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UNDOING THE GROUP'S FABRIC: SOCIAL DISINTEGRATION AS A POSSIBLE MANIFESTATION OF GENOCIDAL INTENT

Abstract

The fundamental element of genocide, the special intent "to destroy" a protected group, has given rise to two possible readings of its scope. A narrow view limits intended destruction to physical and biological forms only, while a broad approach dictates that the intent can be manifested in the desired social disintegration of a human group, i.e., destruction as a social unit. This debate as to the potential place of social disintegration within the intent element remains far from being settled in the contemporary law of genocide, and direct and rigorous analysis of the issue in the jurisprudence and doctrine has been relatively rare. The present article aims to remedy this gap by elucidating the essence of genocidal intent through fundamental rules of treaty interpretation. It concludes that nothing in the ordinary meaning of the term "to destroy" in its context, in light of the Genocide Convention's object and purpose, as well as the travaux préparatoires limits intended destruction to physical and biological forms only. It further explains how, despite seemingly contradictory wording of reasoning common to case-law of international tribunals, the latter, too, intentionally or not, implied a broad reading of the intended destruction in their analysis. The article points to the apparent recurrent and widespread confusion between "destruction" in the sense of modus operandi of underlying acts and "destruction" in the meaning of the intent (i.e., intended outcome). Finally, it provides for important considerations as to why reading social disintegration into the genocidal intent favors the soundest possible interpretation of the law of genocide.

Key Words: *international criminal law, genocide, Genocide Convention, genocidal intent, dolus specialis, destruction, social disintegration.*

Introduction

The universally recognized definition of genocide premises the crime on the central element of special intent to destroy one of the four protected groups (*i.e.,* national, ethnical, racial or religious) in whole or in part. Yet, what the term "to destroy" entails remains a contested area in the law of genocide. While initially, some drafters of the Genocide Convention (including Raphael Lemkin, the founding father of the term "genocide") envisioned the crime as incorporating three categories of punishable destruction – physical, biological, and cultural – only the former two made it to the final text of the Convention. Today, discussions as to whether the so-called "cultural genocide" (*i.e.,* acts aimed at destroying the group's linguistic,

religious or cultural identity) within the crime's definition seems unequivocal – it is not.[1]

Nevertheless, the bare formulation of the crime as it stands in the Convention and customary international law leaves an important question open. Does the term "to destroy" within genocidal intent incorporate "social destruction" of the group or its part (hereinafter interchangeably used with "social disintegration"), as opposed to merely physical or biological destruction? In other words, can genocidal intent take the form of disintegrating the group as a social unit via five exhaustive underlying acts[2] in combination with other heinous conduct without necessarily aiming to achieve the physical or biological elimination of every or nearly every group member?

To date, international and domestic jurisprudence has not provided an unambiguous answer. Certain domestic jurisdictions accepted that the concept of destruction incorporates annihilation of a group "as a social unit" as opposed to merely physical and biological annihilation,[3] with the legitimacy of this interpretation being further upheld by the European Court of Human Rights (hereinafter – "ECtHR").[4] Certain Chambers of the International Criminal Tribunal for the Former Yugoslavia (hereinafter – "ICTY") similarly supported the idea that genocidal intent must aim at the destruction of the group "as a separate and distinct entity", which does not require the actual consequence of death of the group members and can be established in cases where "the group ceases to exist as a group".[5] At the same time, other Chambers consistently pronounced that the notion of destruction refers to physical or biological forms only excluding acts seeking to annihilate cultural or *sociological* elements of the group or other forms of the group's identity.[6] The International Court of Justice (hereinafter – "ICJ") was even more explicit by stating that even those underlying acts that by themselves do not entail physical or biological annihilation of a human being (*e.g.,* causing serious mental harm or transfer of children) must be "carried out with

[1] See, for example, 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 (hereinafter – "ILC, "*Draft Code of Crimes against the Peace and Security of Mankind with commentaries*"), 45, para. 7.*"*

[2] The definition of the crime in the Genocide Convention, as further reflected in other internatinal instruments and customary international law, limits the scope of *actus reus* to the exhaustive list of five underlying acts, namely killing, causing serious bodily or mental harm, deliberate infliction of life conditions calculated to bring about physical destruction of the group or its part, prevention of births, and forcible transfer of children to another group. See Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 United Nations Treaty Series 276 (hereinafter – "Genocide Convention"), Article II.

[3] Federal Constitutional Court of Germany, No. 2 BvR 1290/99, Order of December 12, 2000, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/12/rk20001212_2bvr129099en.html (hereinafter – "Federal Constitutional Court of Germany, No. 2 BvR 1290/99"), paras 22-28.

[4] *Case of Jorgic v. Germany*, App. no. 74613/01, Judgment, July 12, 2007, https://www.legal-tools.org/doc/812753/pdf, paras 103-116.

[5] *Prosecutor v. Blagojević and Jokić* (Trial Judgement), IT-02-60-T, January 17, 2005, https://www.legal-tools.org/doc/7483f2/pdf/ (hereinafter – "*Blagojević and Jokić* Trial Judgement), paras 657-666. Similarly, see *Prosecutor v. Krajisnik* (Trial Judgment), IT-00-39-T, September 27, 2006, https://www.refworld.org/jurisprudence/caselaw/icty/2006/en/91994, (hereinafter – "*Krajisnik* Trial Judgment"), para. 854, as well as *Prosecutor v. Krstić* (Appeals Judgment), IT-98-33-A, April 19, 2004 https://www.refworld.org/jurisprudence/caselaw/icty/2004/en/33340 (hereinafter – "*Krstić* Appeals Judgment"), Partial Dissenting Opinion of Judge Shahabuddeen, paras 50-52.

[6] Among others, see *Prosecutor v. Krstić* (Trial Judgment), IT-98-33-T, August 2, 2001, https://www.refworld.org/jurisprudence/caselaw/icty/2001/en/40159 (hereinafter – "*Krstić* Trial Judgment"), para. 580; *Prosecutor v. Semanza* (Judgement and Sentence), ICTR-97-20-T, May 15, 2003, https://www.refworld.org/jurisprudence/caselaw/ictr/2003/en/61864 (hereinafter – "*Semanza* Judgement and Sentence"), para. 315; *Prosecutor v. Gacumbitsi* (Trial Judgement), ICTR-2001-64-T, June 17, 2004, https://www.legal-tools.org/doc/b4e8aa/pdf (hereinafter – "*Gacumbitsi* Trial Judgement"), para. 253; *Prosecutor v. Muhimana* (Trial Judgement), ICTR-95-1B-T, April 28, 2005, https://www.legal-tools.org/doc/87fe83/pdf (hereinafter – "*Muhimana* Trial Judgement"), para. 497; *Prosecutor v. Popović* (Trial Judgement), IT-05-88-T, June 10, 2010, https://www.refworld.org/jurisprudence/caselaw/icty/2010/en/33661 (hereinafter – "*Popović et al.* Trial Judgement"), para. 822, *Prosecutor v. Tolimir* (Trial Judgement), IT-05-88/2-T, December 12, 2012, https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf (hereinfter – "*Tolimir* Trial Judgement"), paras 741, 746; *Prosecutor v. Tolimir* (Appeals Judgment), IT-05-88/2-A, April 8, 2015, https://www.legal-tools.org/doc/010ecb/pdf, para. 230.

the intent of achieving the physical or biological destruction of the group".[7]

Likewise, legal doctrine has, to date, brought relatively little clarity leaving the issue unsettled. Attempts to address it directly have been relatively rare, although certain prominent legal voices, such as L. Berster,[8] C. Kreß,[9] G. Werle and F. Jessberger,[10] P. Behrens,[11] W. Schabas,[12] engaged in the relevant analysis (albeit to varying degrees of rigor).[13]

This article aims to provide a sound interpretation of the term "to destroy" within genocidal intent following the fundamental rules of treaty interpretation. Upon the analysis of the ordinary meaning of the term "to destroy" used in its context and in light of the object and purpose of the Genocide Convention, the article makes a recourse to supplementary means of interpretation. It provides an overview of relevant jurisprudence and commentaries in order to establish whether intended destruction may expand to social disintegration beyond physical and biological forms only. Particularly, it examines an apparently prevalent confusion between the notion of "destruction" in the meaning of *modus operandi* of underlying acts and "destruction" within the scope of genocidal intent. Finally, it provides for key arguments both in favor and against the inclusion of social disintegration under the umbrella of the intent "to destroy" outlining several important reasons as to why the *mens rea* element of genocide can and should extend to intended social disintegration.

