

Rapidly approaching deadline: Bringing back Ukrainians deported to Russia

Onysiia Syniuk
Legal Analyst at ZMINA Center for Human Rights

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Abstract

The Russian Federation has committed numerous grave violations of international human rights law and international humanitarian law since it launched its full-scale aggression against Ukraine on 24 February 2022. The forcible transfers and deportations of Ukrainians – the focus of this article - however already began a few days earlier, on 18 February 2022, with the announcement of evacuations in the territories of Donetsk and Luhansk regions, occupied before 2022.

Since then, the process of forcible transfers/deportations gained momentum, and was enforced in all the territories occupied by Russia after 24 February 2022. Despite Russia referring to the displacements as evacuations, examining the grounds invoked for these evacuations and the way the process was and is carried out, arguably shows that the displacements fail to comply with the rules on evacuation under international humanitarian law and in fact amounts to forcible transfers and deportations.

This article seeks to provide a comprehensive analysis of the process of forcible transfers and deportations of Ukrainians, conducted by Russia, including the timeline, geography and the policy designed to enable the process. The categories of people forcibly transferred and deported, as well as the violations they experienced prior, during and following the displacement are highlighted in order to determine the specific needs of the different groups involved in the process, including in relation to their potential future repatriation. Examining the decisions issued by Russian and occupation authorities, as well as the details of the process of forcible transfers and deportations in the different regions of Ukraine occupied by Russia, will help determine a pattern and planned nature of the act. Analysing the consequences of the displacement for the people deported highlights the urgency of setting up a mechanism of their return. The article concludes that the crime of forcible transfer and deportation is an ongoing one, and while the documentation efforts have been successful, issues arise with accountability and restitution. The entire international community should be mobilised to condemn and pressure Russia into stopping these unlawful practices and ensure the return of deported Ukrainians.

1. Introduction

The Russian Federation has committed numerous grave violations of international human rights law and international humanitarian law since it launched its full-scale aggression against Ukraine on 24 February 2022. The forcible transfers and deportations of Ukrainians – the focus of this article - however already began a few days earlier, on 18 February 2022, with the announcement of evacuations in the territories of Donetsk and Luhansk regions, occupied before 2022.

Since then, the process of forcible transfers/deportations gained momentum, and was enforced in all the territories occupied by Russia after 24 February 2022. Despite Russia referring to the displacements as evacuations, examining the grounds invoked for these evacuations and the way the process was and is carried out arguably shows that the displacements fail to comply with the rules on evacuation under international humanitarian law and in fact amount to forcible transfers and deportations.

This article seeks to provide a comprehensive analysis of the process of forcible transfers and deportations of Ukrainians, conducted by Russia, including the timeline, geography and the policy designed to enable the process. The categories of people forcibly transferred and deported, as well as the violations they experienced prior, during and following the displacement are highlighted in order to determine the specific needs of the different groups involved in the process, including in relation to their potential future repatriation. Examining the decisions issued by Russian and occupation authorities, as well as the details of the process of forcible transfers and deportations in the different regions of Ukraine occupied by Russia, will help determine a pattern and the planned nature of the act.

In Section 2, an overview will be given of the number of Ukrainians deported, provided by different sources, and with an estimate on how accurate these are. Section 3 will include the legal framework applicable to displacements during an armed conflict, including permissible grounds for the transfer of the population and how they apply to the situation at hand. Section 4 will then examine aspects of these transfers that point to their planned nature, making displacements not the means (for ensuring the safety of the population), but the goal. Section 5 will be focused on the different groups of people deported, especially the vulnerable groups, such as those under 18 and those confined to specialized institutions, as well as the varying challenges they face in leaving the place they were deported to and reaching Ukraine or other countries. In Section 6 the “forcible” nature of the transfers, namely what constitutes force and how consent can be invalidated will be further examined. Section 7 will identify other violations that are committed during displacements. Section 8 will subsequently look into the different qualifications the forcible transfers and deportations might fall under. Finally, in Section 9, apart from drawing conclusions, the article will offer recommendations on what further steps are needed and what the involvement of the international community should be in ceasing the violations and assisting the return of the deported people.

2. The issue of the numbers

During a speech held on 6 October 2022, Ukrainian President Zelensky noted that more than 1.6 million Ukrainians have been forcibly deported to Russia,¹ though how this estimate came about remains unclear. More specifically about children: a number of 19 546 children has been deported according to information gathered by the National Information Bureau of Ukraine,² with 4 390 of them being orphans and children deprived of parental care.³

According to UNHCR data, as of 30 June 2023, there were 2.852,395 million border crossings from Ukraine since 24 February 2022 into Russia.⁴ This figure has not changed since the last update on 31 December 2022 and no later data is available, which indicates the UNHCR has not received any further information from the Russian authorities.

Russia itself reports disproportionately bigger numbers - the latest available information indicates a total of 5.4 million Ukrainian “refugees”, including 744 000 children.⁵

Estimating the number of people displaced from the occupied territories of Ukraine to Russia is essential in order to devise a comprehensive support and return program, as well as to set up an accountability and compensation mechanism. However, there are several reasons preventing an accurate account.

Russia, against its obligations,⁶ refuses to provide accurate information. The numbers indicated above, reported in Russian media, can arguably not be viewed as reliable, considering the systematic infringement of freedom of speech in the country, as well the possibility of inflated numbers for Russian propaganda. Moreover, these numbers are neither explained, not supported by any further data. Russia does not provide additional information on whether these are just recorded border crossings to Russia from the territory of Ukraine, or people registered for shelter and refugee programs. The status of these “refugees”, especially children, is also unknown - there is no segregation of data on the number of children traveling with parents, those from specialised institutions for children deprived of parental care or children who have relatives in

1 ‘We need your support to bring back peace faster - address by the President to the participants of the session of the General Assembly of the Organization of American States, which is ongoing in Lima’, 6 October 2022, available at: <https://www.president.gov.ua/en/news/nam-potribna-vasha-pidtrimka-shob-priskoriti-nastannya-miru-78305> (last accessed 23 June 2023).

2 The “Children of War” platform, created by the Ukrainian Ministry of Reintegration and the National Information Bureau on behalf of the Office of the President of Ukraine, provides up-to-date, consolidated information about children who suffer as a result of Russia’s war against Ukraine (killed, wounded, missing, deported) and those who have been found and rescued. Quantitative indicators are updated daily by law enforcement agencies, available at: <https://childrenofwar.gov.ua/en/> (last accessed 29 January 2024).

3 ‘National Information Bureau gathers data on deported Ukrainian children’, 28 March 2023, available at: <https://minre.gov.ua/2023/03/28/nacjonalne-informacijne-byuro-nakopychuye-dani-pro-deportovanyh-ukrayinskyh-ditej/> (last accessed 24 July 2023). Operational Data Portal, Ukrainian Refugee Situation, UNHCR, available at: <https://data.unhcr.org/en/situations/ukraine> (last accessed 29 January 2024).

4 Operational Data Portal, Ukrainian Refugee Situation, UNHCR, available at: <https://data.unhcr.org/en/situations/ukraine> (last accessed 29 January 2024).

5 ‘The number of refugees from Ukraine and Donbas in Russia surpassed 5.4 million’, TASS, available at: <https://tass.ru/obschestvo/17248303> (last accessed 24 July 2023).

6 Article 49 of the Geneva Convention (GC) (IV) relative to the Protection of Civilian Persons in Time of War provides that the Occupying Power undertaking transfers or evacuations shall inform the Protecting Power of any transfers and evacuations as soon as they have taken place. According to Article 11 of GC (IV), in the case no Protecting Power has been designated (as it is in the case of this armed conflict), the International Committee of the Red Cross or any other impartial humanitarian organization should be designated as a substitute. Therefore, the information on any transfers and evacuations by the Occupying Power should be provided to them.

