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THE FORCIBLE TRANSFER OF UKRAINIAN CHILDREN AS GENOCIDE: AN ASSESSMENT OF RUSSIA'S ACTIONS IN LIGHT OF THE INTERNATIONAL DOCUMENTS AND JUDICIAL RULINGS

Abstract: This article discusses the characterization of the forced transfer of Ukrainian children by Russia as genocide. In March 2023, the International Criminal Court (ICC) classified the forced transfer of Ukrainian children to areas under Russian control as a war crime based on Articles 8(2)(a)(vii) and 8(2)(b) (viii) of the ICC Rome Statute. This article, based on evidence and statements from the parties involved in the conflict, demonstrates that, according to Article 2(e) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and Article 6(e) of the Rome Statute, Russia's actions could also be classified as genocide. This is because the transfer was carried out without the children's consent and forcibly (*Actus reus*). Furthermore, the perpetrators were aware of their criminal actions (*Mens rea*), and there was also a special intent to destroy, in part, Ukrainians as a national group (*Dolus specialis*). This article presents its content in three sections: Firstly, it outlines some of the most important facts related to the forced transfer of Ukrainian children. In the second section, the concept of the crime of forced transfer of children is discussed, and the *Actus reus* and *Mens rea* of this crime as genocide are analyzed. Finally, the third section is dedicated to analyzing the possibility of classifying Russia's actions as genocide.

Keywords: Ethnic group, Forcible transfer of children, Genocide, Russia, Ukraine

1. Introduction

During the 2022 conflict between Russia and Ukraine, Russia forcibly transferred thousands of Ukrainian children to areas under its control. This situation has led to the separation of these children from their families. The first reports of the forced transfer of Ukrainian children to Russian territory emerged in mid-March 2022, during the siege of Mariupol.¹ These transfers were often carried out for the purposes of adoption, guardianship, or residence in so-called recreational camps. In this regard, it is noteworthy that a decree signed by Vladimir Putin on 30 May 2022, facilitated the process of granting Russian citizenship to Ukrainian children or those who are not under the care of their parents.² Ukrainian officials believe that this decree violates the provisions of the 1989 Convention on the Rights of the Child and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). There is evidence that some of these children have been mistreated by the Russian government, also some children were pressured to adopt Russian patriotism. According to some estimates at that time, their number ranged from 13,000 to 30,000. In this situation,³ the Office of the Prosecutor General of Ukraine stated that by 10 April 2022, approximately 494 children had been killed as a result of pressures exerted by the Russian government.⁴ It was also reported that 20,000 Ukrainian children were transferred by Russian forces from Ukraine to Russian territories without their families or consent.⁵ The Ukrainian Ministry of Foreign Affairs announced that these actions could constitute forced transfer from one protected group to another.⁶

The facts mentioned, draw attention to the issue of the forced displacement and transfer of children as an international crime. This criminal behaviour refers to the transferring of one or more children without legal authorization and without their consent from one place to another within the borders of a country. Based on international documents, forced

1 Mark, “Thousands of residents in a besieged Ukrainian city were ‘forcibly’ taken to Russia, Mariupol city officials say”.

2 El Deeb, Shvets, and Tilna, “How Moscow grabs Ukrainian kids and makes them Russians”.

3 Children of War, available at: <https://childrenofwar.gov.ua/>.

4 Ochab, “Ukrainian Children Forcibly Transferred and Subjected to Illegal Adoptions”.

5 Ukraine says Russia took 20,000 children during war. Will some be returned?

6 Ukrinform, “Putin’s decree ‘legalizes’ abduction.”

displacement can be classified as a crime against humanity, a war crime, and even genocide under specific circumstances.

According to Article 7(1)(d) of the Rome Statute of the International Criminal Court (ICC Rome Statute), the forced transferring of populations, which includes children, constitutes a crime against humanity and genocide under Article 6(e) of this statute when it is carried out as part of a systematic or widespread attack against a civilian population with awareness of that attack. The forced transfer of children during conflicts can also be considered a war crime according to Article 49 of the Fourth Geneva Convention, Article 17(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, and Article 8 of the Rome Statute. Based on this, on 17 March 2023, Pre-Trial Chamber ii of the ICC issued an arrest warrant for Vladimir Putin, the President of Russia, and Ms. Maria Alekseyevna Lvova-Belova, the Commissioner for Children's Rights in the Office of the President of the Russian Federation, under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the ICC Rome Statute,⁷ concerning the war crime of the unlawful transfer of children from occupied areas of Ukraine to the Russian Federation.⁸ However, the Court has not classified their actions as genocide.

ICC Prosecutor Karim Ahmad Khan, during his fourth visit to southern Ukraine, visited a childcare home and stated that the place was full of special pictures that showed the solidarity of these children as a group.⁹ However, the place has been vacated due to the transfer of all the children to another location. The prosecutor also expressed that testimonies and evidence collected by the prosecutor's office indicate that at least hundreds of children have been taken from orphanages and childcare centres, and many of them have been given to Russia to quickly become Russian citizens under the new citizenship laws approved by Putin and to be adopted by Russian families.¹⁰

7 Statement by ICC Prosecutor Karim A.A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova, available at: <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>.

8 International Criminal Court, "Situation in Ukraine."

9 ICC Prosecutor Karim A.A. Khan KC concludes fourth visit to Ukraine: "Amidst this darkness, the light of justice is emerging, available at: <https://www.icc-cpi.int/news/icc-prosecutor-karim-khan-kc-concludes-fourth-visit-ukraine-amidst-darkness-light-justice>.

10 Statement by ICC Prosecutor Karim A.A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova, available at: <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>.

However, the court did not consider these cases sufficient to confirm the identification of genocide.

It is worth mentioning that according to Article 2(e) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and Article 6(e) of the ICC Rome Statute, the forced transfer of children from one group to another is considered genocide if it is undertaken with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Accordingly, judicial rulings particularly those of the International Criminal Tribunals for the former Yugoslavia (ICTY)¹¹ and the International Criminal Tribunal for Rwanda (ICTR),¹² have recognized the forcible transfer of children with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as an act of genocide.

It appears that the facts and evidence related to the forced transfer of Ukrainian children by Russia, some of which were mentioned at the beginning of the introduction and will be explained in detail in the first section of the article, clearly demonstrate the *Actus reus* of the crime, that is, the displacement of children without their consent from their place of residence and their integration into another group. More importantly, based on the relevant facts, the existence of both general and special intent for genocide in Russia's actions can also be proven. Russia has systematically and forcibly transferred Ukrainian children from the territories under its control with the special intent to partially destroy Ukrainians as a national group. The Russian government has not only played an active and planned role in these actions but has also adopted a humiliating and discriminatory approach. Overall, although there is reasonable evidence to believe that Russia has committed genocide, this has not been formally recognized by the ICC. While it is unclear whether the ICC has actually examined the possibility of genocide in its sessions, it seems that this institution should evaluate this matter in the future.

This article, therefore, aims to evaluate the feasibility of applying the label of genocide to the forced transfer of Ukrainian children by Russia during the ongoing conflict between the two countries. First, it addresses the facts related to the forced transfer of Ukrainian children in the conflict with Russia. The second part analyzes the concept of forcible transfer of children and the material (*Actus reus*) and mental (*Mens rea*) elements of this crime, including the special intent required for genocide. Finally,

11 *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, ICTY Decision on Karadzic's Appeal of the Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2016, para 540.

12 *Prosecutor v. Akayesu*, ICTR-96-4-T, ICTR Judgment, 2 September 1998, para 494.

the third part examines whether the forcible transfer of Ukrainian children can indeed be regarded as an act of genocide.

