The Forcible Transfer of Children from Ukraine as Genocide

*Awakening the Dormant Prohibition of the Genocide Convention*

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**Abstract**

On 17 March 2023, Pre-Trial Chamber 11 of the International Criminal Court (ICC) issued secret warrants of arrest for President Putin and the Commissioner for Children's Rights in the Office of the President of the Russian Federation, Ms. Lvova-Belova, for the commission of the war crime of forcible transfer of children. This article argues that there are “reasonable grounds to believe”, as the ICC Statute requires for the arrest warrant stage, that both Putin and Lvova-Belova bear individual criminal responsibility for the forcible transfer of Ukrainian children as a crime of genocide; however, two types of considerations – general and particular – prevented the issuing of arrest warrants for genocide crimes.

In Section 2, after a short historical-legal review of the formulation of Article 2(e) of the Genocide Convention (GC), the article notes that despite the significant number of cases of children being transferred and removed from their families that have taken place since the GC was adopted, the provision has been dormant and considered anachronistic and was rarely applied by an international or a local court. Section 3 proceeds with a legal analysis of the elements of the crime of the forced transfer of children and the genocidal special intent. Section 4 parses the case study of the forcible transfer of children from Ukraine as a crime of genocide. Section 5 analyses the litigation of the crime of genocide in the ICC through the only case of genocide the court has addressed so far: the arrest warrant for Sudan’s former president, Omar al-Bashir. Section 6 concludes with a forecast that despite the sufficient legal
basis for issuing arrest warrants for Putin and Lvova-Belova, practical and political considerations would impede the ICC from doing so.

Keywords

1 Introduction

On 17 March 2023, Pre-Trial Chamber II of the International Criminal Court (ICC) issued secret warrants of arrest for the President of the Russian Federation, Vladimir Vladimirovich Putin, and the Commissioner for Children's Rights in the Office of the President of the Russian Federation, Maria Alekseyevna Lvova-Belova. The warrants were issued in the context of the ICC’s investigation of the situation in Ukraine, namely, the Russia-Ukraine armed conflict that began on 21 November 2013. They addressed the crimes of unlawful deportation and transfer of population (children) from occupied areas of Ukraine to the Russian Federation (ICC Statute, articles 8(2)(a)(vii) and 8(2)(b)(viii)), and held Putin and Lvova-Belova to be suspects bearing individual and direct criminal responsibility for the commission of these crimes. However, while the warrants addressed the unlawful acts as war crimes, they failed to recognise them as also constituting the crime of genocide, according to the ICC statute.

Article 6(e) of the ICC Statute, adopted verbatim from the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Genocide

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1 According to the ICC press release, the chamber mentioned that the warrants are secret for interests of safeguarding the investigation and protecting victims and witnesses. Nevertheless, the chamber found the public disclosure of 'the existence of the warrants, the names of the suspects, the crimes for which the warrants are issued, and the modes of liability as established by the Chamber' as serving the interests of justice, hoping to contribute to the prevention of the further commission of these ongoing crimes. See the ICC press release, 17 March 2023, available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

2 Putin and Lvova-Belova are suspected for having committed the crime as direct perpetrators, jointly with others and/or through others (article 25(3)(a) of the ICC Statute). President Putin is also suspected of failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility (article 28(b) of the ICC Statute).
designates the forcible transfer of children from a national, ethnic, racial or religious group to another group a crime of genocide when it is perpetrated with a special intent to destroy one of the aforementioned protected groups, in whole or in part. Yet, the ICC Pre-Trial Chamber has not issued the arrest warrants on the grounds of the suspicion of committing a crime of genocide. Because the warrants are partly confidential, it is unknown whether the chamber declined a request to issue these warrants on the grounds of the crime of genocide, or whether it was only asked to issue them on the grounds of war crimes and confirmed the request.

This article suggests that there are ‘reasonable grounds to believe’ that both Putin and Lvova-Belova bear individual criminal responsibility for the forcible transfer of Ukrainian children as a crime of genocide; however, it seems that two types of considerations – general and particular – prevented the issuing of arrest warrants for genocide crimes. The general considerations pertain to the legal difficulties in proving the crime of genocide and specifically the forcible transfer of children – a prohibition that has been dormant for decades. The particular political considerations are linked to the prosecution of a prominent political head of state and superpower such as Russia. The article, hence, analyses these considerations vis-à-vis the facts of the case of forcible transfer of Ukrainian children from Ukraine to Russia during the Russia-Ukraine conflict. It argues that the transfer of Ukrainian children is a strong case of genocide according to the ICC statute and the Genocide Convention. It nevertheless concludes that the political constraints and legal difficulties would probably prevent the ICC Prosecutor from appealing the Pre-Trial Chamber’s decision or amending the indictment at the time of the confirmation of charges and adding the crime of genocide. Lamentably, this may create a vicious cycle where the forcible transfer of children is not pursued as a crime of genocide because there are not enough legal precedents to support its prosecution, but the fear that it could not be proven in court precludes pressing charges on that count and establishing legal precedents.

The article begins, in Section 2, with a short historical-legal review of the formulation of Article 2(e) of the Genocide Convention. It first discusses lessons from the forcible transfer of children during the Armenian genocide of 1915–1916, as this case study shares many characteristics with the Ukrainian case study. It then proceeds to address the reasons for including Article 2(e) in
the Genocide Convention. It notes, however, that despite the significant number of cases of children being transferred and removed from their families that have taken place since the Genocide Convention was adopted, the provision has been dormant and considered anachronistic (Mundorff, 2009) and was rarely applied by an international or a local court. Section 3 proceeds with a legal analysis of the elements of the crime of the forced transfer of children – the actus reus and mens rea of the crime, including the genocidal special intent. Section 4 parses the case study of the forcible transfer of children from Ukraine as a crime of genocide. Section 5 analyses the litigation of the crime of genocide in the ICC through the only case of genocide the court has addressed so far: the arrest warrant for Sudan’s former president, Omar al-Bashir. The analysis focuses on the ICC’s former experience with the crime of genocide to decide whether the court could find a sufficient evidentiary foundation to issue arrest warrants for the crime of genocide in the Ukrainian case. Section 6 concludes with a forecast that despite the sufficient legal basis for issuing arrest warrants for Putin and Lvova-Belova, practical and political considerations would impede the ICC from doing so.

2 Legal Historical Review

2.1 Lessons from the Armenian Genocide

Policies that call for the removal of children from their families that governmental authorities of dominant groups apply against subordinate groups have been in place since ancient times. In biblical times, ancient Greece and the Assyrian and Neo-Babylonian empires, such policies served to justify enslavement and abuse. Later, they were adopted by the Islamic Arab Empire, which recruited administrators and fighters, among them children, from non-Muslim slaves and prisoners of war, and by the Ottoman Turkish Empire, which, in the 14th century, referred to recruiting children among Christian subjects as a form of tax called “devshirme” (Diamadis, 2012, 312–316).

The forcible transfer of children was first referred to as genocide (although not officially as a crime of genocide, because such a crime did not yet exist) by the Nuremberg Military Tribunal. See, United States v. Greifelt (the RuSHA case), 5 Trials of War Criminal before the Nuremberg Military Tribunals under Control Council Law No. 10, at 102–08 (1950) (Military Tribunal, Nuernberg, Germany, Oct. 1946–Apr. 1949). In 1998, it was addressed by the International Criminal Tribunal for Rwanda in the Akayesu case. See, Akayesu Trial Judgment, Case No, ICTR-96-4-T, Judgment, 509 (2 Sept., 1998) (Akayesu Trial Judgment). In domestic courts, it was considered by the Australian High Court in Kruger v. Australia (1977) 146 A.L.R 126.
In modern times, children were transferred by dominant groups for the purpose of eliminating the cultural existence and biological continuity of a subordinate group. This purpose was shared by states at war with the groups they wanted to physically and culturally eliminate (namely the Ottoman empire and Nazi Germany) as well as by colonial states that aspired to “civilize” the Indigenous peoples under their jurisdiction, namely the United States, Canada and Australia. Despite the fact that most colonial states have finally and fortunately recognised their wrongdoing, the repercussions of their forcible transfer and assimilation of children continue to be felt to this day.

6 This case study is elaborated on below.

7 During World War II, the Nazi Germany regime applied the forced transfer of children as part of the concept of “purification” of race. Lebensborn, a Nazi state-supported association whose goal was to increase the birth rate of Aryan children, provided financial support to the raising of these children in Germany. This practice was later expanded and used by Heinrich Himmler’s Nazi forces to facilitate the kidnapping and removal of orphans with “worthy genes” from European states for adoption in Lebensborn homes in Germany. In this way, the Nazis hoped to dispossess their enemies of their potential future political leaders (Mundorff, 2009).

8 During the colonial era into the late years of the 20th century, these states separated Indigenous peoples’ children from their families, established boarding schools to assimilate these children into the dominant state culture (United States and Canada), and placed these children in foster homes and institutions or had them adopted by non-Indigenous families. In many cases, the children were also victims of abuse. There is a plethora of literature on these case studies. See, for example, Amir, 2018; Amir, 2019; Barta, 2008; MacDonald 2015; MacDonald and Hudson, 2012; Van Krieken, 2001; Van Krieken, 2008; Woolford and Benvenuto, 2015.

