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Genocide in Ukraine – Present Justiciability

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Preface

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Contents

List of Abbreviations

ASR: Draft Articles on the Responsibility of States for Internationally Wrongful Acts

CRC: Convention on the Rights of the Child

ECOSOC: Economic and Social Council

ECtHR: European Court of Human Rights

EP: European Parliament

FCC: Federal Constitutional Court (i.e., of the FRG)

FRG: Federal Republic of Germany (Bundesrepublik Deutschland)

FRY: Federal Republic of Yugoslavia

GA: General Assembly (i.e., of the UN)

GC: Convention on the Prevention and Punishment of the Crime of Genocide

GC-IV: Geneva Convention (IV), relating to the Protection of Civilian Persons in Time of War of 12 August 1949

GCs-API: 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

ICC: International Criminal Court

ICJ: International Court of Justice

ICPA: International Centre for the Prosecution of the Crime of Aggression against Ukraine

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the Former Yugoslavia

ILC: International Law Commission

IMT: International Military Tribunal

JDC: Jerusalem District Court

OPG: Office of the General Prosecutor (Офіс Генерального Прокурора)

PCCR: Presidential Commissioner for Children's' Rights (i.e., of the RF)

PRF: President of the Russian Federation

RF: Russian Federation

SC: Security Council (i.e., of the UN)

UN: United Nations

UNC: Charter of the United Nations

Ukrainian SSR: Ukrainian Soviet Socialist Republic

USSR: Union of Soviet Socialist Republics

VCLT: Vienna Convention on the Law of Treaties

Preface

This study concerns criminalised and punishable acts under the Genocide Convention and their consequences under International Law in the context of alleged genocide in Ukraine. In the introduction, the 2022 Invasion of Ukraine by the Russian Federation is framed as a reflex of the historical relationship between coloniser and colonised, with specific reference being made to arguable historical acts of genocide committed by the Union of Soviet Social Republics in the Ukrainian Soviet Socialist Republic with the intent to destroy the Ukrainian national group, such as the Holodomor. By then focusing on whether the alleged forcible transfer of children of the Ukrainian national group to the Russian national group committed in Ukraine since 24th February 2022 by the Russian Federation, its organs, and officials, is justiciable as the crime of genocide under Art. II(e) Genocide Convention, and thus punishable under Art. III, and gives rise to State responsibility under International Law, this study clarifies the law thereon, establishes the facts, determines whether they fit the standards of the law, and then examines the consequences that could be drawn by treating the following questions of law and of fact: what the thresholds for the *actus reus* & *mens rea* elements of the act criminalised under Art. II(e) and acts punishable under Art. III are under the Genocide Convention and in light of the case-law of the International Court of Justice, International Criminal Court, International Criminal Tribunal for the former Yugoslavia, and International Criminal Tribunal for Rwanda (§B.I); what the rules for the attribution of conduct to a State are, and how this gives rise to State responsibility under International Law (§B.II); whether there is *prima facie* evidence for conduct fulfilling both the *actus reus* and *mens rea* (*general* and *specific*, volitional and cognitive, intent) elements of the act criminalised under Art. II(e) since 24th February 2022 in Ukraine by the Russian Federation, its organs, and officials (§C.I–II); whether there is therefore *prima facie* evidence for conduct comprising (a) punishable act(s) under Art. III (§C.III); and whether this conduct can be attributed to the Russian Federation and therefore give rise to State responsibility under Public International Law for the Russian Federation (§D.I) and for Third States (§D.II). These questions are then concluded upon, against established case-law and in light of reconsiderations thereof discussed (§E), in which it is argued that the alleged forcible transfer of children from the Ukrainian to Russian national group since 24th February 2022 by the officials and organs of the Russian Federation is justiciable as an act criminalised under Art. II(e) Genocide Convention, and thus punishable under Art. III, giving rise to State responsibility under International Law, and the – limited implementable and enforceable – legal consequences thereof.

"[…] genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group […] with the aim of annihilating the groups themselves."

Raphael Lemkin (Axis Rule in Occupied Europe, p. 79)

A. Introduction

This study concerns criminalised and punishable acts under the Genocide Convention (GC) and their consequences under International Law in the context of alleged genocide in Ukraine. By focusing on whether the alleged forcible transfer of children of the Ukrainian national group to the Russian national group committed in Ukraine since 24th February 2022 by the Russian Federation (RF), its organs, and officials is justiciable as the crime of genocide under Art. II(e) GC,[1] and thus punishable under Art. III, and gives rise to State responsibility under International Law, this study clarifies the law thereon, establishes the facts, determines whether they fit the standards of the law, and then examines the consequences that could be drawn by treating the following questions of law and of fact: what the thresholds for the *actus reus* and *mens rea* elements of the act criminalised under Art. II(e) and acts punishable under Art. III are under the GC and in light of the case-law of the ICJ, ICC, ICTY, and ICTR (§B.I); what the rules for the attribution of conduct to a State are, and how this gives rise to State responsibility under International Law (§B.II); whether there is *prima facie* evidence for conduct fulfilling both the *actus reus* and *mens rea* (*general* and *specific*, volitional and cognitive, intent) elements of the act criminalised under Art. II(e) since 24th February 2022 in Ukraine by the RF, its organs, and officials (§C.I–II); whether there is therefore *prima facie* evidence for conduct comprising (a) punishable act(s) under Art. III (§C.III); and whether this conduct can be attributed to the RF and therefore give rise to State responsibility under Public International Law for the RF (§D.I) and for Third States (§D.II). These questions of law and fact are then concluded upon, and their ensuing insights and implications are analysed (§E).

[1] A question already engaged with in academic discourse, see in particular: *Ioffe*, J. Genocide Res. 2023, p. 1; *Azarov et al.*, J. Int. Crim. Justice 2023, p. 1, esp. pp. 29–31; *Conflict Observatory*, Russia's Systematic Program for the Re-education and Adoption of Ukraine's Children, ⟨https://hub.conflictobservatory.org/portal/apps/sites/#/home/pages/children-camps-1/⟩ (last accessed on 21/6/23); *Schabas*, J. Int. Crim. Justice 2022, p. 843; *Bisset*, Russia's Forcible Transfer of Children, ⟨https://lieber.westpoint.edu/russias-forcible-transfer-children/⟩ (last accessed on 27/6/23); *Regional Center for Human Rights & Lemkin Institute for Genocide Prevention*, Communication Pursuant to Article 15 of the Rome Statute of the International Criminal Court, ⟨https://lemkininstitute.com/single-post/the-lemkin-institute-coauthors-communication-to-the-icc-against-the-russian-federation-for-genocide⟩ (last accessed on 21/6/23); *New Lines Institute for Strategy and Policy & Raoul Wallenberg Centre for Human Rights*, An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention, ⟨https://newlinesinstitute.org/russia/an-independent-legal-analysis-of-the-russian-federations-breaches-of-the-genocide-convention-in-ukraine-and-the-duty-to-prevent/⟩ (last accessed on 21/6/23), esp. pp. 34–35.

I. Legal Subjects and Historical Relationships

With the dissolution of the Russian Empire following the February Revolution of 1917, a modern State taking the name Ukraine emerged from a series of governates, which had been occupied, annexed, and colonised by the Russian Empire since the 18th century.[2] Following the October Revolution, leading to the eventual triumph of the Union of Soviet Socialist Republics (USSR) in the Russian Civil War, the Ukrainian People's Republic declared independence in January 1919.[3] This independence ended with the formal integration of the Ukrainian Soviet Socialist Republic (Ukrainian SSR) into the USSR as a founding member in 1922.[4] Despite its quasi-State status, i.e., neither fully sovereign nor self-governing, the Ukrainian SSR was a founding member of the UN. By 26th December 1991, the *de facto* dissolution of the USSR had been formalised.[5] Under International Law, Ukraine, a fully sovereign State since 24th August 1991,[6] is considered the successor State of the Ukrainian SSR,[7] just as the RF, constituted as a sovereign State on 12th December 1991, is considered the successor State of the USSR.[8]

Throughout the 20th century, then, there was a pattern of Ukrainian efforts towards autonomy and independence responded to with Russian efforts towards re-occupation, re-annexation, and re-colonisation. While this was assumed to have ended with the dissolution of the USSR, it in fact re-emerged in 2014 with the occupation, annexation, and colonisation of Crimea by the RF, and the attempt at the same in the Donetsk and Luhansk Oblasts of Ukraine (Donbas). While the ideological dynamics – monarchical absolutism under the Russian Empire, communist totalitarianism under the USSR, and nationalist authoritarianism under the RF[9] – are distinct, the historical context of the 2022 Invasion of Ukraine by the RF is profound.[10] The relationship between coloniser and colonised is often characterised by conduct that under contemporary International Law would be deemed crimes against humanity or even genocide.[11] The relationship between the USSR and Ukrainian SSR during the 20th century is no different.

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[2] See *Reid*; *Plokhy*, esp. pp. 201–213.
[3] See *Plokhy*, esp. pp. 215–227; *Wilson*, esp. pp. 119–128.
[4] See *Plokhy*, esp. pp. 229–244; *Szporluk*, pp. 1–27; *Wilson*, esp. pp. 129–134.
[5] See *Plokhy*, esp. pp. 318–324.
[6] See *Szporluk*, pp. 315–319; *Wilson*, esp. pp. 152–171.
[7] See *USSR*, Treaty on the Formation of the USSR (Договор об образовании Союза Советских Социалистических Республик), ⟨https://rusconstitution dot /library/constitution/articles/1246/⟩ (last accessed on 2/8/23).
[8] Albeit *de facto*, by consensus (in the absence of objections from UN MSs or UN organs) on account of the RF declaring in the Alma Ata Protocol its intention, supported by the Commonwealth of Independent States, to take the USSR's permanent seat on the UN SC (State succession), despite the fact that the Alma Ata Declaration had declared that the USSR had ceased to exist (State dissolution), see *Blum*, Eur. J. Int. Law 1992, pp. 354–361.
[9] See *Ramani*, p. 27.
[10] See, e.g., *Labuda*, Yale. J. Int. Law, fc., p. 1.
[11] Consider, e.g., the series on "Colonial Crimes" in *Justice Info*, Hour of Reckoning for Colonial Crimes, ⟨https://justiceinfo.net/en/78778-hour-of-reckoning-for-colonial-crimes.html⟩ (last accessed on 3/8/23).

A terror campaign of Stalinist purges sought to 'Russify' and 'Sovietise' the Ukrainian SSR by suppressing, assimilating, and destroying – 'de-Ukrainianising' – the Ukrainian national group[12] during the 1920s and 1930s through killing, deportation (i.e., forcible transfer), and forced labour (i.e., deliberately inflicting conditions calculated to bring about *physical* destruction). That campaign culminated in the Holodomor,[13] a man-made famine perpetrated in the Ukrainian SSR from Spring 1932 to Spring 1933 in which forced collectivisation of agriculture, requisitioning of yields, deportation or liquidation of the peasantry, and restrictions on internal travel – all imposed by the USSR – combined to cause the deaths of millions;[14] and, as *Lemkin* concluded, if this process of 'de-Ukrainianisation', 'Russification', and 'Sovietisation' had been completed: "Ukraine [would have been] as dead as if every Ukrainian were killed".[15]

Thus, notwithstanding that the GC does not have retroactive effect[16] and that the retroactive justiciability of genocide under Customary International Law is without precedent,[17] considering past conduct in the historical relationship between the predecessor States of the RF and Ukraine that has been deemed to constitute genocide, such as the Holodomor,[18] serves to contextualise historically the conduct committed by the RF in Ukraine since 24th February 2022.

II. Criminalising Genocide

1. Lemkin's Law

When *Lemkin* compounded *geno-* from Ancient Greek *genos*, meaning "race" or "tribe", with *-cide* from Latin *-cidium*, a suffix derived from *caedere* meaning "to kill", he did so to describe

[12] *Lemkin*, in: National Museum of the Holodomor-Genocide (ed.), p. 47, p. 47; *Antonovych*, Actual Problems of International Relations 2020, p. 54, p. 58.
[13] Голодомор, derived from мори́ти го́лодом, "to exterminate through starvation".
[14] *Lemkin*, in: National Museum of the Holodomor-Genocide (ed.), p. 47, pp. 49–50.
[15] ibid., p. 51.
[16] As discussed in *Tams/Berster/Schiffbauer* (eds.), pp. 24–26, §§44–49, the temporal scope of application of the GC is evident from wording of Arts. I, II, V, VIII, and IX GC, in light of Art. 11 & Art. 24, considering also Art. 22 and Arts. 28–29 VCLT (§A.IV).
[17] While the temporal scope of application of the GC is a different question to the existence of a *jus cogens* (peremptory) norm against genocide under Customary International Law, as discussed in *Tams/Berster/Schiffbauer* (eds.), pp. 23–24, §43, there is neither such a norm predating the GC, nor one with retroactive effect.
[18] In academic discourse consider, e.g., *Lemkin*; *Snyder*, pp. 42–46; *Applebaum*; *Antonovych*, The Holodomor-Genocide and the Ongoing Russian Genocide in Ukraine, ⟨https://jean-monnet- saar.eu/?page_id=70⟩ (last accessed on 3/8/23). In political discourse consider, e.g., EP, *European Parliament resolution of 15 December 2022 on 90 years after the Holodomor: recognising the mass killing through starvation as genocide* (2022/3001(RSP)), OJ C 177, 17/5/2023, pp. 112–114, and a Resolution of the German Parliament, see *Giegerich*, Verhütung, Erinnerung, Aufarbeitung und Sühnung historischer und aktueller Völkermordverbrechen, ⟨https://jean-monnet-saar.eu/?page_id=254332⟩ (last accessed on 3/8/23), p. 1 fn. 3 – one among 30 States in total, see *Holodomor Museum*, Worldwide Recognition of the Holodomor as Genocide, ⟨https://holodomormuseum.org.ua/en/recognition-of-holodomor-as-genocide-in-the-world/⟩ (last accessed on 3/8/23).

"barbarous practices reminiscent of the darkest pages of history" being perpetrated in 20th century Europe[19] – especially in the regions in which he once lived; what is now Belarus (Bezwodne), Poland (Białystok), and Ukraine (Lviv). Yet, he also intended fully that the criminalisation of genocidal acts serve as a warning to those who might think to commit them in future.

Lemkin characterised genocide as having two phases: the destruction of the oppressed group's "national pattern", through political, social, cultural, economic, biological, physical, religious, and/or moral destruction, followed by the imposition of the national pattern of the oppressor – whether in times of peace or of war.[20] Such acts were to be criminalised not only because it is considered an afront to humanity dignity to target individuals based on their group membership and to target a group for annihilation, but also because the destruction of a group "results in the loss of its future contributions to the world".[21]

2. Drafting the Convention

Following the Nuremberg Tribunals, the founding of the UN, and years of activism by Lemkin,[22] the political will for the criminalisation of "genocide" crystallised. In its Resolution of 11th December 1946, the UN GA not only defined genocide as "a denial of the right of existence of entire human groups", whether racial, religious, political or otherwise, and thus as a crime whose perpetrators and accomplices should be punished, irrespective of whether they are private or public individuals, it also *affirmed* that genocide *is* a crime under International Law,[23] *requesting* that the Economic and Social Council (ECOSOC) draft a *Convention on the Crime of Genocide*, and *inviting* Member States (MSs) to enact national legislation to *prevent* and *punish* the crime.

During the ensuing discussions on what became the *Secretariat Draft*, [24] a tripartite characterisation of genocide – "physical", "biological", and "cultural"[25] –, was formulated with the clear object and purpose to prevent the destruction of racial, national, linguistic, religious or political groups (Art. I(I)) by criminalising acts directed against such groups whose purpose

[19] So *Lemkin*, p. 90.
[20] *Lemkin*, p. 79, pp. 82–90, and p. 93.
[21] ibid., p. 91.
[22] The inexhaustible nature of his particular will is captured in *Power*, pp. 17–78 and *Sands*.
[23] UN GA Res 96(I) *The Crime of Genocide* of 11/12/1946, UN Doc. A/RES/96(I), invoked in case-law even following the entry into force of the GC, e.g., in ICJ, *Reservations*, Advisory Opinion of 18 May 1951.
[24] UN ECOSOC Res E/447 *Draft Convention on the Crime of Genocide* of 26/6/1947, UN Doc. E/447 (1947).
[25] Physical: acts intended to cause the death of members of a group, or injuring their health or physical integrity (Art. I(II)(1)); biological: measures aimed at the extinction of a group of human beings by systematic restrictions on births (Art. I(II)(2)); cultural: the destruction by brutal means of the specific characteristics of a group (Art. I(II)(3)), see ibid., pp. 25–26.

is to destroy them in whole or in part, or to prevent their preservation or development (Art. I(II)).

However, this formulation neither survived the observations of MSs invited following the *Secretariat Draft*'s submission, nor the subsequent *Ad Hoc* Drafting Committee.[26] In fact, the *Ad Hoc* Committee proceeded instead with an entirely new draft submitted by the Republic of China,[27] which sought to incorporate not only 10 points of response added by the USSR,[28] but further alternative drafts submitted by France[29] and the USA.[30] The resulting *Ad Hoc Committee Draft*[31] of 24th May 1948, which – notably – removed a provision on universal jurisdiction,[32] was then edited further by the Sixth Committee during the UN GA's Third Session. The Sixth Committee removed, inter alia, the category of "cultural" genocide[33] and the "political group" as a subject to be protected,[34] while adding a duty *to prevent* without defining its scope.[35]

The completed drafting[36] (1st December 1948), unanimous adoption (9th December 1948), and entry into force (12th January 1951) of the *Convention on the Prevention and Punishment of the Crime of Genocide*[37] was a landmark moment in Public International Law; this is not only due to the criminalisation of genocide thereunder and the obligations of States *to prevent*, *punish*, and not commit that crime, but also because it constituted the first Human Rights Treaty drafted under the auspices of, and ratified by, the UN GA.

