

Acts Committed by Russian Citizens in Ukraine after 24 February 2022 that May Constitute the Crime Of Genocide

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Abstract: Russian military aggression against Ukraine is the most flagrant violation of Article 2(4) of the United Nations Charter in recent years. Crimes committed by the Russian armed forces on the territory of Ukraine constitute the most serious crimes of international concern, as confirmed by the ICC’s arrest warrant for Vladimir Putin and Maria Lvova-Belova in regard of particular acts identified by the ICC as war crimes. The crime of genocide requires a special *means rea* element to be met – an intent to destroy a protected group in whole or in part. The aim of this article is to analyze definition of genocide along with its elements established in the document “Elements of Crime” in the context of two forms of genocide that were committed by Russian armed forces – killing Ukrainians and forcible transfer of children of the group.

1. Introduction

The crime of genocide is one of the most serious crimes of international law. The importance of its prevention and punishment resulted in the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide,¹ which was the first international agreement that established the definition of genocide. Subsequently, the Statute of the *ad hoc*

¹ United Nations, Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, adopted on 9 December 1948.

International Criminal Tribunal for the Former Yugoslavia² and the Statute of the *ad hoc* International Criminal Court for Rwanda³ were adopted. These documents were the first that enabled the exercise of jurisdiction over the crime of genocide, along with criteria for the territorial and temporal jurisdiction, which allowed the prosecution of individuals only in narrowly defined circumstances. As a result, the international community initiated the discussion on an international criminal institution, with much broader territorial and temporal jurisdiction, not limited to particular country or period. The solution seemed to be the establishment of the International Criminal Court (hereinafter – ICC), whose Statute was signed in 1998.⁴ Nevertheless, not every country signed and ratified the Statute, which means that there are countries whose citizens will not be prosecuted by the Court or whose territory cannot become the subject of an investigation launched by the ICC Prosecutor. In such cases, additional declaration on accepting the jurisdiction of the Court is required.⁵ Ukraine submitted such declaration, which concerns crimes that have been currently committed by the Russian armed forces.

After more than a year of a full-scale military aggression against Ukraine⁶ that started on February 24, 2022, which according to Russian President was a “special military operation”, it has become clear that, apart from political ambitions, there was a clear intent to eliminate part of the Ukrainian nation. The full-scale military aggression caused the unprecedented mass influx of Ukrainians (and citizens of other countries) into

² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Security Council Resolution 827, adopted on 25 May 1993.

³ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994, UN Security Council Resolution 955, adopted on 8 November 1994.

⁴ The Statute of the International Criminal Court, adopted on 17 July 1998, 2187 U.N.T.S. 3 (hereinafter – Rome Statute).

⁵ Article 12 of the Rome Statute.

⁶ Russian acts against Ukraine were recognized as aggression by UN General Assembly (resolution A/ES-11/1, adopted on 2 March 2022) or UN Human Rights Council (resolution A/HRC/RES/49/1, adopted on 7 March 2022).

EU members states, which triggered the introduction of the EU mechanism of temporary protection for the first time in recent history.⁷ Evidence gathered by the Ukrainian prosecutors in cooperation with the Office of the Prosecutor of the ICC undoubtedly supports the claim of deliberate killing Ukrainian citizens with the sole reason of their nationality. However, killing members of a particular national group is not the only form of committing the crime of genocide. The international community and international organizations recognize acts committed by Russian armed forces since February 24, 2022 as the most serious international crimes, including genocide, and recognizes Russia as a state sponsor of terrorism, emphasizing the need for establishing a special international tribunal for crimes that Russian armed forces are committing in Ukraine.⁸ Nonetheless, political declarations or resolution do not provide legal reasoning and therefore there is still the need for factual analysis in conjunction with legal definitions.

The aim of the paper is to analyze the legal definition and elements of the crime of genocide in the context of particular crimes committed by the Russian armed forces on the territory of Ukraine as a consequence of full-scale military aggression and to provide justification as to why certain crimes committed by Russian armed forces on the territory of Ukraine may constitute genocide. In order to accomplish the aforementioned aim, the legal dogmatic method was applied.