2. Summary of the Facts of the Forced Transfer of Ukrainian Children by Russia

The forced transfer and removal of Ukrainian children by Russia began in 2014 and increased with the invasion in 2022.¹³ The Russian Federation has transferred thousands of Ukrainian children to its controlled territories and has initiated a process of Russification by granting Russian citizenship to these children.¹⁴ In a resolution adopted by the Council of Europe in 2023, it was stated that, according to evidence, the expelled children have been subjected to a process of ‘Russification’ through re-education in the Russian language,¹⁵ culture, and history. They have faced a prohibition on speaking Ukrainian, exposure to propaganda, and visits to ‘patriotic’ sites or military training.¹⁶ Actions that seem to have been taken merely for political reasons,¹⁷ apparently by April 2023, however, 19,000 Ukrainian children had been transferred to Russian-speaking areas. All these transfers have been organized at the state level. Additionally, Russia has attempted to justify these transfers by making living conditions more challenging. In some cases, children and families have been subjected to harsh conditions, such as torture.¹⁸

In April 2023, a report was prepared by independent experts, including Professor Veronika Bilkova, Dr. Cecile Helstuit, and Dr. Elina Steinert. This report was issued under the Moscow Mechanism of the Organization for Security and Co-operation in Europe (OSCE) at the request of 45 countries, including France, on 30 March 2023. According to the report, a large number of Ukrainian children had been transferred from their homes in February 2022 and even prior to that, which could be considered a war crime and a crime of population transfer.¹⁹ According to the report, there is an organizational

13 European Parliament, “Forcible transfer and deportation of Ukrainian children.”

14 Parliamentary Assembly of the Council of Europe (PACE), “The forcible transfer and ‘Russification’.”

15 Parliament of Ukraine, “Declaration on the Genocide.”

16 PACE, Resolution 2495 (2023).

17 Ioffe, “Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?”, 30.

18 Ioffe, “Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?”, 31.

19 French Foreign Ministry, “OSCE: Invocation of the Moscow Mechanism”.

procedure behind all these transfers. In each case, children are separated from their parents and moved to areas controlled by Russian forces. This highlights a systematic approach to these transfers. Furthermore, the report suggests that in many cases, violations such as denial of identity and denial of the right for children to reunite with their families have occurred.²⁰

In another report by Amnesty International in November 2022, it was stated that Russia has unlawfully interfered with children's rights to maintain their nationality, names, and legally recognized family relationships, in violation of the Convention on the Rights of the child. This report indicates that Russian officials and agents under the control of the Russian government in the self-proclaimed republics of Donetsk and Luhansk have transferred Ukrainian children to Russia and facilitated the permanent adoption of some Ukrainian children by Russian families.²¹ This deprives them of the opportunity to grow up and receive care in their own country. The danger facing these children is that, in the absence of official oversight during the war, they may be identified as orphans, making their return to their families nearly impossible. As a result, they may face long-term separation from their loved ones and lose their sense of family and cultural identity, which would make their future even more difficult.²² Amnesty International has also reported the forced transfer of all residents of a state-run institution for the elderly, including children, from Mariupol to Donetsk.²³ According to the organization's report, Russian officials have transferred these children without obtaining consent from their parents or legal guardians, in violation of international laws that require such permission for the transfer of minors.²⁴

Some news agencies reported that during the war, some unaccompanied Ukrainian children fleeing from Mariupol towards areas under Ukrainian control were stopped at Russian checkpoints and handed over to local authorities in Donetsk. Additionally, children who were attacked in hospitals,

20 OSCE, "Report on Violations of international humanitarian law and international human rights law in Ukraine," para 114.

21 Ioffe, "Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?," 22.

22 Amnesty International, "Ukraine: Russian authorities forcibly transferring Ukrainian civilians, including children, to Russia is a war crime – new report", Report 10 November 2022.

23 Amnesty International, "Ukraine: Russian authorities forcibly transferring Ukrainian civilians, including children, to Russia is a war crime – new report", Report 10 November 2022.

24 Amnesty International, *Russia's Unlawful Transfer and Abuse of Civilians in Ukraine During 'Filtration'*, 12. See also: Additional Protocol I, Art. 78(1).

medical centres, and state boarding schools were permanently separated from their families.²⁵ With the power and internet cut off, these children lost any chance to contact their families. For example, on 20 March 2022, two orphaned boys, aged 15 and 16, who had become separated from their guardian while fleeing from Mariupol to the government-controlled area in Zaporizhzhia, were stopped in the village of Manhush, which was under Russian occupation. The self-proclaimed Donetsk People's Republic's child services informed them that they were not allowed to leave.²⁶ In another case, on 18 March 2022, armed men at a Russian-controlled checkpoint in Manhush stopped a Ukrainian volunteer who was evacuating 17 children, including orphans, from a regional clinic for bone diseases and childhood tuberculosis in Mariupol. The children were told that they were not allowed to leave, and the authorities of the self-proclaimed Donetsk People's Republic eventually transferred the children to Donetsk.²⁷

In another report, it was noted that an 11-year-old child was separated from his mother in Bizi mine and was forcibly taken to the Russian-controlled Donetsk region. The boy expressed that his mother was taken to another tent for interrogation. He said, 'But they didn't tell me where my mother was being taken. I was in shock'.²⁸ This narrative illustrates the severity of emotional damage inflicted on children. After these events, the children lived in uncertainty, completely unaware of their parents' fate. They did not even know if their parents would ever be released, and this lack of certainty only added to their pain and suffering.

During the conflict, Russian officials reported that by April 2022, 2,161 orphans from areas like the self-proclaimed republics of Donetsk and Luhansk had come to Russian territory.²⁹ While, the Ukrainian National Intelligence Agency claimed that by 17 October 2022, 8,000 children had been forcibly transferred to areas controlled by Russia.

According to another report, before the conflict in 2022, Mariupol had a population of around 450,000 people.³⁰ In June 2022, officials in Ukraine estimated that the population of the city had fallen by between 100,000

25 Amnesty International, Interviews; Nazarova, "Я привіз малих здоровими і живими".

26 Amnesty International, Interview with guardian and boys, July 11, 2022.

27 Amnesty International, Interview with individual sheltering children, July 5, 2022; Nazarova, "Я привіз малих здоровими і живими"; Human Rights Watch, "We Had No Choice", 54-57.

28 Amnesty International, Interview with grandmother and grandson, July 22, 2022.

29 TASS, "Минпросвещения готовит соглашения."

30 Energy Cities, "City of Mariupol".

and 120,000.³¹ This could indicate a population shift from this city to other cities. According to a statement issued by the Russian Ministry of Defence in 2022, by 22 April 2022, at least 143,631 civilians had been transferred from Mariupol by Russian authorities.³² It is unclear how many Ukrainians were forcibly transferred to areas under Russian control during this time. Several Ukrainian citizens, including children, described situations in which they were compelled to flee toward territories controlled by Russia. This situation included the prevention of evacuations toward Ukraine by Russian forces or those under Russian control. In all cases mentioned by Amnesty International, evacuation buses only transported people to the self-proclaimed Donetsk Republic or directly to Russia.³³ In other examples, civilians reported feeling that crossing the frontline to areas controlled by the Ukrainian government was impossible, either due to the high risk involved or because they lacked a vehicle.³⁴

In 13 April 2022, the Russian Ministry of Education announced that it was preparing a bilateral agreement for the transfer of Ukrainian orphans to Russian families.³⁵ This statement was made following numerous violations of children's rights, initially reported on 11 March 2022, by Maria Lvova-Belova, the Commissioner for Children's Rights in the Office of the President of the Russian Federation. She and other officials were making efforts to place Ukrainian orphans from the self-proclaimed Donetsk and Luhansk republics into Russian families.³⁶ The Russian government also provided financial incentives for families who took in Ukrainian children. On 8 July 2022, Maria Lvova-Belova announced that she had become the foster parent of a 16-year-old boy from Mariupol.³⁷ These actions reflect the government policy of Russian officials regarding the removal of certain Ukrainian children. Such measures have made it difficult for Ukrainian children to return

31 Glavcom, "Как изменилось количество населения Мариуполя".

32 Izvestia, "Минобороны назвало количество эвакуированных".

33 Amnesty International, "Ukraine: Russian authorities forcibly transferring Ukrainian civilians, including children, to Russia is a war crime – new report".

34 Amnesty International, "Ukraine: Russian authorities forcibly transferring Ukrainian civilians, including children, to Russia is a war crime – new report".

