



Beatriz Carolina de Jesus Martins

**Reuniting Families and Ukraine's Lost Children: Going
Beyond Criminal Prosecutions and Ensuring Non-
Repetition Through Transitional Justice**

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obtaining the Master's Degree in Law, with specialization in
International and European Law

Supervisor:

Professor Doctor Jeremy Julian Sarkin

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Anti-Plagiarism Statement

I hereby declare that the work here presented is my own, and that all citations are correctly acknowledged. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offense.

A handwritten signature in black ink, reading "Beatriz Carolina de Jesus Martins". The script is cursive and fluid, with the first name "Beatriz" being more prominent and stylized.

Beatriz Carolina de Jesus Martins

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Abbreviations List

API - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), OF 8 June 1977

CAT – United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

CRC – Convention on the Rights of the Child

ECtHR – European Court of Human Rights

ED – Enforced Disappearance

GCIV – Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949

GNRs – Guarantees of Non-Repetition

IACtHR – Inter-American Court of Human Rights

ICC – International Criminal Court

ICCPED – International Convention on the Protection of All Persons from Enforced Disappearance

ICCPR – International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICL – International Criminal Law

IHL – International Humanitarian Law

IHRL – International Human Rights Law

NGO – Non-Governmental Organization

OSCE – Organization for Security and Co-operation in Europe

TJ – Transitional Justice

UN – United Nations

UNSC – United Nations’ Security Council

WGEID – Working Group on Enforced or Involuntary Disappearances

Declaration on the number of characters

The body of this thesis, including spaces and footnotes, amounts to a total of 182 182 characters.

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Abstract

Not long after the large-scale invasion of Ukraine by the Russian Federation, reports of Ukrainian children being taken to Russian territory begun to surface. This phenomenon was reported by the media, governments, international organizations, NGOs and academics alike, mostly under the concepts of unlawful deportation or transfer of civilians and abduction. The present work adds to these formulations, by arguing that this conduct can be considered, too, enforced disappearance, a grave violation of International and Human Rights Law. This work further points out that the enforced disappearance of children is a widespread practice across time and space, that needs to be dealt with at an international level, to prevent future cases. As an answer to these two questions – the need to deal with and prevent cases of enforced disappearance of children not only in Ukraine, but also internationally - this thesis presents the field of Transitional Justice (TJ), and in particular, Guarantees of Non-Repetition (GNRs). As such, it will be argued that using TJ and GNRs in this case can have positive effects regarding justice, truth, reconciliation, peace and prevention, as well as in repatriating children and helping the Ukrainian community effectively deal with the violations.

Key-words: Ukraine, Russia, Transitional Justice, Enforced Disappearance, Children, Guarantees of Non-Repetition.

Resumo

Pouco depois da invasão em grande escala da Ucrânia pela Federação Russa começaram a surgir relatos de crianças ucranianas levadas para território russo. Este fenómeno foi noticiado por meios de comunicação social, governos, organizações internacionais, ONGs e académicos, na sua maioria sob os conceitos de deportação ou transferência ilegal de civis e rapto. O presente trabalho vem adicionar a estas formulações, defendendo que esta conduta pode ser considerada, também, desaparecimento forçado, uma grave violação do Direito Internacional e dos Direitos Humanos. Este trabalho salienta ainda que o desaparecimento forçado de crianças é uma prática generalizada no tempo e no espaço, que precisa de ser tratada a nível internacional, para evitar casos futuros. Como resposta a estas duas questões - a necessidade de tratar e prevenir casos de desaparecimento forçado de crianças não só na Ucrânia, mas também a nível internacional - esta tese apresenta a Justiça de Transição (TJ) e, em particular, Garantias de Não Repetição (GNRs). Como tal, este trabalho argumentará que a utilização da TJ e das GNRs neste caso pode ter efeitos positivos no que diz respeito à justiça, verdade, reconciliação, paz e prevenção, bem como na repatriação de crianças e na ajuda à comunidade ucraniana para lidar efetivamente com as violações.

Palavras-chave: Ucrânia, Rússia, Justiça de Transição, Desaparecimento Forçado, Crianças, Garantias de Não-Repetição.