⁷ Iryna Kozak-Balaniu, “UE wobec agresji Rosji na Ukrainę. Ochrona czasowa dla obywateli państw trzecich przybywających z terytorium Ukrainy – przykład Polski,” in *Unijny system ochrony praw człowieka wobec współczesnych wyzwań*, eds. Edyta Krzysztofik, Magdalena Maksymiuk, and Dominik Tarczyński (Lublin: Wydawnictwo Naukowe Episteme, 2022), 3–4.

⁸ NATO Parliamentary Assembly Declaration no. 482 adopted on 22 May 2023; European Parliament Resolution on recognizing the Russian Federation as a state sponsor of terrorism, 2022/2896(RSP), adopted on 23 November 2022; United States Congress Resolution (S.Res.713) recognizing Russia’s actions in Ukraine as a genocide, adopted on 20 July 2022; Parliamentary Assembly of the Council of Europe Resolution no. 2433 – consequences of the Russian Federation’s continued aggression against Ukraine: role and response of the Council of Europe, adopted on 27 April 2022.

2. Definition and Elements of the Crime of Genocide in the Statute of International Criminal Court

According to Article 5 of the Rome Statute the Court's jurisdiction is limited to the following most serious crimes of concern to the international community as a whole: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Rome Statute defines the crime of genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) killing members of the group;
- b) causing serious bodily or mental harm to members of the group;
- c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) imposing measures intended to prevent births within the group;
- e) forcibly transferring children of the group to another group.⁹

This definition should be divided into two elements – *mens rea* and *actus reus*. The *mens rea* element of genocide should not be identified as general intent of committing that crime, but as a special one – *dolus specialis*.¹⁰ *Mens rea* consists therefore of two elements: a general one that could be called “general intent” or *dolus*, and an additional “intent to destroy.”¹¹ There are at least several judgements of international criminal tribunals, where the judges explained the meaning of the intent to destroy. The judgement that has a pivotal meaning for the interpretation of the “intent to destroy” is the ruling in the *Akayesu* case, where the International Criminal Tribunal for Rwanda provided that “intent to destroy” as a “special intent”

⁹ Article 6 of the Rome Statute.

¹⁰ Sandra Fabijanić Gagro, “Mental and Material Elements of Genocide,” *The Lawyer Quarterly* 11, no. 1 (2021): 45.

¹¹ Kai Ambos, “What Does “Intent to Destroy” in Genocide Mean?,” *International Review of the Red Cross* 91, (2009): 834. See also: International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, pursuant to SC Res. 1564, 18 September 2004, Annex to letter dated 31 January 2005 from the UN Secretary-General addressed to the President of the Security Council, S/2005/60, 1 February 2005, para. 491; Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Prosecutor v. Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09, para. 139.

(or *dolus specialis*) means “the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged.”¹² Additionally, it is important to prove that the perpetrator with his actions intends to destroy a protected population group.¹³ Ukrainian scholars argue that Putin’s language (for instance denying the existence of Ukrainian state and nation) proves the genocidal intent of every act committed by Russian armed forces on the territory of Ukraine and reflects Russia’s aims, among others forcible transfer along with the process of “Russification” of Ukrainian children and the deliberate infliction of conditions of life aimed at the physical destruction of the Ukrainian nation.¹⁴ It is important to emphasize that *ad hoc* tribunals’ and the ICC’s case law confirms that the judicial assessment of genocide is subject to the facts of the individual situation – particularly, contextual embedding of the crime of genocide is formed by its application in individual cases and adapted to the actual legal, political and historical realities.¹⁵

Actus reus elements of the crime of genocide represent the forms¹⁶ in which that crime can be committed, therefore killing, causing serious bodily or mental harm, inflicting on the group conditions of life intended to bring about its physical destruction in whole or in part, imposing

¹² International Criminal Tribunal for Rwanda, Trial Judgement of 2 September 1998, Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, para. 498. See also: International Criminal Tribunal for Rwanda, Trial Judgement of 13 December 2006, Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-I, paras. 175, 319; International Criminal Tribunal for Rwanda, Trial Judgement of 1 December 2003, Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, para. 803; International Criminal Tribunal for Rwanda, Trial Judgement of 7 June 2001, Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, para. 55. International Tribunal for the Former Yugoslavia followed similar approach towards the interpretation of “intent to destroy”, “special intent” for instance in the case Prosecutor v. Goran Jelisić, Prosecutor’s Pre-Trial Brief, Case No. IT-95-10-PT, 19 November 1998, para. 3.1.