Ukraine and were staying in boarding type institutions. None of this information is directly communicated either to the Government of Ukraine or any other third party, such as other States or international organisations with a mandate to ensure the safety of and care for these people. The last official information the UNHCR reported dates as far back as 30 June 2023 and the figure has not changed since 31 December 2022. The latest reports by international organisations and missions also indicate it is a Russian practice to systematically refuse to provide any verified information.⁷

Ukraine has no feasible way to get the full numbers by itself. Ukrainian authorities have no access to the occupied territories and have no presence in Russia. Ukraine has also severed diplomatic relations with the Russian Federation,⁸ therefore there are no Ukrainian diplomatic missions in Russia. Moreover, Russia has refused to accept Switzerland's offer to represent the interests of Ukraine in Russia.⁹

There has been a history of displacing Ukrainians from the territories occupied by Russia since 2014, particularly Crimea.¹⁰ However, with the full-scale invasion in February 2022, the policy adjusted. In advance of the full-scale invasion, on 18 February 2022, occupation authorities in the occupied territories of the Donetsk and Luhansk regions announced the “evacuation” of the local population to Russia.¹¹ And the “evacuation” announcements appeared as soon as the Russian forces took control of new territories. Information on transfers of the local population from Mariupol¹² and the Kharkiv region¹³ appeared as early as March of 2022.

3. Legal analysis

The crime of forcible transfer or deportation occurs when the perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons from the place they were lawfully present in to another State or location, by expulsion or other coercive acts.¹⁴ The distinction between the two depends on the way of the transfer: the crime of deportation provides that the victims were displaced across a de jure state border, or, in certain circumstances, a de facto border and forcible transfer provides for

7 Report of the Independent International Commission of Inquiry on Ukraine A/77/533, 18 October 2022, available at: <https://documents.un.org/doc/undoc/gen/n22/637/72/pdf/n2263772.pdf>, para. 20 (last accessed 25 July 2023).

8 ‘Ukraine severed diplomatic relations with Russia, which treacherously attacked it; our country will defend itself and will not give up its freedom - Volodymyr Zelenskyy’, 24 February 2022, available at: <https://www.president.gov.ua/en/news/ukrayina-rozirvala-diplomatichni-vidnosini-z-rosiyeyu-yaka-p-73133> (last accessed 25 July 2023).

9 ‘Russia says Switzerland cannot represent its interests in Ukraine’, SWI, 11 August 2022, available at: <https://www.swissinfo.ch/eng/politics/russia-says-switzerland-cannot-represent-its-interests-in-ukraine/47819330> (last accessed 25 July 2023).

10 ‘CRIMEA BEYOND RULES. Thematic review of the human rights situation under occupation.’ - Special issue - Forcible Expulsion of the Civilian Population from the Occupied Territory by Russia, 2018, available at: https://www.helsinki.org.ua/wp-content/uploads/2018/07/5Kren_fin.pdf (last accessed 25 July 2023).

11 ‘‘LPR’ and ‘DPR’ announce the evacuation of civilians to Russia’, TASS, 18 February 2022, available at: <https://tass.ru/mezhdunarodnaya-panorama/13758699> (last accessed 25 July 2023).

12 ‘Donetsk oblast Prosecutor’s office opened an investigation into cases of forcible transfer and deportation from Mariupol. In particular, in March of 2022 Russian armed forces under the guise of evacuation forcibly transferred 12 underage patients of the Mariupol Oblast children’s bone tuberculosis center to the territory occupied prior to February 24. 14 more children from the family type children’s home along with their three guardians were brought from Mariupol to Rostov region in Russia.’ Prosecutor General’s Office of Ukraine, 11 April 2022, available at: <https://www.gp.gov.ua/ua/posts/primusova-evakuaciya-ditei-z-mariupolya-do-rf-ta-psevdopublik-rozpocato-rozsliduvannya> (last accessed 25 July 2023).

13 Testimony recorded by ZMINA in Ruska Lozova, Kharkiv region, February 2023.

14 ICC, Elements of Crimes, 2013, Article 7 (1) (d) Crime against humanity of deportation or forcible transfer of population.

displacement of persons within national boundaries.¹⁵

The prohibition of forcible transfer and deportation is enshrined in treaty, as well as customary international law. Article 49 of Geneva Convention IV relating to deportations, transfers and evacuations provides that “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”

The prohibition of forcible transfer and deportation does have one exception – evacuation, which has to be carried out on specific grounds, as well as in an appropriate manner.

The only permissible grounds for evacuation are as follows:

- a) If the security of the population so demand, or
- b) If imperative military reasons so demand.¹⁶

These grounds are not only specific, but also exhaustive. Based on the wording of Article 49 of Geneva Convention IV, prohibiting forcible transfers and deportations regardless of motive, only the transfer of population, invoked by any of the two permissible grounds provided in the Convention, can be considered an evacuation. Displacement based on any other grounds is a violation of international humanitarian law and might amount to the crime of forcible transfer or deportation.

It is also important to note that a State designating the transfer as an evacuation does not in itself make such a transfer lawful, unless the grounds for it to be considered evacuation are present.¹⁷

Russia continuously claims the transfer of population to be evacuations, invoking both grounds. Therefore, it is important to establish if the relevant requirements are met.

As regards the first condition: the security of the population might be threatened if an area is in danger as a result of military operations or is liable to be subjected to intense bombing¹⁸, or the humanitarian situation on the territory is so dire as to require the removal of civilians from the area¹⁹. However, the security of the population cannot be used as a justification for the transfer if the active hostilities in the territory have already ceased when the transfer occurs.²⁰

In the Kharkiv and Kherson oblasts Russian forces announced “evacuations” long before the Ukrainian

15 Prosecutor v. Jovica Stanišić and Franko Simatović, Case No. IT-03-69-T, Judgement (TC), 30 May 2013, para. 992.

16 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 49, para. 2.

17 Prosecutor v Blagojević & Jokić, Case No IT-02-60-T, Judgement (TC), 17 January 2005, para. 618.

18 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Commentary of 1958, Article 49 - Deportations, transfers, evacuations.

19 The Prosecutor v. Radovan Karadžić, Case No IT-95-5/18-T, Public Redacted Version of Judgement, 24 March 2016, para. 492.

20 Prosecutor v. Radislav Krstić, Case No IT-98-33-T, Judgement (TC), 2 August 2001, para. 525.

counteroffensive started.²¹ Russian forces also urged civilians to evacuate, claiming Ukrainian forces would “level the village to the ground”, which appeared to be disinformation - no attack occurred²² in several instances.²³ Removing civilians from areas with no active hostilities at the moment and under false pretenses does not amount to genuine concern for the security of the population.

In the case of the security of the population reasoning there is another important safeguard: the security of the population ground can not be invoked if the threat that caused the displacement is itself the result of the perpetrator’s own unlawful activity.²⁴ This is particularly important in the case of displacing the residents of Mariupol, as the humanitarian crisis in the city, which might have been a sufficient ground for evacuation, was caused by indiscriminate and disproportionate attacks by Russian forces.²⁵ In another example, before evacuation has been announced in Kherson oblast, the threat of the Kakhovka Hydroelectric Power Plant being blown up by the Ukrainian Armed Forces was used to spread fear among the local population,²⁶ with no substantive evidence for that claim and evidence suggesting it was actually Russian forces that were planning to destroy the Plant upon their retreat.²⁷ On 6 June 2023, the Power Plant under Russian control blew up, and although independent investigation is impossible, tentative evidence suggest it could only be blown up from the inside.²⁸

As regards the second condition: the concept of imperative military reasons is less clearly defined. For interpretation purposes, a descriptor such as “overriding” military reasons was used.²⁹ Considering the general prohibition on transfers, the approach to interpreting imperative military reasons should arguably include a high standard for a military operation to be considered “imperative” - an operation essential to the whole campaign that cannot be achieved by any other means except transferring the population. The proportionality principle should also be applied in determining whether the harm caused to the civilian population by the displacement can justify the military advantage gained by this act.