9 In Canada, a mechanism for reconciliation was established in 2007. This took the form of a settlement agreement and an apology from Prime Minister Stephen Harper, which he made in 2008. See, Indian Residential School Settlement Agreement, available at: https://www.rcaanc-cirnac.gc.ca/eng/1100100015576/157158687074. A Truth and Reconciliation Committee was also established as a part of the agreement, and it submitted its final report in 2015. See Truth and Reconciliation Commission of Canada reports, available at: https://www.rcaanc-cirnac.gc.ca/eng/1450144405592/1529106060525. In 2022 the House of Commons has recognised Canada's Indian Residential School system as an act of genocide. See, Richard Raycraft, CBC News, MP's back motion calling on government to recognise residential schools program as genocide, 28 October 2022: https://www.cbc.ca/news/politics/house-motion-recognize-genocide-1.6632450. In Australia, the government established the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, which published its report (“Bringing them Home”) in 1997. The report consists of 54 recommendations that include a national apology, reparations, improved services for Stolen Generations members and a process to monitor the implementation of the report’s recommendations (Human Rights and Equal Opportunity Commission, 1997). In February 2008, Prime Minister Kevin Rudd apologised to the Stolen Generations in the name of the Australian parliament. In the United States,
article, which discusses a case of the forcible transfer of children during war, focuses in this section on the Armenian case study, which shares methods, aims and modes of implementation with the Ukrainian case study.

In 1915–16, during the first World War, the Ottoman Empire’s ruling party (the Young Turks) embarked on a nationalist campaign to transform the ‘multi-ethnic and multi-religious empire into a Turkish nation state’ (Gzoyan et al., 2022). As part of this campaign, the Ottoman empire committed a genocide of the Armenian community within its borders. In addition to mass killings, abuse and deportations of Armenian people across the empire, the Young Turks applied a policy of assimilation of Armenian children and women (Akçam, 2012; Ekmekcioglu, 2013; Sarafian, 2001). To execute this policy, they deported Armenian women and their children and absorbed them into Muslim households using terror and menace with the expectation that they would “convert” into Islam (Ekmekcioglu, 2013). The Ottoman empire has not officially documented the conversion and forced assimilation of between 100,000 to 200,000 children (Akçam, 2012; Shirinian, 2016). However, published and unpublished memoirs of survivors, emerging accounts of their descendants (Watenpaugh, 2012), the archives of the League of Nations, and the laws enacted by the Ottoman empire attest to the latter’s goals and the methods used to achieve them.

The Young Turks had already made plans to apply policies to assimilate the Armenians at the beginning of the war, preparing both legal and practical infrastructures. The government established new orphanages to absorb “orphaned” Armenian children, and government orders legalised placing children who were likely to become parentless during the war into orphanages for their “education and upbringing” (Gzoyan et al., 2019). The Interior Ministry, the state branch entrusted with coordinating the Temporary Law of

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11 The belief was that women’s identity could be discounted and that children could undergo a process of “reprogramming” (Gzoyan et al., 2022).

12 This process revived, in a way, the ancient “devshirme.”

13 See, especially, the personal account of Yervant Odian, a journalist and satirist, who published a serialised memoir of his ordeal shortly after the end of the war in the Istanbul Armenian-language newspaper, Zhamanag (Watenpaugh, 2012).
Deportations of Armenians, issued a number of orders that determined the treatment of women and young children – boys and girls – described below (Ekmekcioglu, 2013).

The Turkish government applied the policy of assimilation for Armenian children and women in tandem with the killing and the deportation of the Armenian population. While all of the Armenian people on the eastern border (the Armenian “historical homeland”) were massacred, in the west and south, children, women and older people were separated from adult men (who were killed) and deported. The children were further separated from their families with the intent to distribute them to Muslim orphanages, mosques and private households (Ekmekcioglu, 2013). Young children – under the age of ten – were taken away and placed in Muslim orphanages, while older children were taken into Muslim homes, mostly as unpaid servants (Gzoyan et al., 2019). Some of them, mainly girls, were also abused as sexual slaves by the Ottoman military (Watenpaugh, 2012). Girls above 13 years were married off or forced to be concubines (Akçam, 2012). A harrowing phenomenon was the occasional sale of children as young as seven years old by their own parents to Turkish and Arab passersby, who tried to convince destitute families that the children would return after the war or that the parents were giving their children a chance to survive by selling them (Watenpaugh, 2012). In the orphanages, in line with the government plans, Armenian children eventually lost their Armenian identity. The government forged birth certificates and gave the children new Turkish names. They were required to speak Turkish and adopt Islam and Turkish customs (Gzoyan et al., 2019). Many of them, especially the young ones, forgot their heritage and identity.

After the war, the armistice agreements demanded that the Turkish government collect and hand over the Armenian detainees (Gzoyan et al., 2019). This was interpreted to include the transferred children. Some individuals and relief organisations have been engaged in the mission of locating survivors who were transferred as children to Muslim homes and orphanages and who lost their Armenian identity, including those who forgot their origin and refused to be restored (Gzoyan et al., 2019).

However, the international community did not apply any means to account for the forcible transfer of the Armenian children or the Armenian genocide because there was no international convention prohibiting genocide and imposing state and individual criminal liability. It took 23 years and another world war for the international community to define genocide, criminalise it and entrust states with the responsibility to prevent it. Yet, as the subsection below reveals, the inclusion of the prohibition of the forcible transfer of children in the ambit of the Genocide Convention required deliberations and
arguments, and the lessons from the Armenian case study were not applied directly. Unfortunately, the Armenian case did not serve as a historical warning, and the Russian government has applied its own policy of forced transfer and assimilation of Ukrainian children.

2.2 The Incorporation of the Prohibition on the Forcible Transfer of Children into the Genocide Convention

Like the other genocidal acts enumerated in the Genocide Convention, the forcible transfer of children became a crime of genocide after its incorporation in the Genocide Convention. Article 2(e) deems these transfers as genocidal when they are perpetrated with the required special intent to destroy the group in whole or in part. That is, the drafters of the Genocide Convention saw the forcible transfer of children as an embodiment of the crime of genocide according to the views of the convention’s famous architect, Raphael Lemkin, who suggested that genocide was, in essence, ‘a co-ordinated plan of different actions aiming at the destruction of the essential foundations of life of national groups, with the aim of annihilating the groups themselves’ (Lemkin, 1944: 80).

Lemkin’s monumental and highly influential conceptualisation of genocide indicated a broad understanding of the term and included eight techniques of annihilation of a group: political, social, cultural, economic, biological, physical and moral (Lemkin, 1944: 79). The first draft of the Genocide Convention discussed by the Ad Hoc Committee and by the UN Economic and Social Council\(^\text{14}\) did not suggest Lemkin’s broad definition of genocide, but it nevertheless elaborated on prohibited acts ‘destroying the specific characteristics of the group’.\(^\text{15}\) These were acts directed against the cultural aspects of a group, namely, the systematic destroying of a group through targeting its cultural heritage. The acts included, inter alia, prohibiting the use of national language, ordering the destruction of religious, historic and artistic artifacts, and “the forcible transfer of children to another human group.”\(^\text{16}\)

However, the question of whether to include the prohibition of cultural genocide in the Genocide Convention was the subject of intense debate in its preparation, ending in a decision to exclude it (Abtahi and Webb, 2008). An elaboration on this debate is beyond the scope of this article,\(^\text{17}\) but because

\(^{15}\) A/AC.10/42/Rev.1, Article 1(11) (3), in Abtahi and Webb, 2008: 156.
\(^{16}\) Id., Article 1(11)(3) (a).
\(^{17}\) For a discussion on cultural genocide and why it was excluded from the Genocide Convention see, for example, Moodrick-Even Khen, 2023.
the forcible transfer of children – first included in the draft as a form of cultural genocide – remained in the Convention, it is valuable to mention at least one political aspect of the debate. A strong objection to cultural genocide was raised by colonial states, which feared their policies of assimilation toward the native peoples in the territories under their control would be deemed genocidal (Moodrick-Even Khen, 2023). However, those states supported including prohibitions on physical genocide (such as the extermination of a group by killing its individual members) and biological genocide (such as applying measures intended to prevent births within the group).

In light of the controversy over the inclusion of cultural genocide in the Convention, the UN Ad Hoc committee and the Sixth committee discussed the forcible transfer of children. In the end, the Convention included the prohibition of forcible transfer of children – mainly because it could also be seen as a technique of biological genocide, but also because of the work of the Greek delegation in the Sixth committee (Ioffe, 2023). Greece promoted this prohibition because during the Greek civil war, Greek children had been victims of abduction and forcible transfer to countries in Eastern Europe under communist control (Kourtis, 2023). Hence, the Greek delegate, who referred to the ancient Ottoman policy of “devshirme”, argued that the Convention should include provision on forcible transfer of children because it could be ‘perpetrated rather with an intent to destroy or to cause serious physical harm to members of a group.' He was supported by the Uruguayan delegate, who stressed the importance of including a prohibition on “measures intended to destroy a new generation through abducting infants, forcing them to change their religion and educating them to become enemies of their own people.” The American delegate concluded by asking the committee to consider whether ‘there was any difference ... from the point of view of the destruction of a group between measures to prevent birth half an hour before the birth and abduction half an hour after the birth.”