¹³ Martin Shaw, “Russia’s Genocidal War in Ukraine: Radicalization and Social Destruction,” *Journal of Genocide Research* 25, (2023): 5–6.

¹⁴ Denis Azarov, Dmytro Koval, Gaiane Nuridzhanian, and Volodymyr Venher, “Genocide Committed by the Russian Federation in Ukraine: Legal Reasoning and Historical Context,” *SSN Papers*, (2022): 27.

¹⁵ Marjolein Cupido, “The Contextual Embedding of Genocide: A Casuistic Analysis of the Interplay between Law and Facts,” *Melbourne Journal of International Law* 15, no. 2 (2014): 35.

¹⁶ Elizabeth Santalla Vargas, “Una mirada al crimen de genocidio en las jurisdicciones latinoamericanas,” *Criminal Law Review* 10, no. 4 (2010): 63.

measures intended to prevent births within the group, forcibly transferring children of the group to another group – including deportation to another country.

For the purpose of this study, the following forms of committing genocide will be analyzed in the context of acts of Russian armed forces on the territory of Ukraine after February 24, 2022:

1. killing Ukrainians, and
2. forcibly transferring Ukrainian children to Russia and Ukrainian territories temporary occupied by Russia.

This study has been limited to those two forms of committing genocide, since at this point those two are well documented and there is enough data to at least provide the justification whether they may constitute genocide.

According to the document “Elements of Crime,”¹⁷ which explains the structure of crimes that fall under the jurisdiction of the ICC, the crime of genocide committed by killing members of the particular group includes the following elements:

- a) the perpetrator killed one or more persons;
- b) such person or persons belonged to a particular national, ethnical, racial or religious group;
- c) the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such;
- d) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹⁸

As regards genocide committed by forcibly transferring children of one group to another, the following elements have to be taken into account:

- a) the perpetrator forcibly transferred one or more persons;
- b) such person or persons belonged to a particular national, ethnical, racial or religious group;

¹⁷ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B (hereinafter – Elements of Crimes).

¹⁸ Elements of Crimes, 2.

- c) the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such;
- d) the transfer was from that group to another group;
- e) the person or persons were under the age of 18 years;
- f) the perpetrator knew, or should have known, that the person or persons were under the age of 18 years;
- g) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹⁹

It has become evident that abovementioned forms of committing genocide have a common element to be proven by the prosecutor – the act must have occurred in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction. Thus, an emerging pattern has to be identified. This element should not be considered as an additional *actus reus* element, however rather as objective point of reference for determination of the intent that accompanied the crime of genocide.²⁰ Additionally, in order to be found guilty of genocide it is sufficient that the perpetrator merely intended “to destroy, in whole or in part, a group, as such.” As a result, perpetrator must only intend to obtain what he intends and it does not matter whether he was successful in this regard or not.²¹

For instance, the International Criminal Tribunal for the former Yugoslavia in the case *Prosecutor v. Tolimir* identified an emerging pattern in the facts of the case by concluding that:

the Majority recalls that at least 5,749 Bosnian Muslim men from Srebrenica were killed by Bosnian Serb Forces in a period of only several days. These killings followed a pattern. Bosnian Serb Forces were deployed to specifically selected remote locations to take part in these killings. The vast majority of the killings occurred in an efficient and orderly manner; following some of

¹⁹ Elements of Crimes, 3.

²⁰ Claus Kreß, “The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the *Al Bashir* Case,” *Journal of International Criminal Justice* 7, no. 2 (2009): 299–302.