Vladimir Putin personally stated it was necessary to “remove civilians from the active hostilities zone in Kherson”.³⁰ After that, people in the Kherson oblast were evacuated to the left bank of Dnipro river and the

21 On 3 August 2022 the Kharkiv regional prosecutor’s office announced they opened an investigation under Article 438 of the Ukrainian Criminal Code (“violation of the rules and customs of war”) concerning the deportation of civilians from Kozacha Lopan, Kharkiv oblast, to Russia, available at: https://khar.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=317463&s=print. The liberation of the village by Ukrainian forces started on 11 September 2022.

22 Testimony recorded by ZMINA in Lyptzi village, Kharkiv oblast, February 2023.

23 A similar testimony claiming disinformation about an alleged attack by Ukrainian forces to make civilians leave was also recorded by ZMINA in Kozacha Lopan, Kharkiv oblast, February 2023.

24 Prosecutor v. Milomir Stakic, Case No IT-97-24-A, Appeal Judgement, 22 March 2006, para. 287.

25 Report of the Independent International Commission of Inquiry on Ukraine to the Human Rights Council (A/HRC/52/62), 16 March 2023, available at: <https://www.ohchr.org/en/hr-bodies/hrc/iicuhr-ukraine/index>, para. 31 (last accessed 25 July 2023).

26 Russian General Surovikin claimed that the Ukrainian Armed Forces are preparing an attack on the plant to damage the dam, 18 October 2022, *Kommersant*, available at: <https://www.kommersant.ru/doc/5620635> (last accessed 25 July 2023).

27 Russian Offensive Campaign Assessment, Institute for the Study of War, 21 October 2022, available at: <https://www.understandingwar.org/backgrounders/russian-offensive-campaign-assessment-october-21> (last accessed 25 July 2023).

28 ‘Why the Evidence Suggests Russia Blew Up the Kakhovka Dam’, *The New York Times*, 16 June 2023, available at: <https://www.nytimes.com/interactive/2023/06/16/world/europe/ukraine-kakhovka-dam-collapse.html> (last accessed 29 January 2024).

29 Prosecutor v Blagojević & Jokić (Trial Chamber Judgment), para. 598.

30 ‘Putin urged to evacuate Kherson residents’, *News.Ru*, 04 November 2022, available at: <https://news.ru/vlast/putin-prizval-evakuirovat-zhitelej-hersona-iz-zony-boevyh-dejstvij/> (last accessed 25 July 2023).

way back was blocked by the occupation administration.³¹ The occupation administration claimed the move was voluntary, as there was no “critical situation” at hand and evacuation was being conducted for the “safety of civilians” and to “give the military the opportunity to perform their duties”. The area, from which civilians were removed, was meant to be made into a Russian defense line.³²

The displacement of civilians in order to conduct regular military actions does not amount to imperative military reasons and violates the grounds for evacuation.

Another requirement arguably violated by the Russian Federation is for the transfer, unless strictly necessary, to occur within the bounds of the occupied territory. Considering that displacement in itself is a violation of the right of the members of the population to remain in their homes, in the territory they are lawfully present, surrounded by their community, without interference, evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement.³³ Unless the whole occupied territory can be considered dangerous,³⁴ people should be moved within occupied territory. While initially people from the Kherson region were moved to the left bank of the river and Crimea, they were later transferred to territories within Russia in absence of any material reasons for such a move.

Russia arguably also violates the obligation to transfer the evacuated persons back to their homes as soon as hostilities in the area in question have ceased.³⁵ In fact, it is actively taking measures to prevent the possibility of such a return at any point in the future: displacing people to far-away regions of Russia, often not letting them know about the final destination to which they were transferred prior to boarding or constantly changing the information,³⁶ preventing travel from Russia³⁷ and shelling Ukrainian cities to such an extent they become unlivable.³⁸

4. Planned and intentional nature of displacement

The transfer of the Ukrainian population also appears planned in advance. The government of the Rostov region in Russia, which borders Ukraine, announced the opening of 188 temporary accommodation facilities

31 ‘Today is the last day of organized evacuation from the right bank of Kherson oblast to the left bank’, Kiril Stremousov, head of Kherson occupation administration, Telegram channel, 7 November 2022, available at: https://t.me/Stremousov_Kirill/692 (last accessed 25 July 2023).

32 “There is almost anarchy here’. Kherson resident on “evacuation” of his neighbors to Russia, hryvnia returning to shops and removal of monuments’, *Current time*, 3 November 2022, available at: <https://www.currenttime.tv/a/u-nas-pochti-anarhiya-zhitel-hersona-ob-evakuatsii/32114063.html> (last accessed 25 July 2023).

33 *Supra* n. 18.

34 Final Record of the Diplomatic Conference of Geneva of 1949, Volume 2, Section A, p. 759.

35 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 49 - Deportations, transfers, evacuations.

36 Testimony of a resident from Mariupol recorded by ZMINA in Tallinn, Estonia, February 2023.

37 According to testimonies recorded by ZMINA, people reported being denied tickets outside of Russia on different grounds - them having only Ukrainian passports, no passports for traveling abroad or the danger of COVID pandemic in Europe.

38 ‘Bilohorivka and Popasna are wiped off the map: thousands of hits, completely broken infrastructure – head of Luhansk Oblast Military Administration’, *Ukraine Media Center*, 12 January 2023, available at: <https://mediacenter.org.ua/bilohorivka-and-popasna-are-wiped-off-the-map-thousands-of-hits-completely-broken-infrastructure-head-of-luhansk-oblast-military-administration/> (last accessed 25 July 2023).

for the “people of Donbas” as early as 20 February 2022.³⁹

On 12 March 2022, the Government of the Russian Federation issued Regulation №349 providing for a system of distributing Ukrainian citizens, who “were forced to leave the territory of Ukraine” and “arrived in the territory of the Russian Federation on a mass and extraordinary basis” among the regions of Russia.⁴⁰ Notably, the division indicated zero persons to be sent to Moscow and Saint-Petersburg, while apart from the large number being accepted by regions along the border, more than 2000 were to be sent to remote regions such as Murmansk and Krasnoyarsk, thousands of kilometers away from Ukraine.

The first reports about filtration camps, an integral part of the Russian displacement process, operating fully in the occupied territories, appeared very quickly, already in March of 2022,⁴¹ with locations and a comprehensive system of interrogation and checks put in place. “Filtration” procedures were conducted at all the checkpoints while entering or exiting a town or a village in the occupied territory. They typically included inspections of cars, personal belongings, seizure of telephones and computer equipment, fingerprinting, taking photos, as well as interviews with Russian military (apparently with the participation of FSB officers). “Camps” were the second level of filtration, mostly located in the occupied territories of Luhansk and Donetsk regions. People spent a day or several days there waiting to receive a “certificate” about passing the filtration or be detained for a more detailed check.⁴²

Apart from the organised campaign of displacing people to Russia, it can be asserted that there is also a pattern discernible of attacking civilians attempting to leave on their own⁴³ and making it impossible for people to evacuate to the Ukrainian controlled territory by tricking them into going to Russia,⁴⁴ refusing humanitarian corridors and creating artificial queues at the checkpoints leading to Ukraine.⁴⁵ Discouraged from going to Ukrainian controlled territory and fearing for their lives in the occupied territory, civilians felt they had no other choice but to leave for Russia. Some of them with a clear goal to try and leave for the EU countries immediately, some of them just trying to escape the impossible situation and leaving further planning for later.