35 TASS, "Минпросвещения готовит соглашения".

36 Lvova-Belova, Telegram Post, March 11, 2022.

37 TASS, "Детский омбудсмен стала приемной матерью".

to their biological families or guardians, as these children require permission to travel outside the areas controlled by Russia.³⁸

It is noteworthy that since the beginning of the conflict, the lack of official relations between Russia and Ukraine has significantly restricted access to information regarding familial connections or other existing guardianship arrangements. In March 2022, UNHCR and UNICEF issued a joint statement indicating that approximately 100,000 children in institutional care or boarding schools situated in war zones still have living relatives or guardians in Ukraine.³⁹ In several cases, Amnesty International has reported that if a guardian from Ukraine has the necessary documents, the authorities of the self-proclaimed Donetsk People's Republic (DNR) have required the guardian to travel to wherever the child is located in order to collect them. This process involves significant personal risk and expense.⁴⁰

Considering the summary of the realities associated with the forced transfer and displacement of Ukrainian children to Russia and Russian-occupied areas during the 2022 conflict, the following will attempt to clarify the concept and elements of the crime of forced transfer of children.

3. Forcible Transfer of Children as an Act of Genocide: Concept and Analysis of the Elements of the Crime

In this section, the concept of the crime of the forcible transfer of children will be presented first, and in the second part, based on the perspectives of legal scholars, international documents, and judicial rulings, the elements of the crime of the forcible transfer of children as an act of genocide will be examined and analyzed.

3.1. The Concept of the Crime of the Forcible Transfer of Children

During an armed conflict, opposing parties may engage in a range of military and non-military actions aimed at undermining and influencing the survival of each other's population groups. Among these actions, the forcible

38 Amnesty International, "Ukraine: Russian authorities forcibly transferring Ukrainian civilians, including children, to Russia is a war crime – new report".

39 UNICEF and UNHCR, "Unaccompanied and separated children fleeing escalating conflict in Ukraine must be protected".

40 Amnesty International, "Ukraine: Russian authorities forcibly transferring Ukrainian civilians, including children, to Russia is a war crime – new report".

transfer of children is regarded as one of the most critical. The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, is the first international document to address the issue of forcible transfer, classifying this act as one of the prohibited crimes in Article 49.⁴¹ According to this provision: ‘Any individual or collective transfer, as well as the exile of individuals from the territory of the state under its control to the territory of the occupying power, is prohibited regardless of the motivation.’ Following this, Article 17 of Protocol (II) additional to the Geneva Conventions of 12 August 1949, explicitly states that the forcible transfer of civilians for any reason other than ensuring security is not permitted, and individuals cannot be moved from their place of residence for military reasons.⁴² Due to the significance of this hostile act, the ICC Rome Statute recognizes in Article 7(1)(d) that the forcible transfer of a population is considered a crime against humanity if it is carried out intentionally and in a systematic or widespread manner against a civilian population.⁴³

It is important to note that the crime of forcible transfer has deep historical roots and is not a recent phenomenon. Significant historical examples include the expulsion of Jews from France in the 13th century⁴⁴ and the population relocations in the Soviet Union during the 20th century.⁴⁵ These actions were carried out based on governmental decisions and were not criminalized in legal documents. Gradually, with reference to this crime in international documents, the international courts began to criminalize it. The ICTY, in its statute, categorized this crime as a crime against humanity.⁴⁶

41 Fourth Geneva Convention, relative to the protection of civilian persons in time of war, 12 August 1949, Art. 49.

42 Additional Protocol II, Art. 17.

43 ICC Rome Statute (United Nations General Assembly) 17 July 1998, Art. 7(d). Reference to the 1949 Geneva Conventions and their Additional Protocols alongside the Rome Statute may raise the question of the relationship among these documents. It should be noted that the mention of the Geneva Conventions serves solely to further clarify the concept of forced transfer, demonstrating that the prohibition of forced transfer of individuals was acknowledged and emphasized by international law decades before it was criminalized in the ICC Rome Statute. The ICC Rome Statute essentially criminalizes the forced transfer of children as a war crime and genocide, based on the theoretical framework established by the Geneva Conventions, thereby enabling prosecution and punishment of this crime.

44 History Ox, “In 1290, the entire Jewish population of England was expelled by King Edward I”.

45 Sciences Po, “Soviet Massive Deportations: A Chronology”.

46 Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) Art 2 (g).

An important point is that forcible transfer of individuals refers to the compulsory and forced relocation of individuals from an area where they are legally entitled to reside to another location, without a justification that is recognized as permissible under international law⁴⁷ '[t]hese transfers are carried out without the intention of return. This is the feature that distinguishes forcible transfer from temporary evacuation'.⁴⁸

Another notable point is that although forcible transfer and 'deportation' are usually considered similar concepts and despite their similarities, especially in the *Actus Reus* of the crime, it must be said that these two have important differences. Among these differences is that forcible transfer occurs within the national borders of a state, whereas deportation takes place across national borders.⁴⁹ An important point is that although various individuals may fall victim to the crime of forcible transfer, children, due to their specific emotional and age-related characteristics and are more vulnerable to serious harm caused by this crime than other groups.

Moreover, the forcible transfer of children, because of the unique characteristics of children, has distinct international consequences. Children are considered the most important demographic group for the continuation of a nation's existence. For this reason, throughout history, this group has consistently been victims of numerous international crimes in conflicts, including displacement and forcible transfer. According to Article 1 of the Convention on the Rights of the Child, a child, defined as a person under 18 years of age, is regarded as a protected group. It seems that transfer and displacement of children occur when a person is under 18 years old, because at this age children are more at risk of losing their identity.⁵⁰ In the Elements of Crimes, it is explicitly indicated that the individuals subject to this crime must be under 18 years of age.⁵¹

Forcible transfer of children is defined as the displacement of one or more children with the intent of destruction, without their consent or the consent of their legal guardian, from one place to another. Forcible

47 The ICC Rome Statute (United Nations General Assembly), 17 July 1998, Art. 7.

48 *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, ICTY Judgement, 31 March 2003, para 136.

49 Chetail, "Is there any blood on my hands? Deportation as a crime of international law", 924.

50 Kuper, "The development of international child law: The definition of "the child" and implementation mechanisms", 333-348.

51 The Assembly of States Parties to the Rome Statute of the International Criminal Court, *Elements of Crimes*, ISBN No. 92-9227-232-2, 2010 Art. 6(e), 3.

transfer of children causes severe psychological harm to the children and their parents, seriously endangering their mental, emotional security, and physical health. Moreover, this act destroys the children's linguistic and religious cultural heritage, making them culturally and linguistically similar to the group to which they are transferred. For this reason, this type of transfer is often referred to as cultural genocide in scholarly literature.⁵² For instance the great Raphael Lemkin believed that cultural genocide is an inseparable part of genocide, and the destruction of culture means the destruction of that group because a group's identity is formed by its culture. However, the Genocide Convention did not recognize cultural genocide as crime of genocide and only discussed physical genocide and its physical aspects.⁵³ According to Article 2 of the Genocide Convention, the forcible transfer of children is recognized as one form of genocide. Initially, this type of transfer was presented as a form of cultural genocide, but some countries opposed this definition due to concerns that their policies regarding their colonial territories might be interpreted as cultural genocide.⁵⁴ Due to disagreements about including cultural genocide in the convention, the issue of forced transfer of children was reviewed by a UN special committee and sixth committee. Ultimately, the convention accepted the prohibition of forcible transfer of children, mainly because this act could be considered a method of biological genocide.⁵⁵ In addition, the efforts of the Greek representatives in the Sixth Committee played a significant role. Greece raised this prohibition because, during its civil war, it faced cases of kidnapping and forcible transfer of Greek children to Eastern European countries under communist control.⁵⁶ It is noteworthy that in the forcible transfer of children, the destruction of culture is considered a primary objective, not merely one aspect of the crime; this corresponds to what is mentioned as a condition in cultural genocide. In other words, the perpetrator seeks to assimilate the transferred children and integrate them into their own population, which is a form of cultural genocide. Supporting this view, it can be said that in this type of transfer, the destruction of culture is more important than physical destruction. This priority is what brings the forced

52 Schneider, "Forcible Child Transfer".

53 Bilsky and Klagsbrun, "The return of cultural genocide?", 373.

54 Khen, "The Forcible Transfer of Children from Ukraine as Genocide: Awakening the Dormant Prohibition of the Genocide Convention", 76-109.

55 Ioffe, "Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?".

56 Kourtis, "The Greek Civil War and Genocide by Forcible Transfer of Childre".

transfer of children closer to cultural genocide. However, as mentioned before, regardless of the connection of forced transfer to cultural genocide, this type of transfer is pursued under the discussions of physical genocide, because the Genocide Convention does not recognize cultural genocide.