The term "to destroy" in light of the fundamental rules of treaty interpretation

Vienna Convention on the Law of Treaties (hereinafter – "VCLT") provides for the fundamental rules of treaty interpretation reflective of customary international law[14] that present the governing framework to establish the meaning of the term "to destroy" within the element of *dolus specialis*, *i.e.,* genocidal intent. Article 31 of the VCLT stipulates that treaty terms shall be interpreted in good faith according to their ordinary meaning in their context and in the light of the treaty's object and purpose.[15] Additionally, the interpretation process shall encompass subsequent agreements between the parties related to the interpretation or application of the treaty provisions, subsequent practice in the treaty application establishing the parties' agreement on the interpretation of certain provisions, and relevant international law rules applicable between the parties[16] (*i.e.,* all recognized and binding sources of law that have a potential to assist in the interpretation process).[17] Subsequent practice equally encompasses decisions of international courts and tribunals empowered by the parties with a

[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), Judgment, 2015 ICJ Reports 3, https://www.icj-cij.org/sites/default/files/case-related/118/118-20150203-JUD-01-00-EN.pdf (hereinafter – "*Croatia v. Serbia*"), para. 136.

[8] Lars Berster, "Commentary to Article II," in *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary,* ed. Christian J. Tams, Lars Berster, and Björn Schiffbauer (C.H. Beck – Hart – Nomos, 2014), 81-83, 124-125, 128, 149-151 (hereinafter – "Berster in Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary*"); Lars Berster, "The Alleged Non-Existence of Cultural Genocide," *Journal of International Criminal Justice* 13, no. 4 (2015): 677, https://doi.org/10.1093/jicj/mqv049 (hereinafter – "Berster, "The Alleged Non-Existence of Cultural Genocide").

[9] Claus Kreß, "The Crime of Genocide under International Law," *International Criminal Law Review* 6, no. 4 (2006): 461, https://doi.org/10.1163/157181206778992287 (hereinafter – "Kreß, "The Crime of Genocide under International Law"), 486-489.

[10] Gerhard Werle and Florian Jessberger, *Principles of international criminal law* (4th ed., Oxford University Press, 2020) (hereinafter – "Werle and Jessberger, *Principles of international criminal law*"), 364.

[11] Paul Behrens, "The mens rea of genocide," in *Elements of Genocide,* ed. Paul Behrens and Ralph Henham (Routledge, 2013), 82-86.

[12] William Schabas, *Genocide in International Law. The Crime of Crimes* (3rd ed., Cambridge University Press, 2025) (hereinafter – "Schabas, *Genocide in International Law*"), 233-236, 336-340.

[13] See various other authorities as collated in Berster, "The Alleged Non-Existence of Cultural Genocide," 678, footnote 2.

[14] Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties. A Commentary* (Springer, 2018) (hereinafter – "Dörr and Schmalenbach, *VCLT. A Commentary*"), 561

[15] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 United Nations Treaty Series 331 (hereinafter – "VCLT"), Article 31(1).

[16] *Ibid*.

[17] Dörr and Schmalenbach, *VCLT. A Commentary*, 604-605; Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2009) (hereinafter – "Mark E. Villiger, *Commentary on the VCLT*"), 432-433; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) (hereinafter – "Orakhelashvili, *The Interpretation of Acts and Rules*"), 365-371.

mandate to interpret the treaty.[18] In the context of the law of genocide, this inevitably includes jurisprudence of judicial bodies vested with power to directly or indirectly apply and interpret the Genocide Convention, such as the ICJ, the ICTY and the International Criminal Tribunal for Rwanda (hereinafter – "ICTR").

Where this interpretative process leaves the meaning of terms ambiguous or obscure or leads to a manifestly absurd or unreasonable result, recourse may be made to supplementary means of interpretation.[19] They include *travaux préparatoires*, the circumstances of the treaty's conclusion,[20] as well as "subsequent practice which either was not that of parties (but, for example, of international organs) or which does not relate to the application of the treaty or does not establish an agreement of the parties" where it can support the interpretation process.[21] This necessarily, too, justifies the recourse to international jurisprudence, authoritative commentaries and the pronouncements of other international organs, such as the United Nations (hereinafter – "UN") bodies.

The starting point of the interpretation involves the analysis of the ordinary meaning[22] of the term "to destroy". The verb can be defined in several interconnected ways, namely meaning "to put out of existence",[23] "to damage something, especially in a violent way, so that it […] no longer exists"[24] or "to cause so much damage to [something] that it is completely ruined or does not exist any more".[25] As such, while the verb "destroy" can be synonymous to the terms "kill", "ruin", "neutralize", "annihilate", and "vanquish",[26] nothing in the ordinary meaning of the term necessarily limits the form in which destruction can occur. Putting it in the context of the crime of genocide, nothing in the ordinary meaning of the term "to destroy" in the definition of intent *per se* points in the direction of physical and/or biological forms of sought destruction only.

The initial vision of the term "genocide" by its author, Raphael Lemkin, further reinforces this point, illustrating the potential range of alternative forms "destruction" of a human group may undertake. In his first treatise introducing the word "genocide" into the international law plane, "Axis Rule in Occupied Europe", Lemkin defined the notion of "destruction" broadly in comparison to what later made its way to the Convention's final text.[27] To Lemkin, genocide did not necessarily entail the group's "immediate destruction", such as the one accomplished by mass killings of all group members.[28] Genocide could also take the form of "a coordinated plan of different actions aiming at the destruction of essential foundations of the life" of the group that aimed at annihilating the group as such.[29] The forms of such destruction varied and included various measures in order to disintegrate socio-political foundations of the group, such as its "culture, language, national feelings, religion, and the economic existence, […and] destruction of the personal security, liberty, health, dignity, and […] lives" of group members.[30] Lemkin thus outlined a variety of what he labelled as "techniques of genocide". In addition to biological and physical targeting, they incorporated political, social, cultural,

[18] See, *e.g.,* Orakhelashvili, *The Interpretation of Acts and Rule*s, 357; Dörr and Schmalenbach, *VCLT. A Commentary*, 569-570; Ulf Linderfalk, *On the Interpretation of Treaties* (Springer, 2017), 165-166, 171; Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2017), 254-259.

[19] VCLT, Article 32.

[20] *Ibid*.

[21] Dörr and Schmalenbach, *VCLT. A Commentary*, 627. See also Y. le Bouthillier, "1986 Vienna Convention: Article 32 Supplementary means of interpretation," in *The Vienna Conventions on the Law of Treaties: A Commentary*, ed. Olivier Corten and Pierre Klein (Oxford University Press, 2011), 861-863; Villiger, *Commentary on the VCLT*, 445-446.

[22] Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary*, 17.

[23] "Destroy," Merriam-Webster, accessed March 27, 2025, https://www.merriam-webster.com/dictionary/destroy.

[24] "Destroy," Cambridge Dictionary, accessed March 27, 2025, https://dictionary.cambridge.org/dictionary/english/destroy. See also "Destroy," Oxford Learner's Dictionary, accessed March 27, 2025, https://www.oxfordlearnersdictionaries.com/definition/english/destroy.

[25] "Destroy," Collins Dictionary, accessed March 27, 2025, https://www.collinsdictionary.com/dictionary/english/destroy.

[26] "Destroy," Merriam-Webster, accessed March 27, 2025, https://www.merriam-webster.com/dictionary/destroy.