It can be argued that the number of people transferred within such a short time period, the filtration system

39 “40 thousand people evacuated from LPR and DPR in two days’, according to the temporarily acting head of the Russian Ministry of Emergency Situations’, *Red Line*, 20 February 2022, available at: <https://www.rline.tv/news/2022-02-20-iz-dnr-i-lnr-za-dva-dnya-evakuirovalis-40-tysyach-zhiteley/> (last accessed 25 July 2023).

40 Resolution of the Government of the Russian Federation No. 349 dated 12 March 2022, On the distribution of citizens of the Russian Federation, Ukraine, DPR, LPR and persons without citizenship permanently residing in Ukraine, DPR and LPR, forced to leave the territory of Ukraine, DRP and LPR and arriving in the territory of the Russian Federation in an emergency mass manner, between the federal Subjects, available at: <http://publication.pravo.gov.ru/Document/View/0001202203120005?index=4&rangeSize=1> (last accessed 25 July 2023).

41 System of Filtration: Mapping Russia’s detention operations in Donetsk oblast, Yale School of Public Health, Humanitarian Research Lab pp. 26, 30: <https://hub.conflictobservatory.org/portal/sharing/rest/content/items/7d1c90eb89d3446f9e708b87b69ad0d8/data>.

42 ‘Deportation of Ukrainian citizens from the territory of active military operations or from the temporarily occupied territory of Ukraine to the territory of the Russian Federation and the Republic of Belarus’, Ukraine 5 AM Coalition, 1 October 2022, available at: https://zmina.ua/wp-content/uploads/sites/2/2023/01/deportation_eng.pdf (last accessed 29 January 2024).

43 *Supra* n. 7, para. 56-59 (last accessed 25 July 2023).

44 Testimony recorded by ZMINA indicates that people were told that the evacuation bus would be going to Zaporizhzhia region and instead it brought people to a filtration camp further in occupied territory to undergo filtration before crossing to Russia.

45 ‘6000 cars blocked at checkpoint in Vasylivka’, *Ukrainian Pravda*, 8 October 2022, available at: <https://www.pravda.com.ua/eng/news/2022/10/8/7370945/> (last accessed 25 July 2023).

that was quickly set up and started functioning immediately, as well as the national policies established in Russia concerning “refugees” from Ukraine, including a complicated system of temporary accommodations and an official distribution of people among the regions of Russia, indicate this was not a response to the influx of people, but rather a planned set of measures.

If the evacuation itself was in fact the goal, then of course the excuse of the protection of the civilians or of imperative military necessity cannot be used.⁴⁶

While the situation not meeting the requirements of an evacuation does not immediately mean it also amounts to a forcible transfer or deportation, the situation at hand arguably contains all the necessary elements as defined for the crime of forcible transfer or deportation by the International Criminal Court (ICC):⁴⁷

- a) The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts;
- b) Such person or persons were lawfully present in the area from which they were so deported or transferred;
- c) Such person or persons were protected under one or more of the Geneva Conventions of 1949.⁴⁸

5. The “forcible” nature of the transfer

While the fact of the displacement has been widely established, the “forcible” part of it is a matter that needs further examining. It is important to note that among the numbers of people transferred to Russia there are those, who expressed genuine consent to be removed from the territory and brought to Russia with the intention to go to Russia.⁴⁹ However, they were not the only category displaced.

“Forced” is not limited to physical force. It also includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or the act of taking advantage of a coercive environment.⁵⁰ In its core, “forced” refers to the absence of a genuine choice and that also means that when the consent was given, or even a request to be moved was expressed, it is necessary to determine in every specific case whether it was actually done voluntarily.⁵¹ The circumstances, such as illegal detention, the threats, the use of force and other forms of coercion and the fear of violence, might deprive the consent of any value, making the displacement unlawful.⁵² There is a difference between willingly leaving the area on the one

46 *Supra* n. 20, para. 527.

47 For the purpose of this analysis, the defining elements of the crime of forcible transfer or deportation, both as a war crime and as a crime against humanity, were used.

48 *Supra* n. 14, Article 7 (1) (d), Crime against humanity of deportation or forcible transfer of population; Article 8 (2) (a) (vii)-1 War crime of unlawful deportation and transfer.

49 “We Had No Choice”: “Filtration” and the Crime of Forcibly Transferring Ukrainian Civilians to Russia, Human Rights Watch, 1 September 2022, available at: <https://www.hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians> (last accessed 25 July 2023).

50 *Supra* n. 20, para. 529.

51 *Supra* n. 19, para. 489.

52 Prosecutor v. Milorad Krnojelac, Case No IT-97-25-A, Appeal Judgement, 17 September 2003, para. 229.

hand and making a decision to leave, based on the certainty that it is impossible to survive otherwise, on the other.⁵³ As regards the meaning of “certainty”, arguably it should not matter whether there was a real danger to a specific person. Important is that there was an overall atmosphere of coercion and danger and the person reasonably believed to be in danger in those circumstances.

6. People deported

It is important to consider the different categories of people displaced as they are affected differently and it will require different measures to facilitate their return.

People over 18 years old, who are not receiving care in medical institutions and are not in places of deprivation of liberty, in general, have more freedom of movement. That is, however, still limited by regulations on distributing Ukrainian citizens all over Russia, limiting their ability to stay in regions along the border with Ukraine, as well as the general atmosphere of coercion and lack of resources for the victims. A lot of people lose their belongings and finances due to destruction of property and when they are transferred to remote regions of Russia, they lack the resources to flee. Usually they rely on assistance from individual volunteers and volunteer initiatives, such as Helping to Leave.⁵⁴ The duration of stay in Russia for these people is a significant concern, as there are cases of them being rejected from entering the countries bordering Russia on the ground of staying in the country too long.⁵⁵

Another category, a significantly more vulnerable one, is people over 18 years old who are placed in specialized institutions, whose freedom to move and to choose is legally limited. This concerns people in medical institutions dedicated to care for mental disabilities, but also people in detention facilities. Reports indicate there is a pattern of Russian authorities transferring people from these facilities within the occupied territory and to Russia.⁵⁶ The Ministry of Justice of Ukraine has reported around 2000 detainees have been transferred from occupied territories of the Kherson oblast.⁵⁷ Some of them were transferred to detention and penitentiary facilities in the Volgograd, Stavropol and Krasnodar regions in Russia.⁵⁸ Apart from general safeguards, which cover the protection of people in specialized institutions, by transferring detainees, Russia is also violating its obligations to detain persons in the occupied country, and, in case of conviction, to ensure they serve their sentence in the country.⁵⁹ As mentioned previously, people in confinement, who were transferred, are often not allowed to contact anyone and their relatives are not informed about the transfer,

53 *Supra* n. 20, para. 530.

54 Helping to Leave is a volunteer initiative helping people evacuate from areas of military conflict, helping Ukrainians affected by war, including those who are forcibly deported to the temporarily occupied territories of Ukraine and to Russia, available at: <https://helpingtoleave.org/en>.

55 M. Orbegozo. ‘Ukrainians in Russia undertake harrowing journey to Estonia’, *Deutsche Welle*, 13 October 2022, available at: <https://www.dw.com/en/estonia-turns-away-ukrainian-refugees-at-eu-border-after-harrowing-wait/a-63412334> (last accessed 23 June 2023).