It is worth noting that, from the perspective of international law, a transfer is considered unlawful if it occurs without legal authorization and accompanied by violence. For this reason, a transfer carried out for the sake of protection and security is not included in this definition.⁵⁷ For example, in September 2019, the United Nations High Commissioner for Refugees (UNHCR) launched an emergency transfer mechanism from Libya, under which the organization transferred people to safe centres in Rwanda for their security.⁵⁸ Overall, the forced transfer of children is a multilayered act that occurs at various levels within a population group as well as in social, cultural, and political contexts. This means that this act can be examined from different political and cultural perspectives and also affects various groups within a society.⁵⁹

Forced transfer is carried out in a planned and systematic manner and therefore requires organization and strategic management.⁶⁰ Within this framework, the forced transfer of children by a government is carried out in an organized manner. The organizing entity is usually one or several individuals in power who decide to separate children from their families. They are the strategic planners of this act, while the agents from the attacking group merely carry out the violent action.⁶¹ Sonja Grover believes that transferred children are considered victims of war, and in cases such as Darfur and Syria, children are often used as child soldiers and have no role in making decisions.⁶²

With an understanding of the concept of forced transfer of children, and given that, according to Article 2(e) of the Genocide Convention and Article 6(e) of the ICC Rome Statute, this act can be considered as genocide

57 Ioffe, “Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?”, 19.

58 European Stability Initiative, “Safe third countries”.

59 Ioffe, “Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?”, 5-6.

60 Schneider, “Forcible Child Transfer”, 61.

61 Schneider, “Forcible Child Transfer”, 41.

62 Grover, “Child soldiers as victims of ‘genocidal forcible transfer.’ Darfur and Syria as case examples”, 411.

under specific circumstances, the following section will analyze the elements of this crime.

3.2. Elements of the Crime of Forced Transfer of Children as Genocide:

Actus reus and Mens rea

As mentioned, one of the forms of genocide is the forcible transfer of children, and genocide is not legally limited to killing individuals. Rather, physical and psychological harm and inhumane acts are also considered genocide. Forcible transfer of children is also regarded as one of these acts.⁶³

The crime of forcible transfer of children, like any other crime, requires both *Actus reus* and *Mens rea* for its commission. However, since the crime of genocide necessitates a special intent, the act of forced transfer can constitute genocide if committed with this special intent. In light of this explanation, in this section, the *Actus reus* and *Mens rea* of this crime will be examined and analyzed.

3.2.1. Actus Reus: Forced Transfer

In crimes related to children, the *Actus reus* of the crime usually takes the form of a positive or negative act aimed at causing physical and psychological harm to the child.⁶⁴

According to Article 6(e) of the ICC Rome Statute, the displacement of children without their consent from their place of residence and their incorporation into another group constitutes the *Actus reus* of the crime of forcible transfer of children.⁶⁵ An important point is that the term ‘group’ refers to one of the protected groups mentioned in Article 2 of the Genocide Convention and Article 6 of the ICC Rome Statute, which includes national, ethnic, racial, or religious groups. According to the accepted interpretation, such a group must be different from the group to which the child biologically belongs and in which the child has usually been raised.⁶⁶ Of course, some have criticized

63 Jones, “Genocide: A comprehensive introduction”, 14.

64 Marja‘-e Melli-e Konvānsiyun-e Huqūq-e Kūdak, “Chekideh-i az Peymān-nāmeḥ-ye Huqūq-e Kūdak”.

65 ICC Rome Statute (United Nations General Assembly), 17 July 1998, Art. 6.

66 Amir, *Twentieth Century Forcible Child Transfers: Probing the Boundaries of the Genocide Convention*; Khen, “The Forcible Transfer of Children from Ukraine as Genocide: Awakening the Dormant Prohibition of the Genocide Convention”, 78.

the biological characteristic and argued that children themselves should be considered a protected group.⁶⁷ It is not necessary for the transfer of children to result in their full integration into another group; rather, simply placing them under the control of others is sufficient.⁶⁸ Therefore, the transfer of children to groups that are not necessarily different from their assumed larger group (such as national, ethnic, racial, or religious groups), but that results in their separation from their natural environment and deprivation of their rights as children, can also be considered a crime of genocide under the Genocide Convention.⁶⁹ It should be noted that for the commission of this crime, it is not necessary for a collective group of children to be transferred; even a single child, if clearly part of a comprehensive plan for the complete or partial destruction of a protected group, can be considered as genocide.⁷⁰

Regarding forcible transfer as the *Actus reus* of this crime, the main question is whether the transfer can occur solely through physical force or if it can also be realized as a result of psychological harm or threat. On this matter, international criminal jurisprudence has adopted a broad and unified approach, considering forcible transfer to include both cases. For example, the ICTY in the *Radovan Karadžić case*, noted that to establish the *Actus reus* of the crime of forcible transfer and deportation, it is necessary that the displacement of individuals occurs through expulsion or other forms of coercion. Coercion can include physical force, threat of force, or compulsion such as fear of violence, psychological pressure, and repression.⁷¹ It was on this basis that the court tribunal did not consider mere supervision of the transfer and displacement of individuals by an institution such as the International Committee of the Red Cross (ICRC) to amount to voluntariness of their movement.⁷² Physical transfer, such as the separation of children from their parents or guardians and placing them in the care of individuals belonging to groups other than the one in which they were raised until the time of transfer. It also includes removing children from

67 Grover, “Child soldiers as victims of ‘genocidal forcible transfer.’ Darfur and Syria as case examples”, 424.

68 Mundorff, “Other Peoples’ Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)”, 61-127.

69 Schneider, “Forcible Child Transfer”, 249.

70 Schabas, *Genocide in international law: the crimes of crimes*; ICC, *Elements of Crimes*, Art. 6(e).

71 *The Prosecutor v. Karadžić*, ICTY Public Redacted Version of Judgement Issued on 24 March 2016, para 489.

72 *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, ICTY Judgement, 30 May 2013, para 993.

their physical place of residence, such as neighbourhood, village, district, or community that includes members of the child's group, and transferring them to another location where members of different groups live.⁷³ According to the ICTR, the transfer of children includes not only any direct act of forced physical transfer but also threats or fear that led to forced transfer.⁷⁴

The Assembly of States Parties to the ICC holds a similar view. According to the Elements of Crimes, the term 'by force' is not limited to physical force, but may also include threats of force or coercion, such as those arising from the fear of violence, duress, detention, psychological oppression, or abuse of power, against the person themselves or others, or through the exploitation of a coercive environment.⁷⁵ In summary, judicial rulings shows that Article 2(e) of the Genocide Convention and Article 6(e) of the ICC Rome Statute include forced transfer of children resulting from either physical force or threats leading to such transfer.

In the context of psychological coercion, an individual leaves their original place of residence voluntarily but against their inner will, which is itself caused by circumstances that leave people with no choice but to abandon their homeland.⁷⁶ According to the ICTY ruling, an agreement between political leaders cannot legalize a transfer; rather, it is the individual's consent that determines whether the transfer was voluntary or not.⁷⁷ In fact, the characteristic of coercion in the transfer of individuals is determined by the absence of a real choice for the victim. Moreover, the victim must have a legal presence in the place where the forced transfer takes place, and this presence should not be considered as legal residence according to formal laws.⁷⁸ It should be noted that both expulsion and forced transfer occur through the forced displacement of individuals from an area where they have a legal presence, without valid international justification.⁷⁹ In other

73 Schneider, "Forcible Child Transfer", 2-4.

74 *Prosecutor v. Akayesu*, ICTR-96-4-T, ICTR Judgment, 2 September 1998, para 509. *Prosecutor v. Rutaganda*, *Prosecutor v. Musema*, ICTR-96-13-A, ICTR Judgment, 27 January 2000, para 54.

75 Assembly of States Parties to the ICC Rome Statute (ASP), *Elements of Crimes*, 2011, Art. 6(e), n. 5.

76 *Prosecutor v. Krnojelac*, IT-97-25-T, ICTY Judgment, 15 March 2002, para 475.

77 *The Prosecutor v. Karadžić*, ICTY Public Redacted Version of Judgement Issued on 24 March 2016, para 490.