²¹ Otto Triffterer, “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such,” *Leiden Journal of International Law* 14, no. 2 (2001): 401–2.

the largest mass executions in Bratunac and Zvornik between 13 and 16 July 1995, machinery and manpower were swiftly put in place to remove, transport and bury thousands of bodies. These bodies were later dug up and reburied in a further effort to conceal what had occurred. There is no doubt in the Majority's mind, Judge Nyambe dissenting, and indeed the evidence has demonstrated, that several layers of leadership were involved in the organization and coordination of the killing operation."²²

The acknowledged sequence of actions proved that the perpetrator acted with the intent to destroy the particular group. As a result, the defendant Zdravko Tolimir was convicted of genocide, conspiracy to commit genocide and other crimes.

3. Actions of Russian Army on the Territory of Ukraine That May Constitute the Crime of Genocide

Before analyzing if particular crimes committed by Russian armed forces on territory of Ukraine constitute crime of genocide, it is essential to discuss whether those acts fall within the jurisdiction of the ICC. Ukraine is not a State Party to the Rome Statute (nor is Russia), nevertheless this does not preclude the jurisdiction of the ICC. According to the provision of Article 4(2) of the Rome Statute, the Court may exercise its functions and powers on the territory of any State Party and, by special agreement, on the territory of any other state. Article 12(3) provides for the possibility of recognizing the Court's jurisdiction by a State not party to the Statute, which may, by declaration to the Secretary, recognize the Court's jurisdiction over a particular crime. Ukraine submitted two declarations. First declaration was submitted by the Ukrainian government in April 2014 and regarded crimes against humanity and war crimes that were committed on its territory between November 21, 2013 and February 22, 2014.²³ Subsequently, on September 8, 2015, the Minister of Foreign Affairs of Ukraine lodged a second declaration, in which the Ukrainian government agreed on the ICC's

²² International Criminal Tribunal for the former Yugoslavia, Trial Judgement of 12 December 2012, Prosecutor v. Tolimir, Case No. IT-05-88/2, para. 770.

²³ The text of the declaration available on the following website: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>, accessed April 28, 2023.

jurisdiction towards international crimes that were committed on the territory of Ukraine since February 20, 2014 without an end date.²⁴ As a result, the ICC's jurisdiction regarding crimes committed on the territory of Ukraine covers the period from November 21, 2013.

3.1. Killing Members of the Group

From February 21, 2022 till May 7, 2023 Russian army killed over 8,791 civilians in Ukraine.²⁵ For obvious reasons, the actual figures may be considerably higher, as the receipt of information from some locations, especially those where intense hostilities have been going on, has been delayed and a number of reports are still pending corroboration. Russian armed forces killed hundreds of civilians while occupying settlements in Kyiv, Chernihiv, Sumy and Kharkiv regions in February and March 2022.²⁶ The number includes victims of shelling, bombardments, artillery firing or weapon fire.²⁷ Nevertheless, this number includes not only Ukrainians, but also other nationalities, and as a consequence this general number cannot be considered as a number of victims of the crime of genocide.

On March 4, 2022, the Independent International Commission of Inquiry on Ukraine was established by the Human Rights Council.²⁸ The Commission was supposed to investigate all alleged violations and abuses of human rights, violations of international humanitarian law and related crimes in the context of the aggression against Ukraine by the Russian Federation. The Commission issued a report regarding different locations, however the city where the biggest number of killings and execution took place is Bucha.

²⁴ The text of the declaration available on the following website: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine, accessed April 28, 2023.

²⁵ Official figures available on the website of United Nations High Commission for Human Rights: <https://www.ohchr.org/en/news/2023/05/ukraine-civilian-casualty-update-8-may-2023>, accessed May 1, 2023.

²⁶ United Nations Office of the High Commissioner for Human Rights, Report on the human rights situation in Ukraine – 1 February – 31 July 2022, 27 September 2022, 9.

²⁷ Official figures available on the website of United Nations High Commission for Human Rights: <https://www.ohchr.org/en/news/2023/05/ukraine-civilian-casualty-update-8-may-2023>, accessed May 3, 2023.