56 ‘Deportation of custodial settings from occupied territories of Ukraine’, ZMINA Human Right Center, 17 April 2023, p. 5, available at: https://zmina.ua/wp-content/uploads/sites/2/2023/07/deportation_f_eng_web.pdf (last accessed 29 January 2024).

57 Olena Vysotska, Deputy Minister of Justice of Ukraine, *Ukrinform*, 3 March 2023, available at: <https://www.ukrinform.ua/rubric-ato/3677438-olena-visocka-zastupnica-ministra-usticii.html> (last accessed 23 June 2023).

58 Olga Romanova tells why Russia took Ukrainian prisoners out of occupied territories, *Current Time*, 1 December 2022, available at: <https://www.currenttime.tv/a/rossiya-vyvozit-zaklyuchennyh-iz-kolonyi-na-okkupirovannyh-territoriyah/32156992.html> (last accessed 23 June 2023).

59 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 76 – Treatment of detainees.

which makes it harder to find and identify them. As the options of people in confinement to act of their own accord are limited, it is important that their relatives notify the authorities about the lack of contact and that the relevant authorities request information on these persons based on their registries. However, this issue is once again made complicated by Russia not providing information on any of the people transferred to the relevant authorities in Ukraine. The role of the international community and international organisations in continuously pressuring Russia to perform its obligations to this end is therefore crucial.

Another extremely vulnerable category is children. Due to their status, they are unable to consent to any transfer by themselves. Either Russian soldiers or the children's caretakers, willingly or in the absence of other options, make the decision to move the children to Russia.

Recently the permanent representative of Russia to the UN declared that the transfer of children occurred "for their safety".⁶⁰ However, the evacuation of children has a different, much stricter set of rules. Considering how vulnerable this category of the population is and the need for stability for their growth and upbringing, the prohibition on transferring of children is even stricter.

This means the ground of safety can only be applied for evacuation of children within the occupied territory - it is a violation to transfer children on the grounds of safety across the border.

The only lawful ground for a displacement of children across the border is provided for in Additional Protocol I to the Geneva Conventions: temporary evacuation where compelling reasons of the health or medical treatment of the children so require.⁶¹ The State carrying out the transfer also has a range of obligations:

- 1) the written consent to such evacuation from parents or legal guardians, or in case they cannot be found, persons who by law or custom are primarily responsible for the care of the children, is required;
- 2) the evacuation must be conducted in agreement with the State whose nationals are being evacuated;
- 3) to facilitate the return of the children to their families and country from which the children were evacuated, a card indicating important information for identification with photographs has to be drawn up for every child and submitted to the Central Tracing Agency of the International Committee of the Red Cross.

Not only can the "safety" ground not be invoked in the case of transferring the children to a foreign country, also none of the abovementioned obligations have arguably been met by Russia.

The transferred children also have different status - some of them still have relatives in Ukraine, which eases the process of finding and returning them, as relatives can contact the appropriate authorities. However, it can be asserted that Russia, on its part, does not provide information by itself and is not looking for relatives,

60 'The permanent Representative of Russia to the UN Nebenzia claims security is a prerequisite to return children taken from Ukraine', *Kommersant*, 20 March 2023, available at: <https://www.kommersant.ru/doc/5887517> (last accessed 23 June 2023).

61 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 78 – Evacuation of children.

except for searching within the Russian state and National Red Cross Society database.⁶² This indicates the intention to reunite children with relatives only in case the latter are Russian.

The first report on an entire child care facility being transferred to Russia appeared on 19 February 2022, hence before the full-scale invasion: 225 children from Donetsk boarding school №1 were brought to Russia.⁶³ The campaign continued in the Kherson oblast as well,⁶⁴ assisted by the occupation administration.⁶⁵

Children staying in these facilities are orphans, with or without other relatives in Ukraine, but also children whose parents are alive, but were deprived of parental rights. All of them, without distinction, have been taken to Russia and placed in child care facilities or Russian families are offered guardianship over these children. The changes to Russian legislation now also allow the President to grant foreign children Russian citizenship in a procedure where the change of citizenship is initiated by the guardians of the child, if they are Russian citizens themselves, or even heads of the institutions, in which children stay.⁶⁶

The UN Independent International Commission of Inquiry on Ukraine has concluded that the situations concerning the transfer and deportation of children, within Ukraine and to the Russian Federation respectively, violate international humanitarian law, and amount to a war crime.⁶⁷

7. Consequences of forcible transfers and deportations for the people displaced

The forcible transfers and deportations have both short-term and long-term consequences for the people whose rights were violated and continue to be violated as long as they remain uprooted from their homes and communities, unable to get back.

“Getting back” in this instance includes not only physically returning to the territory of Ukraine, which has its complications, mentioned above, but also adapting to the new reality in Ukraine they will be returning to. The longer people deported stay in Russia, the harder it will be to cross the Russian border with other countries, as a long term stay invites questions of loyalty, and the harder it will be to get back to life in Ukraine. Staying in Russia, especially considering the policy of distribution of Ukrainians all over the country, separating them from the border to their home country and from each other, preventing the creation of a community among them, means severing their connections to Ukraine. Taking into account the stress they endured in the territories Russia displaced them from, as well as the stress of the displacement itself and being brought to

62 ‘The Moscow region will help with the placement of orphans from the LPR/DPR in foster families in Russia’, 360, 6 April 2022, available at: <https://360tv.ru/news/mir/podmoskove-pomozhet-s-ustrojstvom-detej-sirot-iz-ldnr-v-priemnye-semi-v-rossii/> (last accessed 25 July 2023).

63 ‘Rostov Oblast has started receiving evacuees from Donbass’, *VestyRU*, 19 February 2022, available at: <https://www.vesti.ru/article/2679189> (last accessed 25 July 2023).

64 ‘The Russians took 46 small children from Kherson to Simferopol’ says head of Kherson Oblast Military Administration’, *Ukrainian Pravda*, 21 October 2022, available at: <https://www.pravda.com.ua/news/2022/10/21/7372970/> (last accessed 25 July 2023).

65 ‘Today a children’s orphanage has been fully evacuated from Kherson’, Kiril Stremousov, head of Kherson occupation administration, Telegram channel, 21 October 2022, available at: https://t.me/Stremousov_Kirill/567 (last accessed 25 July 2023).

66 Decree of the President of the Russian Federation №11 from 04.01.2024 on “Defining specific categories of foreign citizens and stateless persons eligible to apply for the citizenship of the Russian Federation”: http://publication.pravo.gov.ru/document/0001202401040003?index=3&fbclid=IwAR08rRV9qWHw1_pQ3TovbT4IbkNnf0XOn1ifDXvKpvPaXynL5ffUCHsNeKU (last accessed 22 February 2024).

67 *Supra* n. 27, para. 102 (last accessed 25 July 2023).

Russia with barely any means to survive⁶⁸ and going through the process of adapting there, it is not difficult to imagine a lot of them will find it hard to risk everything again trying to get back to Ukraine.

Moreover, a longer stay in Russia demands formal paperwork and very often getting a Russian passport, which is an issue for crossing the border into third countries bordering Russia, as well as leaving Russia itself, as a Russian passport in the Russian legal framework burdens the person with all the citizenship obligations – including possible conscription. The mentioned simplified procedure of granting Russian citizenship to children with Russian guardians or those placed in Russian children’s institutions is arguably the final step in preventing their return to Ukraine for good. These children will be declared Russian and not included in any lists of transferred children, while Ukraine has an even harder time of identifying them.