III. The 2022 Invasion of Ukraine by the RF

The 2022 Invasion of Ukraine ("the Invasion") by the RF refers to an escalation of eight years of aggression[38] into a full-scale invasion constituting an international armed conflict through

[26] Established by UN GA Res. 180(II) *Draft convention on genocide* of 21/11/1947, UN Doc. A/RES/180(II).
[27] UN ECOSOC Ad Hoc Committee on Genocide E/AC.25/9 *Draft Articles for the inclusion in the convention on genocide proposed by the delegation of China on 16 April 1948* of 16/4/1948, UN Doc. E/AC.25/9.
[28] UN ECOSOC Ad Hoc Committee on Genocide E/AC.25/7 *Basic principles of a convention on genocide* of 7/4/1948, UN Doc. E/AC.25/7.
[29] UN ECOSOC E/623/Add.1 *Genocide, France: Draft Convention on Genocide* of 5/2/1948, UN Doc. E/623/Add.1.
[30] UN ECOSOC E/662 *Genocide, United States of America: Proposal* of 12/2/1948, UN Doc. E/662.
[31] UN ECOSOC Ad Hoc Committee on Genocide E/794 *Report of the Committee and Draft Convention Drawn Up by the Committee* of 24/5/1948, UN Doc. E/794.
[32] See the discussion thereof in *Tams/Berster/Schiffbauer* (eds.), p. 11, §20.
[33] UN GA Sixth Committee A/C.6/SR.83 *Eighty-third meeting* of 25/10/1948, UN Doc. A/C.6/SR.83, p. 206.
[34] UN GA Sixth Committee A/C.6/SR.128 *Hundred and twenty-eighth meeting* of 29/11/1948, UN Doc. A/C.6/SR.128, pp. 663–664.
[35] UN GA Sixth Committee A/C.6/SR.68 *Sixty-eighth meeting* of 6/10/1948, UN Doc. A/C.6/SR.68, p. 51.
[36] UN GA Sixth Committee A/C.6/SR.132 *Hundred and thirty-second meeting* of 1/12/1948, UN Doc. A/C.6/SR.132.
[37] UN GA Res 260(III) *Prevention and Punishment of the Crime of Genocide* of 9/12/1948, UN Doc. A/RES/3/260.
[38] Comprising firstly the formal annexation of Crimea by the RF (22/2 to 16/3/14) and secondly an insurgency and proxy war in the Donbas instigated by irregular forces sponsored (from in part to in whole) by the RF from April 2014. The former constitutes the crime of aggression under Art. 3(g), the latter under Art. 3(a) UN GA Res 3314 (XXIX) *Definition of Aggression* of 14/12/1974, UN Doc. A/RES/3314.

the formal deployment of the RF's armed forces into the sovereign territory of Ukraine from the territory of the RF and Republic of Belarus at 05:00 on 24th February 2022. On 21st February 2022, the President of the Russian Federation (PRF) addressed the RF's populace, alleging that "genocide" had been inflicted on 'Russians' in the Donbas,[39] using such as a basis for recognising the so-called Donetsk and Luhansk Peoples' Republics ('DPR' and 'LPR'). Two days later, the Permanent Representative of the RF to the UN SC repeated these allegations, adding that the RF seeks the "demilitarization and denazification of Ukraine".[40] When the full-scale invasion of Ukraine by the RF's armed forces began the following day, the PRF claimed that the "special military operation" was motivated to stop the "genocide of millions" of 'Russians' in the Donbas, invoking Art. 51 UNC as the legal basis "to demilitarise and denazify Ukraine"[41] – apparently in 'defence' of the 'DPR' and 'LPR'. Seven months into the Invasion, the RF illegally annexed four Oblasts of Ukraine[42] – Donetsk, Kherson, Luhansk, and Zaporizhzhia[43] – that it continues to occupy illegally in part.[44] Although this has legal effect neither under Ukrainian (Art. 73 Constitution of Ukraine) nor under International Law,[45] these "Temporarily Occupied Territories"[46] (TOTs) are therefore those over which the RF not only exerts *effective control* and *de facto* jurisdiction in part, but also claims *de jure* jurisdiction and territorial sovereignty in whole.[47] The RF therefore also incurs State responsibility under International Law for its actions in the TOTs (Art. 2 2nd sent. & Arts. 47–78 GC-IV). That the Invasion constitutes the crime of aggression,[48] and that war crimes[49] have been and are being

[39] *PRF*, Address by the PRF (21/2/2022), ⟨http://en.kremlin dot /events/president/news/67828⟩ (last accessed on 15/7/23).
[40] *Nebenzia*, Statement and Reply by Permanent Representative Vassily Nebenzia at UNSC Briefing on Ukraine, ⟨https://russiaun dot /en/news/230222un⟩ (last accessed on 15/7/23).
[41] *PRF*, Address by the PRF (24/2/2022), ⟨https://en.kremlin dot /events/president/news/67843⟩ (last accessed on 15/7/23).
[42] Thereby highlighting how the RF's claim that it exercised force in order to protect the right to self-determination of the 'DPR' and 'LPR' under Art. 51 UNC lacks credibility. This study does not include in its scope the TOT of the Autonomous Republic of Crimea, which was illegally occupied and annexed before the Invasion, see *PRF*, The Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea, ⟨https://en.kremlin dot /events/president/news/20604⟩ (last accessed on 27/6/23), from which Ukrainian children have also been forcibly transferred, see *Ukrinform*, Russia began deporting Ukrainian children in occupied Crimea in 2015 – Lubinets, ⟨https://ukrinform.net/rubric-society/3711068-russia-began-deporting-ukrainian-children-in-occupied-crimea-in-2015-lubinets.html⟩ (last accessed on 27/6/23).
[43] *PRF*, Signing of treaties on accession of Donetsk and Lugansk people's republics and Zaporozhye and Kherson regions to Russia, ⟨http://en.kremlin dot /events/president/news/69465⟩ (last accessed on 15/7/23).
[44] A UN SC Resolution of 30th November failed to pass due to the veto of the RF, whereas an earlier UN GA Resolution of 7th October did pass, albeit with only some three quarters of States fulfilling their obligations under International Law to not recognise the illegal annexation, pursuant to Art. 41(2) ASR, see UN GA Res ES-11/L.5 *Territorial integrity of Ukraine* of 7/10/2022, UN Doc. A/ES-11/L.5.
[45] Art. 5(3) UN GA Res 3314 (XXIX) *Definition of Aggression* of 14/12/1974, UN Doc. A/RES/3314.
[46] Derived from the Ukrainian Тимчасово окупована територія України, with the same meaning in the singular.
[47] *PRF*, (fn. 43).
[48] Art. 3(a) UN GA Res 3314 (XXIX) *Definition of Aggression* of 14/12/1974, UN Doc. A/RES/3314.
[49] *OPG of Ukraine*, Office of the Prosecutor General (Офіс Генерального Прокурора), ⟨https://gp.gov.ua/⟩ (last accessed on 19/6/23).

committed during the Invasion, seems beyond question; contentious has proven the debate over whether the crime of genocide has been and is being committed by the RF, and it is this contention which is taken up in this study.

IV. Applicable Law

The *Convention on the Prevention and Punishment of the Crime of Genocide*[50] (GC) was approved by the UN GA on 9th December 1949 and entered into force on 12th January 1951.[51] As successor States to the USSR and Ukrainian SSR, both of which were signatories, the RF and Ukraine are Contracting Parties without Reservation.[52] The scopes of application of the GC comprise: the material duties *to prevent* and *not to commit* criminalised acts under Arts. I–II and *to punish* and *not to commit* punishable acts under Arts. I & III; the personal of its Contracting Parties under Treaty-based law (Art. 1) and all States under Customary International Law (see below); the territorial of having no territorial limitation (evident from the wording of Art. I);[53] and the temporal of acts committed after its entry into force (i.e., Contracting Parties are bound *pro futuro*) (evident from the wording of Arts. I–II, V, and VIII–IX).[54]

The *Statute of the International Court of Justice* (ICJ Statute) entered into force on 24th October 1945. The RF and Ukraine are both bound by the ICJ Statute by nature of the USSR and Ukrainian SSR being Original Members,[55] although neither have recognised the compulsory jurisdiction of the Court under Art. 36(2).[56] Art. IX GC provides the legal basis for a Contracting Party to file a claim in respect of a dispute with "any" other Contracting Party concerning alleged violations of the GC relating to its interpretation, application, or fulfilment. Thus, in any dispute under the GC between the RF and Ukraine, the ICJ has jurisdiction under Art. 36(1) ICJ Statute, as in the ongoing *Allegations of Genocide* case.[57]

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[50] See *UN*, Treaty Series, Vol. 78, p. 277.
[51] *UN Treaty Collections*, Convention on the Prevention and Punishment of the Crime of Genocide, ⟨https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en⟩ (last accessed on 8/6/23).
[52] See *UN*, Treaty Series, Vol. 190, p. 381 and Vol. 201, p. 368, respectively. Earlier reservations to Art. IX were withdrawn in 1989, see *UN*, Multilateral Treaties deposited with Secretary-General, Vol. 1, Chap. IV, 1. Human Rights, ⟨https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-1.en.pdf⟩ (last accessed on 19/6/23), p. 11, fn. 23.
[53] *Tams* in *Tams/Berster/Schiffbauer* (eds.), pp. 64–65, §§74–75.
[54] *Tams/Berster/Schiffbauer* (eds.), pp. 23–27, §§42–49.
[55] *ICJ*, States entitled to appear before the Court, ⟨https://icj-cij.org/states-entitled-to-appear⟩ (last accessed on 19/6/23).
[56] *ICJ*, Declarations recognizing the jurisdiction of the Court as compulsory, ⟨https://icj-cij.org/declarations⟩ (last accessed on 19/6/23).
[57] ICJ, *Ukraine vs. Russian Federation*.

The *Rome Statute of the International Criminal Court* (RS) entered into force on 1st July 2002. Neither the RF nor Ukraine are Contracting Parties.[58] However, pursuant to Art. 12(3), Ukraine has twice accepted the Court's jurisdiction over alleged crimes committed on its territory for the purpose of identifying, prosecuting, and judging the perpetrators and accomplices of acts criminalised under Art. 5[59] – including, thereby, the crime of genocide (Art. 5(a)). The scopes of application of the RS comprise: the material of international crimes (Art. 5, and Arts. 6–8bis);[60] the personal of natural persons within the jurisdiction of the Court (Arts. 25–28; 30); the territorial of, inter alia,[61] the territory of the Contracting Parties, nationals of Contracting Parties, or Contracting Parties that have accepted the Court's jurisdiction over alleged crimes (Art. 4(2) & Art. 12); the temporal of crimes committed after entry into force (i.e., Contracting Parties are bound *pro futuro*) (Art. 11 & Art. 24, considering also Art. 22 and Art. 29).

To aid the interpretation of the foregoing treaty-based law, Art. 31 of the *Vienna Convention on the Law of Treaties* (VCLT) of 23rd May 1969, to which both the RF and Ukraine are Contracting Parties with Reservations registered by the USSR and Ukrainian SSR,[62] may not be applied retroactively (Art. 4) as treaty-based rules under Public International Law, but instead as rules reflecting Customary International Law.[63]

The international legal status of the crime of genocide as a binding norm of Customary International Law has been confirmed by the ICJ:[64] the principles underlying the GC are "binding on States, even without any conventional obligation", the GC enshrines rights and obligations owed *erga omnes*,[65] and the norm prohibiting genocide is a *jus cogens* (peremptory)

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[58] *UN Treaty Collections*, Rome Statute of the International Criminal Court, ⟨https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en⟩ (last accessed on 19/6/23).

[59] For the First Declaration, covering the period from 21/11/13 to 22/2/14, see *Embassy of Ukraine*, First Recognition of the Jurisdiction of the International Criminal Court, ⟨https://icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf⟩ (last accessed on 19/6/23). For the Second Declaration, covering the period from 20/2/14, see *Minister for Foreign Affairs of Ukraine*, Second Recognition of the Jurisdiction of the International Criminal Court, ⟨https://icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine⟩ (last accessed on 19/6/23).

[60] Although, due to a peculiarity of the Kampala amendments, unlike Arts. 6–8, a State which is not a Contracting Party cannot be prosecuted for the Crime of Aggression (Art. 8bis) under the RS (Art. 15bis(5)) unless referred by the UN SC (Art. 15ter), which is blocked due to the veto of the RF.

[61] As well as through Contracting Party referral under Art. 13(a) in conjunction with Art. 14, UN SC referral under Art. 13(b), or Prosecutor instigation under Art. 13(c) in conjunction with Art. 15.

[62] *UN Treaty Collections*, Vienna Convention on the Law of Treaties, ⟨https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en⟩ (last accessed on 19/6/23).

[63] ICJ *Kasikili/Sedudu Island*, Judgment of 13 December 1999, §18; ICJ, *Territorial Dispute*, Judgment of 3 February 1994, §41; ICJ, *Oil Platforms*, Judgment of 12 December 1996, §23; *Villiger*, pp. 439–440, §§37–39.

[64] ICJ, *Reservations*, Advisory Opinion of 18 May 1951, p. 23.

[65] ICJ, *Bosnia*, Judgment of 11 July 1996, §31.

norm.[66] That the provisions of the GC constitute Customary International Law, *jus cogens*, and obligations owed *erga omnes* was also upheld by the *ad hoc* Tribunals.[67]

Regarding the responsibility of States under Public International Law, the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (ARS), prepared by the ILC and adopted by the UN GA on 12th December 2001,[68] comprise a non-binding, but highly authoritative,[69] soft-law document providing secondary rules of State responsibility governing the consequences of a non-performance or breach of primary rules under Treaty-based and Customary International Law.

B. The Crime of Genocide under Public International Law

I. The Genocide Convention

The GC itself is concise, containing a preamble reiterating the substance of GA Res. 96(I)[70] followed by 19 relatively brief articles of which the first nine provide the substantive and procedural provisions that: genocide *is a crime* under International Law, which can be perpetrated *during war and peace*, and is to be *both prevented and punished*, and implicitly *not committed* (Art. I); the crime of genocide combines both *mens rea* (Art. II 1st sent.) and *actus reus* (Art. II lits. a-e) elements; a series of independent acts are punishable (Art. III); perpetrators *shall be punished* (Art. IV); Contracting Parties *undertake to give effect* to the Convention in their national legal orders (Art. V); individuals charged *shall be tried* in the *locus delicti* or by an international tribunal (Art. VI); extradition is an obligation (Art. VII); Contracting Parties may call upon UN organs *to prevent and suppress* genocide (Art. VIII); and disputes relating to the *interpretation*, *application* or *fulfilment* of the GC are justiciable before the ICJ (Art. IX).

In what follows, this section treats the questions of law of what the thresholds for the *actus reus* and *mens rea* elements of the act criminalised under Art. II(e) and acts punishable under Art. III are under the GC, and in light of the case-law of the ICJ, ICC, ICTY, and ICTR.

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[66] ICJ, *Armed Activities*, Judgment of 3 February 2006, §64; ICJ, *Bosnia*, Judgment of 26 February 2007, §161.
[67] ICTR, *Akayesu* TC, Judgement of 2 September 1998, §495; ICTY, *Jelisić* TC, Judgement of 14 December 1999, §60; ICTY, *Karadžić* TC, Judgement of 24 March 2016, §539.
[68] UN GA Res 56/83 *Responsibility of States for internationally wrongful acts* of 28/1/2002, UN Doc. A/RES/56/83.
[69] The legal status of the ARS, as subsidiary means for the determination of the rules of law (secondary rules), is governed by Art. 38(1) lit. d ICJ Statute.
[70] UN GA Res 96(I) *The Crime of Genocide* of 11/12/1946, UN Doc. A/RES/96(I). That is, that genocide *is* a crime under international law, which has inflicted great losses on humanity, and that to liberate mankind from genocide, international co-operation is required.

1. Art. I

Art. I operationalises the title of the GC, comprising a bipartite functionality: firstly through operating by way of *renvoi*, whereby subsequent implementing provisions (Arts. IV–VIII) clarify the scope of Art. I; secondly through its autonomous legal meaning that binds[71] Contracting Parties during peacetime and war with two explicit positive and one implicit negative obligation(s): (i) the duty *to prevent*[72] (i.e., to preclude Art. II–III acts); (ii) the duty *to punish*[73] (i.e., perpetrators of Art. III acts); and (iii) the duty *to not commit* Art. II–III acts.[74]

2. Art. II

Art. II defines genocide as any of the acts listed in lits. a–e committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Thus, the crime of genocide comprises an *objective, material* element of an *actus reus* as well as a *subjective, mental* element of a *mens rea*. That *mens rea* requires both the *general* intent to commit the *objective, material* element of an *actus reus* and the *dolus specialis* (*specific* intent), both *volitional* and *cognitive*, to destroy the group, as such, in whole/part.

a) a national, ethnical, racial, or religious group

As Lemkin first formulated, genocidal acts are perpetrated against individuals "not in their individual capacity, but as [group] members".[75] Such national,[76] ethnical,[77] racial,[78] or

[71] For this legal meaning of the term "undertake", see ICJ, *Bosnia*, Judgment of 26 February 2007, §162.
[72] i.e., the *commission* (Art. III(e)) of criminalised Art. II acts, see *Tams* in *Tams/Berster/Schiffbauer* (eds.), p. 50, §42. The scope thereof is clarified by Art. VIII and was confirmed in *Bosnia* to not be territorially limited, see ICJ, *Bosnia*, Judgment of 26 February 2007, §§183–184.
[73] The scope thereof is determined in Arts. IV–VII.
[74] Although not stated explicitly, this obligation can be inferred according to the rules on the Interpretation of Treaties (Arts. 31–33 VCLT), which apply to the GC not retroactively as Treaty law, but as norms of Customary International Law, see ICJ *Kasikili/Sedudu Island*, Judgment of 13 December 1999, §18. This has since been confirmed in ICJ, *Bosnia*, Judgment of 26 February 2007, §166 & §179. What's more, *Tams* highlights that inter-State proceedings under Art. IX require State responsibility, which could only result from the commission of a wrongful act, in turn prohibiting – as arguable *e contrario* – such an act, see *Tams/Berster/Schiffbauer* (eds.), pp. 57–58, §60. This was confirmed in ICJ, *Bosnia*, Judgment of 26 February 2007, §182.
[75] *Lemkin*, p. 79.
[76] "a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties", see ICTR, *Akayesu* TC, Judgement of 2 September 1998, §512 citing ICJ, *Nottebohm*, Judgment of 6 April 1955, p. 23, which may include national minorities (especially those recognised in a State's constitutional order), see ICTR, *Akayesu* TC, Judgement of 2 September 1998, §702; ICTY, *Krstić* TC, Judgement of 2 August 2001, §559.
[77] "a group whose members share a common language or culture", as defined in ICTR, *Akayesu* TC, Judgement of 2 September 1998, §513.
[78] a group sharing "hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors", as defined in ibid., §514.

religious[79] group identities – listed exhaustively[80] – are usually based on characteristics defined by birth and hard to change. Yet, group membership can be both *actual* ('objective') or *perceived* (subjective),[81] so long as this derives from a positive identity association, i.e., presence of actual/perceived common characteristics, rather than a negative one, i.e., the absence thereof.[82]

b) in whole or in part

This criterion relates not to the result of the committed acts, but to the intent of the perpetrator.[83] Contentious is nevertheless whether the "part" targeted must pass a – non-defined – threshold. In *Bosnia*,[84] the ICJ introduced three factors for passing this threshold, while caveating that they are not exhaustive and that the criterion of "substantiality" is the most critical:[85] (i) the intent must be to destroy "at least a substantial part", because only the destruction of a substantial part would have a "significant enough" impact on the group;[86] (ii) the perpetrators' control of an area must be *sufficient* for the opportunity available to commit to be *significant*;[87] (iii) the part targeted must be *prominent* within the group[88] – assessed qualitatively, rather than quantitatively.[89] In *Krstić*, the Trial Chamber held that the "part" must be a "distinct part", rather than merely an accumulation of individuals.[90] Finally, the "part" can be territorially bound, as it was, for example, during certain historical genocides by killing.[91]

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[79] Tautologous, so *Kreß*, Int. Crim. Law Rev. 2006, p. 461, p. 479, 'definitions' include that group "members share the same religion, denomination or mode of worship", as defined in ICTR, *Akayesu* TC, Judgement of 2 September 1998, §515.