I. Introduction

Children are some of the most vulnerable members of society during times of armed conflict and are disproportionately affected by the dynamics of war. Children can be both directly and indirectly targeted by armed forces, and often have their Human Rights violated (Sarkin 2012). Predictably, this has been the case also during the international armed conflict between the Russian Federation and Ukraine, after the invasion of the latter by the former in February 2022. Thus far, at least 1,993 children in Ukraine were injured or killed (UNICEF 2024), and in the first month of conflict half of the population under 18 years old was displaced (UNICEF 2022).

This work, however, focuses on the multiple reports of Ukrainian children being taken to Russian or Russian-occupied territory in a large scale, that have come to light in the last two years (Bilkova et al. 2023; Khoshnood, et al. 2023; Del Monte and Barlaoura 2023). Some go as far as arguing that this practice has been taking place even before the events of February 2022, namely since the 2014 Russian annexation of Crimea (Bilkova et al 2023, 40). Thus far, it was found that unaccompanied children that were under the care of the Ukrainian State were taken by government officials to Russia and placed for adoption with Russian families, having their records permanently changed (Bilkova et al. 2023, 18). Many children were taken, under coerced consent given by their parents, to “summer camps”, where they have been through a process of re-education, and their returns home have been delayed and diffculted (Khoshnood et al. 2023, 4). Parents separated from their children at filtration points have also found it difficult to reunite with them. As a result of Russia’s actions, the whereabouts of multiple children are now unknown, and both families and the Ukrainian State are actively looking to locate and repatriate them.

While Russia does not dispute the veracity of these facts, the exact number of children who fell victim to this practice is unclear (Bilkova et al. 2023, 12). The Russian government has indicated that between February 2022 and February 2023, 738,000 children previously in Ukrainian territory have arrived in Russia (Bilkova et al. 2023, 12). However, the Commissioner for Human Rights of the Ukrainian Parliament considers this number to be exaggerated, estimating the accurate figure to be around 150,000 children (Bilkova et al. 2023, 12). On the other hand, the Commissioner of the President of Ukraine for the Rights of the

Child and Child Rehabilitation estimated, in January 2023, that 16,221 children had been forcibly displaced to the Russian Federation and territories under its control (Frantsuz et al. 2023, 18). In a much more reserved approximation, the Humanitarian Research Lab at Yale School of Public Health has estimated that the Russian government was holding “at least 6,000 children from Ukraine within Russia-occupied Crimea and mainland Russia” during 2023, further arguing that the Russian government is operating a “large scale, systematic network of camps and other facilities” where these children are being held (Khoshnood, et al. 2023, 4).

While the Russian Federation claims the transfer of these children is conducted on a humanitarian basis, to ensure their safety and well-being (Bilkova et al. 2023, 14), actors reporting on the situation have denounced its illegality. Russia’s actions towards Ukrainian children have been labeled as abductions (Fedosiuk 2023; Frantsuz et al. 2023) as well as unlawful transfer and deportation of civilians (Lisyansky et al. 2022; Bilkova et al. 2023; Khoshnood, et al. 2023), which may constitute crimes against humanity and war crimes. Some have even argued that such conduct may fall under the definition of genocide, as by Article 2, paragraph e) of the Genocide Convention (Ioffe 2023).

Regardless of the disparaging numbers, it can be established that the forcible displacement of Ukrainian children is a systematic, large-scale practice, affecting thousands of children and their relatives (Ioffe 2023; Khoshnood et al. 2023). It is particularly concerning given that this practice violates multiple international law norms, in the branches of International Humanitarian Law, International Human Rights Law, and International Criminal Law. Particularly relevant are the Geneva Conventions and their Additional Protocols, the Convention on the Rights of the Child, the Rome Statute, the ICCPR, the Declaration on the Protection of All Persons from Enforced Disappearance, and some argue also the Genocide Convention. Thus, considering the illegality of Russia’s actions regarding the displacement of Ukrainian children, the International Criminal Court (ICC) has issued two warrants of arrest in this context - Russian President Vladimir Putin and his Presidential Commissioner for Children's Rights, Maria L’vova-Belova.