The impact of a long stay in Russia for children, especially unaccompanied ones, is arguably extremely damaging. They are separated from Ukrainian language, culture and education, which creates a divide with their peers, who stayed in Ukraine, but is also worsened by the fact they are immersed in Russian language, culture and education, as well as heavy military propaganda. The impact it will have on the identity of children, especially the smallest ones, who did not have time to develop one yet at all, is immeasurable.

Unaccompanied children and people over 18 in specialized institutions have no way to return on their own at all and require the involvement of the Government of Ukraine and pressure on Russia to enforce the return.

We should also consider “getting back” in terms of a longer stay. Around 5.1 million persons are currently internally displaced within Ukraine.⁶⁹ Those who were deported to Russia came from territories under heavy fire. For a lot of these people there is nowhere to return to in Ukraine – the territory they lived in is either still occupied, constantly shelled or there is no housing and property to return to. Starting a journey from Sakhalin oblast to end up in a center for internally displaced persons is a difficult choice to make and carry out. The overall situation in Ukraine is also a factor to be taken into consideration: daily air raid alerts, air strikes, the impact war has on every sphere of life, from income and job market to children’s education process and mental health.

The physical return of people deported, however hard it is, will only be the first step. Helping them find their place in a new reality in Ukraine will take years and the planning should arguably start now.

8. Other violations accompanying the displacements

It is asserted that the displacement from the occupied territory of Ukraine has been preceded and was followed by other violations. The violations people are victim or witness to pressure them into fleeing, leaving no other option but to “evacuate” to Russia or be subjected to these violations. Taking this into account, the violations might constitute coercion, especially if different types of violations occur subsequently or simultaneously, creating an atmosphere of terror.

There are records of at least the following violations occurring in the occupied territories:

68 ‘Survive and escape: why so few Ukrainians deported to Russia return’, *BBC New Ukraine*, 16 August 2022, available at: <https://www.bbc.com/ukrainian/features-62316233> (last accessed 29 January 2024).

69 Ukraine — Internal Displacement Report — General Population Survey Round 13 (11 May - 14 June 2023), IOM, available at: <https://dtm.iom.int/reports/ukraine-internal-displacement-report-general-population-survey-round-13-11-may-14-june-2023?close=true> (last accessed 27 July 2023)

- a) willful killing;⁷⁰
- b) cruel, inhuman, degrading treatment and torture;⁷¹
- c) enforced disappearances,⁷² especially of people active in the community (teachers, civil servants, activists and volunteers);⁷³
- d) sexual and gender-based violence;⁷⁴
- e) threats of use of force;⁷⁵
- f) forced labor.⁷⁶

Deliberate attacks against civilians and against civilian objects⁷⁷ can also be considered as those contributing to the coercive atmosphere and forcing people to flee.⁷⁸

The fact these violations are occurring in different regions, perpetrated, therefore, by different military units and not prevented or encouraged by their commanders, arguably indicates a pattern. The March 2023 report of the UN Independent International Commission of Inquiry on Ukraine indicates that certain violations, such as the use of torture, may amount to crimes against humanity.⁷⁹

Violations continue during the displacement as well. It can be argued that Russia violates its obligations of proper care towards the persons that are transferred, specifically ensuring, “to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.”⁸⁰

Recorded cases of violations of this obligation include not providing nutrition during the transfer and not

70 Russian Retreat Reveals Signs of an Atrocity in a Ukrainian Village, *The New York Times*, 29 November 2022, available at: <https://www.nytimes.com/2022/11/29/world/europe/ukraine-russia-pravdyne-grave.html> (last accessed 25 July 2023).

71 Isobel Koshiw, ‘Kherson torture centres were planned by Russian state, say lawyers’, *The Guardian*, 2 March 2023, available at: <https://www.theguardian.com/world/2023/mar/02/kherson-torture-centres-were-planned-by-russian-state-say-lawyers> (last accessed 25 July 2023).

72 *Ibid.*

73 ZMINA as of 11 March 2023 has recorded 503 cases of enforced disappearances of activists in the occupied territories of Ukraine.

74 *Supra* n. 27, paras. 78-85.

75 Testimony recorded by ZMINA from several residents of Mariupol in February 2023.

76 *Supra* n. 44, p. 18; testimony recorded by ZMINA in Kharkiv region in February 2023.

77 Report of the OSCE Moscow Mechanism’s mission of experts entitled ‘Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine (1 April – 25 June 2022), 14 July 2022, available at: <https://www.osce.org/odihr/522616>, p. 6 (last accessed 25 July 2023).

78 ICC, Prosecutor v. Muthaura, Kenyatta and Ali, “Decision on confirmation of charges”, ICC-01/09-02/11, 23 January 2012, para. 244

79 *Supra* n. 27.

80 *Supra* n. 37, Article 49.

providing satisfactory nutrition at the temporary accommodation facilities,⁸¹ accommodating people at places not suitable for the stay and for the number of people brought there,⁸² as well as separating members of the same family, especially parents and children.⁸³

The filtration process itself perpetuates a number of violations, including the aforementioned separation of families. Invasive checks, which include forced nudity, are carried out at all the checkpoints and filtration camps.⁸⁴ The filtration process also includes excessive data collection, such as taking photos, fingerprints, and downloading information, especially contacts, from mobile phones.⁸⁵ There are also cameras placed in filtration camps, where people stay for several days.⁸⁶ The filtration procedure moreover involves an interrogation process, for which people are usually isolated and pressured into answering questions about their thoughts on Putin, the “special military operation”, Russia, whether they have relatives or friends in the Armed Forces of Ukraine,⁸⁷ etc.

It is also important to note that violations continue after the deportation. As was mentioned earlier, contrary to its obligation under international humanitarian law, Russia arguably does not facilitate the return of the people transferred to the territories they were displaced from, and even prevents them from returning. A case of illegal detention and torture, as well as degrading and humiliating treatment, has been recorded at the moment of a person crossing the Russian border into Estonia.⁸⁸ Moreover, detainees, both those detained lawfully for reasons not related to the conflict, as well as those unlawfully confined, are prevented from contacting their relatives, and their relatives are not informed about what is happening to them.⁸⁹

It can be asserted that Russia also violates the specific rules providing for the care of children. Once the children are transferred, whether within the occupied territory or to Russia, they are immediately immersed in the Russian educational and cultural programs.⁹⁰ One of the ways this happens is through sending children to summer camps. The agenda in these camps involves meetings with Russian and occupation administration

81 Testimony recorded by ZMINA from the residents of Mariupol in February 2023.

82 Testimony of a resident of Mariupol recorded by ZMINA in February 2023.

83 Ukraine: “Like A Prison Convoy”: Russia’s Unlawful Transfer And Abuse of Civilians In Ukraine During ‘Filtration’, Amnesty International, 10 November 2022, available at: <https://www.amnesty.org/en/documents/eur50/6136/2022/en/> (last accessed 25 July 2023).

84 Testimony recorded by ZMINA from residents of Mariupol and Kharkiv region.

85 Nadia Beard, ‘Ukrainians who fled to Georgia reveal details of Russia’s ‘filtration camps’’, *The Guardian*, 12 June 2022, available at: <https://www.theguardian.com/world/2022/jun/12/ukrainians-who-fled-to-georgia-reveal-details-of-russias-filtration-camps> (last accessed 25 July 2023); testimony recorded by ZMINA from residents of Mariupol, Kherson and Kharkiv region.