[80] Problematic, then, is the broadening of the scope to socio-political groups by the ECtHR, engendering 'ethno-political' genocide, consider *Žilinskas*, Drėlingas v. Lithuania (ECHR): Ethno-Political Genocide Confirmed?, ⟨https://ejiltalk.org/drelingas-v-lithuania-echr-ethno-political-genocide-confirmed/⟩ (last accessed on 8/6/23).

[81] As adopted in ICTY, *Jelisić* TC, Judgement of 14 December 1999, §240, following the subjective-objective categorisation in ICTY, *Krstić* TC, Judgement of 2 August 2001, §557.

[82] As held in, e.g., ICTY, *Jelisić* TC, Judgement of 14 December 1999, §§71–72; ICTY, *Stakić* AC, Judgement of 22 March 2006, §§16–27; ICTY, *Karadžić* TC, Judgement of 24 March 2016, §541.

[83] *Schabas*, p. 277.

[84] ICJ, *Bosnia*, Judgment of 26 February 2007, §§198–201, adopted in ICC, *Al Bashir* PTCI, Decision of 4 March 2009, §146.

[85] i.e., the number itself is the starting, not end-point of the inquiry, see ICTY, *Krstić* AC, Judgement of 19 April 2004, §12. Note Kreß's criticism of "expansive case-law", such as the finding in ICTY, *Krstić* AC, Judgement of 19 April 2004, §37, that Srebrenica constitutes genocide despite targeting only "part of a part" of a population, within an already restricted territorial "part", see *Kreß*, Int. Crim. Law Rev. 2006, p. 461, pp. 491–492.

[86] As supported in ICTY, *Krstić* AC, Judgement of 19 April 2004, §§8–12 with references, and ICTY, *Karadžić* TC, Judgement of 24 March 2016, §555.

[87] As supported in ICTY, *Krstić* AC, Judgement of 19 April 2004, §13 with references.

[88] As maintained in ICTY, *Krstić* AC, Judgement of 19 April 2004, §12 & §587.

[89] As supported in ICTY, *Krstić* AC, Judgement of 19 April 2004, §14 with references.

[90] ICTY, *Krstić* TC, Judgement of 2 August 2001, §590. The "special significance" that "part" may play in the group is also deciding, see ICTY, *Sikirica et al.* TC, Judgement of 3 September 2001, §80, as was ruled to have occurred at Srebrenica, see ICTY, *Krstić* TC, Judgement of 2 August 2001, §595.

[91] e.g., Armenians within the territories of the Ottoman Empire, Jews in Axis occupied Europe, and Tutsis in Rwanda. This was upheld by the ICTY for a "limited geographic zone" or a "geographically limited part of the

c) as such

Genocide is not 'simply' an aggravated hate crime. Thus, the formulation "as such" stresses that the intent must be to destroy the group,[92] i.e., perpetrators do not simply target individuals because of their (actual/perceived) group membership,[93] but in order to destroy the group.

d) to destroy (*actus reus*)

Dominant in case-law,[94] soft-law,[95] and academic discourse[96] is that Art. II acts are reserved for those intended to bring about the *physical* or *biological* destruction of a group. This is maintained principally by reference to the explicit exorcising of Lemkin's category of "cultural" genocide from the GC during the drafting process (§A.II). Indeed, in *Krstić*, the Trial Chamber decided that extending the notion of genocide to *social* destruction would breach the principle of *nullum crimen sine lege* which "limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group".[97] Subsequently, the ICJ also held that the scope of the GC is limited to *physical* or *biological* destruction.[98]

There are, however, five principal problems with this majority view, based on (i) the *ordinary meaning*, (ii) *object and purpose*, (iii) *interpretation*, (iv) and *wording* of the law,[99] as well as on (v) the *norms* on treaty interpretation – whereby, as noted in §A.IV, Arts. 31–33 VCLT may not be applied retroactively to the GC as Treaty-based rules under Public International Law, but instead as rules reflecting Customary International Law.

The first, based on the *ordinary meaning* of the law,[100] is that, as held by the ICJ in accordance with Customary International Law and as reflected in Art. 31(1) VCLT, interpretation "must be based above all upon the text of the treaty"[101] – in its context and in

larger group", see ICTY, *Jelisić* TC, Judgement of 14 December 1999, §83 and ICTY, *Krstić* TC, Judgement of 2 August 2001, §590, respectively, and by the ICJ, see ICJ, *Bosnia*, Judgment of 26 February 2007, §199.

[92] ICJ, *Bosnia*, Judgment of 26 February 2007, §187.

[93] As held in ICTR, *Niyitegeka* AC, Judgement of 9 July 2004, §53, ICJ, *Bosnia*, Judgment of 11 July 1996, §187, and in ICTY, *Karadžić* TC, Judgement of 24 March 2016, §551 – as was originally intended, see UN GA Sixth Committee A/C.6/SR.77 *Seventy-seventh meeting* of 18/10/1948, UN Doc. A/C.6/SR.77, p. 131.

[94] "The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group.", see ICTY, *Krstić* AC, Judgement of 19 April 2004, §25; ICTY, *Karadžić* TC, Judgement of 24 March 2016, §553. Compare similar in ICTR, *Semanza* TC, Judgement of 15 May 2003, §315.

[95] The *ILC* concluded from the *travaux préparatoires* that "the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, cultural or other identity of a particular group", see *ILC*, Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996, YbILC 1996 Vol. II(2), pp. 45–46, §12.

[96] See, e.g., *Schabas*, pp. 270–273, and *Kreß*, Int. Crim. Law Rev. 2006, p. 461, p. 487, who both concluded such from the *travaux préparatoires*.

[97] ICTY, *Krstić* TC, Judgement of 2 August 2001, §580.

[98] ICJ, *Croatia*, Judgment of 3 February 2015, §136.

[99] Reflecting Art. 31(1), Art. 31(2–4), and Art. 32 VCLT, respectively – albeit not as Treaty-based rules under Public International Law (Art. 4), but as rules reflecting Customary International Law (§A.IV).

[100] *Villiger*, pp. 426–427, §§9–10.

[101] ICJ, *Territorial Dispute*, Judgment of 3 February 1994, §41.

light of its object and purpose. There is nothing in the text of the GC that restricts the definition of destruction to the *physical* and *biological*, and – as will be seen – the text rather suggests the contrary.

The second, based on *the object and purpose* of the law,[102] as raised, inter alia, by *Kreß*[103]and *Berster*,[104] is that the primary rationale behind prohibiting genocide was to prevent "great losses to humanity" (Preamble GC). Given that both the *social* destruction, and arguably dissolution, of a group, and not only its *physical* or *biological* destruction, would result in comparable social/cultural/linguistic loss, the *effet utile* of the GC requires that forms of destruction, and arguably also dissolution, be considered beyond those of *physical* or *biological* destruction. To do so would not be the same as extending the scope of the GC to those acts caught by Lemkin's formulation of "cultural" genocide, because other forms of destruction, or dissolution, would still be caught as consequences of the "biological" acts criminalised under Art. II(d–e) as well as the "physical" act criminalised under Art. II(b). Unsurprisingly, the Federal Constitutional Court (FCC) of the Federal Republic of Germany (FRG) has highlighted how, given *the object and purpose* of §6(1) VStGB, drawn directly from Art. II GC, is to protect the social existence of a group, 'the intention to destroy the group' is thus 'already broader than the physical-biological destruction according to the natural literal sense' of the wording of the law.[105]

The third, based on *the interpretation* of the law, is that neither the *physical* nor *biological* destruction of a group could occur exclusively through causing mental harm – an act criminalised under Art. II(b).[106] *Berster* maintains[107] that the "mental harm" element can only be understood as "impairing the social interactions within the group over a period of time", i.e., that Art. II(b) requires a consideration of *social* destruction, and arguably also dissolution. Neither during the drafting nor following the conclusion of the GC, however, was an explicit agreement reached, instrument introduced, or practice established by the Committee Delegates to inform an interpretation of the term "mental harm".[108] Indeed, while a consultation of the *travaux préparatoires* makes clear that the introduction of "or mental" was intended to cover the use and effect of narcotics, first suggested in an amendment by the Delegate of the Republic

[102] *Villiger*, pp. 427–428, §§11–14.
[103] *Kreß*, Int. Crim. Law Rev. 2006, p. 461, p. 486.
[104] *Tams/Berster/Schiffbauer*, pp. 81–82, §2.
[105] FCC, *Decision of the 4th Chamber of the Second Senate of 12 December 2000*, §III(4)(a)(aa) (translated by the author). This was upheld in ECtHR, *Jorgic v. Germany*, Judgement of 12 July 2007, §§92–116, esp. §108 & §114.
[106] As highlighted by *Berster* in *Tams/Berster/Schiffbauer*, p. 81–82, §2 – a proponent of the minority view.
[107] *Tams/Berster/Schiffbauer*, p. 121, §71.
[108] As required for utilising the additional means of Treaty interpretation under Arts. 31(2–3(a–b)) & 34 VCLT, see *Villiger*, pp. 429–432, §§15–23.

of China[109] in light of the distribution of opium to the populace by the Japanese occupation forces during the Second Sino-Japanese War,[110] case-law has since interpreted "mental harm" as including numerous forms of mental harm not induced by substances.[111] Thus, the scope of acts criminalised under Art. II(b) is therefore much broader than that envisaged in the *travaux préparatoires* – a credible interpretation in line first with an Art. 31 and then only subsequently with an Art. 32 VCLT interpretation; notably, the opposite line of interpretation taken to that when the scope of *social* destruction or dissolution was considered, and subsequently excluded.

The fourth, based on *the wording* of the law, is that an argument *e contrario* is possible from the wording of Art. II(c), i.e., only Art. II(c) prohibits *physical* destruction explicitly. Thus, although the nature of the act criminalised under Art. II(a) prohibits *physical* destruction implicitly given the nature of killing, this argument *e contrario* facilitates an interpretation permitting *destruction* other than *physical* destruction as the prohibited consequence of acts criminalised under Arts. II(b), II(d), and II(e). Such an interpretation is neither otherwise excluded by the *ordinary meaning* of the treaty's law nor by its meaning in context or in light of the GC's object *and purpose*. This itself accords with the determination of the ICJ that "a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text",[112] which in the case of Art. II(c) is only possible when the absence of the term "physical" in all other provisions of Art. II also confers meaning. This rational technique must be considered as falling under the rules as reflected in Art. 31(3)(c) VCLT. Thus, any consideration of the *travaux préparatoires* is subordinate thereto.[113] When interpreting the scope of §220a StGB, now §6(1) VStGB, drawn directly from Art. II GC, the FCC has maintained how 'the intent of the perpetrator to *physically* destroy at least a substantial number of group members does not necessarily follow from the wording'[114] – derived in part from argumentation *e contrario* from §220a(1)(3) StGB, now §6(1)(4) VStGB, equivalent to Art. II(e) GC. While this interpretation goes mentioned by the ICTY, it is neither commented on nor counterargued or rebutted.[115]

[109] UN GA Sixth Committee A/C.6/232/Rev.1 *China: amendments to article II of the draft convention on genocide* (E/794) of 18/10/1948, UN Doc. A/C.6/232/Rev.1.
[110] UN GA Sixth Committee A/C.6/SR.69 *Sixty-ninth meeting* of 7/10/1948, UN Doc. A/C.6/SR.69, pp. 57–60; UN GA Sixth Committee A/C.6/SR.81 *Eighty-first meeting* of 22/10/1948, UN Doc. A/C.6/SR.81, pp. 177–179.
[111] e.g., as listed in ICTY, *Karadžić* TC, Judgement of 24 March 2016, §545, inter alia: inhumane/degrading treatment; sexual violence including rape; violent interrogation; threats of death; and forcible transfer.
[112] ICJ, *Anglo-Iranian Oil*, Judgment of 22 July 1952, p. 105.
[113] *Villiger*, pp. 445–446, §5; pp. 432–434, §§24–25.
[114] FCC, *Decision of the 4th Chamber of the Second Senate of 12 December 2000*, 2 BvR 1290/99, Rn. 1–49, §III(4)(a)(aa) (translated by the author).
[115] e.g., ICTY, *Krstić* TC, Judgement of 2 August 2001, §579.

The fifth, based on the *norms* on treaty interpretation as reflected in Arts. 31–33 VCLT is that supplementary means of interpretation (Art. 32) are applied when the meaning according to Art. 31 must be confirmed, determined, or absurd/unreasonable determinations are otherwise produced – and even then only as a supplementary means.[116] However, the cited case-law rulings on the nature of destruction, such as that by the ICJ in *Croatia* or ICTY in *Krstić*,[117] are based *exclusively* upon the *travaux préparatoires*' exorcising of "cultural" genocide, which – as also held by the Trial Chamber in *Blagojević*[118] – is nevertheless not the same as the exorcising of *non-physical/biological* destruction. What's more, the ILC's oft-cited passage from the *Draft Code of Crimes against the Peace and Security of Mankind*,[119] which maintains that the preparatory work clearly shows how "the destruction in question is the material destruction of a group either by physical or by biological means", neither explains why it explicitly states that destruction "must be taken only in its material [i.e., physical/biological] sense", nor justifies why the *travaux préparatoires* should suddenly take preference over the GC's wording – contrary to the *norms* on treaty interpretation. The *ILC* concludes that because the text of the GC does not include the concept of "cultural" genocide this is apparently the same as preventing any other types of *destruction* being read into the wording of the GC. Yet, the Sixth Committee did not in fact reject "cultural" genocide as such, but only the criminalised acts it would have encompassed under Art. III of the *Ad Hoc Committee Draft*.[120]

As raised by Judge Shahabuddeen in his Partial Dissenting Opinion in the *Krstić* Appeals Judgement, "[t]he stress placed in the literature on the need for physical or biological destruction implies, correctly, that a group can be destroyed in non-physical or non-biological ways".[121] Thus, Judge Shahabuddeen questioned why the *intent* to destroy a group in a *non-physical/biological* way would fall outside the scope of the GC so long as that *mens rea* can be ascribed to an Art. II act (*actus reus*) that is *physical*/*biological* in nature. That is, if the characteristics constituting the group were destroyed on account of an *intent ascribable* to a *physical/biological* Art. II act, it would be unconvincing to hold that such destruction is not genocide because the destruction itself was not *physical*/*biological*.[122] After all, this is not the

[116] *Villiger*, pp. 445–448, §§2–11.
[117] Illustrative is ICTY, *Krstić* TC, Judgement of 2 August 2001, §§569–580, in which the Trial Chamber jumps immediately to the *travaux préparatoires* in §576, before even considering the object and purpose, wording, and interpretation of the law itself – itself reinforced cyclically by citing the aforementioned report of the *ILC*. Much the same is true of the ICJ in *Croatia*, see ICJ, *Croatia*, Judgment of 3 February 2015, §136.
[118] ICTY, *Blagojević & Jokić* TC, Judgement of 17 January 2005, §658.
[119] See *ILC*, Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996, YbILC 1996 Vol. II(2), there pp. 45–46, §12.
[120] As raised by *Berster* in *Tams/Berster/Schiffbauer*, p. 128, §87.
[121] *Partial Dissenting Opinion of Judge Shahabuddeen* §49 in ICTY, *Krstić* AC, Judgement of 19 April 2004.
[122] ibid., §§50–51.

same as arguing for the recognition of "cultural" genocide.[123] In short, *non-physical/biological* (aka *social*) destruction may be brought about by an intent to destroy *non-physically/biologically* (aka *socially*, except in the case of Art. II(c)) through *physical/biological* Art. II acts.[124]

This distinction, between the nature of the acts committed and the intent with which they were committed, was upheld by the Trial Chamber in *Blagojević*.[125] This is perhaps unsurprising in light of an interpretation of Art. 4 ICTY Statute taken independently of the ICJ's and ILC's unconventional interpretation of Art. II GC: neither the former nor latter article – with the exception of Art. 4(c) & II(c), respectively – actually requires *an intent to destroy physically/biologically*. Indeed, in light of rape and sexual violence committed during the Rwandan genocide, the Trial Chamber in *Akayesu*, with those in *Kayishema & Ruzindana* as well as *Musema* concurring subsequently,[126] also referred to the "psychological" as well as "physical" destruction of Tutsi women, leading to the "destruction of the spirit, of the will to live, and of life itself".[127] In doing so, the Trial Chamber stressed this reinterpretation comprises a clarification of the meaning of the act of *physical/biological* destruction,[128] not a recognition of "cultural" genocide – nevertheless broadening the scope to *non-physical/biological* destruction.

On balance, it has been seen how, contrary to the majority view established in case-law and by the ILC, the *ordinary meaning*, *object and purpose*, *interpretation*, and *wording* of the law, as well as the *norms* on treaty interpretation should not exclude the criminalisation of *non-physical/biological* destruction or dissolution and intent thereto under Art. II, at least as far as acts of destruction are *physical* or *biological* in nature are concerned.[129] While the argumentation behind this minority view has been shown to be legally sound, it is, and will likely remain, a minority view. Nevertheless, when answering whether acts criminalised and punishable as genocide have been committed by the RF in Ukraine since 24th February 2022, i.e., whether the facts fit the standards of the law, this study will consider both the majority and minority views in order to establish whether distinct answers would be reached in each case.

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[123] ibid., §53.
[124] ibid., §54. By comparison, in *Croatia* the ICJ appears to have ruled the precise opposite: the criminalised acts under Art. II(b) must encompass only those carried out *with intent to destroy physically/biologically*, even if the acts themselves *do not concern physical/biological destruction*, see ICJ, *Croatia*, Judgment of 3 February 2015, §136. As stated, this is not required by the wording, but derives from an interpretation of the *travaux préparatoires*.
[125] ICTY, *Blagojević & Jokić* TC, Judgement of 17 January 2005, §659.
[126] ICTR, *Kayishema & Ruzindana* TC, Judgement of 21 May 1999, §95; ICTR, *Musema* TC, Judgement of 27 January 2000, §933.
[127] ICTR, *Akayesu* TC, Judgement of 2 September 1998, §§731–732.
[128] ICTY, *Blagojević & Jokić* TC, Judgement of 17 January 2005, §666.
[129] As in fact discussed in *Schabas*, pp. 270–273.

aa) by forcibly transferring children of the group to another group (Art. II(e))

Art. II(e) preserves aspects of both "biological" and "cultural" genocide. The forcible transfer of children[130] can be considered an act of *biological* destruction because it is comparable to terminating pregnancies and preventing reproduction,[131] yet it can also be considered an act of *social* destruction because it undermines the intergenerational socio(-cultural/-linguistic) persistence of a group,[132] and thus its long-term viability.[133] The forcible nature of transfer is not restricted to physical force, but may include the threat thereof or coercion,[134] and/or an element of deception,[135] while the transfer itself may be temporary, rather than lasting.[136]

This provision was first introduced into the *Secretariat Draft* as a means of "cultural" genocide,[137] exorcised subsequently by the Sixth Committee (§B.II), and finally reintroduced through a proposal by the Greek Delegate – explicitly as a means of not "cultural", but "physical" genocide.[138] Although neither Lemkin's tripartite categorisation of genocide nor the explicit intention of the proposing delegate ascribed this act to that category, the forcible transfer of children from one group to another is nevertheless considered an act of "biological" genocide. The provision was in fact adopted "with little substantive debate or consideration",[139] and so ambiguity as to its exact nature will remain until its scope is clarified before the ICJ.