78 *The Prosecutor v. Karadžić*, ICTY Public Redacted Version of Judgement Issued on 24 March 2016, para 492.

79 *Prosecutor v. Gotovina et al.*, IT-06-90-T, ICTY Judgment, 15 April 2001, para 1738; *Prosecutor v. Karadžić*, IT-95-5/18-T, ICTY Judgment, 24 March 2016, paras. 488; *Prosecutor v. Blaškić*, IT-95-14-T, ICTY Judgment, 3 March 2000, para 234.

words, in forced transfer, an individual is moved without legal authorization and against their will to a place that is not of their choosing.⁸⁰ Of course, the individual's consent by itself does not legalize a transfer. The consent must be fully assessed, as the person may give consent out of fear or in a threatening environment, and such consent lacks any legal effect.⁸¹

In the *Jadranko Prlić case*, the ICTY introduced the criterion of effective distance for the first time. According to this standard, individuals enjoy rights such as property rights and community ties at their place of residence, and the prohibition of forced transfer exists solely to protect these rights. Forced transfer occurs when a person is removed from their home to such a degree that they can no longer effectively enjoy the rights they had at their place of residence.⁸² Of course, this does not mean that every distance can be considered an instance of forced transfer, because for a forced transfer to occur, the transfer must lack humanitarian authorization. In other words, humanitarian law permits cases such as transfers due to protection or military necessity, provided that they are temporary and individuals are aware that they will return to their place of residence. However, citing the evacuation of people based on humanitarian authorization cannot be regarded as a justification for transferring civilians. In other words, states cannot use the creation of conditions, which they themselves illegally caused, as a basis to transfer people to locations far from their homes.⁸³ It should be noted that overall, to assess the legality or illegality of a transfer, the general conditions of the crime must be evaluated.⁸⁴ In fact, the court is obligated to establish the general elements of the crime beyond a mere reasonable doubt that the transfer of individuals is contrary to humanitarian law conditions.⁸⁵

Overall, according to the views of legal scholars and judicial rulings, the *Actus reus* of the crime of forced transfer of children is established if several criteria are met:

80 *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, ICTY Judgement, 31 March 2003, para 519.

81 *Prosecutor v. Prlić*, IT-04-74-T, ICTY Judgement, 29 May 2013, para 51.

82 *Prosecutor v. Prlić*, IT-04-74-T, ICTY Judgement, 29 May 2013, para 49.

83 *Prosecutor v. Karadžić*, IT-95-5/18-T, ICTY Judgement, 24 March 2016, para 492.

84 *The Prosecutor v. Stanišić and Simatović*, IT-03-69-T, ICTY Judgement, para. 994.

85 *Prosecutor v. Dorđević*, Appeals Judgement, 27 January 2014, para. 705.

- a. The child is transferred from the place they live to another location far from their family,
- b. The transfer occurs without valid legal consent and under coercion,
- c. The child's distance from the place they live is to such an extent that they are deprived of their rights related to their place of residence, such as the emotional ties with their parent,
- d. Transfer without international authorizations such as transfer for the purpose of protection shall be carried out.

In the absence of any of these criteria, the establishment of the crime of forced transfer may face uncertainty. An important and final point regarding the *Actus reus* of the crime of forcible transfer of children is that the transfer does not need to be severe or widespread in order to be considered as genocide. In other words, the scale or number of victims is not a necessary condition for genocide. As Michael Petrou points out, some genocides are ignored and do not make it into the newspapers.⁸⁶

3.2.2. Mens Rea: *General Intent and Special Intent of Genocide*

Committing an act of genocide requires proving *Mens rea*. This element refers to the perpetrator's internal state, which can be demonstrated through the perpetrator's behaviour. However, this element must be distinguished from motive because in criminal law motive essentially does not matter.⁸⁷ It pertains to the mental state of the accused at the time of committing the crime; that is to say, the accused must not only have the intent to commit the crime, but also possess knowledge or awareness regarding their criminal act (general intent). It has been previously stated that genocide is an international crime with the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Therefore, the forced transfer of children can be considered genocide only when the perpetrator, in addition to general intent, also possesses the special intent of genocide in accordance with Article 2 of the Genocide Convention, Article 6 of the ICC Rome Statute, and the Elements of Crimes. However, the ICTY in the *Jelisc case* did not require proving the intent to transfer children specifically as a general intent for the mental element of forcible transfer. The court considered it sufficient that the perpetrator was aware their actions contributed to the destruction of part

86 Petrou, *Is This Your First War? Travels Through the Post-9/11 Islamic World*, 134.
87 Jones, "Genocide: A comprehensive introduction", 21.

of a protected group. Similarly, in the *Akayesu case* in the ICTR, the mental element of forcible transfer was based solely on knowledge of the destruction of a group.⁸⁸

Regarding the time frame of population transfer, court rulings differ and there is no uniform practice in this regard. The ICTY in the *PARLIC case* indicated that the perpetrator does not need to intend a permanent forced transfer of individuals; it is sufficient that there is an intent to forcibly displace them.⁸⁹ However, the same court explicitly noted in other cases that the existence of intent for permanent transfer is necessary.⁹⁰ It seems that regardless of differing opinions in cases, the mental element of the crime of forced transfer does not necessarily include intent for permanent relocation. Rather, this element simply refers to the intent to carry out the transfer forcibly.

Concerning the special intent, it should be said that without this intent, the forcible transfer of children can only be recognized as an independent crime or, under certain conditions, as a crime against humanity or a war crime. In the context of the special intent of the crime of forcible transfer of children as genocide, it appears that the existence of human groups as the target of the crime means that the victim is chosen not because of their individual characteristics or identity, but because of their membership in at least one of the national, ethnical, religious, or racial groups.⁹¹

In the context of establishing and proving the special intent required for genocide, the International Court of Justice (ICJ), particularly in the case concerning Serbia's responsibility for the genocide of Bosnian Muslims in Srebrenica, set a high standard for interpreting this special intent. According to this standard, those who commit genocide must not only know that their actions will result in the destruction of whole or in part of a group, but they must also consciously intend to achieve that outcome.⁹² According to the ICTR ruling in the *Akayesu case*, the forced transfer of children from the victim group to another group, if accompanied by special intent, can

88 *Prosecutor v Akayesu*, ICTR-96-4-T, ICTR Judgment, 2 September 1998, paras. 727-498.

89 *Prosecutor v. Prlić*, IT-04-74-T, ICTY Judgment, 29 May 2013, paras. 57 and 58.

90 *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, ICTY Judgment, para 520; *Prosecutor v. Stakić*, IT-97-24-T, ICTY Judgment, 31 July 2003, para 687.

91 Ntoubandi, "Uncovering the Components and Elements of Genocidal Acts"; Schneider, "Forcible Child Transfer", 247; Ioffe, "Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?", 30.

92 Khen, "The Forcible Transfer of Children from Ukraine as Genocide: Awakening the Dormant Prohibition of the Genocide Convention", 90.

constitute genocide.⁹³ According to this court, the special intent of genocide can be inferred from circumstantial evidence and multiple facts, including the general context of committing other criminal acts systematically against the same group.⁹⁴ However, this court has not considered the mere absence of evidence indicating the existence of special intent as a reason to reject the presence of such intent for committing the crime.⁹⁵

According to the ICTY ruling, actions such as the forced transfer of Bosnian Muslim women and children from Srebrenica were part of a policy of collective destruction and can indicate the special intent required for genocide.⁹⁶ This court believed that in assessing the special intent of genocide, all evidence should be evaluated empirically.⁹⁷ This intent in the Court's statute means the intent to carry out any type of destruction.⁹⁸ For instance, the prosecutor in the *Jelisić case* noted that for the mental element of genocide, it is sufficient that the perpetrator knew 'that his actions would destroy the group in whole or in part'.⁹⁹ Ultimately the appeals chamber of the court in the case mentioned that to prove the special intent of genocide, it is necessary that the perpetrator, through any of the prohibited acts listed in Article 4 of the ICTY Statute, including the forced transfer of children from one group to another, seeks the destruction, in whole or in part, a national, ethnical, racial or religious group.¹⁰⁰

We believe that the facts and circumstances of each case must be assessed individually. In other words, the special intent for the crime of genocide can be inferred from the perpetrator's conduct and statements. The following criteria may be useful in evaluating special intent:

1. The general nature and scope of the crimes committed,
2. The overarching political doctrine that led to the genocide,
3. The scale of the destruction,
4. The planned method of killing,
5. The systematic conduct of killing and burial of individuals,

93 *Prosecutor v. Akayesu*, ICTR-96-4-T, ICTR Judgment, 2 September 1998, paras. 509-511.