To conclude, the incorporation of the prohibition on the forcible transfer of children in the Genocide Convention attests to the importance of children and their protection in armed conflict, as well as to the larger social meaning of children in general from an international perspective (Watenpaugh, 2013, 289). This is especially evident in the support of colonial states and others that feared that such inclusion would render their acts genocidal. The gravity of the

19 Id. at 187 (statement of Mr. Manini y Rios of Uruguay).
20 UN 6th Committee.
act of removing children from their parents and uprooting them from their natural environment was acknowledged first by the 20 states that ratified or acceded to the Genocide Convention in 1951, and since that time by each of the 153 member states of the convention.

Hence, the incorporation of the prohibition on children's forced transfer in the Genocide Convention lays a foundation for the legal analysis of the prohibition's elements. Specifically, it facilitates analysis of how these elements are seen to embody the legal concept of genocide developed by international law since the adoption of the Genocide Convention. This is the subject of the following subsection.

3 Forcible Transfer of Children: Analysis of the Elements of the Crime

3.1 Forcible Transfer
The transfer of the children refers to the act of separating them from their group and placing them in another group. The term “group” signifies one of the protected groups enumerated by the Convention: that is, national, ethnic, racial or religious. Yet, the jurisprudence of the international criminal tribunals (ICTY and ICTR)\textsuperscript{21} interpreted these groups as stable. This stability was often understood as based in a biological element,\textsuperscript{22} but at times it was also interpreted as depending on the perpetrator’s perception of the group or on a mixed approach that took into account both biological and perceptual aspects (Amir, 2019). As a result, a traditional interpretation of the transfer requires that the children be removed to a group different from the group to which they biologically belonged (usually the group of their upbringing).

However, scholars have criticised the biological feature of the protected groups (Grover, 2013; Schabas 2000; Schabas, 2008), arguing that it is possible to claim that “children” in their own right are also a protected group (Grover, 2013). Thus, their removal to groups that are not necessarily different from their assumed larger group (the national, ethnic, racial or religious group) but nevertheless results in their separation from their natural environment and

\begin{itemize}
\item \textsuperscript{21} International Criminal Tribunal for Yugoslavia, International Criminal Tribunal for Rwanda.
\item \textsuperscript{22} Akayesu, Trial Judgment, Case No. ICTR 96-4-T, Judgment, 510–516 (2 Sept. 1998) (Akayesu, Trial Judgment).
\end{itemize}
denies their rights as children can also be considered as a genocidal act according to the Genocide Convention.\(^{23}\)

Finally, scholars argue that the transfer does not necessarily have to end up with the children being integrated into the other group, but only with them placed under another group’s control (Mundorff, 2009). Thus, children's removal from their homes or geographical location and their placement in the territory controlled by the other group would be considered to satisfy the “transfer” element of the crime.

The “forcible” element has also been interpreted broadly. The Trial Chamber in the Akayesu case stated that the prohibition on forcible children’s transfer does not apply only to a direct act of forcible physical transfer, but also to acts of threats or trauma which would lead to the forcible transfer of children from one group to another.\(^{24}\) The Preparatory Commission for the ICC supported an even broader understanding, suggesting that the term may include, ‘threat to force or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power ... or by taking advantage of a coercive environment.’\(^{25}\)

In contrast, the ICJ opined that “forcible” requires ‘deliberate intentional acts.’\(^{26}\) It based its reasoning on the volitional and intentional character of the acts enumerated in Article 2 of the Genocide Convention (“killing”, “deliberately inflicting”, “causing”, “inflicting measures” ... “intended to”), thus, concluding that the same logic applies to sub-article (e). Nevertheless, the former broader understanding of the term seems more congruous with the interpretation of the required mental element (mens rea) discussed below.

3.2 Children

To analyse the term “children” in the context of the forcible transfer of children as a genocidal act requires that we explain the centrality of children within the...
concept of genocide. Genocide is understood as the annihilation of groups, and the groups “as such” and their perpetuity (and not individuals) are protected by the Genocide Convention. In the words of the ICTR Trial Chamber in the Rutaganda case:

For any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, this victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, or religious group.27

Children, as the conduits for the perpetuation of both the cultural and physical existence of the group, are an indispensable target for perpetrators of genocide. The latter intend to destroy the protected groups, in whole or in part, through the removal of their young, sometimes acculturating them in a new culture. Thus, the separation of families – Lemkin’s description of the forcible transfer of children – is ‘a biological method and technique of genocide’ (Diamadis, 2012: 351). The children are valuable not only to their parents but also to states, nations, peoples and races, and their protection equals the physical and cultural preservation of the group. Therefore, the term “children” should be interpreted as broadly as possible according to international law standards and include, as the Rome Statute Elements of the Crime suggest, all persons under age 18 (ICC, 2011, Article 6).

Yet, the centrality of children to the concept and crime of genocide in general goes beyond the mere interpretation of the age-range to which the Convention and the ICC Statute relate. In the context of theories of 20th century human rights and children’s rights, and even the concept of the best interests of the child, the forced transfer of children as a genocidal practice regains additional strength and importance when the child is seen both as an individual and as a component of the group (Watenpaugh, 2013: 286). This is especially relevant in contextualising as genocide practices of acculturation of Indigenous children by settler colonialists, which also threaten the continuity of the group, and it may be relevant in other contexts, such as the war in Ukraine, when

27 Judgment Rutaganda (ICTR-96-3-T), 6 December 1999, 60.
perpetrators of genocide claim that the transfer of children aims to serve the children's best interest.

3.3 Special Intent: Forcible Transfer of Children and the Intent to Destroy the Group in Whole or in Part

The perpetration of the crime of genocide is dependent on the perpetrator acquiring a “double” mental element: the general intent and the special intent. The general intent is enumerated in each of the sub paragraphs of Article 2 (for example, ‘deliberately inflicting’, ‘imposing measures intended to ...’) (emphasis added) and includes the perpetrator’s knowledge or awareness of all the elements of the actus reus of the crime (ICC, 2011). The special intent (dolus specialis) is the perpetrator’s intent to destroy, in whole or in part, the protected group as such (Genocide Convention, Article 2).

The requirement to have a special intent for the perpetration of the crime of genocide has been thoroughly discussed by international courts and tribunals and by scholars. They have dealt with two main aspects. The first is what qualifies as a special intent or what is mentally required from perpetrators to denote their special intent. The second is proving the special intent. The following is a summary of the main conclusions of the legal discussions in the ICJ and the ad-hoc tribunals.

The ICJ set a high standard for the interpretation of genocidal intent. It required that those committing genocide not only have knowledge that their acts will bring about the destruction of a group, but that they also consciously aim to achieve this consequence. This standard was formulated by the court in the context of Serbia’s state responsibility for the genocide of Muslim Bosnians in Srebrenica, but the court prescribed that state acts can only

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29 See, for example, Nersessian, 2002; Greenwalt, 1999; Triffterer, 2001; Schabas, 2000; Schabas, 2010.


be understood if they are ascribed to individuals. Thus, the court stated that the genocidal intent can be inferred from a genocidal state policy (Schabas, 2008; Gillich, 2016) that is expressed through ‘a contextual element;’ that is, a pattern of ‘widespread and systematic’ violent acts. If a general plan to destroy a group in whole or in part ‘can be convincingly demonstrated to exist’, a genocidal intent can be inferred. In their dicta, the ad-hoc tribunals also subscribed to the idea of a contextual element of an existing plan or policy to destroy a specific group, which can be proven by resort to, among other things, official statements, directives and a policy. Finally, the ICC Statute formally integrated the contextual element into the Elements of Crimes, prescribing that with respect to the crime of genocide, the genocidal intent can be proven by revealing evidence that ‘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’ (ICC, 2011: Art. 6).

The contextual element pertains closely to the proof of the special intent. The latter was acknowledged by the ad-hoc tribunals as ‘difficult, even impossible, to determine’, and thus had to be inferred from other factual circumstances. The plan or policy to destroy the group and the perpetrator’s knowledge of such a policy can serve for such factual circumstances (Schabas, 2010).

The ICC supported that approach in the decision regarding the arrest warrant issued against President of Sudan, Omar al-Bashir. Because the court mentioned Al-Bashir’s control of the state apparatus with other high-ranking Sudanese political and military leaders, it was in fact looking for the genocidal intent of the government of Sudan rather than genocidal intent of the president.

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32 ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 83.

33 This is a citation of the definition of crimes against humanity in the ICC statute. See, ICC Statute, article 7 (1). International criminal law makes the commission of crimes against humanity dependent on a state or organisational plan or policy. Interestingly, it does not condition the commission of genocide on such a plan or policy. For a criticism on this position see, Schabas, 2008.

34 Although international criminal law does not require a state policy as a condition for a conviction for a crime of genocide, the ICC accepted that a state policy can substantiate the special intent in authorising an arrest warrant for the former Sudanese President Omar Al Bashir. See, Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir (ICC-02/05-01/09-3), Pre-Trial Chamber 1, 4 March 2009, 4, 84.

35 Bosnia v. Serbia, 373.

36 Krstic Trial Judgment 572.

37 Akayesu Trial Judgment 523.

38 Id.
This practice derives from the rareness of evidence explicitly proving a person’s intent (such as documents or declarations regarding such intent) (Cassese, 2008). In conclusion, as Cassese notes,

acts of genocide are always part of a larger context, and even though they are not necessarily committed by state officials they are usually perpetrated with the complicity, connivance and at least the toleration or acquiescence of the authorities.