[130] In line with Art. 1 Convention on the Rights of the Child (CRC) and Art. 6(e) ICC Elements of Crime, where Element (5) holds this to be those under 18 years of age. The group membership of children can be contentious. But, in *Bosnia*, the ICJ held that this can also be a matter of 'subjective' perception, see ICJ, *Bosnia*, Judgment of 26 February 2007, §366.

[131] As held by the ILC, see *ILC*, Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996, YbILC 1996 Vol. II(2), pp. 45–46, §12. With the same interpretation, the ICJ, however, nevertheless termed this a *physical* destruction, see ICJ, *Croatia*, Judgment of 3 February 2015, §136.

[132] Notable, as raised by *Berster* in *Tams/Berster/Schiffbauer*, p. 128, §87, is that it was not "cultural" genocide as such that was rejected by the Sixth Committee, but the acts that it would have encompassed under Art. III of the *Ad Hoc* Committee Draft.

[133] See *ILC*, Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996, YbILC 1996 Vol. II(2), p. 46, §18.

[134] Art. 6(e) ICC Elements of Crime, Element (1), fn. 5. In *Akayesu* the Trial Chamber broadened the interpretation, holding that "threats or trauma which would lead to the forcible transfer of children from one group to another" can also be caught, see ICTR, *Akayesu* TC, Judgement of 2 September 1998, §509.

[135] Note that *Berster* highlights how "in most scenarios of forcible transfer, an element of deception will also be present, such as the assertion that the children are being evacuated for humanitarian reasons or that they will be immediately returned to their parents", see *Tams/Berster/Schiffbauer*, pp. 130–131, §93.

[136] *Berster* in *Tams/Berster/Schiffbauer*, p. 130–131, §93.

[137] UN ECOSOC Res E/447 *Draft Convention on the Crime of Genocide* of 26/6/1947, UN Doc. E/447, p. 27.

[138] UN GA Sixth Committee A/C.6/SR.82 *Eighty-second meeting* of 23/10/1948, UN Doc. A/C.6/SR.82, pp. 186–189, esp. p. 189.

[139] *Schabas*, p. 201, summarised in pp. 201–202.

e) with intent (*mens rea*)

The *mens rea* – *subjective*, *cognitive* and *volitional* – element[140] of the crime of genocide consists of both *general* and *specific* intent. While *general* intent comprises that to commit any Art. II act, *specific* intent[141] is what turns the *objective*, *material* element of those Art. II acts into "genocidal" acts by providing the goal-oriented intent to destroy the group, as such, in whole/part.[142] Such intent is not, however, to be confused with personal motive.[143] As treated in §B.I.3 and §B.II, it is not States, but individuals, who commit the acts criminalised under Art. II and punishable under Art. III. Thus, for a finding of intent, such intent must first be attributable to an individual which, by nature of that individual's official status, is attributed subsequently to a State, giving rise to that State's responsibility for genocide.

aa) specific intent – volitional element of intent & cognitive element of knowledge

If, for example, it had been established in fact that an accused had transferred all 50 children of a particular national group to another group, that accused would only be held criminally responsible for committing genocide under Art. 6(e) RS if the *objective*, *material* element of the transfer had been committed *with* the *subjective*, *volitional* element of *intent* (Art. 30(2)(a) RS) to destroy that national group, as such, in whole/part,[144] as well as the *subjective*, *cognitive* element of *knowledge* such destruction would arise on account of their conduct or that it would occur in the ordinary course of events[145] (Art. 30(2)(b) & 30(3)). If the latter *subjective*, *cognitive* and/or *volitional* element were lacking, Art. 30(1) would not be fulfilled,[146] the accused would not be guilty of genocide under Art. 6(e), but instead of crimes against humanity for deportation/forcible transfer (Art. 7(1)(d)) and persecution[147] (Art. 7(1)(h)).

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[140] Termed variously as "special intent, specific intent, *dolus specialis*, particular intent and genocidal intent", see ICTY, *Karadžić* TC, Judgement of 24 March 2016, §549.

[141] Specificity being the opposite of arbitrariness, see ICTY, *Jelisić* TC, Judgement of 14 December 1999, §108, and neither accidental nor negligent, see the *Draft Code of Crimes against the Peace and Security of Mankind*, in which the *ILC* concluded from the *travaux préparatoires* that "the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, cultural or other identity of a particular group", see *ILC*, Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996, YbILC 1996 Vol. II(2), p. 20, §7.

[142] Intent is reflected further in the wording "deliberately" in Art. II(c) and "intended" in Art. II(d), blurring the boundary between *actus reus* and *mens rea* elements, as seen for the wording "as such" in §B.I.2.c.

[143] Although the existence of a personal motive does not exclude the holding of genocidal intent, see ICTY, *Jelisić* AC, Judgement of 5 July 2001, §49; ICTY, *Stakić* AC, Judgement of 22 March 2006, §45; ICTY, *Karadžić* TC, Judgement of 24 March 2016, §554.

[144] This goal-oriented approach was held in ICTR, *Akayesu* TC, Judgement of 2 September 1998, §498, ICTY, *Jelisić* AC, Judgement of 5 July 2001, §46, and ICTY, *Karadžić* TC, Judgement of 24 March 2016, §549.

[145] As confirmed in the *Darfur Report*, see UN SC S/2005/60 *Report of the International Commission of Inquiry on Darfur to the Secretary-General* of 1/2/2005, UN Doc. S/2005/60, §491.

[146] As elaborated in ICTY, *Blaškić* AC, Judgement of 29 July 2004, §§41–42.

[147] The distinction is laid out in ICTY, *Kupreškić et al.* TC, Judgement of 14 January 2000, §686 and ICC, *Al Bashir* PTCI, Decision of 4 March 2009, §§141–145.

bb) inferring intent – from words or deeds, facts and circumstances

In the absence of a confession, or direct, explicit evidence, it is not possible to establish definitively whether a perpetrator harbours such intent.[148] Thus, intent can instead be inferred "either from words or deeds",[149] and from "facts and circumstances"[150] – by "all of the evidence, taken together".[151] However, where an inference needs to be drawn on a perpetrator's state of mind, the ICJ sets a very high threshold, so much so that "it has to be the only reasonable inference available on the evidence",[152] i.e., "for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that *it could only point to the existence of such intent*"[153] (emphasis added) – slightly reformulated that "in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question".[154] Thereby, according to the ICJ, it is not 'simply' a matter of demonstrating *specific* intent, but *eliminating any other possible explanation* for the commission of an act other than such *specific* intent.[155]

In establishing such, the factors that are relevant include, inter alia, the: general context; perpetration of other culpable acts; scale of atrocities; systematic targeting of group members based on their group membership; repetition of destructive/discriminatory acts against group members; existence of a plan/policy;[156] display of intent through public speeches/meetings;[157] systematic expulsion/forcible transfer of group members;[158] attacks on cultural/religious property/symbols of the group;[159] as well as the co-occurrence of several of these.[160]

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[148] ICTR, *Akayesu* TC, Judgement of 2 September 1998, §523.
[149] ICTR, *Kayishema & Ruzindana* TC, Judgement of 21 May 1999, §93.
[150] ICTY, *Jelisić* AC, Judgement of 5 July 2001, §47; ICTR, *Hategekimana* AC, Judgement of 8 May 2012, §133; ICTY, *Karadžić* TC, Judgement of 24 March 2016, §550.
[151] ICTY, *Stakić* AC, Judgement of 22 March 2006, §55.
[152] ICTY, *Vasiljević* AC, Judgement of 25 February 2004, §120, ICTY, *Brđanin* TC, Judgement of 1 September 2004, §970, and ICTY, *Popović et al.* AC, Judgement of 30 January 2015, §517, confirming ICTY, *Vasiljević* TC, Judgement of 29 November 2002, §68 and ICTY, *Krstić* AC, Judgement of 19 April 2004, §42, and in turn confirmed by the ICJ in ICJ, *Croatia*, Judgment of 3 February 2015, §148.
[153] ICJ, *Bosnia*, Judgment of 26 February 2007, §373.
[154] ICJ, *Croatia*, Judgment of 3 February 2015, §148.
[155] *Schabas*, (fn. 1), p. 850.
[156] ICTY, *Jelisić* AC, Judgement of 5 July 2001, §§47–48; ICTR, *Hategekimana* AC, Judgement of 8 May 2012, §133 (absent a plan/policy); ICTY, *Karadžić* TC, Judgement of 24 March 2016, §550.
[157] For these, see ICTY, *Karadžić* TC, Judgement of 24 March 2016, §550, and note in particular ICTR, *Gacumbitsi* AC, Judgement of 7 July 2006, §43 and ICTR, *Kajelijeli* TCII, Judgement of 1 December 2003, §§531–532, ICTR, *Kamuhanda* AC, Judgement of 19 September 2005, §§81–82, and ICTY, *Tolimir* AC, Judgement of 8 April 2015, §745, respectively.
[158] ICTY, *Krstić* AC, Judgement of 19 April 2004, §33 & §133; ICTY, *Blagojević & Jokić* AC, Judgement of 9 May 2007, §123; ICTY, *Karadžić* TC, Judgement of 24 March 2016, §553 – maintained in ICJ, *Bosnia*, Judgment of 26 February 2007, §190.
[159] ICTY, *Krstić* TC, Judgement of 2 August 2001, §580; ICTY, *Karadžić* TC, Judgement of 24 March 2016, §553; ICJ, *Croatia*, Judgment of 3 February 2015, §§386–390 – upholding ICJ, *Bosnia*, Judgment of 26 February 2007, §344.
[160] ICJ, *Croatia*, Judgment of 3 February 2015, §130.

3. Art. III

The GC provides for five forms of conduct by which a perpetrator incurs criminal responsibility. Art. III(a) concerns the *commission* of genocide itself, while Arts. III(b–e) concern the "other acts" referred to in Arts. IV–IX: the three *inchoate* offences, by nature of which subsequent *commission* is unnecessary,[161] of *conspiracy*, direct and public *incitement*, and *attempt* (relating to the *preventative* purpose of the GC), and the *accessory liability* offence of *complicity*.

The scope of Art. III(a) is provided in Art. II. However, as treated in §B.II, this can be problematised in so far as Art. II is formulated in such a way that the *actus reus* elements are those which would be committed by subordinates,[162] while the *mens rea* element is that which might only be held by superiors – and thereby not necessarily *also* by subordinates. Thus, a finding of Art. III(a) requires a consideration of the attribution of individual criminal responsibility's interaction with State responsibility by nature of a State's control of the perpetrator.

Preventing *conspiracy* (Art. III(b)) seeks to prevent *commission*. Conspiracy is defined as an agreement (*material* element) by at least two persons whose object is commission (Art. III(a)).[163] That *material* element requires both *intent* (*volitional* element) and *knowledge* (*cognitive* element).[164] It is not possible to find *conspiracy* to commit Arts. III(c–e). In the case of *inducement*, i.e., stirring *conspiracy*, Art. 30(2)(b) RS requires *knowledge* that commission will occur in the ordinary course of events – excluding the concept of *dolus eventualis*[165] – and thus that there is a substantial likelihood that it will occur.[166] The distinction between *complicity* and *indirect perpetration* is thereby a question of control.[167]

Preventing *incitement* (Art. III(c) GC) also seeks to prevent *commission*. A failure to *incite* does not preclude criminal responsibility.[168] A perpetrator must *directly*[169] and *publicly*[170]

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[161] ICTR, *Akayesu* TC, Judgement of 2 September 1998, §562; ICTY, *Tolimir* TC, Judgement of 2 December 2012, §786; ICTR, *Nahimana et al.* AC, Judgement of 28 November 2007, §678.
[162] Except in the case of Art. II(c) acts, as discussed by *Berster* in *Tams/Berster/Schiffbauer*, pp. 147–148, §130.
[163] ICTR, *Nahimana et al.* AC, Judgement of 28 November 2007, §894; ICTR, *Seromba* AC, Judgement of 12 March 2008, §218; ICTY, *Tolimir* TC, Judgement of 2 December 2012, §785.
[164] ICTR, *Musema* TC, Judgement of 27 January 2000, §192; ICTR, *Nahimana et al.* AC, Judgement of 28 November 2007, §894; ICTY, *Tolimir* TC, Judgement of 2 December 2012, §§786–787.
[165] ICC, *Lubanga* TC, Judgement of 14 March 2012, §1011.
[166] ICTY, *Kordić & Čerkez* AC, Judgement of 17 December 2004, §112.
[167] As discussed by *Berster* in *Tams/Berster/Schiffbauer*, p. 176, §45.
[168] ICTR, *Akayesu* TC, Judgement of 2 September 1998, §562.
[169] Whereby a direct line can be drawn between *incitement* and *commission*, see ICTR, *Nzabonimana* TCIII, Judgement of 31 May 2012, §1752; ICTR, *Nahimana et al.* AC, Judgement of 28 November 2007, §§698-701; ICTR, *Akayesu* TC, Judgement of 2 September 1998, §§557–558.
[170] Whereby *incitement* was expressed before, or made available to, an indeterminate plurality of persons, as opposed to a determinate number of private persons, see ICTR, *Kalimanzira* TCIII, Judgement of 22 June 2009, §515; ICTR, *Akayesu* TC, Judgement of 2 September 1998, §§556–559.

incite commission (*actus reus*), with the *intent* to do so (*mens rea*),[171] where there is a sufficient risk of *commission* occurring.[172] Hallmarks of *incitement* include: accusation in a mirror;[173] dehumanisation; and condoning/congratulating violence against the group.[174] Factors affecting *incitement* include the: speaker's influence; audience's susceptibility and conditioning; historical and social context; vulnerability of the targeted group; and availability of alternative sources.[175]

Constituting the stage between *conspiracy* (whether following or preceding *incitement*) and *commission*, preventing *attempt* (Art. III(d) GC) also prevents *commission*. *Attempt* is defined through its *material* element of an action commencing *commission* (Art. 25(3)(f) RS) and its *subjective* element of *intent* as for other punishable Art. III acts.

Complicity is distinct from the preceding three punishable Art. III acts because *complicity* is predicated upon an Art. III(a) offence, i.e., the *commission* of an Art. II act. That is, there can be no liability for *complicity* without *commission*, whereby the degree of accessoriness between an accessory and perpetrator raises the questions of criminal attribution treated in §B.II. In *Krstić*,[176] the Appeals Chamber held that an accomplice need not share the *specific* intent of a perpetrator, only *know* of it, thereby establishing *complicity* as the only punishable Art. III act that unambiguously does not require the *specific* intent element of the crime of genocide. Thus, the Trial Chamber in *Furundžija* defined "aiding and abetting" (aka *assistance*) as comprising the *actus reus* elements of assistance, encouragement, or support that has a "substantial effect" on commission and the *mens rea* elements of *knowledge* that such acts assist *commission*.[177]

4. Art. IV

Art. IV provides that perpetrators[178] *shall be punished*, irrespective of their status – operationalising the title by providing an autonomous legal meaning and linking the substantive and procedural provisions of the GC itself. That is, when read in combination with the duty *to legislate* (Art. V) and duty *to prosecute* (Art. VI), the duty *to punish* (Art. IV) provides a Treaty-based exception to immunity at both the national and international level.[179]

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[171] ICTR, *Nahimana et al.* AC, Judgement of 28 November 2007, §677; ICTR, *Akayesu* TC, Judgement of 2 September 1998, §560.
[172] *Berster* in *Tams/Berster/Schiffbauer*, p. 172, §35.
[173] ICTR, *Akayesu* TC, Judgement of 2 September 1998, §§99–100.
[174] ibid., §90; §148; §156.
[175] ibid., §§557–558; ICTR, *Nahimana et al.* AC, Judgement of 28 November 2007, §§698–700; ICTR, *Kalimanzira* TCIII, Judgement of 22 June 2009, §514.
[176] ICTY, *Krstić* AC, Judgement of 19 April 2004, §140.
[177] ICTY, *Furundžija* TC, Judgement of 10 December 1998, §249.
[178] Although "persons" might seem to suggest that both natural and legal persons could be punished, the specifications provided in other articles make it clear that only natural persons could be meant.
[179] So *Schiffbauer* in *Tams/Berster/Schiffbauer*, pp. 215–216, §74.

The wording is unequivocal, neither mentioning immunity nor distinguishing between immunities *ratione materiae* and *ratione personae*. What's more, it provides for no discretion on the part of Contracting Parties, providing instead that they are obliged to punish – any impunity being in breach of this obligation. Contradictory legislation in the national legal orders of Contracting Parties must therefore either be disapplied or annulled[180] – reflecting how Art. V's positive obligation *to legislate* is paired with a negative obligation not to recognise immunity.

While the ICJ has remained notably strict with regards its rulings on immunities *ratione materiae* and *ratione personae* under Customary International Law,[181] the Court actively distinguishes Customary from Treaty-based Public International Law.[182] That is, the presence of jurisdiction is not equivalent to the absence of immunity, and vice versa; even where Treaty-based obligations to prosecute grant jurisdiction, this does not negate immunities under Customary International Law. Be that as it may, State Parties to the GC and/or RS have, by nature of becoming Contracting Parties, "disclosed their *opinio juris* that immunity for international crimes such as genocide is inapplicable".[183] In doing so, the ICJ has admitted that even the Troika, who would otherwise enjoy immunity *ratione personae*, "*may be subject* to criminal proceedings before *certain* international courts"[184] (emphasis added). Disapplying immunities under the GC would therefore be for the ICJ to decide. A State-based waiver of immunity is found in, e.g., the ICTY Statute (Art. 7(2) & 7(4)), ICTR Statute (Art. 6(2) & 6(4)), and ICC Statute (Art. 27(1–2)), which all explicitly exclude the mitigation of punishment on account of a perpetrator's official status. What's more, a 'core crimes exception' to immunities in international criminal proceedings is now considered part of Customary International Law.[185]

5. Art. IX

Art. IX provides the legal basis for a claim to be brought before the ICJ by "any" Contracting Party regarding a dispute over the "interpretation, application or fulfilment" of the GC, including concerning the responsibility of a State for genocide or any of the punishable Art. III

[180] *Schiffbauer* in *Tams/Berster/Schiffbauer*, p. 200, §37. Art. 27 VCLT clarifies that a provision of national law cannot be invoked as a basis for non-compliance with Treaty-based obligations under International Law.
[181] ICJ, *Arrest Warrant*, Judgment of 14 February 2002, §58; ICJ, *Jurisdictional Immunities of the State*, Judgment of 3 February 2012, §95.
[182] ICJ, *Arrest Warrant*, Judgment of 14 February 2002, §59.
[183] *Schiffbauer* in *Tams/Berster/Schiffbauer*, pp. 208–209, §58.
[184] ICJ, *Arrest Warrant*, Judgment of 14 February 2002, §61.
[185] As recognised by the ICTY in ICTY, *Karadžić* TC, Decision of 16 May 1995, §§23–24; ICTY, *Blaškić* AC, Decision of 29 October 1997, §41; ICTY, *Furundžija* TC, Judgement of 10 December 1998, §140.

acts. As such, this provision provides the primary rule for addressing State responsibility under Treaty-based Public International Law for a State's failure to fulfil its obligations under the GC.