94 *Prosecutor v. Niyamasuhuko et al.*, ICTR-98-42-T, Judgement, 24 June 2011, para 5732.

95 *Prosecutor v. Munyakazi*, ICTR-97-36A-A, ICTR Judgment, 28 September 2011, para 142.

96 *Prosecutor v. Krstić*, IT-98-33-T, ICTY Judgment, 2 August 2001, para 595.

97 *Prosecutor v. Sikirica et al.*, IT-95-8-I, ICTY Judgment on Defence Motions to Acquit, 3 September 2001, para 59.

98 *Prosecutor v. Jelisić*, IT-95-10-A, ICTY Appeals Judgement, 5 July 2001, paras. 45-46.

99 *Prosecutor v. Jelisić*, IT-95-10-A, ICTY Appeals Judgement, 5 July 2001, para 42.

100 *Prosecutor v. Jelisić*, IT-95-10-A, ICTY Appeals Judgement, 5 July 2001, para. 46.

6. The discriminatory nature of the conduct, and

7. The discriminatory intent of the accused.¹⁰¹

Besides the above criteria, the systematic targeting of victims because of their membership in protected groups can also be considered a criterion in proving special intent.¹⁰² In other words, children are targeted because of their membership in a group.¹⁰³ In fact, to prove the special intent of genocide, it is not necessary to examine each act individually; rather, all the acts should be considered together, and it should be assessed whether, in light of all the surrounding circumstances, the special intent of genocide can be established.

Also, in the *Semanza* case, the ICTR stated following the approach of special intent to destroy a protected group that to establish the crime of genocide, proof of intent to commit the crime is essential. Furthermore, it must be clarified that the perpetrator carried out one of the prohibited acts with the intent to destroy, in whole or in part, a protected group.¹⁰⁴ The perpetrator may commit a prohibited act against a small part of a protected group; in such cases, the perpetrator's action endangers the existence of that group. In other words, it is not necessary for proving the special intent of genocide that the perpetrator targets the entire group.

The ICC in the *Bashir* case indicated that the crime of forced displacement must be committed with the intent to destroy, in whole or in part, a protected group.¹⁰⁵ The Court held that there is a connection between Al-Bashir's individual intent for genocide and the collective intent for genocide. The overarching plan of genocide serves as a point of reference for his individual intent. Therefore, there is no need for separate mental element requirements in this regard, and the Court must fully embrace the concept of realistic intent.¹⁰⁶

According to what has been said, it is clear that the forced transfer of children is recognized as genocide only when the perpetrator, in addition

101 *Prosecutor v. Sikirica et al.*, IT-95-8-T, ICTY Judgment on Defence Motions to Acquit, 3 September 2001, paras. 46-61.

102 *Prosecutor v. Gatete*, ICTR-2000-61-T, ICTR Judgment, 31 March 2011, para 583.

103 *Prosecutor v. Kupreškić et al*, IT-95-16-T, ICTY Judgment, 14 January 2000, para 636.

104 *Prosecutor v. Semanza*, ICTR Judgment, 23 October 1997, paras. 429, 316.

105 *Prosecutor v. Bashir*, Case No. 02/05-01/09, ICC, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para 139.

106 *Prosecutor v. Bashir*, Case No. 02/05-01/09, ICC, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, paras. 147-51.

to general intent, carries out the transfer with the special intent to destroy whole or in part of a protected national, ethnical, racial, or religious group.

4. Is it Appropriate to Label the Forced Transfer of Ukrainian Children by Russia as Genocide?

The ICC issued arrest warrants for Vladimir Putin, President of Russia, and Maria Alekseyevna Lvova-Belova, recognizes the unlawful transfer of children from Ukraine to the Russian Federation as a war crime, but did not recognize their actions as genocide. Now, considering what was stated in the first and second parts of the article, the following addresses the question of whether the forced transfer of children from Ukraine to Russia and Russian occupied territories can be recognized as genocide under the applicable regulations?

To assess whether there is an intention to destroy a protected group, all available evidence must be considered together, rather than separately examining whether the accused intended to destroy the protected group through each of the prohibited acts of genocide.¹⁰⁷

In the Russian invasion of Ukraine, people from all regions of Ukraine, both east and west, resisted the attacks, which demonstrates the solidarity of this national group.¹⁰⁸ The people of Ukraine, in other words, are a group of individuals who are considered to have a legal bond based on common citizenship, along with a mutual understanding of rights and duties, and can be regarded as a protected national group under the Genocide Convention. This is the definition that has been articulated in international judicial rulings.¹⁰⁹

The related facts concerning the transfer of Ukrainian children by Russia, as mentioned in the first part of the article, clearly and convincingly prove the existence of the *Actus reus* of the crime, namely the coerciveness of the transfers, and it appears that no one doubts this matter. In fact, the Russian government has deliberately tried, by forcibly transferring children and creating harsh conditions, to compel them to have no choice but to move to areas under Russian control. However, the main issue is whether

107 Azarov et al., “Understanding Russia’s Actions in Ukraine as the Crime of Genocide”, 253.

108 Ioffe, “Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?”, 34; Onuch and Hale, *The Zelensky Effect*, 24-6.

109 *Prosecutor v. Akayesu*, ICTR-96-4-T, ICTR Judgment, 2 September 1998, para 512; *Prosecutor v. Krstić*, IT-98-33-T, ICTR Judgment, 2 August 2001, para 559.

the forcible transfer of children was carried out with the special intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.

It appears that among the national, ethnical, racial or religious groups covered by the Genocide Convention, Ukrainians could fall under the definition of a national group, and Russia has to some extent accepted this as well.

The Trial Chamber of the ICTR, in paragraph 512 of the *Akayesu* judgment, refers to a national group as a collection of persons who are thought to be legally linked by common citizenship and who regard themselves as having mutual rights and obligations.¹¹⁰ From this definition, it can be understood that the designation of a national group applies to a population regardless of their ethnicity, race, or language. Based on evidence and facts, Ukrainians, as a distinct and internationally recognized national group, share a common identity. The vast majority of Ukrainians, regardless of their ethnicity or language including those living in eastern and southern Ukraine, whose language is Russian consider themselves members of this national group. They have united under one flag and nationality and have collectively defended their country against Russian military intervention. This, in itself, is a clear and significant sign of the existence of a shared civic national identity among the people of this country.¹¹¹ Undoubtedly, Ukrainian children are also recognized as part of this national group and are under the protection of the Genocide Convention. The evidence mentioned below largely demonstrates Russia's special intent to partially destroy the Ukrainian national group.

Russia has transferred many Ukrainian children to territories under its control without obtaining parental consent and without international authorization. Many of these transfers have taken place not out of a motive to provide support, but rather with the special intent of eradicating Ukrainian culture by forcibly relocating the children to other areas. The Russian claims of having obtained parental consent do not seem credible due to the wartime tensions and pressure during the armed conflict. On the other hand, some parents have claimed that although they gave consent under certain conditions, these conditions, such as the duration of the children's stay,

110 *Prosecutor v. Akayesu*, ICTR-96-4-T, ICTR Judgment, 2 September 1998, para 512; for further information see: Szpak, "National, al, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals", 158.