A particular set of issues arise from the situation so far exposed. First, there is a pressing need to repatriate these children, to cease both the violation of their rights and the efforts of reeducation and possible assimilation into Russian society. Second, as the conduct of the Russian Federation constitutes grave violations of international law, there will be a need to

appropriately process these events, as to achieve peace and reconciliation. Third, it is important to establish prevention mechanisms that prevent such events from occurring again in the future. Finally, victims and their families have rights to justice, truth and reparations, that need to be fulfilled. With this context present, this thesis will argue that the field of Transitional Justice (TJ) is equipped with the theoretical framework necessary to give adequate responses to the issues so far exposed. This is because TJ has been specifically devised and theorized so that societies can give an adequate answer to periods of instability, Human Rights violations and breaches of International Humanitarian Law, as is the case in analysis. Transitional Justice suggests the tools that societies should use to make sure they adequately process past traumatic events, by achieving peace and reconciliation, while also working for prevention and non-repetition. As such, the *raison d'être* of Transitional Justice and what the field purposes to do appear to fit with the current needs of the Ukrainian people and Ukrainian children. This work will, thus, explore and answer in what ways can TJ, and particularly its pillar of Guarantees of Non-Repetition (GNRs), aid as far as children taken from Ukraine to Russia.

As such, throughout this thesis recommendations will be given, particularly taking the form of GNRs, that should be implemented by both Ukraine and the international community. The goal of this exercise is threefold: first, these recommendations have in mind the reunification of Ukrainian children and their families, as well as their repatriation. Second, these measures should give assurances to the Ukrainian community that these violations will not be repeated. While the Ukrainian State is not responsible for the disappearance of these children, it is responsible for their protection. Third, as this thesis will make clear in future chapters, the ED of children is not a rare occurrence. As such, GNRs ought to be given by the international community to society in general, assuring that this issue is taken seriously and putting in place mechanisms so that it can be prevented in the future, no matter the context.

These recommendations are addressed at Ukraine and the international community but not Russia for one main reason, which is Russia's current design of internal politics. At the moment of writing, Russia has shown to be hostile to international law and recommendations made regarding its handling of the invasion of Ukraine. As such, one cannot expect the Russian government to be open to recommendations on matters of IHL and IHRL as of right now. In the future, such recommendations may be made; however, they will have to be tailored to the specific context of Russian internal politics post-war, which one cannot predict as of today. Furthermore, when that time comes, Russia will have to submit itself to an extensive and

complex transitional justice process: this process should not only consider the invasion of Ukraine and violations of IHL and IHRL connected to it, but it ought to also address violations of Human Rights and authoritarian rule within Russia's own borders. Such a process could be the subject of its own thesis, but it is out of the scope of this one.

To achieve what was above exposed, this work will be structured in six chapters, in addition to this introduction. First, a literature review conducted on the issues of Ukrainian children taken to Russia unlawfully by Russian armed forces will be exposed. This exercise aims at understanding what has been written thus far on this matter, as to expose the current gaps in the literature, which will then allow us to devise the research questions that will guide this work. This literature review also includes research conducted on the prospects of using TJ tools in a post-conflict context in general, but also regarding children's issues in particular, as to comprehend what has already been said on this matter. Following this exercise, a comprehensive view of the events taking place regarding Ukrainian children will be given, exposing how the children are being taken, by whom, and to where. This exposition will then be looked at considering the definition of ED, in the following chapter. Here, it will be argued that this case is indeed ED. This chapter will further expose other cases of the ED of children stretching in time and space, to argue that this is a widely disseminated problem, that requires urgent action by the international community. Additionally, the analysis of these cases will allow for conclusions regarding the effectiveness of TJ efforts in the past, and recommendations for TJ efforts for the future. Next, this thesis will look at the definition and theoretical basis of TJ, while at the same time theorizing its possible application in the context in analysis and the benefits of doing so. Finally, GNRs will be looked at in more detail, whilst recommendations on the implementation of these measures to both Ukraine and the international community will be given. This work will end with some concluding remarks, pointing out the main arguments made.