Cassese, 2008: 144

The larger context and the common plan are, thus, most important when the assessment of a genocidal intent of high officials, who are usually more remote from the actual scene of perpetration, is required. For this purpose, the ad-hoc tribunals and the ICC used innovative though different legal concepts developed to ascribe criminal conduct and liability ‘to a superior, a mastermind of a crime’ (Leme, 2018: 98). These are the joint criminal enterprise theory (JCE), developed by the ad-hoc tribunals, and the control over the crime theory, developed by the ICC.

Both theories were legal constructions created to distinguish between principal perpetrators and aiders and abettors (Leme, 2018: 105). They were based on the idea that a perpetrator shares a common design and plan with the other members of the ‘enterprise’. The perpetrator may act pursuant to the common design or hold a position of authority within a hierarchy. The control over the crime theory focused on the group leader, the ‘man behind’, without whom the plan will not be executed (Leme, 2018: 102).

JCE, thus, provided a larger ground for the assessment of the genocidal intent because it allowed focusing on more than one person (the accused) and learning the intentions from the common plan (Leme, 2018). For example, in Akayesu, the ICTR trial chamber determined the defendant’s special intent based on his membership in a JCE and inferred his intent based on ‘the general

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39 As much as this approach can be criticised in terms of basic principles of criminal law that require the proof of the individual’s specific intent, it can nevertheless be confirmed as a method of proof of the individual intent that is based on the suspect’s membership in the government.

40 Opinion and Judgment, Tadic (IT-94-1-T) Trial Chamber, 232. The JCE was applied in numerous ICTY and ICTR cases. See, Leme, 2018, n. 43 and the cases cited there.

41 The ICC developed the control over crime theory in its first case: Judgment, Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges (29 Jan. 2007) 330.
context of the perpetration of other culpable acts systematically directed against that same group.\textsuperscript{42}

The control over the crime theory was applied by the ICC prosecutor in his request for an arrest warrant for al-Bashir to assess al-Bashir’s genocidal intent, proving him to have the ultimate position of a “mastermind” because of his indisputable command over the military and the paramilitary groups in Sudan. Thus, the prosecutor inferred al-Bashir’s genocidal intent from the genocidal acts those forces committed and his control over them.\textsuperscript{43}

However, the special intent required for the forcible transfer of children as a crime of genocide requires consideration of two other debated aspects of the special intent. The first raises again the concept of cultural genocide and its influence on the nature of the special intent. As outlined above, cultural genocide was abrogated from the Genocide Convention, especially with regard to the acts constituting the crime of genocide. Yet, determining whether the status of the special intent also denotes an intent to destroy the group culturally is more complicated. On the one hand, in \textit{Croatia v. Serbia}, the ICJ determined that because ‘it was decided to ... limit the scope of the Convention to the physical or biological destruction of the group ... only acts carried out \textit{with the intent of achieving the physical or biological destruction of the group}, in whole or in part\textsuperscript{44} can be considered genocidal (emphasis added). On the other hand, in \textit{Krstic}, the Trial Chamber noticed that the intent to culturally destroy the group can support and serve to prove the intent to bring about the latter’s physical destruction. The Chamber points out that,

\begin{quote}
where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.\textsuperscript{45}
\end{quote}

In the \textit{Krasjinik} case, the Trial Chamber grants the special intent to destroy the group culturally an even higher status. It criticises the narrow view that reduces the special intent to apply only when the perpetrator intends physically or biologically to destroy the group:

\begin{quote}
\textsuperscript{42} \textit{Akayesu} Trial Judgment, 523.  
\textsuperscript{43} \textit{Situation in Darfur}, ICC-02/05-157-Annex A, Prosecutor’s Application under Article 58 (14 July 2008), 244–48. For further elaboration on the JCE and the control over the crime theories and their significance in proving the genocidal special intent see, Moodrick-Even Khen, 2020.  
\textsuperscript{44} \textit{Croatia v. Serbia}, 136.  
\textsuperscript{45} \textit{Krstic}, Trial Judgment, 580.
\end{quote}
“Destruction,” as a component of the mens rea of genocide, is not limited to physical or biological destruction of the group’s members, since the group (or a part of it) can be destroyed in other ways, such as by transferring children out of the group (or the part) or by severing the bonds among its members.46

The discussion above concerning the forcible transfer of children has a number of repercussions. First, according to the narrower view, endorsed by the ICJ, because the removal of children has both cultural and biological characteristics, it can be considered a crime of genocide when an intent to biologically destroy the group is proved. Second, the intent physically to destroy the group can be proven by an act of forcible transfer of children, which is motivated by an intent culturally to destroy the group. Third, according to Krajisnik, an intent culturally to destroy the group is sufficient to establish a special intent in the case of the forcible transfer of children.

The second debated question in the context of the forcible transfer of children is whether intent in general and the special intent in particular also require consideration of the perpetrator’s motive. This question is crucial in the case of the forcible transfer of children because this act can be performed on the basis of (at least allegedly) “benevolent” motives. While all the other genocidal acts enumerated in Article 2 of the Genocide Convention aim at a physical liquidation of the group, the transfer of children does not result in physical extermination. It results in an annihilation of the group (but not the individuals), as it leads to the “social death” of the group (Card, 2003). However, because it does not involve physical destruction, it can be suggested (as was, for example, claimed by the Australian governments47 with regard to the forced assimilation of the Aboriginal children), that the forcible transfer is not always perpetrated with evil intentions but is sometimes motivated by “benevolent” motivations to “save” the children of the targeted group. Can such an intention preclude a genocidal special intent?

Criminal law theory distinguishes between motives and intent involved in perpetrating a criminal offence. In everyday life, every action usually involves both an intent, that is, ‘deliberate functioning to reach the end, which manifests the intentionality of the conduct’ (Mundorff, 2009: 94), and motives, that is, ‘the reasons or grounds for (the “causes” of) the end-seeking’ (Mundorff, 2009: 94). Yet, when assessing the criminality of the act and the culpability of the perpetrator, criminal law (with only a few exceptions) considers just

47 See discussion below.
the intent of the perpetrators. Their motives, whether noble or untoward, are irrelevant. According to this logic, and keeping in mind the “special intent” required for the perpetration of genocide, it seems that in deciding the genocidal character of an act, “we must determine if they were conducted with the further intent of destroying the group as such; other motives simply do not come into play” (Mundorff, 2009: 104).

However, this conclusion is somewhat blurred by the words “as such” at the end of the clause or Article 2 denoting the special intent: ‘genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’ (emphasis added) (Genocide Convention, Article 2). These words were added as a compromise between members of the Ad Hoc Committee who supported an inclusion of a motive – to avoid a conviction of genocide for acts that were perpetrated for non-genocidal motives – and other members who believed a motive was dangerous because it would serve to exonerate a person who committed a crime of genocide on grounds that were not listed in Article 2 (Mundorff, 2009). Hence, the somewhat vague addition left open and controversial the question of whether a genocidal motive is required for the conviction for genocide, as is also reflected by varying opinions of commentators and international and domestic courts on this question.48

The application of that discussion to the forcible transfer of children is, thus, whether having a “noble” motive rather than being guided by hatred49 of the group can exempt the perpetrator from the accusation of committing genocide. Indeed, it seems that the European and American drafters of the Genocide Convention aspired to prohibit only children’s forced transfer guided by racial reorganisation (as demonstrated, for example, by the Nazi Lebensborn programme), thus promulgating a prohibition on a child’s removal when the intent to destroy the group was based on hatred of the group. Yet, sometimes, and especially in the case of the assimilation policies of colonial states such as Canada and Australia, the “intent to destroy” the culture of the group of Aboriginals in Australia or the First Nations in Canada so as to eliminate their collective identity was, in fact, guided by what the perpetrators saw as a benevolent motive. They sought to improve the children’s welfare by allowing them the opportunity to become “members [of a] highly civilized group [in which

48 Note, for example, the ICTR Appeal Chamber prescribing that motive must not be confused with intent in Kayishema Judgment, Case No. ICTR-95-1-A, Judgment (Reasons), 161 (1 June 2001). Cf., Schabas, 2000.

49 Schabas suggests that a conviction of genocide requires that the perpetrator be guided by a motive of hatred of the group in addition to having a special intent to destroy the group (Schabas, 2000). For criticism of this view see, Mundorff, 2009: 109–110.
they] would suffer no physical harm and would indeed enjoy an existence which was materially much better.”50 Would such a motive, then, preclude a genocidal intent?