²⁸ United Nations General Assembly resolution A/HRC/RES/49/1 adopted on 7 March 2022; United Nations General Assembly resolution A/HRC/RES/52/32 adopted on 11 April 2023.

Bucha is a small city five kilometers northwest of Kyiv, with a population of about 40,000 people. From the first days of full-scale Russian invasion on Ukraine, Bucha was involved in armed activities. As of March 5, 2022, Russian troops have established full control over the city and remained there until March 30. At that time, about 5000 inhabitants remained in the city. After entering the city on April 2, 2022, Ukrainian armed forces saw dozens of corpses first on the streets, and then in other places: in yards, apartments, basements, vehicles, forests lanes and improvised single and mass graves. There were signs of arbitrary executions on many of the bodies: bruises, cuts, bullet wounds, tied hands and burns. Two mass graves containing more than 100 bodies were found near the city church. Dozens of bodies were exhumed from improvised graves throughout the city. As of April 7, more than 300 civilian bodies have been found and as of September 13, their number reached 422 bodies.²⁹ The Independent International Commission of Inquiry on Ukraine concluded the killings in Bucha as deliberate executions. Witnesses, including an official who was one of the first who entered the city after it was de-occupied, saw dead bodies in the backyard of houses where the soldiers had established their base. Some of them had their hands tied behind their backs and presented signs of torture. More than 10 dead bodies of civilians were found on the street. In another incident, five bodies were found in a basement, with their hands tied behind their backs and gunshot wounds. A woman confirmed that her adult son was among the five bodies.³⁰ The Commission, whose members were working *in situ*, established also the following facts, which also concern other provinces and cities as well:

1. executions took place in numerous other localities;
2. there is reliable information about similar executions in 16 other cities and settlements, involving 49 victims;
3. the majority are men of fighting age;

²⁹ Головне управління Національної поліції в Київській області, «422 тіла вбитих окупантами мирних жителів виявили в місті після деокупації. Місця масових страт поліцейські Київщини знаходили в підвалах, на вулицях, в гаражах», 13 вересня 2022 року, доступне за посиланням <https://www.facebook.com/watch/?v=766527297938115>, accessed May 6, 2023.

³⁰ United Nations Independent International Commission of Inquiry on Ukraine – report, A/77/533, 2022, 13.

4. cases are located in all four provinces under the Commission's initial focus (that is provinces of Kyiv, Chernihiv, Kharkiv and Sumy), suggesting a wide geographical pattern of committed executions;
5. executions confirmed by the Commission occurred in places occupied by Russian armed forces for longer period of time, close to the front lines;
6. the Commission had not have an access to particular areas of Kharkiv Province due to security reasons;
7. a common element was that victims were last seen in the custody or presence of Russian armed forces;
8. the bodies of the victims were exhumed from separate or mass graves or recovered from houses or basements that the Russian armed forces had occupied; some victims' dead bodies were found with hands tied behind their back, a clear indication that the victim was in custody and posed no threat at the time of death.³¹

Another city where mass graves were found by the Ukrainian armed forces is the city of Izyum (city in the Eastern part of Ukraine, located in Kharkiv province). Mass graves contained 445 bodies buried next to each other.³² The condition in which bodies were found, manner of burials and wounds correspond to those that were discovered in Bucha.

Ad hoc tribunals agreed in their judgements that genocidal intent is conditional to the acts, utterances and position of the accused and from the "pattern of purposeful action."³³ The latter category includes circumstances such as: the general policy underlying the acts; the methodical way of planning; the systematic manner of killing; the number of victims; the scale of atrocities; and the use of derogatory language towards members of

³¹ United Nations Independent International Commission of Inquiry on Ukraine – report, A/77/533, 2022, 13.

³² Information available on the following website: <https://www.nytimes.com/2022/09/18/world/europe/izium-mass-grave-ukraine.html>, accessed May 20, 2023.