[27] Raphael Lemkin, *Axis Rule in Occupied Europe; Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, Division of International Law, 1944), 79.

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

economic, religious and moral methods of "destruction of the national pattern".[31] Hence, the ordinary meaning of the term "to destroy" within genocidal intent is not immediately conclusive as to the possibility to encompass social versus physical and biological destruction only. In turn, it equally does not rule out the reading of social disintegration into the definition of genocidal intent.

The context of the use of the term "to destroy" in the Genocide Convention in light of the Convention's object and purpose is the second step to follow in order to elucidate the ordinary meaning. The Convention's origins showcase the intention "to condemn and punish genocide as "a crime under international law"" that involves "a denial of the right of existence of entire human groups, a denial which shocks the conscience of [hu]mankind and results in great losses to humanity".[32] The Convention was thus preoccupied with a purpose of "liberat[ing] [hu]mankind from such an odious scourge".[33] The objects of the Convention are "purely humanitarian and civilizing", namely "to safeguard the very existence of certain human groups and […] to confirm and endorse the most elementary principles of morality".[34]

As such, the context, object and purpose fail to provide additional clarity as to the scope of the term "destruction". If the essence of genocide is denying entire human groups the right to exist that is to be condemned, then condemnation and punishment of genocide may equally extend to acts undertaken to achieve the group's social dissolution in addition to its physical and biological annihilation. Where intended social disintegration is similar or equal in effect to physical and biological disappearance, it is hard to see why only the latter is to be criminalized, leaving the former unpunished, if spirit of securing the Convention's object and purpose.

At the same time, the Convention's object and purpose should be viewed in light of its overarching objective of ensuring the broadest possible participation of states.[35] This, in particular, led to the exclusion of certain debatable notions broadening the crime's scope (for example, the so-called "cultural genocide" and political, economic, social and other groups within the protective scope). One may claim that this important aspect of the object and purpose would favor a restricted reading of the intent "to destroy" in case of doubts. This may as well exclude social disintegration from the scope of genocidal intent given that states did not explicitly envision it in the Convention.

With the meaning of "destruction" remaining ambiguous or obscure, recourse should be made to supplementary means of interpretation, particularly the *travaux.* Explicit inclusion or in-depth discussions of the group's social disintegration or dissolution as a potential form of intended destructive outcome are mostly missing from the *travaux.* The notable exception is presented in one of the first drafts of the Convention presented by Saudi Arabia that defined the crime of genocide as, *inter alia*, "planned disintegration of the political, social or economic structure of a group, people or nation".[36] However, the proposed provision was not mirrored in any subsequent drafts. At the same time, important cues can be extracted from multiple bids relevant to how states envisioned the potential place for cultural destruction under the Convention.

From the beginning, the drafting process significantly trimmed Lemkin's initial broad authorial vision of "destruction". Already, in one of the first drafts prepared by a group of three experts (including Lemkin) on behalf of the UN Secretariat, the notion of genocide undertook a more structured form. The crime was initially defined as acts directed against a protected group

[31] *Ibid.*, 82-90.

[32] *Reservations to the Convention on Genocide*, Advisory Opinion, 1951 ICJ Reports 15, https://www.icj-cij.org/sites/default/files/case-related/12/012-19510528-ADV-01-00-EN.pdf (hereinafter – "*Reservations* Advisory Opinion"), 23 with the reference to UN General Assembly (hereinafer – "UNGA"), *The Crime of Genocide*, UN Doc. A/RES/96(I), https://digitallibrary.un.org/record/209873?v=pdf.

[33] Genocide Convention, Preamble.

[34] *Reservations* Advisory Opinion, 23.

[35] *Ibid.*, 24.

[36] UNGA, Sixth Committee, "Delegation of Saudi Arabia: Draft Protocol for the Prevention and Punishment of Genocide," UN Doc. A/C.6/86, November 26, 1946, https://digitallibrary.un.org/record/752077?ln=en&v=pdf, 1.

"with the purpose of destroying it in whole or in part, or *of preventing its preservation or development* [emphasis added]",[37] the latter appearing to be a broad definition of the intent going beyond mere destruction. The exhaustive list of prohibited acts was split into three distinct categories broadly representing perceived physical, biological, and cultural forms of destruction.[38] While some conducts of what was labelled as "cultural genocide" – could as well by their nature – constitute means to achieve the group's disintegration as a social unit, most experts' commentaries focused on these conducts as an expression of *underlying acts* rather than the sub-element of the intent – a distinction that is important to bear in mind throughout the analysis of all subsequent jurisprudence provided below.

Several notable examples are, however, worth singling out. For instance, when defining the underlying act of "cultural genocide" in the form of "forced and systematic exile of individuals representing the culture of a group", the experts' commentary noted that disappearance of such individuals would turn the group into nothing "more than an amorphous and defenceless mass".[39] This reads as a hint on the idea that a group can be disintegrated and eventually destroyed through targeting of its emblematic representatives – without physically eliminating all other members – whose disappearance would turn the group into a mere accumulation of individuals. Similarly, the underlying act in the form of "forced transfer of children to another human group" was incorporated with the view that it "tends to bring about the disappearance of the group as a cultural unit in a relatively short time",[40] again leaving the lives of other members intact. As will be explained further below, both ideas of targeting representative group members as an indicator of genocidal intent and destroying the group via forced transfer of children eventually made their way to the Convention's interpretation, albeit under different pretexts and reasons.

Throughout further negotiations, the potential inclusion of "cultural genocide" gave rise to two opposing sets of views. Although not directly relevant to the notion of "social disintegration", these views are important to examine for two reasons: first, because of the apparent resemblance between cultural and social forms of destruction as further perceived in jurisprudence, and, second, because the exclusion of "cultural genocide" from the Convention was subsequently repeatedly used as a pretext to limit the interpretation of intended destruction to physical and biological forms only.

Delegations opposing the incorporation of "cultural genocide" into the Convention advanced several core claims. They argued that cultural destruction did not reach a threshold of seriousness equal to physical and biological forms,[41] that the concept was overly vague and risked making the definition of genocide

[37] UN Economic and Social Council (hereinafter – "ECOSOC"), "Draft Convention on the Crime of Genocide," UN Doc. E/447, June 26, 1947, https://digitallibrary.un.org/record/611058?v=pdf, 5 (Article I(II)).

[38] *Ibid*., 5-7.

[39] *Ibid*., 28.

[40] *Ibid*., 27.

[41] See, for example, UNGA, "Draft Convention on the Crime of Genocide: communications received by the Secretary-General," UN Doc. A/401/Add.2, October 18, 1947, https://digitallibrary.un.org/record/603201?v=pdf, Communication to the UN Secretary-General received from the United States of America (hereinafer – "UN Doc. A/401/Add.2"), 5. See also UN ECOSOC, "Prevention and punishment of genocide: historical summary, 2 November 1946 – 20 January 1948," UN Doc. E/621, January 26, 1948, https://digitallibrary.un.org/record/3964943?v=pdf (hereinafer – "UN Doc. E/621"), 48 (statement by the United States of America); UN ECOSOC, "Ad Hoc Committee on Genocide: summary record of the 14th meeting, Lake Success, New York, Wednesday, 21 April 1948," UN Doc. E/AC.25/SR.14, April 27, 1948, https://digitallibrary.un.org/record/601789?ln=en&v=pdf (hereinafter – "UN Doc. E/AC.25/SR.14"), 10 (statement by the United States of America); UNGA, Sixth Committee, "Fortieth meeting, Lake Success, New York, on Thursday, 2 October 1947 at 11 a.m., continuation of the discussion on the draft convention on the crime of genocide (document A/362, A/382, A/401, A/C.6/147, A/C.6/149 and A/C.6/151)," UN Doc. A/C.6/SR.40), October 2, 1947, https://docs.un.org/en/A/C.6/SR.40, 27 (statement by Egypt); UN ECOSOC, "218th meeting held at the Palais des Nations, Geneva, on Thursday, 26 August 1948, at 3 p.m.," UN Doc. E/SR.218, August 26, 1948, https://docs.un.org/en/E/SR.218 (hereinafter – "UN Doc. E/SR.218"), 707 (statement by Canada); UNGA, Sixth Committee, "Sixty-fourth meeting, Palais de Chaillot, Paris, Friday, 1 October 1948, at 10.30 a.m.," UN Doc. A/C.6/SR.64, October 1, 1948, https://digitallibrary.un.org/record/603890?v=pdf&ln=en (hereinafter – "UN Doc. A/C.6/SR.64"), 15 (statement by India); UN ECOSOC, "Ad Hoc Committee on Genocide, Commentary on Articles adopted by the Committee," UN Doc. E/AC.25/W.1, April 26, 1948, https://digitallibrary.un.org/record/601993?v=pdf (hereinafer – "UN Doc. E/AC.25/W.1"), 4.