II. Attributing Responsibility for Genocide

The GC is a curious instrument in so far as it binds States to not commit acts that could only be committed by its officials or organs. As introduced in §B.I.2.e, while the attribution of a criminalised act to an individual gives rise to that individual's responsibility under International Criminal Law, it is the attribution of that individual's conduct to a State, by nature of their official status, that gives rise to that State's responsibility under Public International Law.

1. Individual Responsibility

The purpose-[186] vs. knowledge-based[187] approaches to the *mens rea* element delineate whether it is necessary that a perpetrator *act with the intent* to contribute to the goal-oriented destruction of a group or whether it is sufficient that they *know the intent behind*, and therefore goal of, the campaign to which they are contributing *is* such destruction.[188] That is, in short, whether an individual who lacks the goal-oriented *intent* of destruction may nevertheless be held criminally responsible for the *commission* of genocide, and whether this is as a principal or associate.[189]

For the purposes of this study, it serves to consider specifically the second variant of the *Joint Criminal Enterprise* (aka "common purpose") doctrine, which offers a *subjective* approach to criminal attribution – a concept of co-perpetration[190] differing from that based on Art. 25(3)(a) RS by nature of being devised by the ICTY Appeals Chamber based on Art. 7 ICTY Statute[191] – subsequently adopted also by the ICTR. All forms of this doctrine have since been found to be rooted in Customary International Law, and thus applicable in this study.[192] JCE requires three *material* elements: (i) a common criminal purpose (ii) shared by a plurality

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[186] Elaborated by the Trial Chamber in *Akayesu*: "special intent […] demands that the perpetrator clearly seeks to produce the act charged", see ICTR, *Akayesu* TC, Judgement of 2 September 1998, §498. Yet, this judgement is inconsistent with itself: "The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.", see ibid., §520, as well as ICTY, *Jelisić* AC, Judgement of 5 July 2001, §45; ICTR, *Rutaganda* AC, Judgement of 26 May 2003, §524; ICTY, *Krstić* AC, Judgement of 19 April 2004, §134. Note also the *Darfur Report*, see UN SC S/2005/60 *Report of the International Commission of Inquiry on Darfur to the Secretary-General* of 1/2/2005, UN Doc. S/2005/60, §491.

[187] First elaborated in *Greenawalt*, Columbia Law Rev. 1999, p. 2259.

[188] As elaborated by *Kreß*, Int. Crim. Law Rev. 2006, p. 461, p. 492.

[189] e.g., in *Krstic*, the Appeals Chamber held that the accused had *knowledge*, but not *intent*, and so he was not guilty as principal perpetrator, see ICTY, *Krstić* AC, Judgement of 19 April 2004, §134.

[190] Co-perpetration (aka *commission with another*) describes the *horizontal* attribution of criminal responsibility, whereby an offence is caused by the combined, mutual, and co-ordinated contributions of members of a collective, see ICC, *Lubanga* TC, Judgment of 14 March 2012, §994.

[191] ICC, *Lubanga* PTCI, Decision of 29 January 2007, §323.

[192] ICTY, *Tadić* AC, Judgement of 15 July 1999, §220.

of persons (iii) to which an accused perpetrator contributed significantly, and which took place.[193]

JCEII (*systemic* JCE) describes a common criminal purpose organised systemically, i.e., usually through a concentration/detention camp,[194] whose criminalised acts can be attributed to anyone furthering that system. Comparable to co-perpetration under Art. 25(3)(a) RS, JCEII thereby permits criminal attribution as co-perpetrators to subordinates lacking the *specific* intent to destroy the group, so long as they had *knowledge* of that goal and acted to further it.[195] JCEII attributes *all* individual crimes that occur in the ordinary course of the operation of a system to *each* participant.[196] The *mens rea* element can thereby be proven or inferred directly from an accused's position in that system's hierarchy.[197]

Without committing any Art. II acts themselves, superiors might not be charged with *commission*, but instead *conspiracy* (Art. III(b)), *incitement* (Art. III(c)), and *complicity* (Art. III(e)) – as well as *attempt* (Art. III(d)), if they had attempted but failed to commit an Art. II act. However, there is also often a moral imperative that superiors be charged with *commission* (Art. III(a)), which is only possible by attributing the acts of their subordinates to them.[198] The approach favoured in this study follows that of *Amos*,[199] by which, in order to characterise an individual as a principal or associate, a distinction is to be made between the *intent* (*volitional*) and *knowledge* (*cognitive*) elements of the *mens rea* defining the criminalised acts under Art. II, as well as between the *forms* of participation defining the punishable acts under Art. III: while an intent-based approach – focusing on the *volitional* element – is required for superiors, a knowledge-based approach – focusing on the *cognitive* element – must suffice for subordinates; while in the case of superiors a *volitional* element is required for principal forms of perpetration – direct, co-, or indirect perpetration, as well as conspiracy, incitement, and attempt all require *intent*, but complicity does not –, in the case of subordinates the *cognitive* element always suffices.

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[193] ICTY, *Brđanin* AC, Judgement of 3 April 2007, §430.
[194] *Berster* in *Tams/Berster/Schiffbauer*, p. 147, §128.
[195] ICTY, *Tadić* AC, Judgement of 15 July 1999, §203.
[196] *Berster* in *Tams/Berster/Schiffbauer*, pp. 188–189, §74.
[197] ICTY, *Tadić* AC, Judgement of 15 July 1999, §220.
[198] As advocated by *Ambos* through a structure- and knowledge-based approach, see *Ambos*, Int. Rev. Red Cross 2009, p. 833. In response to *Studt*'s rebuttal thereof, see *Studt*, The Necessity of a Structural Investigation into the Cultural Genocide in Ukraine, ⟨https://voelkerrechtsblog.org/the-necessity-of-a-structural-investigation-into-the-cultural-genocide-in-ukraine/⟩ (last accessed on 20/6/23), it should be stressed that *Studt*'s conclusion is based on precisely no engagement with the question of identifying *principals* vs. *associates*, itself fundamental to the question of *purpose*- (*intent*-) vs. *knowledge-based* approaches.
[199] *Ambos*, Int. Rev. Red Cross 2009, p. 833, p. 854; 858.

2. State Responsibility

In light of the Nuremberg Tribunal's judgement that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced",[200] Nuremberg Principle I[201] enshrines individual criminal responsibility for acts proscribed under International Law. Art. I GC in turn enshrines how acts perpetrated by individuals can be attributable to a State by nature of that person's official status. There is no *criminal* responsibility or liability of States – indeed, the GC's drafting committees were keen not to enshrine such a principle.[202] Instead, State responsibility for the internationally wrongful act of genocide flows from ascribing to a State the criminalised acts committed by individuals,[203] whether within a *de jure* (Art. 4 ASR), *de facto* (Art. 5), or lent (Art. 6) State organ, or when otherwise directed by a State (Art. 8),[204] and even if committed *ultra vires* (Art. 7). In short, the principal factor for determining State responsibility for a genocidal act is a State's control over its perpetrator(s).[205]

If a State is found in breach of its obligations *to prevent*, *to punish*, or *not to commit* genocide, this constitutes an internationally wrongful act (Art. 2 ASR). Under the primary rules of substantive International Law, a violation of the GC gives rise to State responsibility before the ICJ under Art. IX for a breach of Arts. I & III (primary rule).[206] Under the secondary rules of State responsibility, this also gives rise to the obligation to end that violation of both a Treaty-based rule (Art. 30 ASR) – and thus provide reparations therefor (Arts. 31 & 34 in conjunction with Arts. 35–39) – and of a *jus cogens* (peremptory) norm (Arts. 12–13) of Customary International Law (Art. 40) (secondary rule).[207]

A Third State may also be found in breach of its obligations under the GC for failing *to prevent* or *to punish*, which also gives rise to State responsibility before the ICJ under Art. IX (primary rule), as well as the obligation to bring to an end the violation of a *jus cogens* (peremptory) norm (Art. 41 ASR) (secondary rule) of International Law that is owed *erga omnes* (Art. 48(1)(b)).[208] As with the injured State (Art. 42), a Third State may also invoke the State responsibility of the perpetrating State (Arts. 48 & 54), with Art. 48(2)(b) seemingly allowing a Third State to claim reparations in the interest of both the injured State and the

[200] IMT, *The Trial of German Major War Criminals*, Judgment of 1 October 1946, p. 447.
[201] *ILC*, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, YbILC 1950 Vol. II, p. 374.
[202] See *Tams/Berster/Schiffbauer* (eds.), p. 12, §22.
[203] See *Tams* in ibid., pp. 61–62, §67; *Milanović*, Eur. J. Int. Law 2006, p. 553, p. 568.
[204] See ibid., p. 561; p. 568.
[205] So ibid., p. 561; p. 569.
[206] See ibid., p. 560.
[207] See ibid., pp. 562–564; pp. 570–571.
[208] See ibid., p. 563; pp. 569–570.

beneficiaries of the *erga omnes* obligation breached,[209] as well as, by nature thereof, invoke countermeasures as an injured State (Art. 54).

State Responsibility for punishable Art. III acts is a hypothetical issue other than for *commission* under Art. III(a). While the two *inchoate* offences of *conspiracy*[210] and direct and public *incitement*[211] and the accessory liability offence of *complicity*[212] constitute conduct that could feasibly be ascribed to a State, *attempt* belongs more so to the paradigm of individual criminal responsibility.[213] As with all attributions of State responsibility discussed, however, the only determining element is that a State exercises control over those organs or officials committing criminalised Art. II or punishable Art. III acts.[214]

C. The Crime of Genocide during the 2022 Invasion of Ukraine

This section treats whether there is *prima facie* evidence for conduct fulfilling both the *actus reus* (§C.I) and *mens rea* (§C.II) elements of the act criminalised under Art. II(e) against the Ukrainian national group in the four partially TOTs,[215] and therefore whether there is *prima facie* evidence for conduct comprising (a) punishable act(s) under Art. III (§C.III).

I. Criminalised act under Art. II(e) – *actus reus*

Victim status for a national group under Art. II(e) is established on the basis of the national identity and age demographic of the individuals forcibly transferred.[216] The citizens of Ukraine comprise a national group[217] and, as such, constitute a protected group under the GC (Art. II 1st sent.) (§B.I.2.a). Under Art. 1 Convention on the Rights of the Child (CRC), a child is defined as a human being under 18 years of age unless majority is attained earlier under national law.[218] This is neither the case under the legal order of Ukraine (Art. 34(1) Civil Code of Ukraine) nor of the RF (Art. 21(1) Civil Code of the RF). For the purposes of this study, the criminalised act

[209] See ibid., p. 563; p. 564.
[210] e.g., the Wannsee Protocol, see ibid., p. 572.
[211] e.g., *Der Stürmer* and the ascription of the conduct of *RTLM* radio to Rwanda, see ibid., pp. 572–573.
[212] e.g., a State-owned arms company sells arms to a genocidal regime.
[213] See ibid., p. 563 & pp. 572–574, in which Milanović describes State responsibility for attempt as "a theoretical possibility".
[214] ibid., p. 574.
[215] i.e., as introduced in §A.III, the Donetsk, Kherson, Luhansk, and Zaporizhzhia Oblasts of Ukraine – excluding, for the purposes of this study, the fully-occupied TOT of the Autonomous Republic of Crimea.
[216] ICTR, *Akayesu* TC, Judgement of 2 September 1998, §521.
[217] The legal definition of the Ukrainian national group under Ukrainian law, as governed by Section II Acquisition of Citizenship of Ukraine, Arts. 7–18 Law of Ukraine.
[218] That this identification is also maintained by the organs and officials of the RF is clear from governmental sources using the term "children", see *Regional Center for Human Rights & Lemkin Institute for Genocide Prevention*, (fn. 1), p. 7, §26 with fns. 24–26.

under Art. II(e) can therefore be defined as the forcible transfer of children[219] from the Ukrainian national group to the Russian national group.

Whatever the professed motivations of the RF, as, e.g., proclaimed by the PRF (§A.III), the pattern of conduct ensuing since the beginning of the Invasion makes clear that the RF sought to forcibly effect regime change in, and annex and colonise sovereign territories of, Ukraine.[220] The Invasion should, therefore, be categorised as a settler-colonial war of conquest. The forcible transfer of indigenous/autochthonous populations – and particularly their children – to depopulate occupied territory in favour of colonial settlement and rupture existing social structures, as well as the forcible assimilation of those populations to deconstruct remaining social structures in favour of socio-political cohesion within the colonising power's dominant group, are practices that have existed as long as colonising powers have existed – most saliently, including in the USSR.[221] As territories illegally annexed into the RF, the four partially TOTs and the TOT of Crimea may be compared directly with such historically-colonised territories.

Evidence for the *commission* of the *actus reus* of Art. II(e) is substantial.[222] Figures verified by the Ukrainian Police Force number nearly 20,000 forcibly transferred,[223] while those claimed by the government of Ukraine are in excess of 240,000, by the government of the RF in excess of 448,000,[224] and by its Federation Council in excess of 700,000.[225] In all, a six-figure estimate seems credible,[226] whereby tens of thousands of those have been transferred to a system of at least 43 camps dispersed across the RF.[227] The four partially TOTs treated in this study had a pre-war population of c.8.5million,[228] of which – based on population

[219] Without further elaboration, itself already a violation of, inter alia, Art. 49(1) & 147 GC- IV, Art. 85(4)(a) GCs-API, and Arts. 3, 7, 8, 9 & 35 CRC.
[220] Possibly with a view to ultimately coerce Ukraine into the Union State, as is apparently the RF's aim for Belarus by 2030, see *Weiss/Roonemaa*, Revealed: Leaked document shows how Russia plans to take over Belarus, ⟨https://news.yahoo.com/russia-belarus-strategy-document-230035184.html⟩ (last accessed on 23/6/23).
[221] Consider, e.g., a study on the forcible transfer of children from the Siberian national group in *Bloch*.
[222] See, in particular, *Conflict Observatory*, (fn. 1).
[223] See *Children of War*, Children of War, ⟨https://childrenofwar.gov.ua/en/⟩ (last accessed on 27/6/23).
[224] See, e.g., *Human Rights Watch*, "We Had No Choice": "Filtration" and the Crime of Forcibly Transferring Ukrainian Civilians to Russia, ⟨https://hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians⟩ (last accessed on 27/6/23). Note also EP, *European Parliament resolution of 15 September 2022 on human rights violations in the context of the forced deportation of Ukrainian civilians to and the forced adoption of Ukrainian children in Russia* (2022/2825(RSP)), see OJ C 125, 5/4/2023, pp. 67–71.
[225] Apparently accompanied by parents or family members, and among some 4.8 million Ukrainian residents now located in the RF, see, e.g., *Kelly* & *Perry*, Moscow says 700,000 children from Ukraine conflict zones now in Russia, ⟨https://reuters.com/world/europe/moscow-says-700000-children-ukraine-conflict-zones-now-russia-2023-07-03/⟩ (last accessed on 4/7/23).
[226] See *Conflict Observatory*, (fn. 1), p. 9.
[227] See *Conflict Observatory*, (fn. 1), pp. 4–5; *UN Meetings Coverage & Press Releases*, 'For the Sake of Ukraine's People, Global Community' Russian Federation's Unjustified War Must Stop, Under-Secretary-General Tells Security Council, ⟨https://press.un.org/en/2023/sc15358.doc.htm⟩ (last accessed on 3/8/23).
[228] *State Statistics Services of Ukraine*, Total population, ⟨https://ukrstat.gov.ua/operativ/operativ2022/ds/kn/kn_0122_ue.xls⟩ (last accessed on 23/6/23).

demographics[229] – c.2million were children. Thus, the scale itself – where a six-figure estimate comprises at least one child in every 20 – suggests not an arbitrary, unorganised pattern of conduct without a specific motive, but rather a systematic, ongoing pattern of conduct, and thus perhaps one with a *specific* intent.[230]

Forcible transfer has occurred under three principal sets of circumstances:[231] (i) children have lost (contact with) parents during hostilities;[232] (ii) children have been separated from their parents following the detention of (a) parent(s) at a 'filtration' point;[233] and (iii) children were already in public institutions within the now partially TOTs.[234] Two further circumstances are also to be noted: (iv) children have been separated forcibly from (a) parent(s);[235] and (v) children have been unable to return from 're-education' camps in the four partially TOTs or RF.[236]

Three principal narratives are promulgated by the RF for the forcible transfer of children from Ukraine into the four partially TOTs or RF:[237] (i) the 'evacuation' of orphans and children who are wards of the State from public institutions take over as part of the occupation; (ii) the transfer of children with the initial consent of parents/guardians; and (iii) the resettlement of children in order that they receive medical care.

Four principal reasons are claimed by the RF for transferring children:[238] (i) to attend 'recreational' camps; (ii) to 'evacuate' frontline areas; (iii) to receive medical treatment; and (iv) to be adopted into Russian families. Without the explicit, written consent of parents/guardians or the relevant authorities, however, even these supposedly 'benevolent' reasons are in violation of International Law,[239] thus making the transfer illegal, and – without

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[229] *State Statistics Committee of Ukraine*, About number and composition population of Ukraine by data All-Ukrainian census of the population 2001, ⟨http://2001.ukrcensus.gov.ua/eng/results/general/age/⟩ (last accessed on 23/6/23).

[230] In his rebuttal article against those who have claimed that the RF is perpetrating genocide, in which a criticism of the lack of consideration for the quantity and degree criterion for Art. II acts is particularly pointed, *Schabas* is notably silent on the question of the act criminalised under Art. II(e), see *Schabas*, (fn. 1), p. 843.

[231] As reported in UN OHCHR, *Report of the Independent International Commission of Inquiry on Ukraine* of 15/3/2023, UN Doc. A/HRC/52/62, §97.

[232] i.e., unaccompanied, separated, and orphaned children, see *Ioffe*, (fn. 1), p. 15 fns. 123–125. Notable is that the PCCR herself adopted – of no legal effect under Ukrainian law (governed by Arts. 207–242 of the Family Code of Ukraine 2002) – such a child from Mariupol, see ibid., p. 25 fn. 128 & p. 26 fn. 132.

[233] EP, (fn. 224), §G; §4. Such unaccompanied children are often then relocated to an orphanage as if they were parentless, see *Ioffe*, (fn. 1), pp. 15–16 with fns. 131–133.

[234] esp. orphanages and boarding schools, see *Ioffe*, (fn. 1), p. 14 with fn. 113, and healthcare facilities, see *Human Rights Watch*, "We Had No Choice": "Filtration" and the Crime of Forcibly Transferring Ukrainian Civilians to Russia, ⟨https://hrw.org/news/2022/09/01/forcible-transfer-ukrainians-russia⟩ (last accessed on 2/8/23).

[235] See *Ioffe*, (fn. 1), p. 15 with fn. 122.

[236] UN OHCHR, *Report of the Independent International Commission of Inquiry on Ukraine* of 15/3/2023, UN Doc. A/HRC/52/62, §§99–100.

[237] See *Conflict Observatory*, (fn. 1), p. 6.

[238] ibid., p. 10.

[239] See also UN SC Res 1261 *Children and armed conflict* of 25/8/1999, UN Doc. S/RES/1261.

consent, as is the case almost without exception – forcible. As seen in §B.I.2.da, the definition of "forcible" is not restricted to physical force, but may include the threat of force, coercion, or – as is evidently the case in light of the narratives promulgated and reasons claimed by the RF – deception.