The Australian High Court answered this question in the affirmative.51 In deciding a challenge by a number of Aboriginal plaintiffs to the constitutionality of the 1918 Aboriginals Ordinance, which authorised their forced separation from their families, the court dismissed the claims that the ordinance authorised genocidal acts and was thus unconstitutional. According to the High Court, because the Ordinance was formulated in welfare terms and was intended to sustain ‘the best interest of the Aboriginals,’52 it could not be regarded as authorising genocide. In her verdict analysing the “intent to destroy” requirement, Justice Gaudron writes that ‘the acts [enumerated in Article 2 of the Genocide Convention] are so fundamentally abhorrent to the principles of the common law that ... it is impossible to construe the [ordinance] as extending to laws of that kind.’53

However, the Australian High Court’s interpretation of the distinction between intent and motive, which understands genocidal intent to exist only when accompanied by malicious motives, is not congruent with the objectives of the Genocide Convention. The Convention, as Lemkin prescribed, protects groups as distinct entities. In that respect, the intended biological or cultural destruction of a group is a genocidal act no matter what the motives of the destroyer are. When the group is the victim, the fact that the transfer resulted in improving the individual’s welfare does not preclude the conclusion that genocide was committed. The Venezuelan delegate to the UN Sixth Committee connected ‘alleged humanitarian treatment of children and the possibility of genocide’ (Watenpaugh, 2013: 289) in a way that can be seen as preceding its time, stating that,

even though in such cases there would be no question of mass murder, mutilation, torture or malnutrition ... if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.54

51 Kruger v. Australia (1977) 146 A.L.R.
52 Kruger v. Australia (1977) 190 C.L.R 1, 70 (Dawson J.)
53 Id, Gaudron J., 105.
54 The Venezuelan delegate to the UN Sixth Committee.
A last element of the special intent that requires consideration pertains to the group, which the perpetrator can intend to destroy “in whole or in part”. The ICJ addressed the question of at what level the destruction of a group “in part” amounts to a crime of genocide. It considered three factors drawn from the jurisprudence to interpret whether the part of a group targeted reaches the level of genocide based on an intent to destroy “in part” (New Lines Institute for Strategy and Policy et al., 2022). The first is whether the targeted part is substantial or ‘significant enough to have an impact on the group as a whole.’ The second is the perpetrator’s domain of control. And the third is the “qualitative” criterion, or the targeted part’s ‘prominence within the group,’ including individuals emblematic of the group or essential to its survival.

The preceding discussion about the critical status of children and the importance of their protection to securing the perpetuation of the group suggests that children form a substantial part of the protected group. Moreover, the act of their transfer is aimed at achieving, in the final conclusion, a destruction of the whole group.

Following this parsing of the legal elements of the prohibition on children’s transfer as a genocidal act, the next section applies the analysis to the case of the forcible transfer of Ukrainian children perpetrated and supervised by Russian key governmental figures, including the Russian president. It assesses whether the case study can be considered genocide.

4 Forcible Transfer of Children from Ukraine to Russia and Russian Occupied Territories: A Genocide Case Study

4.1 The Facts: Re-Education Camps and Adoption Operations

According to open-source material – including social media posts, government announcements and publications, news reports and interviews with Ukrainian children and their families – since the beginning of February 2022, Russia’s federal government has been engaged in a large-scale organised forced transfer of Ukrainian children (infants to teenagers) to camps and other facilities in different locations in Russia and occupied Crimea. It has also arranged for the adoption of alleged Ukrainian orphans by Russian families (Hoslet, 2023; Kaveh et al., 2023; Koshiw, 2023; Dixon and Abbakumova, 2022). The public

56 Krstic, Trial Judgments, 12 and 587.
58 In occupied Crimea, the transfers have begun in 2014 (Hoslet, 2023).
has limited access to these facilities and to the children held there. However, some researchers, in addition to retrieving information from the sources outlined above, have managed to obtain information from officials overseeing the system (Kaveh et al., 2023). They have found that at least 6,000 children have been held in 43 facilities of “recreational” re-education camps and more than 1,000 have been adopted by Russian families (Dixon and Abbakumova, 2022). The primary purpose of the camps appears to be political re-education. The aim is to render the children pro-Russian through indoctrination and systematic exposure to Russian-centric academic, cultural, patriotic education (Kaveh et al., 2023). On some occasions, the children have also undergone military training (Kaveh et al., 2023; Hoslet, 2023).

Russian authorities have not concealed the existence of the network of facilities, which stretches along the entire Russian territory – some areas located thousands of miles from Ukraine. However, the regime claims the purposes of the transfer were to evacuate orphans and state wards from facilities controlled by Russia after February 2022 and to provide relief and medical care for Ukrainian children with their parents’ consent (Kaveh et al., 2023).

However, in fact, the camps are a part of the ‘larger plan’ of Russia’s leadership to re-educate the overall Ukrainian population and to ‘suppress the Ukrainians’ sense of history, language and nation’ (Ioffe, 2023: 28). This plan has been applied mainly in the occupied territories of Ukraine, where Russian authorities have consistently tried to replace Ukrainian textbooks with Russian (Ioffe, 2023).

The Russian government has also legalised the transfer of Ukrainian children to the facilities and their adoption through domestic legislation that changed adoption laws and facilitated a quick process of granting Russian citizenship to Ukrainian children without parental care (Ioffe, 2023; Dixon and Abbakumova, 2022). This legislation aimed, as confirmed by Lvova-Belova, to turn the temporary guardianship of the “orphans” into permanent guardianship (Ioffe, 2023).

Human rights organisations have strongly criticised the evacuation of Ukrainian orphans and the efforts made to facilitate their quick and easy adoption in Russia, suggesting it was based on lies and manipulations. In August 2022, the Department for Family and Children in Russia’s Krasnodar region posted a statement on its website that more than 1,000 children from Ukraine had been adopted by families in distant cities, and 300 more were awaiting adoption (Dixon and Abbakumova, 2022). This was celebrated as a triumph by Kremlin propaganda, which uploaded photos and video on its website and on state television (Dixon and Abbakumova, 2022). In October 2022, the highest official in charge of the forcible transfer system and its operation – Maria...
Lvova-Belova, Russian Federation Commissioner for Children’s Rights – said that the children were orphans and awaited adoption in Russia (Dixon and Abbakumova, 2022).

However, in many cases, the claims that the children were orphans were proven to be misleading. Many of the Ukrainian children who were living in state care at the time of the invasion had living relatives who could not take care of them then, but have begun to search for them since they disappeared (Koshiw, 2023). Moreover, in news interviews several Ukrainian families have said that their children were told they would be adopted by Russians, despite having their own families (Dixon and Abbakumova, 2022). Details about the adopted children and their location in Russia have not been published, making it difficult for Ukrainian and international authorities to identify them and track their movements. In some cases, relatives have identified children through videos posted by Russian state media and have campaigned for their return (Koshiw, 2023).

Both the adoption system and the re-education camps are orchestrated initiatives to destroy the children’s Ukrainian identity and replace it with Russian identity. The adoption system also intends permanently to remove the children from Ukraine and, if broadened, could serve as a plan to jeopardise the Ukrainian people’s continuity. The camps, hosting children as young as 4 months to 17-years-old, are intended for children who have parents or clear familiar guardianship. They are advertised as “integration programs with the apparent goal of integrating children from Ukraine into the Russian government’s vision of national culture, history and society” (Kaveh et al., 2023). Although consent is collected from parents or legal guardians, it is in some cases gathered through signing over power of attorney, including to an unnamed agent. In addition, parents claim that although they have given consent under specific conditions, these conditions were violated, such as the term of stay of their children (Kaveh et al., 2023). Moreover, it is contentious whether the consent given was valid since it was achieved under conditions of implicit stress and duress as a result of the armed conflict (Kaveh et al., 2023).

It has also been reported that in some camps, communication between parents, children and camp administrators has been restricted and limited. Although many children managed to integrate back with their families after their return from camp, in a significant number of cases the children’s return has been suspended (Kaveh et al., 2023). Some parents managed to retrieve their children by making the long and difficult journey to Russia themselves or by using the help of secret networks of anti-Putin volunteers (Koshiw, 2023). However, the camps are still operating.
As outlined above, the camp programmes include mainly Russian indoctrination, through re-educating the children with Russia’s state curriculum and culture. Seventy-eight percent of the camps include an identified component of Russia-aligned re-education. In Chechnya and occupied Crimea, military training was also part of the programme (Kaveh et al., 2023).

The adoption operations and the camps and other facilities holding children from Ukraine are centrally coordinated by officials of the federal government and conducted by Russia’s regional leaders and proxy authorities. Children are transported by bus, train, commercial aircraft and even by Russia’s Aerospace Forces (Kaveh et al., 2023). In addition to logistical coordination, officials are involved in raising funds, collecting supplies, managing the camps and promoting the programme (Kaveh et al., 2023). Putin is personally involved in orchestrating the programme and appointed many of the high officials involved, in particular Lvova-Belova. She is a zealous supporter of the programme and personally adopted a Ukrainian boy – an orphan who had been evacuated from the besieged Ukrainian city of Mariupol (Dixon and Abbakumova, 2022). She has been sanctioned by the US, UK, EU, Canada, Australia and Switzerland for her involvement in the forced adoption plans for Ukrainian children by Russian families. However, Putin has supported her efforts, condemning Western sanctions and stating, ‘We should thank her and make a low bow to her’ (Dixon and Abbakumova, 2022).

Not only Western states, but also the ICC Pre-Trial Chamber attributed criminal responsibility to Lvova-Belova (and to Putin) for the forcible transfer of Ukrainian children, although not as a crime of genocide.\(^59\) The next sub-section assesses the existence of a genocidal intent for the commission of the crime of genocide in the context of the Russia-Ukraine conflict in general and the forcible transfer of children in particular.

### 4.2 The Forcible Transfer of Children from Ukraine as a Genocidal Crime

The legal analysis of the forcible transfer of children from Ukraine to Russia focuses mainly on the special intent to destroy the group in whole or in part. It also addresses the direct responsibility of Putin and Lvova-Belova, against whom the ICC issued the arrest warrants.