111 Ioffe, "Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?", 347-348.

have been violated.¹¹² All these children have been transferred to areas where Russian books have replaced Ukrainian books, indicating a long-term systematic plan.¹¹³ In addition, Russian forces destroyed grain and agricultural products during their battles, which can also indicate Russia's intent and effort to deliberately create harsh living conditions aimed at the physical destruction of Ukrainians at that time.¹¹⁴

The United Nations Development Programme (UNDP), in its report dated 20 June 2023, documenting Russian attacks on Ukraine's energy facilities, stated that 40 percent of Ukraine's energy capacity has been lost.¹¹⁵ Dolgov (former Russian commissioner for human rights) stated that the purpose of these attacks is to freeze and starve the civilian population of Ukraine, making survival in their current location impossible, and consequently forcing them into exile, which constitutes a form of forced displacement.¹¹⁶

Also, the actions taken against Ukrainian children clearly show the systematic process of Russification of these children.¹¹⁷ For example, the mayor of Melitopol, located in the Zaporizhzhia region of Ukraine, reported that Russian authorities have threatened to take children away from their families if they do not attend schools with the Russian curriculum.¹¹⁸ Similarly, the United Nations Independent International Commission of Inquiry on Ukraine stated in its March 2023 report that parents in the port city of Kherson in southern Ukraine were sent threatening and intimidating messages to coerce them into registering their children in schools operating under the Russian education system in the occupied areas.¹¹⁹

It seems that the strongest and most significant evidence indicating the special intent of genocide in the forced transfer project of Ukrainian children can be inferred from the statements of the parties to the conflict,

112 Kaveh et al., "Russia's Systematic Program for the Re-education and Adoption of Ukraine's Children".

113 Ioffe, "Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?", 347-348.

114 Reuters, "Russian attack destroys warehouses at major Ukrainian commodity terminal-governor".

115 UNDP, "Towards a Green Transition of the Energy Sector in Ukraine: Update on the Energy Damage Assessment", 18.

116 Ioffe, "Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?", 32. Davis, Twitter post, 20 October 2022.

117 Davis, Comment on Andrey Kartaplov.

118 Orlova, "V Melitopole okkupanty ugrozhajut otbirat' u roditel' detej, kotorye ne budut hodit' v rossijskie shkoly".

119 UN OHCHR, Report of March 15, 2023, para. 93.

especially high-ranking Russian officials. Alice Nderitu, Special Adviser on the Prevention of Genocide, stated in her remarks at the United Nations Security Council meeting on 21 June 2022, that the Russians pursued an incitement to violence through the use of misinformation, and the Russian authorities tried through propaganda to portray Ukrainians as enemies and label them as 'Nazis'. They were shown as enemies and inhuman in the eyes of Russian soldiers to serve as a factor to incite the soldiers to destroy and commit crimes on Ukrainian soil.¹²⁰

Some authors like Noëlle Quenivet argue that Russia seeks the destruction of Ukrainian radicals, not the whole culture of Ukraine. Such an analysis ignores the reality of genocide and treats these events merely as random violence.¹²¹ By examining other Russian actions on Ukrainian soil, it can be understood that Russia has targeted the entire culture of Ukraine, not just a specific political group. Moreover, since 2014 and more explicitly since 2022, Russia has used the term Nazism to demonize the Ukrainian nation, creating an image of an enemy that neither deserves a place at the negotiation table nor the right to self-determination.¹²² Moreover, Vladimir Putin, the President of Russia, has long persistently denied the existence of a distinct Ukrainian identity, attributing the creation of Ukraine solely to Lenin. In other words, he denies any legitimacy to a Ukrainian identity prior to the establishment of the Soviet Union.¹²³ That is why historian Timothy Snyder believes that Russia's definition of 'Nazi' is different and refers to those who identify as Ukrainian but deny being Russian. He believes Russia misuses the terms nationalism and Nazism to label patriotic Ukrainians as Nazis. Snyder warns that such language is part of a totalitarian strategy to control and eliminate dissenters.¹²⁴ Russia's use of these distorted definitions reflects its inability to accept Ukraine's independence and serves to justify genocidal actions against the country. This policy is reflected in the non-confidential KGB textbooks and shapes the mindset of Russian leaders. According to this perspective, nationalism seeks superiority over other cultures through their suppression.¹²⁵ The Kremlin has always insisted on labelling Ukrainian nationalism as Nazism because it believes

120 United Nations, "Warning Incitement of Racial, Religious Hatred".

121 Azarov et al., "Understanding Russia's Actions in Ukraine as the Crime of Genocide", 236.

122 Azarov et al., "Understanding Russia's Actions in Ukraine as the Crime of Genocide", 237.

123 Azarov et al., "Understanding Russia's Actions in Ukraine as the Crime of Genocide", 245.

124 Snyder, "Russia's genocide handbook".

125 Weeks, *Separatist nationalism in the Romanov and Soviet empires*, 161.

that Ukraine's independence constitutes an existential threat to the Russian empire.¹²⁶ A few days after the liberation of Bucha in April 2022, Russian television published an article titled "What Russia Must Do with Ukraine", which argues that Ukrainian nationalism is a Nazi movement and the war is its punishment.¹²⁷ In fact, denazification takes place in two stages: the first stage is the elimination of patriotism, and the second stage is the destruction of statehood.¹²⁸

Moreover, the intention to destroy the culture of a people can be understood from various aspects. One of these signs is the destruction of libraries and historical monuments.¹²⁹ In other words, if attacks are accompanied by damage to cultural-historical sites, they can be considered as evidence of genocidal intent.¹³⁰ This opinion was later confirmed by the ICJ in the cases of *Bosnia and Herzegovina vs. Serbia and Montenegro*, as well as *Croatia vs. Serbia*.¹³¹

In the battle of Mariupol, Russia damaged the memorial buildings in the city, in the Donetsk region, which were erected to commemorate the victims of the Holodomor.¹³² This can somewhat prove Russia's special intent to destroy Ukrainian culture. Also, on 26 January 2023, the Ministry of Culture of Ukraine announced that the number of damaged cultural objects had reached 553 by that date. Many of these, including the Hryhoriy Skovoroda Literary Memorial Museum, the Sviatohirsk Lavra Church,

126 Azarov et al., "Understanding Russia's Actions in Ukraine as the Crime of Genocide", 248.

127 ергейцев, 'Что Россия должна сделать с Украиной' (T. Sergeytsev, 'What Russia Must Do with Ukraine', RIA Novosti, 3 April 2022, available online at <https://ria.ru/20220403/ukraina1781469605.html>).

128 Azarov et al., "Understanding Russia's Actions in Ukraine as the Crime of Genocide", 248.

129 *Bosnian Genocide case (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 344; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, I.C.J. Reports 2015, p. 3, para. 390; Ioffe, "Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?", 33.

130 Office of the Prosecutor of the International Criminal Court, Policy on Cultural Heritage, June 2021, available online at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2021-03-22-otp-draft-policy-cultural-heritage-eng.pdf>, at para 78.

131 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, I.C.J. Reports 2015, p. 3, para 390.

132 Balachuk, "The Occupiers of Mariupol Dismantled the Monument to the Victims of the Holodomor".

the Totalitarian Victims Memorial, and historic buildings in the ancient city of Chernihiv, were targeted without any clear military necessity.¹³³

Many scholars believe that the actions of Russian forces in Ukraine, including the killing of civilians, use of banned weapons against non-combatants, attacks on theatres, and causing severe physical and psychological harm, constitute acts of genocide.¹³⁴ This intent appears to be closely linked to the forced transfer of Ukrainian children to Russia.

Russian officials, on multiple occasions and through various means, have expressed their intention to impose a Russian identity on Ukrainian children. They have attempted to justify their actions of forcibly transferring children as a humanitarian measure aimed at providing them with a better life. Anton Krasovsky, the head of Russian-language broadcasting for the state channel RT, stated that Ukrainian children who reject their new Russian identity should be killed and their bodies burned.¹³⁵ Maria Lvova-Belova announced in the first year of the conflict with Ukraine that all the children who were taken into custody were orphans, and that these custodianships were carried out solely to give them a better life.¹³⁶ However, it is widely accepted in the academic community and courts that the main motive of the perpetrator is not significant for proving genocide.¹³⁷ The policy of erasing the Ukrainian identity by the Russian Federation has deep historical roots. During the Soviet Union era, Ukrainian culture was regarded as second-rate, and Ukrainians were seen as backward villagers.¹³⁸ This policy has continued today. Moreover, the establishment of campaigns by the families of these children to bring them back after being identified through Russian government videos disproves this claim, since most of these children, contrary to Russia's assertion, have living relatives. Furthermore, many of them have also been under the protection of the Ukrainian government.¹³⁹

133 Ministry of Culture and Information Policy of Ukraine, 'Destroyed Cultural Heritage of Ukraine' available online at <https://culturecrimes.mkip.gov.ua/>.