meaningless,[42] and that it was purely a matter of human rights and minority protection.[43]

Arguments favoring the inclusion of "cultural genocide" treated physical and biological and cultural forms of genocide as tantamount and indivisible,[44] claiming that genocide could equally occur through both causing the group's physical or biological disappearance and abolishing its special traits without annihilating the lives of group members.[45] Thus, as some delegates claimed, while differing in *modus operandi*, both forms of destruction had a shared objective of causing the group's disappearance.[46]

Certain delegations, however, moved closer to hinting on the idea of social disintegration. They were even more precise in stating that genocide did not require the extermination of the group's every individual member, and a human group could disappear even if its members survived physically or biologically.[47] The argument stressed that confining genocide to physical disappearance of group members is inherently wrong because individual group members can continue existing even where "the group as such had been killed off".[48]

New Zealand's delegation's intervention is particularly remarkable for the discussion on the social aspect of the intended destruction. The delegate provided an example where perpetrators might choose to physically eliminate older members of the group while preserving the youth and converting it ideologically into another group's identity.[49] In such a case, even with individual members of the group surviving, the group would face annihilation.

"Cultural genocide" eventually did not make it into the Convention being excluded after lengthy debates by 25 votes, with 16 oppositions, 4 abstentions, and 13 absentees.[50] Only one out of the previously listed underlying acts of "cultural genocide" – forcible transfer of children – made

[42] UN ECOSOC, "219th meeting held at the Palais des Nations, Geneva, on Thursday, 26 August 1948, at 9 p.m.," UN Doc. E/SR.219, August 26, 1948, https://digitallibrary.un.org/record/826235?v=pdf&ln=en, 727 (statement by United Kingdom); UNGA, Sixth Committee, "Sixty-third meeting, Palais de Chaillot, Paris, Thursday, 30 September 1948, at 10.30 a.m.," UN Doc. A/C.6/SR.63, September 30, 1948 https://docs.un.org/en/A/C.6/SR.63 (hereinafter – "UN Doc. A/C.6/SR.63"), 8 (statement by France); UNGA, Sixth Committee, "Sixty-fifth meeting, Palais de Chaillot, Paris, Saturday, 2 October 1948, at 10.40 a.m.," UN Doc. A/C.6/SR.65, October 2, 1948 https://digitallibrary.un.org/record/603891?ln=en&v=pdf (hereinafter – "UN Doc. A/C.6/SR.65"), 29 (statement by France); 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, October 25, 1948, https://digitallibrary.un.org/record/604635?v=pdf (hereinafter – "A/C.6/SR.83"), 203 (statement by Netherlands).

[43] UN Doc. A/401/Add.2, 5 (statement by the United States of America); UN Doc. E/621, 48 (statement by the United States of America); UN Doc. A/C.6/SR.63, 8 (statement by France); UN Doc. A/C.6/SR.65, 29 (statement by France); UN Doc. E/SR.218, 707 (statement by Canada). See also UN ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Eleventh Meeting, Lake Success, New York, Friday, 16 April 1948, at 2.00 p.m.," UN Doc. E/AC.25/SR.11, April 21, 1948, https://digitallibrary.un.org/record/601781?v=pdf, 4 (statement by France); UN ECOSOC, "Prevention and Punishment of Genocide. Comments by Governments on the Draft Convention prepared by the Secretariat (E/447)," UN Doc. E/623/Add.3, April 22, 1948, Comments submitted by the Netherlands, in *The Genocide Convention: the travaux préparatoires*, ed. Hirad Abtahi and Philippa Webb (Martinus Nijhoff Publishers, Leiden, 2008), 636; UN Doc. E/AC.25/SR.14, 7-8, 10-11 (statements by France and the United States of America); UN Doc. A/C.6/SR.64, 16-17 (statements by Uruguay and the United Kingdom); UN Doc. E/AC.25/W.1, 4; UN Doc. A/C.6/SR.83, 197 and 203 (statements by Brazil and Netherlands).

[44] UN ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Fifth Meeting, Lake Success, New York, Tuesday, 8 April 1948, at 2 p.m.," UN Doc. E/AC.25/SR.5, April 16, 1948, https://digitallibrary.un.org/record/601707?v=pdf, 5 (statement by China).

[45] UN Doc. E/AC.25/W.1, 4; UN Doc. A/C.6/SR.65, 27 (statement by Ukrainian Soviet Socialist Republic); UNGA, Sixth Committee, "Sixty-sixth meeting, Palais de Chaillot, Paris, Monday, 4 October 1948, at 10.45 a.m.," UN Doc. A/C.6/SR.66, October 4, 1948, https://digitallibrary.un.org/record/603892?v=pdf, 32-33 (statement by Lebanon); UN Doc. A/C.6/SR.83, 193 and 205 (statements by Pakistan and Czechoslovakia); UN ECOSOC, "Ad Hoc Committee on Genocide, Submitted by the Delegation of the Union of Soviet Socialist Republics on 5 April 1948," UN Doc. E/AC.25/7, April 7, 1948, https://digitallibrary.un.org/record/601592?v=pdf, 2.

[46] UN Doc. A/C.6/SR.83, 203-204 (statement by Ecuador).

[47] UN ECOSOC, "Ad Hoc Committee on Genocide, Second Meeting, Lake Success, New York, Monday 5 April 1948, at 3 p.m.," UN Doc. E/AC.25/SR.2, April 6, 1948, https://digitallibrary.un.org/record/601678?ln=en&v=pdf, 4 (statement by Lebanon); UN Doc. E/AC.25/SR.14, 2-3 (statement by China); UN 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, April 29, 1948, https://digitallibrary.un.org/record/601786?ln=en&v=pdf, 13 (statement by Poland); UN ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Third Meeting, Lake Success, New York, 15 April 1948, at 2 p.m.," UN Doc. E/AC.25/SR.4, April 15, 1948, https://digitallibrary.un.org/record/601703?ln=en&v=pdf (hereinafter – "UN Doc. E/AC.25/SR.4"), 7 (statement by Venezuela).

[48] UN Doc. E/AC.25/SR.4, 7 (statement by Venezuela).

[49] UNGA, Sixth Committee, "Seventy-third meeting, Palais de Chaillot, Paris, Wednesday, 13 October 1948, at 3.15 p.m.," UN Doc. A/C.6/SR.73, October 13, 1948, https://digitallibrary.un.org/record/604081?v=pdf, 94 (statement by New Zealand).

[50] 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, https://digitallibrary.un.org/record/604635?v=pdf, 206.

it into the final text of the Convention. It was done so upon the clarification from several delegations of their understanding that forcible transfer has "not only cultural, but also physical and biological effects" and was analogous to physical and biological methods of destruction.[51]

Despite marginal discussions trying to justify the inclusion of "cultural genocide" within the crime's definition, the *travaux* reinforced by subsequent practice and doctrine clearly testify against the validity of this suggestion. However, the express exclusion of "cultural genocide" does not resolve the dilemma of social disintegration, primarily for two reasons. First, the social disintegration of the group represents a graver form of annihilation, as opposed to the mere erasure of its identity. Second, discussions surrounding "cultural genocide" mainly related to its inclusion in the list of underlying acts as opposed to its implications for the intent. While it remains relevant to conclude that in the absence of respective underlying acts the intent to destroy the group "culturally" is impossible to accomplish, the discussion on social disintegration is much more nuanced. As will be argued below, it seems possible to achieve the group's social dissolution *through* the exhaustive list of five underlying acts encompassing physical and biological methods of destruction.