Ukrainians are internationally acknowledged as a national group, and they were acknowledged as such by Russia. There is also supporting evidence that Russians, and Putin and Lvova-Belova in particular, identified the children

\(^{59}\) The ICC attributed criminal responsibility also to President Putin.
that were forcibly transferred to Russia as Ukrainian (Ioffe, 2023). Therefore, Ukrainians are protected as a group by the Genocide Convention and Ukrainian children can serve as part of the protected group. As the preceding section discussed, the elements of the actus reus of the crime of the forcible transfer of children, the remaining question is what evidence there is to support the existence of a special intent to destroy the Ukrainians in whole or in part.

As argued above, the special intent can be drawn from identifying a general plan or declared policy to destroy the protected group, i.e., Ukrainians, as a national group. The most prominent evidence for this special intent in the context of the Russia-Ukraine conflict is extrapolated from the direct public incitement to commit genocide made by Russia's highest officials and applying to the Russian public. In particular, Russian soldiers participating in the armed conflict in Ukraine are encouraged to see Ukrainians as their mortal enemies (New Lines Institute for Strategy and Policy et al., 2022; Coynash, 2022; UN press report, 2022).

Russia's state media and highest-ranking officials, including Putin, have orchestrated and carried out incitement against the Ukrainian people. Russia has denied the existence of the Ukrainian nation and identity, implying that people who identify themselves as Ukrainian threaten the “unity” of Russians and Ukrainians (New Lines Institute for Strategy and Policy et al., 2022; Coynash 2022) and, according to Putin, deserve punishment for their “treason”. Russia has also referred to Ukrainians as “subhuman, animals, epitome of evil and Nazis” (Ioffe, 2023: 27) and has claimed the need for the “denazification” of Ukraine (Coynash, 2022) – equating nazification with Ukrainians' belief that they have a unique national and cultural identity (Ioffe, 2023).

The Russian media has also characterised the invasion's purpose as an intention to purify Ukraine from Nazism, specifically referring to the Ukrainian leaders as Nazis (New Lines Institute for Strategy and Policy et al., 2022). In
addition, the media has degraded and humiliated Ukrainians, calling them “zombified,” addressing their “bestial nature”, and referring to them as an evil and existential threat (New Lines Institute for Strategy and Policy et al., 2022, 19). Pyotr Tolstoy, the Deputy Chairman of the State Duma, compared Ukrainian youth with “Hitler Youth” (Ioffe, 2023: 28).

Perhaps the most blatant statement attesting to the Russian regime’s genocidal plan is the 5 April post in the Telegram by Dmitry Medvedev, deputy chair of the Security Council of Russia since 2020:

It’s no wonder that, having transformed itself into the Third Reich, and having written into its history textbooks the names of traitors and Nazi henchmen, Ukraine will suffer the same fate. This kind of Ukraine gets what it deserves! ... These difficult tasks cannot be completed instantaneously. And they will not only be decided on battlefields.64

The media propagandists received the messages from high officials in the Russian regime, such as Putin or the deputy head of the Security Council of the Federation Dmitry Medvedev, and operated according to the narrative expected from them (Coynash, 2022).

The inciting messages have been used to justify atrocities against Ukrainians in the battlefield and beyond, including the Ukrainian civilian population, calling for its liquidation (New Lines Institute for Strategy and Policy et al., 2022). There is considerable evidence that Russian soldiers have internalised state propaganda and carried out atrocities in response to it (New Lines Institute for Strategy and Policy et al., 2022).

The potential of the Russian incitement to trigger the commission of atrocities was also underscored in a special report of the UN Special Advisor on the Prevention of Genocide to the Security Council (UN Report, 2022). The UN Independent International Commission of Inquiry on Ukraine, whose first reports made faint comment on the possible occurrence of genocide in Ukraine (Human Rights Council, 2023b), has been much more determinate about that possibility (specifically with regard to children’s transfer to Russia) in its September 2023 report. It stated that it will continue to investigate these allegations, as ‘some of the rhetoric transmitted in Russian state and other media may constitute incitement to genocide’ (Human Rights Council, 2023a).

Obviously, incitement has been followed by atrocities of mass killing (Article 2(a), Genocide Convention), deliberate attacks on civilians and residential areas, military sieges inflicting life-threatening conditions (Article 2(c), Genocide

64 https://t.me/medvedev_telegram/34.
Convention), rape and sexual violence (Article 2(d), Genocide Convention) and the forcible transfer of children (New Lines Institute for Strategy and Policy et al., 2022). These acts, when motivated by incitement against the Ukrainian people – and when perpetrated within a “general context [and reach a certain] scale of atrocities, [a] systematic targeting of victims on account of their membership in a particular group, [and] repetition of destructive and discriminatory acts, or the existence of a plan or a policy” – demonstrate a pattern that renders Ukrainians a legitimate targeted group for destruction. It thus supports the inference of a genocidal intent, as the ICJ prescribed.

Yet, with respect to the forcible transfer of children, the pretext used by Russian high officials including Putin and Lvova-Belova to dismiss the genocidal intent should be rebutted. According to this pretext, and as described above, Putin and Lvova-Belova claim that the transfers were motivated by benevolent intentions to save orphans and alleviate children's suffering. Yet, as the discussion about the distinction between motives and intent demonstrated, in the context of criminal law in general and the genocide crime in particular, the motive is irrelevant as long as the intention is to bring about destruction of the group. The specific inciting expressions prove that the Russian regime intended to eliminate the Ukrainian identity, which renders the children's transfer a means to achieve this end.

Having based a solid ground for the conclusion that the forcible transfer of Ukrainian children is a crime of genocide, the next section examines the case and the criminal liability of Putin and Lvova-Belova through the lens of the ICC. It begins with an analysis of the first arrest warrant that was issued for the crime of genocide against a head of state, Omar al-Bashir; it proceeds with examining the ramifications of al-Bashir’s case for theoretically considering the issuing of arrest warrants against Putin and Lvova-Belova on counts of the forcible transfer of children as a crime of genocide.

5 Forcible Transfer of Ukrainian Children: Should the ICC Pre-Trial Chamber Amend the Arrest Warrants to Include the Crime of Genocide?

5.1 The ICC and the Crime of Genocide: Arrest Warrants for President Omar al-Bashir

On 12 July 2010, for the first time in the history of the ICC (and the only time as of this writing), the ICC Pre-Trial Chamber issued an arrest warrant against Omar

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Hassan Ahmad al Bashir, then Sudan’s President, for three counts of genocide in the context of the atrocities committed by the Sudanese government forces in their fight against insurgents in Darfur. The arrest warrant confirmed that there were reasonable grounds to believe that al-Bashir acted with the special intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups. It was also the first case against an incumbent head of state dealt with by the ICC and was, thus, a reaffirmation of the ICC’s commitment ‘to put an end to impunity for the perpetrators of [international core] crimes’ (ICC Statute, preamble) without bias or fear to apply its jurisdiction against influential and strong figures such as heads of state. The case was, therefore, precedential for both these reasons (being the first case of genocide and the first case of an incumbent head of state). Yet, additional aspects and the developments that resulted in the trial chamber’s decision to issue the arrest warrants for the crime of genocide made this case significant and enriching in the jurisprudence of genocide cases in the ICC. It had repercussions both for substantive international criminal law—in particular, the criminal liability of indirect perpetrators—and for evidence law and criminal procedural law in the ICC.

Beginning with evidence law and criminal law procedure, the decision of 12 July was not the first made in this case. The first arrest warrant for al-Bashir, yet, not for the crime of genocide, was issued by the trial chamber on 4 March 2009. Because the trial chamber dismissed the prosecutor’s request to include the crime of genocide in the arrest warrant, the prosecutor appealed the decision; on 3 February 2010, the appeals chamber found that the standard of proof used by the trial chamber to decide whether a warrant for the crime of genocide could be issued was not adequate. It directed the Pre-Trial Chamber to reconsider the question based on the correct standard of proof: “reasonable grounds to believe” instead of a standard requiring the genocidal intent to be the only reasonable conclusion from the evidence.

The first trial chamber’s decision denied the request to issue the arrest warrant for al-Bashir for the crime of genocide because the majority judges used a stringent standard of proof to assess the amount of existing evidence to support an allegation of genocide. This standard was extrapolated from the

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66 Al-Bashir, Second arrest warrant. The counts were: Article 2(a-c), Genocide Convention.
ad-hoc tribunals’ dicta (Crowley-Buck, 2011) and prescribed that a conviction for the crime of genocide, which entails the proof of genocidal intent, is valid only when the genocidal intent is the sole reasonable conclusion from the evidence.  

However, in a minority dissenting opinion, Judge Ušaca found the standard of proof required by the majority incorrect because she interpreted differently the standard of ‘reasonable grounds to believe’ set by Article 58 of the ICC statute. Article 58 of the ICC statute prescribes that to issue an arrest warrant, the Pre-Trial Chamber should be satisfied that ‘there are reasonable grounds to believe that the [suspect] has committed a crime within the jurisdiction of the court.’ Judge Ušaca determined that at the stage of issuing an arrest warrant, the prosecution is not expected to present evidence that would convince the court that the genocidal intent is the only reasonable inference from the evidence, and this is because such a threshold would be too high and equated with the threshold of ‘beyond a reasonable doubt,’ applicable only at a later stage, the trial stage.