II. Criminalised act under Art. II(e) – *mens rea*

Evidence for the commission of the *actus reus* with the requisite *general* intent is substantial. However, as so often for the crime of genocide, direct evidence for the requisite *specific* intent required for a finding of the act criminalised under Art. II(e) may be considered equivocal.[240]

1. general intent

First, the *general* intent to commit the *objective, material* element of the offence (*actus reus*) must be established, i.e., to transfer the children of one group to another, forcibly (i.e., coercively or deceptively) – temporarily or permanently.[241] That *prima facie* evidence therefor can be found is suggested not only by the material evidence cited in §C.II, but also by the ICC's issuing of arrest warrants for the PRF and the Presidential Commissioner for Children's' Rights (PCCR),[242] on account of there being "reasonable grounds to believe" that both[243] "committed the acts directly, jointly with others and/or through others" (Art. 25(3)(a) RS) in violation of Arts. 8(2)(a)(vii) & 8(2)(b)(viii).

[240] For a compilation of political resolutions (principally without reference to requisite legal thresholds) that call conduct perpetrated by the RF in Ukraine genocide, see *Whatcott*, Compilation of Countries' Statements Calling Russian Actions in Ukraine "Genocide", ⟨https://justsecurity.org/81564/compilation-of-countries-statements-calling-russian-actions-in-ukraine-genocide/⟩ (last accessed on 27/6/23). For judgements for and against in academic discourse, consider, e.g., *Ioffe*, (fn. 1), p. 1; *Azarov et al.*, (fn. 1), p. 1 vs. *Schabas*, (fn. 1), p. 843. For the judgement against by the UN Independent International Commission of Inquiry on Ukraine, see *Euronews*, Murder, torture and rape but no genocide, ⟨https://euronews.com/2023/03/16/murder-torture-and-rape-but-no-genocide-the-uns-latest-report-on-ukraine⟩ (last accessed on 27/6/23). For the judgement against by legal investigations, e.g., the Public Prosecutor General in the FRG, see *Heinemann*, Russlands Krieg wirklich kein Völkermord?, ⟨https://lto.de/recht/hintergruende/h/generalbundesanwalt-ermittlungen-ukraine-russland-voelkermord-vstgb-de-ukrainisierung/?r=rss⟩ (last accessed on 27/6/23).

[241] As established in §B.I.2.da, transfer does not need to be permanent: while some return has happened, see *Dabrowska/Voitenko*, 'It was heartbreaking': Ukraine children back home after alleged deportation, ⟨https://reuters.com/world/europe/ukraine-returns-31-children-russia-after-alleged-deportation-2023-04-08/⟩ (last accessed on 27/6/23), return has since been suspended, see *Conflict Observatory*, (fn. 1), p. 12.

[242] *ICC*, Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, ⟨https://icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and⟩ (last accessed on 23/6/23).

[243] While the former "failure[d] 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" (Art. 28(b) RS).

a) to transfer from one group to another

Reports by the government of the RF of the intention of the PCCR to carry out forcible transfers of children have been identified,[244] as have those by the 'government' of the 'LPR'.[245] Forcible transfers were painstakingly planned[246] and executed[247] – sometimes with the explicit involvement of senior officials.[248] Legislation in the legal order of the RF was passed to facilitate not only the forcible transfer,[249] but also the naturalisation,[250] of children, as well as the automatic recognition of children born in the TOTs as being Russian citizens.[251] Given the broader context of the Invasion, it seems unequivocal that those carrying out the forcible transfers were aware that they were doing so from one group to another, while the systematic nature thereof suggests that the transfer is not arbitrary, but discriminatory.

b) forcibly

Forcible population transfer is prohibited under Art. 78(1) GCs-API without strict exceptions, which are in the present case unfulfilled, i.e., because consent was not provided by the parents/guardians or relevant authorities or consent was acquired through deception,[252] the transfers were, by definition, forcible.

2. specific intent

Second, the *specific* intent to commit the *objective, material* element of the offence (*actus reus*) with the *subjective*, *mental* intent of the offence (*mens rea*) – the *volitional* element of *intent* (Art. 30(2)(a) RS) to destroy that national group in whole/part and the *cognitive* element of *knowledge* (Art. 30(2)(b) & 30(3)) that such destruction will arise on account of their conduct or that it will occur in the ordinary course of events – must be established.

[244] See *Ioffe*, (fn. 1), p. 11 fn. 88.
[245] See *Regional Center for Human Rights & Lemkin Institute for Genocide Prevention*, (fn. 1), p. 6, §22.
[246] See ibid., §23.
[247] See ibid., §7; §§12–17; *Ioffe*, (fn. 1), p. 13 fn. 105; *Conflict Observatory*, (fn. 1), p. 5.
[248] e.g., the partaking of the PCCR, governor of Moscow Region, among other officials, see *Regional Center for Human Rights & Lemkin Institute for Genocide Prevention*, (fn. 1), pp. 4–5, §12.
[249] See *Ioffe*, (fn. 1), pp. 17–19 with fns. 149–159.
[250] See UN OHCHR, *Report of the Independent International Commission of Inquiry on Ukraine* of 15/3/2023, UN Doc. A/HRC/52/62, §96.
[251] See *Azarov et al.*, (fn. 1), p. 31 with fn. 193, granted otherwise by family or birth as per Art. 12, Chapter II, On Citizenship of the Russian Federation.
[252] See the sources cited in *Ioffe*, (fn. 1), pp. 19–20; UN OHCHR, *Report of the Independent International Commission of Inquiry on Ukraine* of 15/3/2023, UN Doc. A/HRC/52/62, §98; EP, (fn. 224), §6, see; *Conflict Observatory*, (fn. 1), p. 5 & esp. pp. 13–14.

a) with intent – from words or deeds, facts and circumstances

As established in §B.I.2.eb, without a confession or unequivocal documentary evidence, *specific* intent must be inferred either from words or deeds, facts and circumstances, and it is necessary and sufficient that this inference be the only one that could be drawn reasonably from that pattern of conduct. What follows examines the criteria introduced thereunder in §B.I.2.eb.

The *general context* for the forcible transfer of children from the Ukrainian to the Russian national group is the Invasion; the most recent in a series of settler-colonial wars of conquest against Ukrainian territory by the predecessor States of the RF (§A.I). The pattern of conduct ensuing since the beginning of the Invasion, and as evidenced in the TOT of Crimea and four partially TOTs, makes it clear that the RF sought and seeks to forcibly effect regime change in, and annex and colonise territories of, Ukraine.

As is evident from the example of the TOT of Crimea, occupied and annexed illegally since 2014, the fate of the Ukrainian national group in a TOT comprises: forcible naturalisation[253] – resulting in the *de facto* abolition of the Ukrainian national group; (forcible) emigration of members of the Ukrainian national group unwilling to naturalise and immigration of the Russian national group[254] – resulting in civil reconfiguration; erasure of the Ukrainian language in the public[255] and academic[256] spheres – resulting in the socio-linguistic suppression of the Ukrainian national group; and the dismantling of Ukrainian national monuments[257] – resulting in the suppression of the historical, cultural roots of the Ukrainian national group. Comparable trends have already emerged in, e.g., occupied Mariupol in Donetsk Oblast.[258]

As introduced in §B.I.2.da, the criminalised act under Art. II(e) is recognised principally as a means of producing "biological" genocide. Thus, the long-term effect of the forcible transfer of children in the *general context* of the Invasion must be considered because evidence of *biological* destruction will only emerge over time.[259] Such a pattern is to be found in the TOT

[253] See, e.g., *Ukraine Crisis Media Center*, Massive Russification: how Russia populates the occupied territories, ⟨https://uacrisis.org/en/internationaloutreach⟩ (last accessed on 27/6/23).
[254] See *Hurska*, Demographic Transformation of Crimea, ⟨https://jamestown.org/program/demographic-transformation-of-crimea-forced-migration-as-part-of-russias-hybrid-strategy/⟩ (last accessed on 27/6/23).
[255] See, e.g., *Cheremshyna (Черемшина)*, Crimean Ukrainians: an oppressed minority (Кримські українці: пригноблена меншість), ⟨https://ua.krymr.com/a/25397484.html⟩ (last accessed on 27/6/23).
[256] *Centre for Investigative Journalism (Центр журналистских расследований)*, The Department of Ukrainian Philology at Taurida University has been abolished (В Таврическом университете ликвидировали факультет украинской филологии), ⟨https://investigator.org.ua/ua/news/136635/⟩ (last accessed on 27/6/23).
[257] See, e.g., *Ukrainska Pravda*, In Sevastopol, monuments to Sahaidachny and the Ukrainian Navy will be replaced by a Russian admiral, ⟨https://pravda.com.ua/news/2014/04/26/7023702/⟩ (last accessed on 27/6/23).
[258] For the long-term planning of the systematic forcible transfer of the Ukrainian national group out of occupied Mariupol and its replacement with the Russian national group, see, e.g., *ISW*, Russian Offensive Campaign Assessment, August 21, 2023, ⟨https:// understandingwar.org/backgrounder/russian-offensive-campaign-assessment-august-20-2023⟩ (last accessed on 21/8/23).
[259] Indeed, note the Deputy Chairman of the Security Council of the RF's remarks that 'Ukraine will suffer the same fate as the Third Reich', but that 'tasks to that end cannot be completed instantaneously', and 'will not only

of Crimea,[260] where members of the Ukrainian national group are expelled or are forced to identify or come to self-identify as members of the Russian national group[261] – resulting also in the *social* destruction, or indeed dissolution, of the Ukrainian national group (§B.I.2.d).

Specifically in the case of the forcible transfer of Ukrainian children, the pattern of conduct and evidence thereof demonstrates that the principal aim behind the camps[262] in which thousands of forcibly transferred children have been settled appears to be political 're-education' and national-linguistic 'Russification'.[263] The four partially TOTs are also populated by children's organisations, e.g., the Russian Movement of Children and Youth,[264] the Russian Volunteer Society for Assistance to the Army, Aviation, and Navy of Russia,[265] and the Russian Young Army Cadets National Movement,[266] which – along with schools[267] – are providing platforms for anti-Ukrainian and pro-Russian propaganda.[268] Deriving from an analysis of the forms of genocide committed during settler-colonial wars of conquest, the suppression of one national pattern and its replacement by another comprised part of Lemkin's formulation of the crime of genocide (§A.II.1). While this is absent from the GC, and so neither 'de-Ukrainianisation' nor 'Russification' form part of the crime's *material* element, they both nevertheless evidence the *mental* element – the *specific* intent to destroy the Ukrainian national group, as such, in part, in the four partially TOTs, by depriving it of its next generation.

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be carried out on the battlefield', see *Domańska*, Medvedev escalates anti-Ukrainian rhetoric, ⟨https://osw.waw.pl/en/publikacje/analyses/2022-04-05/medvedev-escalates-anti-ukrainian-rhetoric⟩ (last accessed on 27/6/23).

[260] See *Hurska*, Demographic Transformation of Crimea, ⟨https://jamestown.org/program/demographic-transformation-of-crimea-forced-migration-as-part-of-russias-hybrid-strategy/⟩ (last accessed on 27/6/23).

[261] From a population that was c.58% Russian and c.24% Ukrainian in 2001, to one that was 76% and 8% in 2020, compare *State Statistics Committee of Ukraine*, About number and composition population of Ukraine by data All-Ukrainian population census 2001 data, ⟨http://2001.ukrcensus.gov.ua/eng/results/general/nationality/⟩ (last accessed on 23/6/23) with *Rosstat*, National Composition of the Population, ⟨https://rosstat.gov dot /storage/mediabank/tab-5_VPN-2020.xlsx⟩ (last accessed on 23/6/23). Such rapid 'growth' in the population of the former group is principally on account of the (forcible) emigration and naturalisation of members of the latter.

[262] Of which there are at least 32 across the RF, delivering 'integration' programmes, see *Conflict Observatory*, (fn. 1), pp. 5–6; 14–15.

[263] *Conflict Observatory*, (fn. 1), p. 5, incorporating cultural, historical, and societal re-education, see ibid., p. 14.

[264] See, *ISW*, Russian Offensive Campaign Assessment, May 30, 2023, ⟨https://understandingwar.org/backgrounder/russian-offensive-campaign-assessment-may-30-2023⟩ (last accessed on 23/6/23).

[265] See *National Resistance Center of Ukraine*, Occupiers brainwash young people in Donetsk region, ⟨https://sprotyv.mod.gov.ua/en/occupiers-brainwash-young-people-in-donetsk-region/⟩ (last accessed on 3/8/23).

[266] See *Sobenko/Kinsha*, Ombudsman: Russia involves minors in war against Ukraine, ⟨https://suspilne.media/516473-rf-zalucae-nepovnolitnih-do-ucasti-u-vijni-proti-ukraini-ombudsman/⟩ (last accessed on 3/8/23).

[267] See *National Resistance Center of Ukraine*, Russians actively engaged in propaganda among Ukrainian children, ⟨https://sprotyv.mod.gov.ua/en/russians-actively-engaged-in-propaganda-among-ukrainian-children/⟩ (last accessed on 3/8/23).

[268] For the 'Russification' of education in the TOTs, see the sources cited in *Ioffe*, (fn. 1), p. 28 with fns. 245–247, which was overseen by the Minister for Education of the RF, and endorsed by Federal Subjects of the RF, see ibid., p. 29 with fns. 248–249.

That this *specific* intent is attributable to certain superiors is evidenced by the findings of the *Conflict Observatory*'s report on the RF's "systematic programme for the re-education and adoption of Ukrainian children", which concluded that the programme is "centrally coordinated" by the Federal Government of the RF and "involves every level of government",[269] – detailing the senior leadership of Federal Government, Regional Governments, and Occupation Authorities, as well as regional and local officials, camp and facility officials responsible.[270] While the camp network itself is strongly suggestive of the *existence of a plan/policy* to forcibly transfer Ukrainian children in the material sense, the systematic programme of re-education employed in that network, to 'de-Ukrainianise' and 'Russify' those children, is strongly suggestive of the intent to destroy the national group in the mental sense.

The display of this intent through *public speeches/meetings* can be contentious because statements objectively made can be submitted to interpretations that are – whether geopolitically[271] or culturally[272] – subjective. Evidence of eliminationist rhetoric emanating from organs, officials, associates, and supporters of the government of the RF is, however, both substantial[273] and historical:[274] from the denial of Ukrainian Statehood[275] to the denial of the

[269] See *Conflict Observatory*, (fn. 1), p. 5.
[270] ibid., pp. 17–18; 19; 20, respectively.
[271] For a deconstruction of the 'Westsplaining' of Ukraine-RF relations, whether through the objectification of Ukraine as subservient to either the RF or EU/NATO, or through the radical underappreciation of the gravity of soft power and interventionism emanating from organs and officials of the RF, see, e.g., *McCallum*, What we lose by 'Westsplaining' the Russian invasion of Ukraine, ⟨https://lens.monash.edu/@politics-society/2022/04/13/1384606/what-we-lose-by-westsplaining-the-russian-invasion-of-ukraine⟩ (last accessed on 4/8/23) and *Labuda*, On Eastern Europe, 'Whataboutism' and 'West(s)plaining': Some Thoughts on International Lawyers' Responses to Ukraine, ⟨https://ejiltalk.org/on-eastern-europe-whataboutism-and-westsplaining-some-thoughts-on-international-lawyers-responses-to-ukraine/⟩ (last accessed on 4/8/23).
[272] For the evident underestimation of racism expressed by Russians towards Ukrainians, see, e.g., *Hrytsenko, Hanna*, Westsplaining Ukraine, ⟨https://euromaidanpress.com/2020/06/19/westsplaining-ukraine/⟩ (last accessed on 4/8/23) and *Smoleński/Dutkiewicz*, The American Pundits Who Can't Resist "Westsplaining" Ukraine, ⟨https://newrepublic.com/article/165603/carlson-russia-ukraine-imperialism-nato⟩ (last accessed on 4/8/23).
[273] See the compilation in *Apt*, Russia's Eliminationist Rhetoric Against Ukraine, ⟨https://justsecurity.org/81789/russias-eliminationist-rhetoric-against-ukraine-a-collection/⟩ (last accessed on 27/6/23).
[274] Consider the comment of the PRF from 2008 that "Ukraine is not even a state/country", in *PRF*, The NATO bloc broke up into blocking packages, ⟨http://kommersant dot /doc/877224⟩ (last accessed on 22/6/23), and an interview with the then PM of the RF, in *Medvedev*, Russian Prime Minister: Ukraine Has 'No Industry, or State', ⟨https://themoscowtimes dot com/2016/04/05/russian-prime-minister-ukraine-has-no-industry-or-state-a52385⟩ (last accessed on 22/6/23).
[275] "There is "no historical basis" for the "idea of Ukrainian people as a nation separate from the Russians.", see *PRF*, On the Historical Unity of Russians and Ukrainians, ⟨http://en.kremlin dot /events/president/news/66181⟩ (last accessed on 22/6/23); countering efforts "to deprive Russia of these historical territories that are now called Ukraine", see *PRF*, President Address to the Federal Assembly (21/2/2023), ⟨http://en.kremlin dot /events/president/news/70565⟩ (last accessed on 22/6/23).

Ukrainian national group's identity;[276] from the dehumanisation[277] of Ukrainians to their demonisation;[278] not to mention the Holocaust resonant allusions to their destruction,[279] or the explicit advocation of the dissolution of the Ukrainian State[280] and the extermination of the Ukrainian people[281] – 'justified' by "accusation in mirror";[282] as well the explicit advocating of

[276] Russians and Ukrainians are "one people", see *PRF*, On the Historical Unity of Russians and Ukrainians, ⟨http://en.kremlin dot /events/president/news/66181⟩ (last accessed on 22/6/23); Ukrainians are a "people who do not have any stable self-identification", see *Medvedev*, Why contacts with the current Ukrainian leadership are pointless, ⟨https://kommersant dot /doc/5028300⟩ (last accessed on 3/8/23).

[277] For terms of abuse such as "worms" and "scum", see the sources cited *Ioffe*, (fn. 1), p. 27 fn. 224; for "fascists" and "livestock", see UN OHCHR A/77/533 *Report of the Independent International Commission of Inquiry on Ukraine* of 18/10/2022, UN Doc. A/77/533, §82. Consider also: the assertion by a Russian State TV Host that "[Ukrainians] are simply animals. They don't need to be agitated to lose their human form. They have no human form anymore.", see *Mardan*, They have no human form anymore, ⟨https://twitter.com/JuliaDavisNews/status/1640898437850750977?t=U8fBooeQO9c0qRR2EQP4nQ&s=09⟩ (last accessed on 22/6/23); the remarks of the Chechen leader in *Kadyrov*, The result of the special operation for us is the complete destruction of the manifestations of Satanism, ⟨https://t dot me/s/RKadyrov_95/2251⟩ (last accessed on 22/6/23).

[278] As stated by the PRF: "we will seek to demilitarise and denazify Ukraine", see *PRF*, (fn. 41). As stated by the Minister of Foreign Affairs of the RF: "We are talking about preventing the neo-Nazis and those who promote methods of genocide from ruling this country", see *TASS*, Kiev regime controlled by West, neo-Nazis, Lavrov says, ⟨https://tass dot com/politics/1411139⟩ (last accessed on 15/7/23). For statements that the Ukrainian youth are equivalent to the Hitler youth, see the sources cited in *Ioffe*, (fn. 1), p. 28.