II. Literature review & problematization

Since February 2022, a significant amount of attention has been given to the issue of Ukrainian children taken to Russia - by news outlets, academics, international organizations, NGOs, and governments. A great deal of literature focuses on quantifying and qualifying what is happening - how the children are being taken, to where, for what purposes, and who is taking them (Khoshnood et al. 2023; Lisyansky et al. 2022; Bilkova et al. 2023). Fronek et al (2023, 6), for example, point out that children from institutions, families in hiding and parents in the military have been taken by the Russian government since February 2022, particularly from the DPR and LPR, and are being adopted by Russian families. Fedosiuk (2023) points out that illegal adoption by Russians has been taking place since the invasion of Crimea in 2014. Fronek et al (2023, 6) argue that Russian policy towards children from the occupied regions constitutes “russification”, with the intent to “destroy all traces of Ukrainian identity”. In the same line, Fedosiuk (2023, 7) also argues that the abductions and illegal adoptions are “psychological warfare” on Ukrainians, and can amount to genocide, something that will be discussed in more detail later in this chapter. Lunov (2023, 2) adds by arguing that the “abduction of children” by Russia is a way for the invader to demonstrate its power over Ukraine, while at the same time making the parents subservient and indoctrinating the children.

Trautman and McFarlin (2023), among other things, give a detailed recount of Russia’s criminal actions since the beginning of the full-scale invasion. They argue that Russian forces have incurred “abhorrent transgressions” of international law, constituting Human Rights violations and war crimes, even possibly genocide (Trautman and McFarlin 2023, 22). They focus on how these violations can be prosecuted and point out the shortcomings of the ICC and ICJ, arguing that the best chance for criminal justice is in European courts, under universal jurisdiction (Trautman and McFarlin 2023, 22). Additionally, they denounce the lack of action by International Organizations in bringing effective legal action against Russia (Trautman and McFarlin 2023, 22).

Colvin & Orchard (2023, 282) also argue that “Russia’s deportation campaign in Ukraine” can be considered both a war crime under the Rome Statute, and due to their widespread and systematic nature, also a crime against humanity, notwithstanding a history of confusion in the definition of these crimes in international law. They, too, present three avenues for the

international community to aid in pursuing accountability other than the ICC, by assisting Ukraine in national trials or through universal jurisdiction.

Academics have also commented on the current landscape of Ukrainian national law concerning children and their adoption. Particularly, Maryna (2022, 49) focuses on introducing the concept of “temporary placement of children” in the provisions of the Family Code of Ukraine, which would allow orphans and children deprived of parental care to people that can care for them, for a certain period of time. However, the author mostly looks at the issue from the viewpoint of the “mass resettlement of children”, or war refugees, not children taken by Russia in particular (Maryna 2022, 48). Hartman (2022) also studied the Ukrainian national legislation on child adoption, particularly, its changes with the introduction of martial law. The author mentions a ban on international adoptions and adoptions by Ukrainian citizens living outside Ukraine (Hartman 2022, 171). Further, children evacuated outside of the country’s borders can only be adopted once they return to Ukraine, and children in “the war zone and occupied territories” cannot be adopted (Hartman 2022, 170). Gscheidlen (2022, 66) additionally points out that in an effort to counteract Russia’s plans for facilitated adoptions in the occupied regions, Ukraine changed its legislation to allow for relatives of children without parental care or orphans to obtain their guardianship. This would give the new guardians legal ground for a claim to demand the return of the child from the place of transfer (either Russia or the DPR and LPR) (Gscheidlen 2022, 66). However, the author argues that the existing legal protective framework, both national and international, regarding the protection of children in Ukrainian State care, is still insufficient (Gscheidlen 2022). In this line, Melnychuk et al. (2022) comment on the tasks the Ukrainian government faces in order to protect the rights of children in armed conflict. The authors argue that there is a need for a comprehensive policy and law on the protection of children’s rights, as well as developing a culture of children’s rights (Melnychuk et al. 2022). Regarding ED in Ukraine, Denysiuk points out that while the country has supplemented its national legislation in order to fulfill international standards and obligations regarding the crime, there is still a high number of forcibly disappeared persons, especially after the 2022 invasion (Denysiuk 2023). However, the author affirms that ED in Ukraine goes unpunished, due to problems with the “application of the legal norm” as well as the difficulties in investigating during armed conflict (Denysiuk 2023, 18).