86 Testimony recorded by ZMINA from a resident of Mariupol in Riga, Latvia, February 2023.

87 Testimony recorded by ZMINA from residents of Mariupol in February 2023.

88 Testimony recorded by ZMINA from a resident of Mariupol in Tartu, Estonia in February 2023.

89 ‘Ukraine: Torture, Disappearances in Occupied South, Apparent War Crimes by Russian Forces in Kherson, Zaporizhzhia Regions’, Human Rights Watch, 22 July 2022, available at: <https://www.hrw.org/news/2022/07/22/ukraine-torture-disappearances-occupied-south> (last accessed 25 July 2023).

90 Russia’s systematic program for the re-education & adoption of Ukraine’s children Yale School of Public Health’s Humanitarian Research Lab, 14 February 2023: <https://hub.conflictobservatory.org/portal/apps/sites/#/home/pages/children-camps-1> (last accessed 22 February 2024); Forcible transfer and deportation of children from the temporarily occupied territories of Ukraine to the Russian Federation, ZMINA Center for Human Rights, April 2023: https://zmina.ua/wp-content/uploads/sites/2/2023/06/children_eng_web.pdf (last accessed 22 February 2024).

political figures,⁹¹ as well as field trips to cultural or patriotic sites throughout the country, lectures from Russia's veterans and historians, and military activities.⁹² Often the standard stay in the camps is prolonged beyond the three weeks, and children are enrolled in Russian school programs,⁹³ which include “patriotic education”, militarization of education and false narratives about history, such as the reasons and events of the Russian invasion in Ukraine.⁹⁴ These programs are also implemented in schools in the occupied territories.⁹⁵ This is arguably a violation of the obligation of the State, when providing care to the child, to pay due regard to the continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.⁹⁶ This also goes against a state's obligations to entrust the care and education of children to persons of their own nationality, language and religion,⁹⁷ as well as persons of a similar cultural tradition.⁹⁸

The fact that these violations continue to occur after the displacement signifies the importance not only to bring accountability, but also to prevent the violations and assist those who were deported to return as soon as possible.

9. Qualifying the deportations

Investigations into cases of deportation were opened by a number of regional Prosecutor's offices in Ukraine, but it might be beneficial to build a case on deportations within the ICC, considering the scale of the crime, the involvement of high level officials in Russia in perpetrating deportations,⁹⁹ as well as the need for international attention to the issue to prevent subsequent deportations in the future and return those deported, who have no way to leave Russia on their own. While the ICC has already issued an arrest warrant¹⁰⁰ in the investigation of the war crime of deportation (children), this is and should arguably be just a beginning.

The current ICC warrant, unfortunately, concerns only the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children). The OSCE Moscow mechanism, which is an instrument activated by OSCE participating states to monitor the implementation of OSCE human rights

91 Vkontakte page 'Navigators of Childhood | CRIMEA' ('Navigators of childhood' is a project within the federal project 'Patriotic education of the Russian citizens'), 9 October 2022, available at: https://vk.com/wall-214910068_4716 (last accessed 25 July 2023).

92 *Supra* n. 98, p. 15.

93 *Supra* n. 98, p. 5; In Gelendzhik, children from the Kharkiv oblast began studying according to the school curriculum, Kuban 24, 22 September 2022, available at: <https://kuban24.tv/item/v-gelendzhike-deti-iz-harkovskoj-oblasti-nachali-obuchenie-po-shkolnoj-programme> (last accessed 25 July 2023)

94 Elise Morton 'How Russia is molding the minds of schoolkids to support its brutal invasion of Ukraine', *Insider*, 29 January 2023, available at: <https://www.businessinsider.com/russia-ukraine-invasion-propoganda-schoolkids-2023-1> (last accessed 25 July 2023).

95 "School curriculum: Russian hidden weapon against Ukraine", a study, N. Vaskivska, K. Kornienko, D. Pidhorna, M. Petrovets, 2023, available at: <https://almenda.org/wp-content/uploads/2023/02/Doslidzhennya-Shkilna-osvita-prykhovana-zbroya-RF-proty-Ukrayiny.pdf> <https://www.ejiltalk.org/occupation-of-minds-ihl-response-to-russian-education-policies-in-the-occupied-ukrainian-territories/> (last accessed 25 July 2023).

96 Convention on the Rights of the Child, Article 20.

97 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 50 – Children.

98 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 24 - Measures relating to child welfare.

99 *Supra* ns. 11, 32, 33, 64, 66, and 69.

100 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', 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> (last accessed 25 July 2023).

commitments that has “increasingly become an instrument for collecting evidence and shining a light on human rights abuses and potential war crimes, rather than a tool for mediating and resolving human rights violations via dialogue and cooperation”,¹⁰¹ noted in its first report that the experts received “numerous consistent reports from Ukrainian official and NGO sources and from private individuals on social media on forced deportations from occupied territories to Russia” and “if (some of) these deportations were forcible (including because Russia created a coercive environment in which those civilians had no other choice than to leave to Russia) and as they necessarily concerned civilians who had fallen into the power of Russia as an occupying power, this violates in each case IHL and constitutes a war crime”.¹⁰² The war crime of unlawful deportation and transfer means persons protected under one or more of the Geneva Conventions were deported or transferred to another State or another location in the context of an international armed conflict.¹⁰³ The existence of an international armed conflict between Russia and Ukraine, and the fact that persons in the territory of Ukraine, occupied by Russia, are considered protected persons under the Geneva Conventions is indisputable. Therefore, if the ‘forcible’ element, which is defining for the crime of unlawful deportation and transfer, is established in a particular case, the act constitutes a war crime.

The abovementioned context of the scale of deportations both in term of numbers of people deported, different groups of people targeted, as well as the widespread geography of the crime, which also invites a conclusion on involvement of different military units and commanders in the process, point to a possible qualification of these deportations and transfers as a crime against humanity.

When speaking about the possibility of qualifying the situation as a crime against humanity in terms of deportations, the element of widespread or systematic attack directed against the civilian population should be considered.

“Attack directed against a civilian population” means a course of conduct involving the multiple commission of acts listed in article 7, paragraph 1, of the Rome Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The policy in this case means that the State or organization actively promotes or encourages such an attack against a civilian population.¹⁰⁴

The second report of the OSCE Moscow mechanism noted that patterns of violent acts violating international human rights law became more evident.¹⁰⁵ As previously mentioned, the UN Independent International Commission of Inquiry on Ukraine indicated that certain violations, committed by the Russian side, might amount to crimes against humanity.¹⁰⁶ The number of cases of forcible transfer and deportation already recorded by various organisations, including ZMINA, also indicate a pattern. These cases share common characteristics, especially regionally (in certain regions, depending on local circumstances, slightly varying

101 Stephanie Liechtenstein, ‘How the OSCE helps collect evidence of potential war crimes in Ukraine’, Security and Human Rights Monitor, 12 June 2023, available at: <https://www.shrmonitor.org/how-the-osce-helps-collect-evidence-of-potential-war-crimes-in-ukraine/> (last accessed 27 July 2023).

102 Report of the OSCE Moscow Mechanism’s mission of experts entitled ‘Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022’, OSCE, 13 April 2022, available at: <https://www.osce.org/odihr/515868> (last accessed 27 July 2023).

103 *Supra* n. 14, Article 8 (2) (a) (vii)-1 War crime of unlawful deportation and transfer.

104 *Supra* n. 15, p. 4.

105 *Supra* n. 85, p. 4.

106 *Supra* n. 27.

patterns were developed). The fact that all the necessary legal and practical infrastructure has been built up in Russia for the people displaced arguably points to the planned nature of the act. Numerous statements by high level officials in Russia, including the President, and in the occupied territories, encouraging and highlighting the necessity of evacuations,¹⁰⁷ arguably show their involvement, as well as a single policy to enact the transfers. All the violations, those preceding displacement, often designed to make the stay in the territory people are fleeing impossible, those accompanying the displacement, such as a complex and organised system of filtration, and those following displacement also build a single pattern ensuring the displacement.