Thus, the ordinary meaning of the term "destruction" in light of its context, the Convention's object and purpose, as well as the *travaux*, makes it *prima facie* plausible that the intent "to destroy" may encompass social disintegration committed via five underlying acts. This preliminary conclusion remains to be tested against other supplementary means of interpretation, primarily international jurisprudence.

Potential room for "social disintegration" within genocidal intent in light of the contemporary jurisprudence

The most frequently discussed roots of social disintegration within genocidal intent stem from the German domestic courts' rulings in the case of *Nikola Jorgić*, a Bosnian Serb paramilitary convicted for genocide for the incidents of killing more than 20 Bosnian Muslims. In the German courts' interpretation, further upheld by the Constitutional Court, genocidal intent encompasses the destruction of the group "as a social unit with its special qualities, uniqueness and its feeling of togetherness, not exclusively their physical-biological annihilation".[52] The Constitutional Court further reasoned that the criminalization of genocide represents "a legal interest that lies beyond the individual, namely the social existence of a group" which is further indicated by the requirement that genocidal intent "must be directed against the "group as such"".[53]

The case of *Jorgić* proceeded to the ECtHR[54] and the Court upheld the validity of the German courts' interpretation from the standpoint of the legality principle. Jorgić claimed that "a mere attack on the living conditions or the basis of subsistence of a group", such as "ethnic cleansing", with the goal to expel the group from the area, did not constitute genocide.[55] According to the Applicant, destruction within the definition of intent had to be understood "in a biological-physical sense" only and not as directed at a group as a social unit.[56] The ECtHR disagreed. It stated that any system of criminal law inevitably provides for the "element of judicial interpretation" to elucidate doubtful issues and

[51] UNGA, Sixth Committee, "Eighty-second meeting, Palais de Chaillot, Paris, Saturday, October 23, 1948, at 10.30 a.m.," UN Doc. A/C.6/SR.82, https://digitallibrary.un.org/record/604634?ln=en&v=pdf, 186-188 (statements by Greece and the United States of America).

[52] Federal Constitutional Court of Germany, No. 2 BvR 1290/99, para. 20.

[53] *Ibid*., para. 22.

[54] *Jorgic v. Germany*.

[55] *Ibid*., para. 92.

[56] *Ibid*., para. 93.

gradually clarify the law, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".[57] In the ECtHR's view, German courts' interpretation of intent as incorporating destruction of the group as a social unit complied with this test.[58] While there was indeed a scholarly disagreement on the question, various authorities at the relevant time construed the notion of intent broadly favouring the interpretation by German courts that was consistent with the essence of genocide as an offence.[59]

Yet, German courts' reasoning in *Jorgić* did not find support from the ICTY. In *Krstić (Trial)*, the Chamber cited German Constitutional Court's pronouncement in *Jorgić* and recalled Lemkin's original broad vision of "destruction" encompassing all forms targeting "a group as a distinct social entity".[60] The Chamber, however, further concluded that "customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group".[61] At the same time, mere attacks at "cultural or sociological characteristics" forming a distinct identity of a group with the purpose of their annihilation will not qualify a genocide.[62] Various subsequent Chambers restated this pronouncement.[63]

At first glance, one of the immediate suggested readings of this pronouncement may imply the complete rejection of social disintegration from the scope of genocidal intent. However, the actual analysis and findings of Chambers in *Krstić* and subsequent cases present a far more nuanced picture. Taking *Krstić (Trial)* as an example, the Chamber established genocide based on the fact of killing of around 7.000 to 8.000 Bosnian Muslim men in the Srebrenica enclave, combined with the removal of around 25.000 remaining Bosnian Muslim women, children and elderly and the destruction of their homes and mosques.[64]

The Trial Chamber stated that the evidence pointed to the intent of Bosnian Serb forces "to eliminate all of the Bosnian Muslims in Srebrenica as a *community* [emphasis added]".[65] The Bosnian Serb forces should have known that such selective destruction "would have a lasting impact upon the entire group" given its patriarchal nature and precluding Bosnian Muslims' chance of recapturing the territory or re-establishing their presence there.[66] The aforementioned combination of acts "would inevitably result in the *physical disappearance* of the Bosnian Muslim population at Srebrenica [emphasis added]".[67]

The plain reading of the Trial Chamber's pronouncements and accompanying reasoning leaves the understanding of "destruction" within the definition of the intent rather vague. The Chamber consistently references the survival of "the community" – an inherently social, geographically limited notion. When explaining that genocide must consist of acts seeking physical or biological destruction, not attacks on cultural or sociological features, the Trial Chamber seemed to focus on the *actual methods of destruction* as *modus operandi* for the commission of underlying acts, not the intended outcome. In Srebrenica, the majority of the community survived (although displaced), with around one-fifth of the community being physically targeted for destruction. The community was indeed removed from Srebrenica physically, as the Trial Chamber suggested, yet most of its members also physically survived. It thus seems that the Trial Chamber either implied (intentionally or unintentionally) or did not rule out the possibility (despite the actual wording used) that while material elements of underlying acts do not encompass social destruction, it remains a

[57] *Ibid*., para. 101.

[58] *Ibid*., para. 109.

[59] *Ibid*., paras 113-114.

[60] *Krstić* Trial Judgment.

[61] *Ibid*., paras 579-580.

[62] *Ibid*., para. 580.

[63] See *supra* 4.

[64] *Krstić* Trial Judgement, paras 594-596.

[65] *Ibid*., para. 594.

[66] *Ibid*., paras 595, 597.

[67] *Ibid*., para. 595.

possible objective of the intent, where individual members of the group survive, while the group (or its part) does not as such.

The Appeals Judgment that upheld the finding of genocide was seemingly clearer on certain issues, particularly its focus on physical and biological survival. The Appeals Chamber reiterated that the Genocide Convention prohibits "only the physical or biological destruction",[68] which – once again – is an ambiguous statement that can relate to underlying acts rather than the intent itself. It further explained that Bosnian Serb forces' acts undermined the "likelihood of the [Bosnian Muslim] community's physical survival".[69] Given the patriarchal nature of the society, physical destruction of most men led to women being "unable to remarry and, consequently, to have new children" having "severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction".[70] The Chamber concluded that this type of "physical destruction the Genocide Convention is designed to prevent".[71] In response to the Defence's argument that sparing women, children and elderly from killing undermined the finding of genocidal intent, the Chamber stated that their displacement was "an additional means" to "ensure the physical destruction of the Bosnian Muslim *community in Srebrenica* [emphasis added]."[72] Such transfer thus "completed the *removal* of all Bosnian Muslims from Srebrenica [emphasis added]" and eliminated "even the residual possibility" of the community to reconstitute itself.[73]

Repeated reference by the Appeals Chamber to "physical survival" can be read as an indicator that "destruction" within the intent is limited to physical and biological forms only. However, references to "physical survival" seem somewhat superficial and dissonant from the factual analysis undertaken. The very narrative used by the Chamber seemingly testifies that the social disintegration of the *community* was the actual result achieved and intended, not the literal preclusion of physical survival of its members. The Chamber focused its analysis on the emblematic nature of the Srebrenica community, given its prominence and "strategic importance" to both Bosnian Muslims and Serbs,[74] which too refer to the social features of the community rather than individual victims. While the disappearance of men would indeed have a significant impact on the patriarchal society, it would unlikely alone undermine the physical survival of the Bosnian Muslim group – rather, the Srebrenica *community.* This directly stems from the Chamber's conclusion that killings combined with the displacement ensured that the Bosnian Muslim community in Srebrenica was *removed* and further incapable *of reconstituting itself in the area.* Moving from the contrary, theoretically, the remaining part of the group could reconstitute itself elsewhere with the survival of children and other group members or – more broadly – dissolve in a broader Bosnian Muslim group in whole. Nevertheless, what mattered for the analysis and kept being reiterated by Chambers is that Srebrenica disappeared as a Bosnian Muslim *community*. Despite the literal wording used by the Chambers, the actual analysis indicated that social destruction of the part of the Bosnian Muslim group as a distinct community appeared to be the true intent of the perpetrators.