Certain authors have begun theorizing on what can be done, on multiple levels, to deal with the crimes committed by the Russian army regarding Ukraine’s children. Acknowledging the

struggle that searching for these children and reuniting them with their families in a post-conflict scenario will imply, as one cannot expect Russian cooperation on the matter, Fedosiuk (2023) theorizes briefly on what can be done. As such, the author proposes that future investigators have a mandate given by the UN to grant them unrestricted access to Russia and any camps the children may be in (Fedosiuk 2023, 18). Additionally, the author suggests that Ukraine should demand the repatriation of all children in Russian territory before entering a peace agreement and use this as a condition for a Russian return to the ECHR and the Council of Europe (Fedosiuk 2023, 18). Regarding a future peace agreement, Amann (2022, 564) argues that it is necessary to include children and their experience in a future peace agreement, particularly their “experiences, needs, rights, and capabilities”. Particularly relevant, the author argues for the need to include a provision on the return of children to their communities, if they have been “subjected to forced deportation”, as well as a provision on the respective reparations, or “services needed to redress harms resulting from their departures” (Amann 2022, 590).

Literature on the matter has also mentioned reparations. Moffet (2022), for example, has focused exactly on reparations for the war in Ukraine, while acknowledging the difficulty in achieving them. The paper discusses “who would be eligible for reparations, evidential issues and funding” (Moffett 2022, 3). On the taken children, the author points out that financial remedy is not enough, but it will be necessary that those responsible “investigate, trace and identify those children” as well as prosecute the responsible (Moffett 2022, 22). While not referring to them as reparations, Fedosiuk (2023) also theorized about the tasks before Ukraine once the conflict reaches its end. The author argues for the necessity of a “domestic system of recovery and reintegration for the repatriated children”, as well as a program for their mental health and psychological support (Fedosiuk 2023, 22). These types of measures, focusing on reintegration and psychological support, have been categorized by other TJ academics as types of reparations. Fronek et al. (2023, 8) also argue for the need to locate the taken children, as well as implement “properly funded post-war services” focused on tracing their whereabouts and reuniting them with their families, such as DNA repositories. The authors further argue for considering a truth commission in post-war Ukraine, while pointing out the difficulty in achieving reparation and restitution (Fronek et al. 2023,8). In TJ theory, these too can be seen as measures that achieve truth, reconciliation and reparations.

On the implantation of TJ specifically, both Chubinidze (2021) and Calvet-Martinez (2023) have written on the possibilities for the implementation of such an approach in Ukraine. While both mention GNRs (in addition to all other 3 pillars of TJ), these are theorized to have the goal of guaranteeing the conflict does not recur, not being focused on violations of HR, let alone on the enforced disappearance of children (Chubinidze 2021; Calvet-Martinez 2023).

Since the forcible transfer of children during armed conflict is explicitly mentioned in the Genocide Convention, often the unlawful deportation and illegal adoption of Ukrainian children is mentioned in academic debate framed within the overall discussion of genocide. Fronek et al (2023, 7) point out that Raphael Lemkin, one of the most prominent figures in the drafting of the Genocide Convention, had a much broader view of genocide, which included the policies of the Nazi Regime, arguing that “certainly, the same extension could be applied to Putin’s coordinated policies in the war he instigated”. Fedosiuk (2023, 19), too, compares Russia’s actions to the “Lebensborn” program.

Besides these comparisons, discussions tend to focus on proving the *dolus specialis* of genocide, as the *actus reus* does not raise controversy. Other authors have written on the possibility of genocide on Ukrainian soil (Azarov et al. 2023), but Ioffe (2023) has focused specifically on Article II (e) of the Genocide Convention. The author argues that the forcible transfer of Ukrainian children to Russia does satisfy the *dolus specialis* requirement, thus being genocide in light of the Genocide Convention (Ioffe 2023). The author further analyses the relevant jurisprudence on genocide and argues that in the Ukrainian case, direct intent to commit genocide can be proven through the objective of destroying the group and a demonstrated “general plan” (Ioffe 2023, 26). The author justifies this stance by pointing out that forcible transfer aims at the dissolution of Ukrainian identity among children, which has physical and biological consequences on the group (Ioffe 2023, 26). Additionally, the text argues that evidence of a plan to commit genocide can be inferred from Russia’s official statements, documents, policy, and genocidal discourse in state-owned media (Ioffe 2023, 41). Other authors have also claimed that genocidal intent can be proven by Russia’s policy (such as ‘Denazification’, derogatory language against Ukrainians, denying the existence of a Ukrainian nation and identity, and the perpetration of atrocities by the Russian military against civilians), as well as statements from government members (Azarov et al. 2023; Marchuk and Wanigasuriya 2022). This argument has been used to justify the idea that Ukraine should

extend its claim at the ICJ, arguing that Russia is committing genocide against Ukrainians, breaching the Genocide Convention (Marchuk and Wanigasuriya 2022).