[279] According to a Russian State TV host, the PRF "took upon himself – without exaggeration – a historical responsibility, having decided not to leave the resolution of the Ukrainian question (решение украинского вопроса) to future generations", see *Akopov*, The Advance of Russia and the New World Order, ⟨https://web.archive.org/web/20220226051154/https://ria dot /20220226/rossiya-1775162336.html⟩ (last accessed on 22/6/23).

[280] Made by the Deputy Chairman of the Security Council of the RF, see *Medvedev*, Why will Ukraine disappear? Because nobody needs it…, ⟨https://twitter dot .com/MedvedevRussiaE/status/1643252804507631616⟩ (last accessed on 23/6/23) and *Medvedev*, The termination of life, or death, of the former state…, ⟨https://t dot me/s/medvedev_telegram/11⟩ (last accessed on 22/6/23), as well as the Head of the Occupation Authority of Crimea – the "best guarantee" to "burn out the Nazi plague" is "the liquidation of Ukrainian statehood" –, see *Aksyonov*, Now it's our turn to burn out the Nazi plague…, ⟨https://t dot me/s/Aksenov82/1084⟩ (last accessed on 22/6/23).

[281] Consider the assertion of the former self-proclaimed People's Governor of the DPR: "We will kill as many of you as we have to. We will kill 1 million, or 5 million; we can exterminate all of you until you understand that you're possessed and you have to be cured.", see *Gubarev*, These are Russian people, possessed by the devil, ⟨https://twitter.com/juliadavisnews/status/1579820810751324160⟩ (last accessed on 22/6/23). For denazification being the same as de-Ukrainianization, see *Hrudka*, How Russia justifies the murder of Ukrainians, ⟨https://euromaidanpress.com/2022/04/15/how-russia-justifies-the-murder-of-ukrainians-russias-2022-genocide-handbook-deconstructed/⟩ (last accessed on 3/8/23).

[282] i.e., because Ukrainians are a threat, it is legitimate to target them: consider, e.g., the statement made by the former Deputy Prime Minister that "what has grown up in the place of Ukraine is an existential threat to the Russian people, Russian history, Russian language and Russian civilization. If we do not put an end to them…", see *Rogozin*, In general, what has grown up in the place of Ukraine…, ⟨https://twitter dot com/Rogozin/status/1536418079143563266?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet⟩ (last accessed on 22/6/23). Compare, in particular, Himmler's 'justification' for the extermination of the Jewish people, cited in *Dangerous Speech Project*, Dangerous Speech: A Practical Guide, ⟨https://dangerousspeech.org/wp-content/uploads/2020/08/Dangerous-Speech-A-Practical-Guide.pdf⟩ (last accessed on 3/8/23), p. 16. This, in turn, 'justifies' the condoning of atrocities against Ukrainians, see the sources cited in *Ioffe*, (fn. 1), p. 27 fn. 226.

forcible transfer[283] and of "biological" genocide.[284] Given the nature of the national group (§B.I.2.a), the denial of Ukrainian Statehood and national identity by, e.g., the PRF and Chair of the SCRF, can be considered equivalent to advocating the destruction of the Ukrainian national group.

The principal legal challenge is whether these constitute "isolated indicators emanating from individuals who appear to harbour genocidal intent and who manifest racial hatred on social media or express genocidal sentiments when they attack victims",[285] or officially-sanctioned statements that may as well have emanated directly from the PRF.[286] Certainly, some politicians consider the threshold for the commission,[287] or at least incitement,[288] of genocide to have been met. Rebuttal to the conclusion that such eliminationist rhetoric constitutes only "isolated indicators emanating from individuals" is that it glosses over the status of those individuals – from the PRF down –, misrepresents those statements as isolated – given the primacy of, e.g., the voice of the PRF in the Russian information space –, and understates how such statements may in fact stand as the 'irrational' rationale behind the Invasion itself.[289]

The *perpetration of other culpable acts* systematically directed against the same group[290] is sometimes interpreted in case-law as forming part of the *general context* criterion.[291] As a criterion, it rather speaks against *Schabas*' assertion that an accumulation of violations of Art.

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[283] Consider that of the Head of State Duma Defence Committee: "We need to deal with the children, perhaps in […] cadet schools…", see *Kartaolov*, Ukraine has to be restored, rebuilt from scratch, but the biggest problem today is people, ⟨https://twitter.com/JuliaDavisNews/status/1554122972935372804?t=B9B2tlLSBcE8_Y9PXhYYvA&s=19⟩ (last accessed on 22/6/23).

[284] As advocated by a prominent pundit and propagandist: the "Letter Z" means "concentration camps, re-education, sterilization", see *Shakhnazarov*, 'There will be no mercy', ⟨https://express.co.uk/news/world/1605292/putin-news-russia-ukraine-war-concentration-camps-sterilisation-vn⟩ (last accessed on 22/6/23).

[285] As argued by *Schabas*, (fn. 1), p. 849.

[286] As argued by *Ioffe*, (fn. 1), p. 27 with fn. 233.

[287] e.g., President of the USA, see *Liptak*, Biden calls atrocities in Ukraine a 'genocide' for the first time, ⟨https://edition.cnn.com/2022/04/12/politics/biden-iowa-genocide/index.html⟩ (last accessed on 3/8/23); President of Poland, see *Herb*, Polish president said it's 'hard to deny' genocide in Ukraine after images of civilians killed emerge, ⟨https://edition.cnn.com/2022/04/06/politics/andrzej-duda-poland-ukraine-cnntv/index.html⟩ (last accessed on 3/8/23).

[288] Thomas Heilmann, a member of the German Parliament, asked the Berlin Prosecutor's Office to initiate investigations into the author of *What should Russia do with Ukraine*, see *Sergeytsev* (Сергейцев), *What should Russia do with Ukraine* (Что Россия должна сделать с Украиной), ⟨https://ria dot /20220403/ukraina-1781469605.html⟩ (last accessed on 3/8/23), for incitement to genocide, see *Hanfeld*, CDU-Abgeordneter erstattet Anzeige wegen Aufrufs zum Völkermord, ⟨https://faz.net/aktuell/feuilleton/medien/cdu-abgeordneter-erstattet-anzeige-wegen-aufrufs-zum-voelkermord-17945217.html⟩ (last accessed on 3/8/23).

[289] This is not least because Western thinking on the RF has been dominated by 'rationalising' myths that have proven spurious, see the deconstruction in *Chatham House*, Myths and misconceptions in the debate on Russia, ⟨https://chathamhouse.org/2021/05/myths-and-misconceptions-debate-russia⟩ (last accessed on 2/8/23).

[290] As formulated in, e.g., ICTY, *Jelisić* AC, Judgement of 5 July 2001, §§47–48 and ICTY, *Tolimir* AC, Judgement of 8 April 2015, §246.

[291] ICTR, *Hategekimana* AC, Judgement of 8 May 2012, §133.

II(a–e) is "quite an original idea" for evidencing genocidal intent "that does not find support in the case law".[292] Here, such culpable acts can be considered alongside the following criterion.

The apparent difficulty with the *scale of atrocities* criterion – which during the Invasion incorporates, inter alia: killing; torture; inhumane and degrading treatment including sexual violence; and the destruction of domestic architecture, civilian infrastructure, and cultural heritage[293] – is firstly on account of quantity and degree,[294] and secondly on account of the fact that all acts could be committed, and thus accounted for, without *specific* intent.[295] This, in turn, reflects three principal tensions of perception, that of: (i) a *just* vs. *unjust* war;[296] (ii) a higher and lower ranking of mass atrocity crimes;[297] and (iii) the experience of victims.[298] These tensions are perhaps unresolvable precisely because they are of principally moral, rather than legal, character. As established in §C.I, the scale of the forcible transfer of children is, however, beyond doubt one of substantial quantity and thus degree – where the camp system itself evidences the *material* element of forcible transfer, the programme of re-education therein evidences the *mental* element of group destruction.

Much the same could be said for the criterion of *repetition of destructive/discriminatory acts* against group members, which is reflected in the acts described under the *scale of atrocities* criterion. What's more, that there is *systematic targeting* of group members *based on their group membership* is evident precisely because, although such acts might be explained as 'collateral' consequences of war, that the transfer is forcible, and that those individuals transferred are children of the Ukrainian national group, speaks strongly against a finding of arbitrariness.

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[292] *Schabas*, (fn. 1), p. 849.

[293] Attacks on a group's cultural/religious property/symbols constitutes its own criterion, consider, e.g., *UNESCO*, Damaged cultural sites in Ukraine verified by UNESCO, ⟨https://unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco⟩ (last accessed on 3/8/23) and *Conflict Observatory*, Potential Damage to Ukrainian Cultural Heritage Sites, ⟨https://hub.conflictobservatory.org/portal/apps/sites/#/home/pages/heritage-1⟩ (last accessed on 3/8/23).

[294] *Schabas* criticises the lack of consideration for this threshold, see *Schabas*, (fn. 1), p. 849, pp. 851–852, yet seems rather content to consider his assertion conclusive despite it drawing upon a miniscule source base.

[295] Consider *Schabas'* criticism: "All of these are quite indistinguishable from war crimes and describe atrocities that are frequently committed in many armed conflicts.", see *Schabas*, (fn. 1), p. 849.

[296] e.g., the systematic destruction of German cities and inflicting of civilian deaths in the hundreds of thousands did not lead to charges of genocide levelled against the Allies in 1944–45 because of the Allies' intent and aims.

[297] The RS provides no hierarchy of mass atrocity crimes (Arts. 6–8bis), yet genocide is perceived as the 'crime of crimes' in popular consciousness, see the remarks to that effect in *Schabas*, (fn. 1), p. 855, despite the fact that the Nuremberg Tribunals established crimes against peace (the predecessor of the crime of aggression) as such, see IMT, *The Trial of German Major War Criminals*, Judgment of 1 October 1946, p. 422.

[298] Consider how *Ioffe*, (fn. 1), pp. 30–31, cites *Marchuk's* and *Wanigasuriya's* charge that denying the killing in Mariupol reached the intensity threshold for genocide is to deny the experience of civilians targeted for destruction there, see *Marchuk*/*Wanigasuriya*, J. Genocide Res. 2022, p. 1, p. 16.

b) in part

The intent to destroy the Ukrainian national group in part is evident from the fulfilment of the three criteria maintained by the ICJ (§B.I.2.b): (i) the six-figure estimate of children transferred comprises a "substantial part" of the population of the Ukrainian national group in the four partially TOTs, thus having a "significant enough" impact on that group; (ii) the control of organs and officials of the RF in the four partially TOTs is *sufficient*, which has in turn allowed for the opportunity available to commit to be *significant*; and (iii) the targeted part is indeed prominent within the group, precisely because the viability of a national group rests upon its capacity to transmit intergenerationally, inter alia, its language, social norms, and culture.

c) to destroy as such

"Biological" genocide is not "physical" genocide because its acts do not bring about immediate, but instead intergenerational, destruction. Thus, the intent to destroy the group "as such" through "biological" genocide is harder to evidence because evidence thereof emerges over time. Nevertheless, the demographic trends in the TOT of Crimea (§C.II.2.a) suggest strongly what the outcome sought for the Ukrainian national group in the four partially TOTs is, as well as that Ukrainians are targeted not in their capacity as individuals, but as members of the Ukrainian national group, due to the goal being the destruction of that group in those TOTs.

d) the only reasonable inference available on the evidence, i.e., conduct that could only point to the existence of such intent

This criterion is the most demanding, and thus most criticised.[299] In this study, the only reasonable inference resulting from a consideration of the evidence is argued to be that perpetrators of the forcible transfer of Ukrainian children to the Russian national group held the intent to destroy the Ukrainian national group, as such, in part (i.e., in the four partially TOTs). Some of the problems raised with the existing literature alleging genocide during the Invasion cited in fn. 1 are that its scope, and thus conclusions, are overly broad – introducing ambiguity into that argumentation. This study, by comparison, treats the intent to destroy, as such, in part, the Ukrainian national group *in the four partially TOTs* as the motivation behind, and facilitated by, the Invasion. In doing so, it draws upon the finding of genocide in the case of Srebrenica:[300] a territorially-bound act of genocide targeting a particular demographic of the protected group, in turn the motivation behind, and facilitated by, the *general context* of an armed

[299] For a charge of narrowness bordering on perversity, see *Shaw*, J. Genocide Res., 2023, p. 1, pp. 5–6.
[300] Held to be genocide by the Trials Chamber in, e.g., ICTY, *Krstić* TC, Judgement of 2 August 2001, §§597–599, and upheld by the Appeals Chamber in ICTY, *Krstić* AC, Judgement of 19 April 2004, §37.

conflict characterised by ethnic cleansing and forcible assimilation persecuted against that protected group.

Fulfilling this criterion is, however, not 'simply' a matter of demonstrating *specific* intent – as was argued in §C.II.2.a to be the case from, inter alia, the eliminationist rhetoric of the RF's organs and officials and the systemic 're-education' taking place in network of detention camps –, but *eliminating any other possible explanations*. That the three principal narratives promulgated, and the four principal reasons claimed, by the RF for the forcible transfer of children are not credible has been established in §C.I. Forcible transfer stands out among criminalised Art. II acts in so far as it is hard to maintain, contrary to *Schabas*' contention, that its commission is "indistinguishable from war crimes".[301] While forcible transfer is a criminalised act under Arts. 8(2)(a)(vii) and 8(2)(b)(viii) RS, the *material* element of Art. II(e) GC is substantively different: it requires not only that the victims be children, but also that the act be the transfer from one group to another – not simply to occupied territory. Although forcible transfers of adults have also taken place during the Invasion,[302] this has not been into the custody of another group by nature of the fact that those individuals are not children. Given the *general context* of the Invasion, any argument that the forcible transfer of children can instead be seen as motivated to bring about a military-strategic objective ascribable exclusively to the waging of war, and thus isolated entirely from the eliminationist rhetoric cited, does not seem credible.

e) Biological Genocide as Social Destruction/Dissolution but not as Cultural Genocide

The act criminalised under Art. II(e) is categorised conventionally as an act of "biological" genocide. Be that as it may, the impact on the non-transferred group members could nevertheless be compared directly to *physical* destruction – when assessed territorially, and where transfer is permanent, it is as if forcibly transferred group members had been *physically* destroyed.

As treated in §B.I.2.d, the majority view on the scope of the destruction requires it to be *physical/biological* in nature. While this usually sets a high threshold for a finding of the *mens rea* element, what "biological" genocide in fact means is that the socio-cultural/-linguistic persistence of a group is undermined intergenerationally. This, as argued from the minority view proposed in §B.I.2.d, brings about the *social* destruction and dissolution of a group. Given,

[301] See *Schabas*, (fn. 1), p. 849.
[302] *Human Rights Watch*, Forcible Transfer of Ukrainians to Russia: Punitive, Abusive Screening of Fleeing Civilians, ⟨https://hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians⟩ (last accessed on 27/6/23).

then, the arbitrarily construed and inadequately defined nature of "biological" genocide (§B.I.2.d), the *social* destruction and dissolution of a group in fact appears to be consistent with, if not even part of, a finding of the *mens rea* to bring about *biological* destruction. As identified by Judge Shahabuddeen, the text of the GC requires only that the acts criminalised under Art. II be *physically/biologically* destructive acts, not that the intent behind the destruction brought about be *physical/biological* – and this is without any broadening of scope towards "cultural" genocide. In short, a criminalised Art. II(e) act has the potential to bring about both *biological* and *social* destruction, at least in part through the *social* dissolution, of a group, even as a purely *biological* act of destruction. In this study, both the *biological* and *social* destruction, as well as *social* dissolution, of the Ukrainian national group in the four partially TOTs is argued to be both the near- and long-term consequence of the forcible transfer of Ukrainian children.

III. Punishable acts under Art. III

Following the argumentation that there is *prima facie* evidence for a finding of both the *material* (*actus reus*) and *mental* (*mens rea*) elements of the act criminalised under Art. II(e), the corollary findings of punishable acts under Art. III can be treated.

In light of a finding of *specific* intent, the evidence of *general* intent – e.g., the aforementioned reports evidencing the PCCR's intention to carry out forcible transfers of children, evidence of painstaking planning, and legal reforms to facilitate transfer etc. (§C.II.1) – in turn provides *prima facie* evidence of an agreement by at least two persons whose object is commission, i.e., of *conspiracy* (Art. III(b)). In addition, not only that those plans have been made, but also that they have been put into action, provides *prima facie* evidence of the *material* element of an action commencing *commission*, i.e., *attempt* (Art. III(d)). Given that it has been argued in §C.II.2.b how the intent to destroy the Ukrainian national group as such, in part, is evident from the fulfilment of the three criteria maintained by the ICJ (§B.I.2.b), it can be argued that the forcible transfer of a six-figure estimate of children from the Ukrainian to Russian national group evidenced provides *prima facie* evidence that *commission* has in fact taken place (Art. III(a)). In light of the *specific* intent argued to be attributable to, inter alia, the PRF, who has final ultimate control[303] over the systemic forcible transfer of children from the Ukrainian to Russian national group (a JCEII, see §B.II.1), according to the criteria discussed in §B.I.3, a finding of *conspiracy*, *attempt*,[304] and *commission* of an Art. II(e) act is arguable by

[303] Under the doctrine of superior responsibility, see *Berster* in *Tams/Berster/Schiffbauer*, pp. 178–183, §§50–60.
[304] If, e.g., following peace, all forcibly transferred children were returned.

nature of his exercising of control thereover.[305] If a finding of *commission* were to be made, this would also open up potential charges of *complicity*, *conspiracy*, and *commission* for those involved in the JCEII.[306] Given that a *complicit* perpetrator need not share the *specific* intent of the principal, but only *know* of it, a finding of *complicity* would be arguable in light of the eliminationist rhetoric – evidence of *specific* intent – expressed by the PRF in the Russian information space, because such rhetoric would arguably be known to subordinates (§B.II.1).[307] As treated in §B.II.2, only an Art. III(a) act can in turn be ascribed to a State. Yet, importantly, State responsibility can arise without the individual whose conduct is ascribed to that State ever having been convicted of that conduct.[308] Thus, the argumentation in this section leads to this study's final question of law: whether this attributed conduct can be attributed to the RF and therefore give rise to State responsibility under Public International Law (§D).

D. The Legal Consequences of the Commission of the Crime of Genocide under Public International Law

This section treats the questions of law of how the arguable *commission* (Art. III(e)) of an Art. II(e) act attributed to certain officials of the RF gives rise to the State responsibility of the RF and Third States under Public International Law.