The only reasonable explanation of the conflicting narratives used by both Chambers is that they kept confusing and mixing "destruction" in the meaning of underlying acts and "destruction" as an element of the intent. The former, indeed, consists of physical and biological forms only and cannot extend to attacks on cultural or sociological foundations. The latter, however, does not necessarily require the physical or biological disappearance of the group or its part (unless the Chambers meant physical disappearance in the meaning of *literal*

[68] *Krstić* Appeals Judgment, para. 25.

[69] *Ibid*., para. 28.

[70] *Ibid*.

[71] *Ibid*., para. 29.

[72] *Ibid*., para. 29.

[73] *Ibid*.

[74] *Ibid*., paras 15-16.

presence in the area, not survival as the group). This is the only way to explain how individual members of the group – or even the overwhelming majority of the targeted community – can survive while the geographically limited "community" stops existing as a social unit without its further possibility of reconstituting itself. Members of the group continue their existence elsewhere while their community is gone, particularly as a result of effects caused by physical and biological underlying acts of destruction. It remains, however, true that "destruction" in any case should be distinguished from mere "dissolution" in the form of expulsion of the group members (falling short of underlying acts), which – in itself – will not qualify as genocide.[75]

This very logic was spelled out and acknowledged in the partially dissenting opinion of Judge Shahabuddeen to the Appeals Judgment.[76] He stated that allowing a substantial number of Bosnian Muslims in Srebrenica to survive precluded the intent to achieve their physical destruction.[77] A principal distinction must thus be made between the nature underlying acts and the prerequisite intent.[78] Underlying acts must only consist undertake physical or biological forms, but the intent does not need to "lead to a destruction of the same character".[79] It is thus unclear why the intent to achieve a non-physical or non-biological destruction is not encompassed by the Genocide Convention, in cases when it is realized through the five underlying acts.[80] In the words of Judge Shahabuddeen, since protected groups are distinguished by various tangible and intangible characteristics binding "a collection of people as a social unit", destruction of such characteristics through five underlying acts may lead to the effective obliteration of the group that is not physical or biological.[81]

The same confusion between "destruction" in the sense of underlying acts and "destruction" in the meaning of the intent seemingly migrated to later judgments too. Subsequent Chambers took the vague and generic pronouncement in *Krstić (Appeal)* that the "Convention, and customary international law in general, prohibit only the physical or biological destruction" as a basis for stating that the intent too must be limited to physical and biological forms only.[82] A similar dissonant approach has been undertaken by a few other Chambers of the ICTR, where underlying acts were misconstrued as a basis for defining the essence of intent.[83] Even the ICJ seemingly adopted the reasoning stemming from the same confusion. In *Croatia v. Serbia*, the Court noted that underlying acts of causing serious mental harm have to only encompass acts committed with the intent to cause the group's "physical or biological destruction".[84] The only support provided to this conclusion was the fact of the exclusion of underlying acts of "cultural genocide" from the conventional scope leaving only physical or biological genocide covered.[85] Yet again, the exclusion of "cultural genocide" primarily related to the notion of "destruction" manifested in underlying acts, not necessarily the intent as such. The

[75] *Prosecutor v. Stakic* (Trial Judgement), IT-97-24-T, July 31, 2003, https://www.refworld.org/jurisprudence/caselaw/icty/2003/en/40192 (hereinafer – "*Stakic* Trial Judgement"), para. 519.

[76] *Krstić* Appeals Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 46.

[77] *Ibid*.

[78] *Ibid*., para. 47.

[79] *Ibid*.

[80] *Ibid*., para. 48.

[81] *Ibid*., para. 49.

[82] See, *e.g., Popović et al.* Trial Judgement, para. 822 and particularly footnote 2943 misreading *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 2007 ICJ Reports 43, https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf (hereinafter – "*Bosnian Genocide* Judgment 2007"), para. 344 discussing "destruction" in the meaning of underlying acts. See further *Tolimir* Trial Judgement, para. 746; *Prosecutor v. Mladić* (Trial Judgement), IT-09-92-T, November 22, 2017, https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-09-92/JUD275R0000516226.pdf, para. 3435; *Prosecutor v. Karadžić* (Trial Judgement), IT-95-5/18-T, March 24, 2016, https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf, para. 553.

[83] See, *e.g., Semanza* Judgement and Sentence, para. 315; *Gacumbitsi* Trial Judgement, para. 253; *Muhimana* Trial Judgement, para. 497.

[84] *Croatia v. Serbia*, para. 136.

[85] *Ibid*.

exclusion of underlying acts of "cultural" genocide is in itself not conclusive of the drafters' intention as to the scope of the intent.

Several judgments, however, did deviate from the commonly accepted reasoning based on *Krstić (Appeal)*. *Krajisnik (Trial)* moved closer discussing social disintegration within the scope of genocidal intent. The Chamber claimed that the notion of "destruction" within the intent is not limited to physical and biological forms only since a group can be destroyed in other ways.[86] The Chamber held the transfer of children to be one example thereto.[87] It also referred to "severing the bonds among [group] members" explaining that a group is not amenable to merely physical or biological destruction.[88] Group members remain physical and biological human beings, yet united by intangible bonds, common culture and beliefs.[89] Although the Chamber did not establish genocide based on the available factual pattern, the reasoning presented a notable attempt to provide a more delicate approach to determining the scope of the intended destruction resonating Judge Shahabuddeen's dissent.

In another instance, *Blagojević and Jokić*, the Trial Chamber examined whether forcible transfer of adults fell within the definition of genocide. The Chamber stated that the exclusion of "cultural genocide" from the Convention "[did] not in itself prevent that physical or biological genocide could extend beyond killings".[90] The Chamber concluded that the notion of "destruction" may incorporate the forcible transfer of population (particularly adults), especially if the group is unable to reconstitute itself since physical or biological destruction of the group is not necessarily achieved through deaths only.[91] The Chamber concluded that "a group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land" which forcible transfer is capable of undermining leading to the group's physical or biological destruction.[92]

While the reasoning is interesting from the perspective of bringing in the relevance of social ties for the group's preservation and survival, the overall conclusion seems apparently defective. Even if the described impact upon the group is valid to be anticipated, forcible transfer of adults does not fall within the exhaustive list of underlying acts and, as such, cannot constitute genocide (even though it can – depending on evidence – be indicative of genocidal intent). Here again, there is an important caveat to make: the group's social destruction may arguably reasonably fall under the scope of genocidal intent *solely* if it achieved via five underlying acts. Consequently, it cannot encompass mere deportations or expulsions from the area broadly known under the umbrella of "ethnic cleansing",[93] as well as other persecutory campaigns destroying social ties between the group members and leading to its disappearance.

Hence, even where the wording used by the judgments may seem to indicate otherwise, the actual analysis undertaken by various Chambers does not preclude the possibility of social disintegration being encompassed by genocidal intent; to the contrary, it appears to be supportive of it. There are several important considerations additionally favoring this approach.

[86] *Krajisnik* Trial Judgment, para. 854.

[87] *Ibid.*

[88] *Ibid.*, including footnote 1701.

[89] *Ibid.*, footnote 1701.

[90] *Blagojević and Jokić*, para. 658.

[91] *Ibid*., paras 665-666.

[92] *Ibid*., para. 666.

