carried out part of the Sovietization plan in order to eradicate undesirable ethnic groups using precise methods and guidelines.

Since 2022, numerous high-level public assertions of genocidal intent have been recognised and cited as evidence of a genocidal scheme; nevertheless,

future legal proceedings may also depend on Russia's political ideology and the organisational structure of the country's decision-making process. Prosecutors may be forced to work in the field of political science and develop an interdisciplinary strategy in order to identify those responsible for potential genocidal crimes against Ukrainians since 2022, given that Russia's current ideology and governmental structure have still not been clearly defined.

2.4. A Jurisdictional Challenge in the Coastal State Rights Dispute: Sovereignty Issues over Crimea

2.4.1. The Factual Background of the Coastal State Rights Dispute

On 16 September 2016, Ukraine served the Russian Federation with a Notification and Statement of Claim under Annex VII of the UN Convention on the Law of the Sea (hereafter – the UNCLOS) referring to the *Coastal State Rights Dispute.* This dispute was caused by Russian violations of UNCLOS in the Black Sea, Sea of Azov, and Kerch Strait. The Annex VII arbitral tribunal characterised that this dispute was as a consequence of 'events that occurred in 2014 in Crimea', and from then the parties to the dispute have had different views on these events.

The main disagreements began in March 2014. Firstly, on 11 March 2014, the parliament of the 'Autonomous Republic of Crimea' adopted a resolution entitled 'About Crimean Independence'. This was followed by a controversial referendum on 18 March 2014, where 96.77% of votes were cast in favour of Crimea's reunification with Russia. Several different international institutions and representatives recognised this referendum as invalid, including the Parliamentary Assembly of the Council of Europe (hereafter – the PACE), the presidents of the European Council and the European Commission, the UNGA, the Venice Commission, etc.

The Russian Federation and the 'Republic of Crimea' signed the Treaty on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation on 18 March 2014. Ukraine reacted negatively to all of these events, claiming that the Russian Federation invaded, occupied and unlawfully annexed Crimea in 2014.

It is important to note that the authors are of the opinion, guided by the resolutions of the GA and the legal analysis of the situation, that Crimea was illegally occupied and that it is currently annexed by the Russian Federation. Such a view is also supported by different scholars including Socher (2021), Gaspani (2021), Nuridzhanian (2018), Buchan and Tsagourias (2017), Grzebyk (2017), Leichtova (2016), Marxsen (2014), and others.

Lyra Jakulevičienė / Patrick R. Hugg /
Dmytro Luchenko (eds.)

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