³³ International Criminal Tribunal for Rwanda, Trial Chamber Judgement of 21 May 1999, Prosecutor v. Kayishema, Case No. ICTR-95-1-T, para. 93; International Criminal Tribunal for Rwanda, Trial Chamber Judgement of 6 December 1999, Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, para. 61; International Criminal Tribunal for Rwanda, Trial Chamber Judgement of 27 January 2000, Prosecutor v. Musema, Case No. ICTR-96-13-A, para. 167; International Criminal Tribunal for the former Yugoslavia, Judgement of 12 December 2012, Prosecutor v. Tolimir, Case No. IT-05-88/2-T, para. 121.

the targeted group.³⁴ According to the Trial Chamber in *Prosecutor v. Jelišić*, Genocide Convention “did not discount the possibility of a lone individual seeking to destroy a group as such.”³⁵ Taking the above into account, the aforementioned executions and killings in Bucha and Izyum were committed in a similar pattern, with the same intent.

The analysis of the killings and executions of Ukrainian civilians discovered by Ukrainian armed forces in Bucha and Izyum after those cities were occupied by Russian armed forces is only an example, since only after full recovery of Ukrainian territories, that are currently occupied by Russia (including the Crimean Peninsula), a complete documentation and corroboration of crimes committed by Russian armed forces will be possible. Nonetheless, crimes in Bucha and Izyum may³⁶ constitute the crime of genocide, as most of the criteria from the definition provided in the Rome Statute and Elements of Crime are met. First of all, killings were committed with a clear intent to destroy in part national group – Ukrainians. All of the killings and executions were committed by members of Russian armed forces (soldiers). In addition, there were particular military-controlled killing sites, for instance in Bucha.³⁷ Moreover, the majority of civilians executed or killed in Bucha and Izyum were men of so-called fighting age. Therefore, additional aim was to eliminate those, who potentially could join the Ukrainian armed forces and fight against the aggressor state. Secondly, the perpetrator killed more than one person in an identifiable pattern

³⁴ International Criminal Tribunal for Rwanda, Judgement of 7 June 2001, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, para. 62; International Criminal Tribunal for Rwanda, Judgement and Sentence of 15 May 2023, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, para. 313; International Criminal Tribunal for Rwanda, Judgement and Sentence of 1 December 2003, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, paras. 804, 806; International Criminal Tribunal for the former Yugoslavia, Judgement of 9 May 2007, *Prosecutor v. Blagojević*, Case No. IT-02-60-A, para. 123.

³⁵ International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgement of 14 December 1999, *Prosecutor v. Jelišić*, Case No. IT-95-10-T, para. 100.

³⁶ It is impossible to unequivocally state whether those acts constitute genocide, since available sources do not cover all the facts and circumstances. However, some findings may be concluded with high degree of probability.

³⁷ Military-controlled killing sites were well-known in other genocides, for instance in Indonesian genocide. See: Jess Melvin, “Mechanism of Mass Murder: A Case for Understanding the Indonesian Killings as Genocide,” *Journal of Genocide Research* 19, no. 4 (2017): 498.

(common elements can be established), which confirms that the acts were committed deliberately and purposely. As a result, the conduct of acts (crimes in Bucha and Izyum) occurred in the context of a manifest pattern of similar conduct against Ukrainians that lived in those cities.

3.2. Forcible Transfer of Ukrainian Children to Russia

On March 17, 2023, the ICC Pre-Trial Chamber issued arrest warrants for Vladimir Putin (President of the Russian Federation), and Maria Lvova-Belova (Commissioner for Children's Rights in the Office of the President of the Russian Federation). The arrest warrants were the response to the Prosecution's applications of February 22, 2023. According to the Pre-Trial Chamber, there are reasonable grounds to believe that each suspect is responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children.³⁸ The ICC qualified those acts as war crime in the form of deportation of population and unlawful transfer to another country. The legal issue is therefore whether those acts may constitute also the crime of genocide.

Ad hoc tribunals referred in a number of cases to deportation and forcible transfer. The Trial Chamber of ICTY delivered that the prohibition against deportation serves to provide civilians with a legal safeguard against forcible removals in time of armed conflict and the uprooting and destruction of communities by an aggressor or occupant of the territory in which they reside.³⁹ The only exception to the absolute prohibition concerns evacuations, required to ensure the "security of the population" or dictated by "imperative military reasons."⁴⁰ Deportation means a transfer with crossing

³⁸ Press release available on the following website: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>. Further information about the investigation into the situation in Ukraine available on the website: <https://www.icc-cpi.int/situations/ukraine>, accessed May 26, 2023.