[93] See, *e.g., Stakic* Trial Judgement, para. 519; *Bosnian Genocide* Judgment 2007, para. 190.

Other arguments supporting the inclusion of social destruction within the scope of genocidal intent

First, the fundamental goal behind the criminalization of genocide is to protect the groups' right to exist,[94] which intended destruction in the form of social disintegration is undoubtedly capable of undermining.[95] Genocidal intent must be directed at a group "as a separate and distinct entity" and not simply accumulation of individuals due to their membership in a group.[96] Protected groups are defined by intrinsic intangible features creating strong social bonds uniting group members (e.g., depending on the group, culture, language, religion, national self-identification and national projects – lesser so though for racial groups defined by race as an artificial social construct dependent on the perceived physical traits[97]). Thus, realistically, the groups disappear when these characteristics are eliminated through five underlying acts. For their eradication, the perpetrators do not need to continue the destruction until the actual physical disappearance of (most) every group member. Respectively, a group can be annihilated physically or biologically, but its existence may also cease through its social disappearance as a "as a separate and distinct entity". The Convention's fundamental goal to uphold the diversity of humankind is imperiled equally by social disintegration and physical or biological destruction.[98]

Second, only one underlying act out of five – deliberately inflicting deadly life conditions – incorporates an express *mens rea* requirement of being "calculated to bring about [the group's] *physical* destruction [emphasis added]".[99] While one may read it as another support to the claim that destruction sought within the intent must be physical or biological only, alternative argument may suggest that such specification in the body of an underlying element is rather peculiar and uncommon to four other underlying acts. Moving from the contrary, it may indicate that inflicting deadly conditions is the only underlying act that requires the intent to achieve *physical* destruction while the others fall short of such specification for a reason of simply not requiring them.[100] In other words, the addition indicates that "destruction" within the intent element is broader than within an individual underlying act in question and "extends to dissolving the social bonds".[101]

Implicit reading of physical and biological destruction as an outcome can hypothetically be made in relation to the underlying elements of killing and prevention of births, which do result in the physical or biological destruction of at least a certain degree. However, this logic does not apply to other underlying acts. For example, causing serious mental harm leaves the group's physis (*i.e.,* physical conditions) as such intact.[102] Thus, it cannot be reasonably explained why protection of the group's physical and biological survival only would require the criminalization of the infliction of mental harm.[103] The only sound reason for its inclusion would be "to cover detrimental effects on a group's social texture".[104] Even causing serious bodily (*i.e.,* physical) harm does not as such result in physical destruction.[105] It is thus once again possible for group members subjected to the underlying acts of serious bodily or mental harm to survive even if their group is destroyed.

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[94] Berster in Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary,* 81; *Reservations* Advisory Opinion 23.

[95] Kreß, "The Crime of Genocide under International Law," 486.

[96] ILC, "*Draft Code of Crimes against the Peace and Security of Mankind with commentaries,"* 45, para. 7.

[97] See, *e.g., Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, September 2, 1998, https://www.refworld.org/cases,ICTR,40278fbb4.html, para. 514.

[98] Berster in Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary,* 82. See also Berster, "The Alleged Non-Existence of Cultural Genocide," 686-687.

[99] Genocide Convention, Article II(c).

[100] Kreß, "The Crime of Genocide under International Law," 486-487.

[101] Berster in Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary,* 82.

[102] *Ibid*., 81; Berster, "The Alleged Non-Existence of Cultural Genocide," 689.

[103] *Ibid*.

[104] *Ibid*., 82; Berster, "The Alleged Non-Existence of Cultural Genocide," 689.

[105] Werle and Jessberger, *Principles of international criminal law,* 364.

Yet, the very fact of their survival would entail that the objective of destroying the group physically or biologically was not fully achieved – an interpretative gap that is only possible to remedy with the inclusion of social disintegration within the scope of genocidal intent.

This very logic equally applies to the underlying act of child transfer. While taking children out of the group *may* indeed have biological implications on the group's ability to survive, it remains theoretically possible for the adult population to continue the group's procreation. There are only two unambiguous scenarios in which the transfer of children would lead to the group's biological destruction. The first scenario includes cases when all children are consistently taken away from the group (which is only likely in relatively small communities or those fully controlled by perpetrators), virtually precluding any possibility for the group to procreate. The second scenario only covers cases where the transfer of children is combined with another underlying act of birth preventions *or* if the remaining adult population is physically exterminated. However, the Convention does not impose such conditions which would be logical if physical and biological destruction was intended to be the only manifestation of the intent. Hence, not only the wording of underlying acts is sufficiently open to encompass the intent to socially disintegrate the group,[106] such inclusion is interpretatively desirable to reconcile otherwise arising normative contradictions within the definition of genocide. The Convention is based on the premise that none of the underlying act should be accomplished in its absolute, thus leaving the possibility of the group members' survival when the group as such disappears.

Third, viewed realistically, campaigns of massive blatant physical and biological destruction of human groups, such as the Holocaust that largely inspired the adoption of the Genocide Convention, are relatively rare. *Krstić (Appeal)* implicitly acknowledged this by explaining that Bosnian Serb forces' decision to deport Bosnian Muslim women and children, sparing them from killing, may have been justified by "sensitivity to public opinion" and impossibility to keep secrecy or create a disguise under the pretext of military reasons.[107] Respectively, the fear of retribution can prompt perpetrators to adopt genocidal tactics that may not seem to be the most efficient methods to achieve destruction.[108] Especially in the age of media and rapid spreading of information, perpetrators are more likely to adopt a sophisticated campaign of destruction consisting of a mixture of various underlying acts and other heinous conducts leading to the group's disappearance through social disintegration rather than blanket physical or biological extinction.

A human group disappears when its defining social foundations are gone. Blatant physical or biological extermination of such foundations is one way of ensuring this outcome. However, these foundations may disappear far before physical and biological extermination occurs. It would be absurd to claim that where perpetrators succeeded in achieving their goal of the group's disappearance through a sophisticated targeting campaign involving underlying acts, their conduct will fall short of the genocide qualification *unless* they continue pushing further until actual physical or biological destruction of a sufficient level is ultimately secured (which raises another question as to when this sufficiency is reached).[109]

Fourthly, there is another convincing cue in the jurisprudence supporting the inclusion of social disintegration under the scope of genocidal intent. It is well-recognized that genocidal intent can manifest itself in two forms: to destroy the group in whole or in part. The latter can be materialized through a limited and selective targeting of the most representative members of the community due to the impact

[106] *Ibid*.

[107] *Krstić* Appeals Judgement, para. 31.

[108] *Ibid*., para. 32.

[109] See similar considerations in Berster, "The Alleged Non-Existence of Cultural Genocide," 687-688.

"their disappearance would have upon the survival of the group as such".[110] Among them are leaders of the group, *i.e.,* persons who, due to their special qualities, either by virtue of official position or characteristics of their personality, have a special quality of directing or influencing the group's actions or opinions and whose disappearance would impact the group's survival.[111] Targeting the totality of leadership may be a strong genocidal indicator "regardless of the actual numbers killed" in view of the fate that befell the rest of the group: *e.g.,* if extermination of leadership, including its defenders, rendered the remainder defenseless in the face of other heinous acts (such as deportations).[112]

If it is accepted that genocidal intent can manifest itself through a limited selective targeting of leaders, it implies that the remainder of the group should not necessarily be targeted by underlying acts. Rather, their fate has to be assessed in light of the leaders' disappearance leading to the destruction of the group that is not physical or biological. As with the *Krstić* example, the totality of leaders of the emblematic community may be annihilated together with the group defenders, which would expose the remainder to subsequent heinous acts and deportations leading to the community's disappearance as a social unit, not physical or biological destruction of its members.