I. State Responsibility of the RF

In §C, the finding of an Art. II(e) act and thus Art. III(a) act conducted systemically as part of a JCEII was argued. Under the rules for the attribution of State responsibility introduced in §B.II.2, the criminalised acts committed by individuals participating in that JCEII give rise to the State responsibility of the RF by nature of the fact that such conduct is ascribable to the *de jure/facto* organs of the RF. At the top of this JCEII hierarchy, for example, by nature of the PRF and PCCR having acted in their official capacities – in which they enjoy no immunity for the *commission* of genocide pursuant to Art. IV GC (§B.I.4) –, their contribution to the forcible

[305] Arguable is also whether the eliminationist rhetoric expressed by the PRF would also comprise *direct and public incitement* (Art. III(d)). For an advocate of that view, see, e.g., *Snyder*, Putin has long fantasized about a world without Ukrainians. Now we see what that means, ⟨https://washingtonpost.com/opinions/2022/03/23/putin-genocide-language-ukraine-wipe-out-state-identity/⟩ (last accessed on 3/8/23).
[306] Notwithstanding their incrimination in the *Conflict Observatory*'s aforementioned report, the legal question of individual criminal responsibility of specific perpetrators is beyond the scope of this study, but it is arguable that those individuals would also be open to charges of *conspiracy* and *commission*.
[307] In light of the approach of *Amos* introduced in §B.II.1, the *volitional* element evident through a finding of *specific* intent among superiors, such as the PRF, in turn facilitates a finding of the principal forms of perpetration requiring intent, i.e., commission, conspiracy, incitement, and attempt, whereas for subordinates acting thereunder, a finding of the *cognitive* element is always sufficient.
[308] ICJ, *Bosnia*, Judgment of 26 February 2007, §182.

transfer of children from the Ukrainian to Russian national group in order to destroy, as such, the Ukrainian national group in the four partially TOTs is in turn attributable to the RF itself.

1. under the Genocide Convention

It is therefore arguable that the RF is in breach of its obligation *not to commit* genocide within the territory over which it exercises *effective control* and *de facto* jurisdiction, i.e., the four partially TOTs. As described in §B.II.2, this constitutes an internationally wrongful act (Art. 2 ASR). Under the primary rules of substantive International Law, this gives rise to State responsibility before the ICJ under Art. IX for a breach – i.e., non-fulfilment – of Art. I (primary rule). Given that Ukraine already has a case under Art. IX before the ICJ concerning a dispute with the RF relating to the interpretation, application, or fulfilment of the GC,[309] it seems unlikely – in light of the high thresholds set by the ICJ and the ICJ's interpretation of the GC (§B.2.d) – that the arguable breach of the primary rule would be brought before the ICJ under Art. IX.

2. under the Articles on the Responsibility of States for Internationally Wrongful Acts

Under the secondary rules of State responsibility, this also gives rise to the obligation to end that violation of both a Treaty-based rule (Art. 30 ASR) and of a *jus cogens* (peremptory) norm (Arts. 12–13) of Customary International Law (Art. 40). A further obligation is to provide reparations for that breach (Arts. 31 & 34), comprising restitution to the *status quo ante* (Art. 35), compensation (i.e., remedy) (Art. 36), and satisfaction (Art. 37). Given that the RF has demonstrated its contempt for International Law through the non-fulfilment of its obligations, this makes any leveraging of the secondary rules of State responsibility in favour of Ukraine highly unlikely. Instead, as will be treated in §D.I.2.d, it would be for the injured State (Ukraine) and any Third States to act uni- or multilaterally on the legal basis of the ARS.

II. State Responsibility of Third States

1. under the Genocide Convention

a) Duty to Prevent

As described in §B.I.1, the duty *to prevent* constitutes the obligation to prevent the *commission* (Art. III(a)) of Art. II acts. In *Bosnia*, the ICJ confirmed that this obligation includes a corresponding duty to act, and that this arises as soon as a State learns, or should have learned,

[309] ICJ, *Ukraine vs. Russian Federation*.

of the existence of a serious risk that genocide will be committed.[310] This duty is not territorially limited,[311] but extends to all reasonable means, irrespective of where it threatens to occur.[312] As treated by *Schabas*,[313] when seeking to prevent genocide, Contracting Parties are obliged to either bring the matter before the organs of the UN (Art. VIII) or to bring an application before the ICJ (Art. IX). Given the blocking of the UN SC, to be treated in §D.I.2.c, the former mechanism is unviable in the current situation, while it is unlikely that any further application would be brought before the ICJ prior to a finding on the merits in the ongoing *Allegations of Genocide* case.[314] Given the lack of political will among Contracting Parties to engage forcible measures (as countermeasures) in the TOTs in order to end other breaches of substantive International Law,[315] it is perhaps unsurprising that the finding of the *commission* of an Art. II(e) act is so contentious, because it would in turn trigger this very duty *to prevent*.[316]

b) Duty to Punish

As described in §B.I.1, the duty *to punish*, enshrined in Art. I by way of *renvoi* (Arts. IV–VII), comprises the duty *to legislate* (Art. V), duty *to prosecute* (Art. VI), and duty *to extradite* (Art. VII). Through the unequivocal language in Art. IV, the duty *to punish* also provides a Treaty-based exception to immunity at both the national and international level (§B.I.4). As with the duty *to prevent* (§D.II.1.a), because the finding of the *commission* of an Art. II(e) act is so contentious, this precludes a triggering of the duty *to punish*. Nevertheless, were a finding of *prima facie* evidence to be made, Contracting Parties could fulfil their duty *to punish* by supporting cases before the ICC through extradition and before the ICJ through interventions.[317]

2. under the Articles on the Responsibility of States for Internationally Wrongful Acts

In the absence of effective enforcement mechanisms through the UN under Art. VIII GC due to the blocking of the UN SC by the RF and PRC,[318] and the RF's non-fulfilment of its

[310] ICJ, *Bosnia*, Judgment of 26 February 2007, §431.
[311] ibid., §183.
[312] ibid., §430.
[313] *Schabas*, Preventing Genocide and the Ukraine/Russia case, ⟨https://ejiltalk.org/preventing-genocide-and-the-ukraine-russia-case/⟩ (last accessed on 3/8/23).
[314] ICJ, *Ukraine vs. Russian Federation*.
[315] i.e., the breaches of the *jus cogens* (peremptory) norms owed *erga omnes* not to commit the crime of aggression, crimes against humanity, or war crimes.
[316] As for the geopolitical 'justifications' for inaction in the face of genocide, consider the analysis of supposed "utility, perversity, and jeopardy", first formulated by *Hirschman*, in *Power*, esp. pp. 121–127; 281–288; 461–466.
[317] Both international fora would fulfil the requirements of Art. VI 2nd alt. GC.
[318] In spite of the *Code of conduct regarding Security Council action against genocide, crimes against humanity or war crimes*, see UN GA/SC Doc. A/70/621–S/2015/978, *Annex I to the letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General* of

obligation[319] to realise an Order of the ICJ,[320] States are nevertheless permitted to act unilaterally against the RF. In doing so, any Third State may invoke its obligation to bring to an end the violation of a *jus cogens* (peremptory) norm (Art. 41(1) ASR) that is owed *erga omnes* (Art. 48(1)(b)). Both the injured State of Ukraine (Art. 42) and any Third State may invoke the State responsibility of the RF (Arts. 48 & 54). Due to the obligation breached being owed *erga omnes*, Art. 54 allows a Third State to invoke countermeasures by nature of being an injured party,[321] so long as they are limited to inducing a State to cease its wrongful act (Art. 49(1)). Be that as it may, before invoking countermeasures a Contracting Party is first obliged under Art. 49(2)(a) ARS to fulfil its obligations under Arts. VIII–IX GC (primary rules). However, the fulfilment thereof is firstly not viable because of deadlock in the UN SC, and secondly delayed until a finding on the merits in the ongoing *Allegations of Genocide* case before the ICJ. Thus, it is only after a judgement in that case that a Third State might feasibly invoke countermeasures in response to a continued non-fulfilment by the RF of its obligations under the GC.

3. to preserve International Peace & Security

Given that genocide is understood to be a threat to international peace and security,[322] the principal object of the UN (Art. 1(1) UNC), i.e., the maintenance thereof, is invoked. On account of the UN SC Permanent Members' veto (Art. 27(3)), an attempt on 25th February 2022 at a UN SC Resolution that would have required the RF to cease its use of force was, expectedly, unsuccessful.[323] Subsequently, the UN GA engaged its role in discussing any questions relating to the maintenance of international peace and security (Art. 11(2)) by convening the 11th

14/12/2015, UN Doc. A/70/621–S/2015/978, and that vetoing a legal response seeking to end a breach of *jus cogens* (peremptory) norms is itself in breach of International Law because all States are obliged to cooperate to end such violations (Art. 41 ASR). In light of the Invasion, and the corresponding vetoes cast, the UN GA has established a standing mandate for the GA to debate when a veto is cast, see UN GA Res 76/262 *Standing mandate for a General Assembly debate when a veto is cast in the Security Council* of 28/4/2022, UN Doc. A/RES/76/262.

[319] In *LaGrand*, the ICJ found that Orders indicating provisional measures are legally binding, see ICJ, *LaGrand*, Judgment of 27 June 2001, §115.

[320] ICJ, *Ukraine vs. Russian Federation*, Order of 16 March 2022.

[321] Art. 48(2)(b) seems to allow a Third State to claim reparations in the interest of Ukraine and other States who should be beneficiaries of the *erga omnes* obligation breached by the RF.

[322] *UN Meetings Coverage & Press Releases*, Genocide is a Threat to Peace Requiring Strong, United Action, Secretary-General Tells Stockholm International Forum, ⟨https://press.un.org/en/2004/sgsm9126rev1.doc.htm⟩ (last accessed on 3/8/23).

[323] *UN Meetings Coverage & Press Releases*, Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, ⟨https://press.un.org/en/2022/sc14808.doc.htm⟩ (last accessed on 3/8/23).

Emergency Session of the UN GA.[324] A series of draft Resolutions were produced,[325] invoking in particular the UN GA's *Uniting for Peace* Resolution designed specifically for use in cases of UN SC deadlock.[326] Nevertheless, despite being passed with significant majorities, the UN GA's recommendations were non-binding (Art. 11(2)). Thus, in the case of reacting to the crime of aggression, once again the SC failed, and the GA was unable, to fulfil the UN's principal object. It is, then, just as likely that, upon a finding of the *commission* (Art. III(e) GC) of an Art. II(e) act and thus threat to international peace and security, the UN would remain deadlocked in its inability to restore peace and security through Resolutions under Chapter VI or VII.

4. to fulfil the Responsibility to Protect Doctrine

Under the "responsibility to protect" (R2P) doctrine, if a State is "unwilling or unable" to protect its citizens from breaches of *jus cogens* (peremptory) norms, the International Community has not only a *right* but a collective *duty* to intervene, including forcibly – pursuant to authorisation by the UN SC under Chapter VII. This doctrine was proposed by the International Commission on Intervention and State Sovereignty (2001) and adopted at the 2005 UN GA World Summit. The Outcome Document[327] summarised how UN MSs recast traditional views of State sovereignty towards a principal responsibility to protect their populations. In doing so, they formally recognised their R2P their populations from mass atrocity crimes, including genocide, through prevention (§138), and stressed how the International Community has a collective responsibility, through the UN, to use all measures available under Chapters VI and VII of the UN Charter to protect populations worldwide therefrom (§139).

The first UN SC Resolution citing the R2P doctrine was UN SC Resolution 1970 (2011),[328] which imposed sanctions on Gaddafi's Libya. This was followed closely by UN SC Resolution 1973 (2011), [329] authorising, inter alia, "all necessary measures [...] to protect civilians" in Libya.[330] Regime change in Libya following forcible intervention under the R2P

[324] UN SC Res 2623 *11th Emergency Special Session of the UN GA* of 27/2/2022, UN Doc. S/RES/2623.
[325] Beginning with UN GA Res ES-11/1 *Aggression against Ukraine* of 2/3/2022, UN Doc. A/RES/ES-11/1 – this time with more than three quarters of those States which voted voting in favour – and concluding initially with Resolution UN GA Res ES-11/4 *Territorial integrity of Ukraine* of 12/10/2022, UN Doc A/RES/ES-11/4.
[326] UN GA Res 377 (V) *Uniting for Peace* of 3/11/50, UN Doc. A/RES/5/377.
[327] UN GA Res 60/1 *2005 World Summit Outcome* of 24/10/2005, UN Doc. A/RES/60/1.
[328] UN SC Res 1970 *Peace and security in Africa* of 26/2/2011, UN Doc. S/RES/1970.
[329] UN SC Res 1973 *The situation in Libya* of 17/3/2011, UN Doc. S/RES/1973.
[330] Given that "all necessary measures" could have included series of non-forcible measures, the immediate use of force resulted in a *post hoc* interpretation of NATO's motivation being that of regime change. How political decision-making therefore undermined this legal mechanism is a foremost example of political machinations undermining the progressive development of International Law, and thus trust in a rules-based international order.

doctrine has done little to bolster support therefor; indeed, that NATO's intervention led to Gaddafi's downfall has rather "given R2P a bad name".[331] Even if this had not been the case, the R2P doctrine nevertheless provides no autonomous legal base for (forcible) countermeasures.

5. to undertake Humanitarian Intervention

The 'right' to intervention on a humanitarian basis, i.e., to bring to an end through forcible measures the perpetration of mass atrocity crimes such as genocide, is highly contentious. Indeed, the duty *to prevent/punish* neither creates rights of intervention nor overrides the prohibition on the use of force in Treaty-based (Art. 2(4) UNC) and Customary International Law.[332]

The principal contentious example of a breach thereof with the 'justification' of a declared "humanitarian intervention" is NATO's intervention in Kosovo. That use of force lacked a legal basis and was therefore illegal. Thus, a draft UN SC Resolution demanding NATO's cessation of its use of force against the Federal Republic of Yugoslavia (FRY) was drafted, but failed through the veto of the USA, UK, and France.[333] While UN SC Resolution 1244 (1999)[334] welcomed the withdrawal of the armed forces of the FRY from Kosovo and established an international security presence, it neither endorsed nor condemned the intervention. Infamously, the Independent International Commission on Kosovo held that it was "illegal but legitimate"[335] – i.e., if not having a legal, then at least having a moral, basis. As highlighted by *Tams*,[336] the Non-Aligned Movement – representing 120 States, i.e., a majority of UN MSs – rejected all claims to a 'right' to "humanitarian intervention" due to its lack of a legal basis in both Treaty-based and Customary International Law.[337]

6. in practice

In practice, the legal consequences of a finding of the *commission* of genocide under International Law are evidently untested – neutered by the deadlock of the UN SC, the

[331] As stated at the time by the Republic of India's Ambassador to the UN, cited in *Bolopin*, After Libya, the question: To protect or depose?, ⟨https://latimes.com/opinion/la-xpm-2011-aug-25-la-oe-bolopion-libya-responsibility-t20110825-story.html⟩ (last accessed on 15/7/23).
[332] *Tams* in *Tams/Berster/Schiffbauer* (eds.), p. 51, §45; p. 75, §95.
[333] *UN Meetings Coverage & Press Releases*, Security Council Rejects Demand for Cessation of Use of Force Against FRY, ⟨https://press.un.org/en/1999/19990326.sc6659.html⟩ (last accessed on 3/8/23).
[334] UN SC Res 1244 *on the situation relating to Kosovo* of 10/6/1999, UN Doc. S/RES/1244.
[335] *Independent International Commission on Kosovo*, p. 4.
[336] *Tams* in *Tams/Berster/Schiffbauer* (eds.), p. 75, §95.
[337] *Non-Aligned Movement*, Ministerial Declaration from the 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, ⟨https://g77.org/doc/Decl1999.html⟩ (last accessed on 3/8/23), §69.

impotence of the UN GA, and delay before the ICJ. In fact, this international legal practice of inaction was invoked in the Oral Submission of Ukraine in the ongoing *Allegations of Genocide* case: the ICJ held in *Nicaragua* that the use of force is not an appropriate measure for the fulfilment of human rights obligations[338] and, correspondingly, nothing in the GC authorises a State to violate the territorial integrity of another State, "whether to prevent, deter or punish genocide".[339]

E. Conclusions

On balance, this study has argued that the alleged forcible transfer of children from the Ukrainian to Russian national group during the Invasion by the officials and organs of the RF is justiciable as an act criminalised under Art. II(e) GC, and thus punishable under Art. III, giving rise to State responsibility under International Law. First, the applicable law under both Treaty-based and Customary International Law, in light of the case-law of the ICJ, ICC, ICTY, and ICTR, was clarified (§A.IV–B), and a minority view vis-à-vis the threshold of the *social* destruction/dissolution of a group was advocated and justified (§B.II.2.d). Second, a finding was made not only of the *material* element (*actus reus*) (§A.III; §C.I), but also of the *mental* elements (*mens rea*) (§C.II), of the act criminalised under Art. II(e), and thus also of *prima facie* evidence for conduct attributable to the officials and organs of the RF constituting a criminalised Art. II(e) act and one or more punishable Art. III acts (§C.III). Third, these acts were found to give rise to State responsibility under both Treaty-based and Customary International Law (§B.II) on the part of both the RF (§D.I), by nature of such conduct being in breach of the RF's Treaty-based and Customary International Law obligation *not to commit* genocide, and of Third States (§D.II), by nature of their obligations under those primary and secondary rules of International Law being *to prevent* and *punish* genocide.

In the introduction (§A.I), particular emphasis was placed on arguable historical acts of genocide committed by the USSR in the Ukrainian SSR, such as the Holodomor, whereby the Invasion itself was argued to be a reflex of this historical relationship between coloniser and colonised. This argumentation amplified considerations of the *general context* of the settler-colonial war of conquest that the Invasion arguably constitutes, and provided an essential lens for the interpretation of the eliminationist rhetoric expressed by officials of the RF and the actions constituting 'de-Ukrainianisation' undertaken in the (partially) TOTs (§C.II.2.a). In light of the risk of the *social* destruction, and indeed dissolution, that would arguably result

[338] ICJ, *Nicaragua*, Judgment of 27 June 1986, §§267–268.
[339] ICJ, *Ukraine vs. Russian Federation*, Public Sitting of 7 March 2022, p. 28, §44.

from acts of "biological" genocide (§B.II.2.d), the intended and enacted fate of the Ukrainian national group under Russian occupation became all the more apparent.

Notwithstanding such a finding of justiciability, it was also seen how UN SC deadlock, UN GA impotence, and ICJ delay precludes legal actions under both Treaty-based and Customary International Law, and that, without a UN SC Resolution, there are no lawful forcible measures that could be taken by Third States uni- or multilaterally – even to bring to an end such a breach of a *jus cogens* (peremptory) norm owed *erga omnes*. Whether the conclusion of the ongoing *Allegations of Genocide* case will lead to further litigation before the ICJ for the RF's arguable further breach of the GC under Art. IX remains to be seen.[340]

Thus, in spite of this study's finding of *prima facie* evidence that the crime of genocide has and is being committed by the RF in Ukraine, no viable legal remedies appear available to bring this crime and this breach of International Law to an end. Thus, despite being considered a crime in Customary International Law long before the GC enshrined the duty *not to commit*, *to prevent*, and *to punish* in Treaty-based International Law, and despite being "contrary to the spirit and aims of the UN", both International Law and the UN remain once again unable "to liberate mankind from this odious scourge", if and when perpetrated by a Permanent Member of the UN SC.

[340] Only a respondent State may, e.g., file a counter-claim, see *Murphy*, Counter-Claims at the International Court of Justice, ⟨https://ssrn.com/abstract=3086752⟩ (last accessed on 19/6/23).

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