³⁹ International Criminal Tribunal for the former Yugoslavia, Trial Chamber of 31 July 2003, Prosecutor v. Stakić, Case No. IT-97-24-T, para 681.

⁴⁰ Etienne Henry, "The Prohibition of Deportation and Forcible Transfer of Civilian Population in the Fourth Geneva Convention and Beyond," in *Revisiting the Geneva Conventions: 1949–2019*, eds. Md. Jahid Hossain Bhuiyan and Borhan Uddin Khan (Leiden: Brill Nijhoff, 2020), 75.

an international border from one country to another, whereas transfer occurs within the territory of one country⁴¹ or, in the case of Russian military aggression, within occupied Ukrainian territories, which are internationally recognized as Ukrainian sovereign territory. Analogous interpretation was applied by the ICTY: deportation may be defined as a forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. Deportation requires a displacement of a persons across the national border, to be distinguished from forcible transfer which may take place within national borders.⁴²

Ukrainian authorities have received over 20,000 complaints of missing Ukrainian children.⁴³ However, there are reliable grounds to believe that real number may be much higher, as children were taken from orphanages, residential institutions or families. The Organization for Security and Co-operation in Europe (OSCE) has launched the investigation on forcible transfer of children within parts of Ukraine temporarily controlled by Russia, and deportations to the Russian Federation. In May 2022, the Ukrainian Commissioner for Children's Rights claimed that more than 180,000 children were illegally transferred to the occupied territories and Russia.⁴⁴ In October 2022, the United States estimated that around 260,000 Ukrainian children were taken to Russia.⁴⁵ Around the same period,

⁴¹ Vincent Chetail, "The Transfer and Deportation of Civilians," in *The Geneva Conventions: A Commentary*, eds. A. Clapham, P. Gaeta, and M. Sassoli (Oxford: 2015), 1189.

⁴² International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgement of 15 March 2000, Prosecutor v. Krnojelac, Case No. IT-97-25-T, para. 474; International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgement of 2 August 2001, Prosecutor v. Krstic, Case No. IT-98-3, para. 521; International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgement of 1 September 2004, Prosecutor v. Brdalin, Case No. IT-99-36, para. 540.

⁴³ Information available on the following website: <https://www.hrw.org/news/2023/04/06/investigation-launches-forcible-transfer-children-ukraine>, accessed May 27, 2023.

⁴⁴ Information available on the following website: <https://mediacenter.org.ua/the-russians-illegally-deported-or-transported-181-000-ukrainian-children-to-the-occupied-territories-commissioner-of-the-president-of-ukraine-for-children-s-rights-and-rehabilitation/>, accessed May 23, 2023.

⁴⁵ Yale School of Public Health – Humanitarian Research Lab, "Russia's Systematic Program for the Re-Education and Adoption of Ukrainian Children – A Conflict Observatory Report," New Haven 2023, 10.

it is reported that the Ukrainian Ombudswoman for Human Rights, Lyudmyla Denisova, declared that Russia had relocated more than 1.2 million Ukrainians against their will, including more than 210,000 children.⁴⁶ Parliamentary Assembly of the Council of Europe called for an immediate halt to the forced deportation and transfer of Ukrainian civilians, including children, to Russia and their safe return to Ukraine.⁴⁷