Finally, certain arguments do oppose the reading of social disintegration into the definition of intent. Some of them – as certain Chambers did – operate upon the fact that "cultural genocide" was excluded from the Convention, concluding hence that nothing less than physical or biological destruction can fall within the scope of genocidal intent.[113] As discussed above, this conclusion suffers from an interpretative inaccuracy. There is no reason why the exclusion of "cultural genocide" from the list of underlying acts must *per se* be indicative of the meaning of the "destruction" within the intent element. It is normatively possible and – as explained before – desirable that "destruction" in the sense of underlying conduct employed and "destruction" in the sense of the intended outcome undertake separate meanings, with the latter being broader. The exclusion of "cultural genocide" certainly testified to the drafters' intention to avoid the criminalization of a defined list of underlying conducts as *modus operandi* for the commission of genocide (*e.g.,* attacks on the group's linguistic or cultural heritage). However, the *travaux* present insufficient evidence to conclude that such an exclusion did have a bearing on the "intent" element excluding social disintegration from its scope.

Other commentators focused on the risky practical implications the expanded reading of the intent can bring. As Kreß argued, broad reading of the intent that incorporates social disintegration may lead to a situation where a perpetrator kills one group member or subjects them to another underlying act, knowingly furthering the campaign of the group's dissolution through mainly persecutory acts (*e.g.,* systematic targeting of culture), such perpetrator will be liable for genocide.[114] This will – as the argument suggests – defy the very nature of the offence. However, as Berster contends in response, such prosecution will anyways be well-justified even with the narrow reading of the Convention under the modes of incitement or an attempt to commit genocide.[115] In every individual case, the contextual

[110] *Prosecutor v. Goran Jelisić* (Trial Judgement), IT-95-10-T, December 14, 1999, https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/33140 (hereinafter – "*Jelisić* Trial Judgement"), para. 82.

[111] *Prosecutor v. Sikirica, Dosen, Kolundzija* (Judgement on Defence Motions to Acquit), IT-95-8-T, September 3, 2001, https://www.refworld.org/jurisprudence/caselaw/icty/2001/en/19633, paras 76-78.

[112] UN Security Council, "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)," UN Doc. S/1994/674, May 25, 1994, https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf, para. 94. For a detailed discussion of relevant issues, as well as further references to the cited Report see: Maksym Vishchyk, "Targeting of the protected group's leadership and otherwise representative members as an indicator of genocidal intent," *NaUKMA Research Papers. Law* 14 (2024):19, https://doi.org/10.18523/2617-2607.2024.14.19-31.

[113] Schabas, *Genocide in International Law,* 233-236.

[114] Kreß, "The Crime of Genocide under International Law," 487.

[115] Berster in Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary,* 83.

assessment will differ. A predominantly persecutory campaign that does incorporate sporadic underlying acts of genocide (*e.g.,* killings or infliction of serious harm) will remain within the realm of persecution falling short of the genocide qualification. Incorporation of social disintegration within the scope of genocidal intent will not and cannot change this determination.

Conclusion

The term "to destroy" as an inherent element of genocidal intent has given rise to two competing interpretations as to its scope. The narrow approach suggests that *dolus specialis* should be limited to the intended physical and biological destruction of the group only. The broader view indicates that the intent to destroy may as well cover the social disintegration of the group, *i.e.,* its destruction as a social unit.

Following fundamental rules of treaty interpretation, nothing in the ordinary meaning of the term "to destroy" analyzed in the context of the Genocide Convention in light of its object and purpose *prima facie* limits the intended destruction to physical and biological form only. With the meaning remaining ambiguous and unclear, supplementary means of interpretation, including the Convention's *travaux*, jurisprudence and authoritative commentaries, offer conflicting guidance that precludes a conclusive interpretative outcome.

Where, at first glance, the *travaux* seems to favor the narrow reading due to the exclusion of "cultural genocide" from the Convention's scope, such an exclusion related primarily to the definition of underlying acts while having no apparent intended bearing on the definition of the intent. On the contrary, multiple delegations repeatedly indicated that a group can be destroyed even where its individual members continue existing, implicitly indicating that actual physical or biological elimination is an absolutist outcome not necessarily envisioned by genocidal intent in every case.

The confusion between these two categories – "destruction" as a *modus operandi* for underlying acts and "destruction" as an intended outcome – unreservedly migrated to international jurisprudence. With the exception of several judgments (primarily originating from the reasoning by German domestic courts' decisions in *Jorgić*), on its face, the pronouncements in international case-law may be read as pointing to the narrow reading excluding social disintegration from the *mens rea* element. However, the actual analysis undertaken by Chambers testifies to the opposite reading. *Krstić* judgments, the first genocide conviction by the ICTY, established the commission of genocide in the case where the large majority of the group survived physically and biologically, while the community to which they belonged faced annihilation. The actual reading of jurisprudential findings thus indicates that the group's social disintegration can fall within the definition of genocidal intent, *provided that it is achieved through one or several exhaustive underlying act(s)* defined in the Convention. Thus, where mere attacks on a group's cultural or sociological identity will not qualify as genocide, social annihilation of the group through the combination of underlying acts can.

There are several convincing arguments in favour of the inclusion of social disintegration within the notion of "destruction" under the intent element. It is in line with the essence of the crime of genocide targeting human groups as distinct entities mostly united by intangible social features and bonds, whose destruction can lead to a group disappearance whilst individual members (even the majority of them) continue existing. Broad reading particularly explains the criminalization of certain underlying acts (such as infliction of serious mental harm) that *do not lead* (and are incapable of leading *as such*) to physical or biological destruction. It also justifies why genocidal intent can take the form of limited selective targeting of representative group members (*e.g.,* leaders) whose disappearance is likely to have a significant impact on the group's survival while leaving its

other members (relatively) intact. Finally, it presents a realistic view on multiple shades of the crime of genocide in modern-day realities, where perpetrators cautious about the image in the public's eyes will avoid blatant and mass physical elimination of group members, instead choosing a sophisticated combination of various tactics, including selective targeting via underlying acts, to achieve the group's disappearance.

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РУЙНУВАННЯ СТРУКТУРИ ГРУПИ: СОЦІАЛЬНА ДЕЗІНТЕГРАЦІЯ ЯК МОЖЛИВИЙ ПРОЯВ ГЕНОЦИДНОГО НАМІРУ

Анотація

Основоположний елемент геноциду, спеціальний намір "знищити" захищену групу, породив два можливі тлумачення його обсягу. Вузький підхід обмежує знищення, на яке спрямований намір, лише фізичними та біологічними формами, а широкий підхід вказує, що намір може виявлятися у бажаній соціальній дезінтеграції людської групи, тобто її знищенні як соціальної одиниці. Ця дискусія щодо потенційного місця соціальної дезінтеграції в елементі наміру залишається далеко не вирішеною в сучасному праві стосовно злочину геноциду, а безпосередній і ретельний аналіз цього питання в судовій практиці та доктрині є відносно рідкісним. Ця стаття має на меті заповнити прогалину, пояснюючи суть геноцидного наміру через фундаментальні правила тлумачення міжнародних договорів. Вона доходить висновку, що ніщо в звичайному значенні терміна "знищити", вжитому в його контексті, з огляду на предмет і мету Конвенції про геноцид, а також підготовчі роботи, не обмежує знищення, на яке спрямований намір, лише фізичними та біологічними формами. Далі пояснюється, як попри здавалося би, суперечливі формулювання в аргументації, притаманні судовій практиці міжнародних трибуналів, останні, навмисно чи ні, також передбачали широке тлумачення знищення, на яке спрямований намір, у своєму аналізі. У статті вказується на очевидну повторювану і поширену плутанину між "знищенням" у значенні способу вчинення основоположних діянь і "знищенням" у значенні наміру (тобто бажаного результату). Нарешті, у статті наводяться важливі міркування щодо того, чому тлумачення геноцидного наміру як такого, що охоплює соціальну дезінтеграцію, сприяє найбільш обґрунтованому тлумаченню права стосовно злочину геноциду.

Ключові слова: *міжнародне кримінальне право, геноцид, Конвенція про геноцид, геноцидний намір, dolus specialis, знищення, соціальна дезінтеграція.*