The appeals chamber accepted Judge Ušaca’s reasoning and found that there was no basis to require the prosecution to prove at the stage of issuing arrest warrants that no reasonable doubt existed with respect to the suspect’s genocidal intent. The only thing the prosecution should establish was that there were reasonable grounds to believe that such inference was possible. It therefore ordered the Pre-Trial Chamber to reconsider its decision not to issue an arrest warrant on counts of genocide. When the Pre-Trial Chamber reconsidered its decision according to the new standard established by the appeals chamber, it inevitably reached the conclusion that there were ‘reasonable grounds to believe that Omar al-Bashir is criminally responsible’ for the commission of three counts of genocide.

The ICC appeals chamber’s decision was significant and served guidance to future decisions in the ICC. By handing the decision back to the Pre-Trial Chamber in lieu of ordering it to issue new arrest warrants for the crime of genocide, the appeals chamber implicitly let the Pre-Trial Chamber establish the legal norms for the ICC and set the evidentiary standard that will be used in future similar cases in the court (Crowley-Buck, 2011). Those standards and

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69 Al-Bashir First arrest warrant, 204(v).
70 See Separate and Partly Dissenting Opinion of Judge Anita Ušacka, ICC-02/05-01/09, 4 March 2009, 32–34, 84.
72 Al-Bashir Second arrest warrant.
norms will serve as ‘a stable procedural structure’ (Crowley-Buck, 2011: 26), both for the court in adjudicating genocide cases and for the prosecutor and the accused in litigating before the ICC, presenting and rebutting evidence (Crowley-Buck, 2011).

The appeals chamber’s decision also differentiated clearly between the standards of proof required at each point of the criminal procedure, from issuing an arrest warrant, through the stage of confirmation of charges – where the prosecution has to present evidence with ‘substantial grounds to believe’ that the person committed the crime (ICC statute, Article 61(7)) – to the trial, where the accused’s guilt should be proven ‘beyond reasonable doubt’ (ICC Statute, Article 66). This differentiation was more commensurate with the ability of the defence to present exculpatory evidence at the stage of confirmation of charges. If the highest standard of proof were already required at the first stage – issuing an arrest warrant – (as the first pre-trial’s decision suggested), the defence would have been dispossessed of the ability to prove the accused’s innocence at the later stages. This is because the prosecution had already used the first stage to prove its case with the highest standard of proof.

However, although it is intended for the most preliminary stage of the criminal procedure in the court, accepting a low standard of proof of the genocidal intent raises a concern that the court would be dealing at later stages with ‘wholly unfounded allegations that do not merit any further consideration’ (Rojo, 2011: 64). This is especially relevant in genocide cases, where the genocidal intent is often extrapolated from indirect evidence, such as the genocidal plan and the contextual element. Because the crime of genocide is so grave and may have great effects on both the state and the suspects (especially if they are high officials or even heads of state), the lower standard of proof that the Pre-Trial Chamber finally authorised should be used with precautions. This would sustain a solid enough basis for the court to proceed with the later stages of the criminal procedure (Rojo, 2011).

Yet, the al-Bashir’s arrest warrant case was also a ground-breaking decision with respect to the interpretation of the substantive international criminal law concept of “perpetration” as configured in the ICC statute. Because heads of states and high officials usually do not physically or directly perpetrate the alleged crimes but commit them indirectly through their subordinates – the army, the militia or other civil servants – the Pre-Trial Chamber had to figure out whether al-Bashir could be determined a ‘perpetrator’ according to the ICC statute. Although the first arrest warrant issued by the Pre-Trial Chamber did not address the commission of the crime of genocide (as the first arrest warrant was not issued for the perpetration of this crime), the second arrest
warrant applied the analysis of the status of perpetration or co-perpetration made in the first warrant to the crime of genocide.

Article 25(3) of the ICC statute distinguishes between perpetration (Article 3(a)) and aiding and abetting (Article 3(b)). It also prescribes that perpetration can be either direct (when the person commits the crime as ‘an individual’ or ‘jointly with another’) or indirect (when the person commits the crime ‘through another person’).

The first arrest warrant issued by the Pre-Trial Chamber interpreted the concepts of indirect perpetration and indirect co-perpetration, that is, the perpetration through another, based on the control over the crime theory, elaborated on in Section 3.3 of this article. The Pre-Trial Chamber defined the leader as having –

control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilizes his authority and power within the organization to secure compliance with his orders. Compliance must include the commission of any of the crimes under the jurisdiction of this court.\(^{73}\)

Identifying al-Bashir as the mastermind of the concerted plan to commit the atrocities against civilians, the Pre-Trial Chamber noted that al-Bashir had indisputable command over the military and the paramilitary groups in Sudan and thus directed the branches of the apparatus of the state of Sudan jointly to implement the common plan (Ssenyonjo, 2010).

The ICC Pre-Trial Chamber’s interpretation of the substantive criminal law concept of indirect perpetration and co-perpetration is significant because it impedes the intentions of high state officials, including heads of state, to eschew legal accountability for international core crimes. Truly, it is common for high officials to avoid direct perpetration of crimes, both because it may facilitate their escape from criminal prosecution and because it is often practically impossible for them to be involved in the actual carrying out of the crimes. Yet, the concept of indirect co-perpetration thwarts the high officials’ plans to avoid criminal prosecution and denies immunity to those that planned, organised and ordered the commission of international core crimes in general and genocide in particular.

Interestingly enough, the prosecutor has not asked the Pre-Trial Chamber to issue the arrest warrant for al-Bashir also on grounds of vicarious liability

\(^{73}\) Al-Bashir, First arrest warrant, citing The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, 514.
for the crimes, including the crime of genocide. Article 28 of the ICC statute prescribes the vicarious criminal liability of either a military commander or a civilian superior for crimes within the jurisdiction of the court committed by subordinates under the formers’ effective command or authority and control, as a result of their failure to exercise control properly over such subordinates.

In both cases, the vicarious liability of persons in a position of authority imposes upon them responsibility for failing to prevent or repress the commission of the crimes or to effectuate the investigation or prosecution of those who committed them. It requires proof of a lesser form of mens rea than “intent” (and a “special intent”) (Van der Vyver, 2010). In the case of military commanders, it requires only negligence and in the case of civilian superiors it requires that they acted with willful blindness. Hence, in the case of genocide, persons in positions of authority and control can be held liable for genocide committed by persons under their effective control without possessing the special intent required for the commission of this crime as a perpetrator: that is, without giving instructions to commit the crime, orchestrating or even just participating in the genocidal plan.

It was argued, however, that resting criminal responsibility for genocide with persons who did not have the special intent explicitly required for the commission of this crime is not legally valid (Van der Vyver, 2010); yet, the ad hoc tribunals supported the opposite stance in some cases and imposed criminal liability for genocide on persons of authority who knew or had reasons to know that their subordinates were participating in the commission of the crime of genocide and failed to take action to prevent it. Naturally, under the ad hoc tribunal’s interpretation, imposing vicarious liability for genocide is both legally possible and much easier to prove. However, it was not asked for by the prosecution in al-Bashir’s case, and hence, not discussed by the trial-chamber.

Finally, the arrest warrants issued against al-Bashir for the commission of genocide, which confirmed his genocidal intent as an indirect perpetrator

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74 Article 28 (a)(1), ICC Statute, states that the military commander will be held liable of the offence if (he or she), ‘either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes’ (emphasis added).

75 Article 28(b)(1), ICC Statute, states that the superior will be held liable of the offence if (he or she) ‘either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes’ (emphasis added).


77 The arrest warrants were also issued for the commission of crimes against humanity and war crimes.
of these crimes, set a precedent and a solid legal basis for the ICC to consider issuing arrest warrants against incumbent heads of state for the crime of genocide. In the next sub-section, the involvement of Putin and Lvova-Belova in the forcible transfer of Ukrainian children is examined vis-à-vis the arrest warrants issued against al-Bashir, to decide whether there is legal basis to consider amending the arrest warrants issued against them to include the crime of genocide.

5.2 Arrest Warrants against Putin and Lvova-Belova: Should they be Reconsidered to Include the Crime of Genocide?

As mentioned above, ICC Pre-Trial Chamber II issued the arrest warrants for Putin and Lvova-Belova as direct perpetrators of the war crime of unlawful deportation of population as war crimes. Putin was also suspected of having vicarious liability as, according to the Pre-Trial chamber, he failed to exercise proper control over civilian and military subordinates under his effective authority and control and committed the acts or allowed for their commission. However, and although the Pre-Trial Chamber mentioned specifically that the deported population referred to “children”, it did not issue the arrest warrants for the forcible transfer of children as a crime of genocide.

The Pre-Trial Chamber’s decision is questionable in light of the al-Bashir precedent, which seems similar to the current case in quite a few aspects. Al-Bahsir’s case deals with the highest official, an incumbent head of state, as Putin also is, and addresses crimes of genocide (although not the forcible transfer of children), which require a special intent for their perpetration.

However, a caveat is required regarding the following analysis of the pre-trial’s decision in the situation in Ukraine. Because the arrest warrants issued in this case are confidential, the discussion below is not conclusive but rather hypothetical and rests more on independently gathered information about the transfer of Ukrainian children than on the information given by the court.

Section 4 of this article presented evidence supporting the claim that the forcible transfer of Ukrainian children committed by Russian officials is a crime of genocide, as it comprises both the \textit{actus reus} and the \textit{mens rea} required for the crime. It was also argued that Putin and Lvova-Belova have been directly involved in authorising, supervising and carrying out the plan forcibly to transfer the children to Russia. It seems, therefore, that there are at least ‘reasonable grounds to believe’ that a crime of genocide has been committed by Putin and Lvova-Belova.