The ICC issued arrest warrants for Vladimir Putin and Maria Lvova-Belova suspecting they are responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population. Therefore, the legal issue is whether these acts, apart from constituting war crimes, may constitute genocide. First of all, forcible transfer of Ukrainian children was committed with a clear intent to destroy a national group – Ukrainians – in part, especially children. In a vast majority of cases Ukrainian children after arriving to Russia or occupied Ukrainian territories undergo special procedures – filtration, “re-education” with Russian propaganda and “patriotic adaption,” not to mention the risk of being a victim of human trafficking, sexual abuse or exploitation, illegal adoption into Russian families.⁴⁸ These procedures that children were subjected to after arriving to the occupied Ukrainian territories or Russia prove that the ultimate purpose of those forcible transfers was and still is to erase their Ukrainian identity as much as possible, not only mentally and psychologically, but also physically, easing the procedure for Russian citizenship or adoption to Russian families.⁴⁹ The latter falls within the notion of destroying a national group in part. Secondly, the perpetrator forcibly transferred more than one person – actually thousands of Ukrainian children under 18 years of age, who belonged to particular national group. Thirdly, the transfer took place from one group to another, including deportation from Ukraine to Russia. The perpetrator unquestionably knew that the children were under 18 years

⁴⁶ Information available on the following website: <https://www.reuters.com/world/europe/exclusive-ukraine-investigates-deportation-children-russia-possible-genocide-2022-06-03/>, accessed May 23, 2023.

⁴⁷ Parliamentary Assembly of the Council of Europe, Resolution 2482 (2023).

⁴⁸ Maria Mentzelopoulou, “Russia’s War on Ukraine: The Risk of Trafficking in Human Beings,” European Parliamentary Research Service, PE 729.410, Brussels 2022, 1–2.

⁴⁹ Commissioner for Human Rights of the Council of Europe, “Memorandum on the Human Rights Consequences of the War in Ukraine,” CommDH(2022)18, 8 July 2022, 13.

of age. The fact that the forcible transfer occurred with the involvement of the Commissioner for Children's Rights in the Office of the President of the Russian Federation, that served as the ground for issuing an arrest warrant for her, proves that Russian authorities had knowledge of the age of Ukrainian children being transferred or deported. Additionally, the conduct took place in the context of a manifest pattern of similar conduct directed against Ukrainians and Ukrainian children.

4. Conclusion

Russian military aggression against Ukraine is probably one of the most significant events in recent history, as it constitutes the most flagrant and evident violation of fundamental principles of international law and the UN Charter directly. Russia is one of the permanent members of the UN, which enables to undertake any possible action by the UN Security Council under Articles 41–42 of the UN Charter, thus addressing threats to the peace, breaches of the peace and acts of aggression. As a result, the only international institution that is competent to introduce particular actions is ineffective.

Crimes of Russian armed forces on the territory of Ukraine as a result of its military aggression against Ukraine, undeniably constitute the most serious crimes of international concern that fall within the jurisdiction of the ICC. Due to jurisdictional exception, it may not be possible to prosecute individuals for the crime of aggression, since according to Article 15 *bis*, in respect to a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's citizens or on its territory. Therefore, the ICC cannot exercise jurisdiction over the crime of aggression in the case of acts committed by Russian citizens. Nevertheless, the ICC can exercise jurisdiction over other crimes enlisted in its Statute, thus crimes against humanity, war crimes and genocide. Acts that have been subject of this article, such as killing members of the group and forcible transfer of children of one group to another, may constitute the crime against humanity or war crime, however in the case of meeting additional criteria, especially *mens rea* elements, it may constitute the crime of genocide. The killings and executions in such cities as Bucha, Izyum meet the criteria established in the "Elements of Crime," as they were committed with a clear intent to destroy Ukrainians.

The perpetrator – Russian soldiers – is clearly identified, along with its role in the ongoing international military conflict on the territory of Ukraine.⁵⁰ Some of the executions and killings were conducted in particular military-controlled killing sites. Moreover, the majority of civilians executed or killed in Bucha and Izyum were men of so-called fighting age. The perpetrator killed more than one person in an identifiable pattern (common elements can be established), which confirms that acts were committed deliberately and purposely. The abovementioned mean that the conduct of acts perpetrated by Russian armed forces (crimes in Bucha and Izyum) occurred in the context of a manifest pattern of similar conduct against Ukrainians that lived in those cities.

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⁵⁰ According to the Article 2 of the Geneva Conventions of 1949, the ongoing military conflict on the territory of Ukraine as a result of Russian military aggression is an international military conflict. See: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted on 12 August 1949, 75 U.N.T.S. 31.

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