The deportation and transfer of children specifically might arguably also amount to genocide as an act of transferring children from one group to another.¹⁰⁸ In the context of this violation, the elements that require deliberation are the intent to destroy, in whole or in part, that national, ethnical, racial or religious group as such and the fact 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.¹⁰⁹

The reports currently available on the study programs Ukrainian children are enrolled in, involving re-education and military propaganda, the failure to observe the obligation to search for relatives in Ukraine and actively preventing the return of children,¹¹⁰ the fact children are placed under guardianship in Russian families and granting Russian citizenship to Ukrainian children¹¹¹ indicate the intention to sever their ties to Ukraine and prevent their return in the future. The fact that there were no attempts to transfer children from occupied territories to the territory of Ukraine under the control of Ukrainian government and the refusal to inform Ukraine or any of the international organisations with a mandate to assist these children¹¹² arguably highlight this intent.

10. Conclusions and recommendations

Forcible transfer and deportation is a continuing crime - every day Russia carries out forcible displacements/transfers of Ukrainians within the occupied territories or to its own territory. While there is progress in documenting and advancing justice for this crime, the non-repetition and restitution parts of the accountability process are lagging behind.

The reason for this is largely the lack of access to the deported people in Russia and Russia's refusal to perform its obligations thereto. Considering that the Ukrainian authorities have very limited options to see Ukrainians in Russia, a more significant involvement from organisations with a relevant mandate and a presence in Russia is needed. UN Entities and Bodies, such as the UN High Commissioner for Refugees, and other international

107 *Supra* ns. 11, 32, 33 and 64; 'Kherson authorities announce forced evacuation in Kakhovka district from 6 November', Kommersant, 1 November 2022, available at: <https://www.kommersant.ru/doc/5646214> (last accessed 25 July 2023).

108 Article 2 (e), Convention on the Prevention and Punishment of the Crime of Genocide (1948).

109 *Supra* n. 14, Article 6 (e) Genocide by forcibly transferring children.

110 Prof. Veronika Bilkova, Dr. Cecilie Hellestveit and Dr. Elina Šteinerte, 'Report on violations and abuses of international humanitarian and human rights law, war crimes and crimes against humanity, related to the forcible transfer and/or deportation of Ukrainian children to the Russian Federation', p. 1, OSCE, 28 April 2023, available at: <https://www.osce.org/files/f/documents/7/7/542751.pdf> (last accessed 25 July 2023).

111 *Supra* n. 27, para. 102.

112 *Supra* n. 110, p.1: "To date, neither this Mission nor the Ukrainian authorities have been able to establish even a list of the children concerned, let alone their whereabouts, despite having approached the Russian authorities with such requests".

organisations, such as the International Committee of the Red Cross, should mobilize efforts in order to help identify and support deported people still in Russia and unable to leave on their own. Through their own systems, or through their partner connections in the country, they should be able to monitor the places Ukrainians are brought to, as well as assist them in returning to Ukraine or leaving to third countries.

Another issue is the excessive documentation without practical follow-up steps. Recently the OSCE Moscow Mechanism was invoked again; it examined reports of the Russian Federation's forcible transfer and deportation of Ukraine's children.¹¹³ Moreover, the crime of forcible transfer and deportation, concerning children in particular, as well as adults, has been documented extensively by both Ukrainian non-governmental organisations and international organisations. In fact, as explained, the ICC has already started an investigation into the matter, with no updates on the topic since. However, the focus at the moment should shift to devising practical ways of assisting the people who were deported. For this, information on the issue from Russian authorities is essential. However, reports from both the OSCE Moscow Mechanism and the UN Independent International Commission of Inquiry on Ukraine demonstrate that the Russian authorities are not cooperating in providing such information.

This does not mean, however, that there is no role for organisations such as the OSCE. In fact, the OSCE has a uniquely wide regional composition, including countries that share a border with Russia, and is one of the few organisations Russia still participates in, unlike the Council of Europe. This makes the OSCE a viable option to be the basis or at least provide a platform for the creation of a repatriation system.

With the lack of public communication on the status of the ICC investigation into the topic it is hard to determine which further developments to expect. Not to mention the apprehension of the international judiciary in dealing with the crime of genocide due to its complexity and high standard of proof. The possible indicators for the crime of genocide in terms of the forcible transfer of children from a group to another group, however, are growing. Russian practices are not limited to transferring Ukrainian children to Russian territory and enrolling them in local schools. Ukrainian children are also placed in Russian families, and Russian legislation continues to make the process of changing their citizenship easier, arguably permanently removing them out of their national group. Taking this into account, the ICC charge of a war crime of deportation evolving into a genocide charge is not unforeseeable. In turn, a charge like this might be a better catalyst to mobilize the international efforts in establishing a mechanism to return the children. While this issue is more in the spotlight compared to others, the efforts to condemn and pressure Russia into stopping the practice are not yet truly international. While the support of the European countries, as well as of the US and Canada, is extremely important, Central and South American states, as well as African and Asian states adding pressure on Russia might be the deciding factor.

It is important to note that the return of forcibly transferred and deported Ukrainians is a time sensitive issue. While less attention is focused on the adults that were deported, they also suffer the longer they remain without assistance. The longer people stay in Russia, the harder it is for them to enter countries bordering Russia, such as Estonia, as mentioned above. The security concerns the Estonian side has need to be addressed in a way that does not make the return of deported people through that border impossible.

Time is also of essence for people with disabilities, who were receiving care in specialised institutions and

113 *Ibid.*

were deported to Russia and those, who were detained or serving a sentence. They cannot return on their own due to their status. For Ukrainian citizens in Russian penitentiary or detention institutions it is also a matter of safety and the threat of subsequent violations, unlawful convictions and inhumane treatment.

It is moreover critical to return children as soon as possible, as they keep being separated from their parents or other relatives, as well as their community. The constant change of situation, as they are displaced from familiar territory to another country, placed in different institutions or put under guardianship in a Russian family, is psychologically detrimental to the child. The adverse impact of being surrounded by Russian narratives and propaganda cannot be ignored. The danger of adoption, which would make it impossible to identify and return the child later, is immense – there are already two¹¹⁴ known facts of adoption of Ukrainian children by Russian families. Much more might be not public.

Therefore, there should be constant pressure on Russia to cease the violations and perform its obligations in terms of providing information on the deported people and returning them. The Resolution adopted by the UN General Assembly on 23 February 2023 on Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine¹¹⁵ calls for the return of all deported civilians. The subsequent efforts within the UN, but also within the OSCE and other relevant organisations, should be focused on putting pressure on Russia to comply with its obligations, as well as devising a way to make sure people are actually returned.



114 That woman chose them and will bring them to Mocsow'. The head of 'Just Russia' Sergey Mironov and his new wife adopted a child kidnapped from Ukraine and changed his identity, Important stories, 23 November 2023, available at: <https://istories.media/stories/2023/11/23/mironov-i-deti/>; Investigation: how kidnapped children from Ukraine are adopted. Exclusive material from TV Rain, TV Rain, 27 April 2024, available at: <https://www.youtube.com/watch?v=I5DOIA81RO8> (last accessed 19 June 2024)

115 Resolution 'Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine' adopted by the General Assembly on 23 February 2023, available at: <https://digitallibrary.un.org/record/4004933?ln=en> (last accessed 25 July 2023).



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Netherlands Helsinki Committee
Het Nutshuis
Riviervismarkt 4
2513 AM The Hague
The Netherlands

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