134 Azarov et al., "Understanding Russia's Actions in Ukraine as the Crime of Genocide".

135 Roth, "Russian TV Presenter Accused of Inciting Genocide in Ukraine".

136 Dixon and Abbakumova, "Ukrainians struggle to find and reclaim children taken by Russia".

137 Nersessian, "The Contours of Genocidal Intent: Troubling Jurisprudence for the International Criminal Tribunals", 267.

138 Chernetsky, "Postcolonialism, Russia and Ukraine".

139 Koshiw, "Putin's alleged war crimes: who are the Ukrainian children being taken by Russia?".

Russia, by forcibly teaching the Russian language and banning the use of native languages, aimed to distance these children from their national identity and bring them closer to Russian nationality. In other words, Russia intended to destroy Ukrainian culture by separating these children from their original culture and connecting them to Russian culture, which fulfils the essential condition for genocide through the forced transfer of children. Although the Russian government justified these transfers by claiming that all these actions were solely for the protection of the children themselves, the government made no arrangements to return these children to their families and disproved its claim by bombing a children's hospital on 9 March 2022. Additionally, the country's military bombed residential homes on which the phrase 'child' was written on both sides of the walls, indicating that children had taken refuge in those homes.¹⁴⁰

Ukrainian children were subjected to forced transfers because of their Ukrainian national identity, which itself is considered a sign of Russia's special intent to harm Ukrainians as a national group. None of the reports mention the forced transfer of migrant children, Russia has only transferred Ukrainian children to areas under its control. Overall, these actions depict a distinct pattern of genocide, in which Ukrainians are considered a threat to the Russian nation and, as a result, are regarded as a legitimate target.¹⁴¹

At the end of the third section, it should be noted that in addition to the case regarding international crimes committed by Russia against Ukraine in the ICC, the Ukrainian government filed two important cases against Russia in the ICJ on 16 January 2017, and 26 February 2022. In the first case, Ukraine alleged that Russia participated in a campaign of racial discrimination that violated the political, civil, economic, social, and cultural rights of the Crimean Tatars and ethnic Ukrainians in Crimea, which contravened Russia's obligations under CERD. Ukraine based its arguments on several key points, including discrimination in language education, physical violence against the Ukrainian ethnic group, access to education, measures against cultural heritage, and actions related to citizenship.¹⁴² In examining Ukraine's claims, the ICJ noted that according to some reports,

¹⁴⁰ Associated Press, "Airstrike on Mariupol theater".

¹⁴¹ Khen, "The Forcible Transfer of Children from Ukraine as Genocide: Awakening the Dormant Prohibition of the Genocide Convention", 102.

¹⁴² *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment of 31 January 2024, I.C.J. Reports 2024, paras. 324-369.

the number of students receiving instruction in Ukrainian had decreased by 80 percent, while no similar reduction occurred in education in other languages, also the Russian Federation has full control over the public school system in Crimea, especially regarding the language of instruction and the conditions for the use of that language by parents and children. However, it did not provide a convincing explanation for the sudden and fundamental changes in the use of Ukrainian as the language of instruction, which disproportionately negatively affects the rights of ethnic Ukrainians. In this case, the Court ruled on 31 January 2024 that Russia violated Article 1(a) and Article 5(e)(v) of the CERD Convention.¹⁴³ The second case of Ukraine against Russia at the Court, dated 26 February 2022, concerns a dispute over the interpretation, implementation, and fulfilment of the Genocide Convention. Ukraine claimed that the Russian Federation falsely declared that acts of genocide had occurred in the Ukrainian provinces of Luhansk and Donetsk. Based on this claim, Russia recognized the self-proclaimed ‘Donetsk People’s Republic’ and ‘Luhansk People’s Republic’, then announced and carried out a special military operation against Ukraine, allegedly to prevent and punish the claimed genocide. Ukraine firmly denied the existence of such genocide and subsequently requested provisional measures in those areas.¹⁴⁴ However, Russia stated that the Court lacked jurisdiction *ratione materiae* and that any possible ruling by the Court would lack practical effect.¹⁴⁵ The Court noted that although some actions and omissions might have related to several conventions, this could not have affected the Court’s jurisdiction. The Court believed that the initial dispute between the parties over the Genocide Convention established the Court’s jurisdiction.¹⁴⁶ Additionally, on 16 March 2022, the Court declared that under Article 41 of its Statute, it had the right to issue provisional measures to protect the situation pending the final ruling. The Court considered Ukraine’s right not to be subjected

143 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, para 386.

144 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, request for the indication of provisional measures, 27 February 2022.

145 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, preliminary objection of the Russian Federation, 3 October 2022, para 145.

146 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, order of 16 March 2022, paras. 48-49.

to Russian military operations under the pretext of preventing and punishing genocide as plausible, and there was a risk of irreparable harm to Ukraine's rights.¹⁴⁷ Based on the court's order, Russia was obligated to stop the military operation that began on 24 February 2022, and also to ensure that no military action was taken in support of the self-proclaimed Donetsk People's Republic and Luhansk People's Republic.¹⁴⁸ Russia paid no attention to that order. Additionally on 2 February 2024, the court, in response to Russia's preliminary objections, declared that it only has jurisdiction to examine paragraph (b) of Ukraine's claim, in which Ukraine requests the court to declare that 'there is no reliable evidence of Ukraine's responsibility for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk regions of Ukraine'.¹⁴⁹ However, the court ultimately stated that it does not have jurisdiction to hear substantive violations such as causing extreme destruction and killing of Ukrainian civilians,¹⁵⁰ as these matters are outside the court's jurisdiction.¹⁵¹ Overall, it seems that the ICJ could have examined the allegations against Russia by accepting its jurisdiction to consider substantive violations of the rules of the Genocide Convention committed by Russia. It is assumed that with the Court's involvement, Russia would likely have been found to have violated the Genocide Convention. The significance of this issue lies in the fact that the Court's engagement and a possible ruling against Russia for committing genocide could have paved the way for major developments in the course of the Russia-Ukraine conflict and increased the possibility of broader international justice and accountability. The ICJ's ruling could also have created conditions that might encourage the ICC to seriously examine the genocide case in Ukraine, especially regarding the forcible transfer of children.

147 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, order of 16 March 2022, paras. 78-85.

148 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, order of 16 March 2022, para 86.

149 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, judgment of 2 February 2024, para 149.

150 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Memorial of Ukraine, 1 July 2022, para 52.

151 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, judgment of 2 February 2024, para 149.

5. Conclusion

Considering what has been discussed, it can be concluded that although the ICC recognized the forcible transfer of children by Russia to its territory or occupied territories as a war crime in March 2023, the Court could also have established and proven genocide under Article 2(e) of the Genocide Convention and Article 6(e) of the ICC Rome Statute. This is because the evidence and facts related to the forcible transfer of Ukrainian children in the ongoing conflict largely indicate that these transfers were carried out without legal authorization, forcibly, and with the special intent to partially destroy Ukrainians as a national group. In fact, Russia has forcibly transferred Ukrainian children with the aim of separating them from their national and cultural identity, including efforts to Russify the children through education and replacing their national ties with allegiance to Russia. This action could lead to the destruction of Ukrainian culture and identity. Extensive objective evidence and documentation of organized actions by the Russian government, including forcibly removing children from their homes and families, pressuring them to accept Russian citizenship, placing them in Russian families, and preventing their return to Ukraine, demonstrate that these transfers occurred without the genuine consent of the children and their families. These harsh conditions constitute a violation of the children's natural right to live in their own country and clearly exemplify forcible transfer. Placing children in difficult living conditions and subjecting them to mistreatment are among the reasons that prove the coercion behind the transfer from the area where these children lawfully had the right to live.

It appears that the Russian government has attempted systematically and forcibly to transfer Ukrainian children to Russia and Russian occupied territories. Furthermore, by holding Russian-language classes and placing them in Russian families, it has tried to detach these children from their Ukrainian nationality. Additionally, the Russian government has tried to prevent these children from returning to their families, which could threaten the survival of the Ukrainian nationality. It seems that even if these children were returned to Ukraine, they might not be able to reconnect with Ukraine as before, since they have been living in Russian families for years. Overall, the forcible transfer of Ukrainian children could affect the future of this country by severing their emotional bonds with other Ukrainians as

a national group. This is precisely the issue that the Ukrainian government is pursuing before the ICC.¹⁵²

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