Truly, the \textit{actus reus} of the crime – that is, the acts involved in the transfer of the children – satisfy the requirements for both the commission of a war crime and a genocide crime, thus making the inference that a genocide crime
has been committed unexclusive. Yet, the al-Bashir precedent prescribed that a standard of ‘the only reasonable inference’ is not required to issue an arrest warrant for the crime of genocide and, hence, the court was not prevented from doing so. Moreover, Pre-Trial Chamber II specifically mentioned that the decision referred to the deportation of children and not the deportation of population in general. This strengthens even more the conclusion that the deportation was commensurate with Article 6 (e) of the ICC statute (the forcible transfer of children), which makes the inference about the commission of a genocidal crime stronger.

It is possible, however, that the Pre-Trial Chamber knew that it could rely on a low standard of proof to issue an arrest warrant for the crime of genocide but feared that relying on such a standard would open the door for insufficient evidence the court would have to deal with at later stages of the criminal procedure. Yet, it seems that the evidence that exists, and which was elaborated on in sections 3 and 4, would sustain an even higher standard of proof and render the court’s fear irrelevant.

In addition, the arrest warrants prescribed that Putin’s and Lvova-Belova’s involvement in the commission of the war crime of the deportation of children was direct and, thus, held them responsible for the commission of the crime as direct perpetrators. If the court could not find a basis to assume that Putin and Lvova-Belova were direct perpetrators of genocide, it could nevertheless sustain that they were indirect perpetrators, as the evidence presented in Section 4 proves and based on the definition of indirect perpetrators elaborated on in the al-Bashir’s case. Section 4 proves that Putin and Lvova-Belova orchestrated the genocidal plan and, thus, that they have been ‘perpetrating through another’ (ICC Statute, Article 25(a)) the forcible transfer of children as a genocidal crime.

Indeed, the question remains of whether it could be proven that the suspects had genocidal intent. As outlined above, genocidal intent is the hardest to prove of all other forms of mens rea in criminal law. If the Pre-Trial Chamber or the prosecutor accepts the narrow concept that the special intent to destroy the group refers only to biological destruction, then perhaps the adoption system does not serve as a strong enough basis to prove this intent in later stages of the criminal procedure when the standard of proof will reach ‘beyond reasonable doubt’. It is even doubtful whether the existence of such a biological intent to destroy the Ukrainian people is a ‘reasonable inference’ (according to the standard of proof required at the arrest warrant stage), assuming that the adoption operation is not of a large-enough scale.

However, if the Pre-Trial Chamber or the prosecutor accept the other suggested interpretations of the special intent – namely, using the cultural
destruction of the group to prove the biological genocidal intent, or directly considering the intent to culturally destroy the group sufficient to sustain a crime of genocide – then there is reasonable ground to believe that a genocidal crime has been perpetrated. The camps system supports a reasonable inference that a plan has been orchestrated culturally to destroy the Ukrainian’s identity. Seen together with the adoption operations, which are an act of biological genocide, the cultural destruction serves as evidence for the existence of a genocidal intent biologically to destroy the Ukrainian people, as suggested by the Krstic Trial Chamber’s decision. Finally, according to the Krasjinik Trial Chamber’s decision, the means taken to destroy the Ukrainians’ identity through the camps system underlie the existence of a genocidal special intent and serve reasonable grounds to believe that the forcible transfer of Ukrainian children to Russia is a crime of genocide.

In addition, the ICC and the ad-hoc tribunals’ jurisprudence demonstrated in Section 3.3 and the various ways to prove the genocidal intent using the control over the crime and the JCE perpetration theories suggest that reasonable grounds exist to extrapolate the suspects’ genocidal intent from a contextual element of an existing plan or policy to destroy a specific group. The policy and plan are well demonstrated by Putin’s inciting speeches and the statements made by Lvova-Belova.

Finally, if the Pre-Trial Chamber could not be convinced of the criminal liability of Putin and Lvova-Belova as direct or indirect perpetrators of genocide, it could have at least held them responsible for vicarious liability for the crime, as demonstrated in Section 5.1. However, it is possible that the court subscribed to the claim also conjured in Section 5.1 that the concept of special intent (required to prove a crime of genocide) is not congruous with vicarious liability and thus declined issuing the arrest warrant for the crime of genocide on that foundation.

6 Conclusion

Although not issued for the crime of genocide, the arrest warrants the ICC issued for Putin and Lvova-Belova brought back to the forefront the forcible transfer of children and provoked the question of why the court did not refer a crime of genocide to the suspects. This article parsed the forcible transfer of children as a crime of genocide, addressing its historical and legal development and applying the analysis to the case study of the forcible transfer of Ukrainian children by Russia during the ongoing armed conflict between them.
The historical and legal review of the development of the forcible transfer of children showed that it was committed in different forms and for various purposes before the Genocide Convention designated it a crime of genocide and prohibited it and, moreover, that it has persisted to this day, even after the Convention was adopted. Unfortunately, international courts have rarely dealt with it, and the domestic Australian court did not find this practice, as applied by the Australian government to the Indigenous Peoples, genocidal.

Nevertheless, parsing the elements of the *actus reus* and the *mens rea* of the crime, including the special intent, the article found a legal basis to sustain the forcible transfer of children as a genocidal crime even when it is committed with an alleged benevolent motive. It also elaborated on how a special intent can be proven using the *jce* and control over crime theories and the reliance on the existence of a general plan and contextual elements to prove the special intent. In this context, the article also addressed the debate about whether an intent to destroy the group culturally can be considered genocidal and found that it can at least serve as evidence of a genocidal intent.

The application of the theoretical analysis of the crime to the case study of the forcible transfer of Ukrainian children in the context of the armed conflict between Russia and Ukraine laid a legal basis to assume that Putin and Lvova-Belova could be held accountable for the crime of genocide. The article tested this assumption vis-à-vis the precedential al-Bashir case of an arrest warrant for the crime of genocide in the ICC. It concluded that the ICC’s decision in that case laid a solid basis for issuing an arrest warrant on the counts of genocide for Putin and Lvova-Belova.

Yet, it remains to be seen whether the ICC prosecutor will take action to add the crime of genocide, either as another count for an arrest warrant, through an appeal to the appeals chamber or by amending the charges at the confirmation of charges stage (ICC Statue, Article 61(4)). Unfortunately, the forecast is that practical and political reasons will probably prevent him from choosing any of these alternatives.

Proving a war crime, for which the arrest warrants have been issued, is easier than proving a crime of genocide, as the former does not require proving a special intent. In the arrest warrant stage, the required level of proof is low, but the prosecutor is preoccupied with the later stages of having to convince the court of the accused’s guilt beyond reasonable doubt. With almost no legal precedents dealing with the forcible transfer of children as a crime of genocide, and with the difficulty of proving that a special intent was attached to the act of removing the children as outlined above, the prosecutor probably fears risking a chance of losing the case in the trial stage.
In addition, getting the court to issue an arrest warrant against Putin, who is not only a head of state but the head of a very influential state and a permanent member of the UN Security Council with significant economic and political leverage in the international arena, was a hard task. The prosecutor would not want to risk either his own or the court’s reputation with proceeding with a charge of genocide against such an important international figure and taking the chance of finally losing the case in the trial.

The above is equally true for the Pre-Trial Chamber’s decision in case the prosecutor decides to amend the charges or to appeal the decision about the arrest warrant so as to include the crime of genocide. The Pre-Trial Chamber would probably prefer to avoid approving the inclusion of a count of genocide in the arrest warrant or adding the charge of genocide to the indictment on the basis of the lower standards of proof required in the preliminary stages of the criminal procedure, that is, the arrest warrant and the confirmation of charges. This is because such a decision would risk a chance that the court would have to deal in the final stage – the trial – with evidence that cannot be sustained by the highest standard of proof: beyond reasonable doubt.

This forecast seems realistic and yet frustrating, because the solid case examined in this article could have been an opportunity to awake the dormant prohibition on the forcible transfer of children as a genocidal crime. If the ICC prosecutor does not pursue this opportunity because of fears about the difficulties of proving the case, a vicious cycle is created, where the crime cannot be proven because of a lack of legal precedents, but legal precedents cannot be created because the case is not taken to court. In addition, this is a significant opportunity to render a dominant leader of a powerful state accountable for the commission of such core crimes in general, and genocide in particular. This is one of the declared goals of the ICC Statute, which affirms that the states parties to the treaty are ‘determined to put an end to impunity for the perpetrators of these crimes’ and thus to contribute to the prevention of such crimes. It is regrettable that the ICC will not have the opportunity to fulfil its goals with respect to the crime of genocide in this case.

However, the speculations about the prosecutor and the courts’ considerations are also understandable. The forcible transfer of children should be sustained as a crime of genocide, but perhaps this is not the right case to prove it in practice. Using the case of Putin as a test case may not be the right decision because it comes with too many risks and the gains from prosecuting on the grounds of genocide would be fewer than the potential losses. Unfortunately, this will likely not be the last case of forcible transfer of children to pursue; hence, other opportunities should be seized, hopefully with better chances to succeed in litigating the forcible transfer of children as a genocidal offence.
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