Despite these arguments, not everyone agrees with this view: some argue that one cannot classify Russia's actions in Ukraine as genocide (Schabas 2022; Quéniwet 2022). Quéniwet (2022), when addressing *dolus specialis*, says that direct intent is difficult to prove given the evidence we have so far, and contradicts Ioffe (2023) by saying that in line with the ICTY jurisprudence on genocide, hate speech and dehumanizing language in state-owned media cannot prove genocidal intent. The author further argues that executions and forcible displacements are “unlikely to reach the scale required” to be considered genocide (Quéniwet 2022, 10). This leads to the conclusion that a genocidal plan against Ukrainians cannot be proven yet (Quéniwet 2022, 10). Shabbas (2022) argues the same, saying that so far, no direct evidence of a Russian plan to commit genocide has been demonstrated, and adds that for a pattern of conduct to reveal genocide, it would have to be such that no other explanations can be derived from the behavior. The author concludes by saying that this is not the case in Ukraine and thus genocide is not proven (Schabas 2022).

Gaps in the literature & problematization

From the literature review above, two gaps can be identified. The first relates to the definition of the crime taking place: notwithstanding the accuracy of the theorizations exposed, this thesis will argue that Ukrainian children have been victims of enforced disappearance, a classification that so far has not been used in academic debate. To do so, first an account of what is happening to Ukrainian children will be given; then, this conduct will be compared to the definition of enforced disappearance, and it will be proven that, indeed, this definition fits the facts of what is happening in Ukraine. This thesis will further argue that not only can this conduct be considered enforced disappearance, but it is also more beneficial to do so, as unlawful deportation and abduction do not contain important elements that are crucial in this situation – particularly, the reasons for committing the crime, the continuing and criminal natures of it, but also the extension of the victim scope to the next of kin. Additionally, it will be said that considering this conduct enforced disappearance will open a wider set of avenues for victims to obtain redress.

The second gap in the literature concerns the possibility of TJ tools being used to deal with this issue. While TJ has been theorized to give an answer to periods of grave violations of IHRL and IHL, as explained earlier in this introduction, this possibility is yet to be adequately explored within academic discussion. While the connection between the field and the issue at hand appears clear, there is a lack of literature on a possible TJ approach to the issue of the enforced disappearance of Ukrainian children, and particularly, there is a gap regarding literature on guarantees of non-repetition, although these would be beneficial not only to the children in Ukraine, but to children in active armed conflicts around the world.

In this context, the present thesis will attempt to answer the following question: how can Transitional Justice, particularly through guarantees of non-repetition, aid as far as children taken by Russia from Ukraine? The answer to this research question will be given on two avenues: GNRs that can be employed by Ukraine, and GNRs that can be employed by the international community as a whole. To do so, the present work will explore how the four pillars of Transitional Justice – justice, truth, reparations, and guarantees of non-repetition – can be employed within the Ukrainian context to aid in the situation of disappeared children. This work will further argue that guarantees of non-repetition can be particularly helpful in this case, as they play a pivotal role in fostering reconciliation and rebuilding trust between victims and the perpetrator, while simultaneously looking into the future, creating assurances to society in general that the violations will not occur again.

An answer to the research question proposed in this thesis is important on multiple levels. First, due to the urgency of the case at hand - the prompt relocation and repatriation of these children is crucial. Repatriation is first and foremost required to put an end to the violations, as well as to restore the rights of children and their families. Such reparation ought to be carried out sooner rather than later, as the situation in question is time sensitive: the longer children are unaccounted for, the more likely it is that their whereabouts are never restored. This has clear consequences on children and their families, but also on the Ukrainian society in general: removing children from their societies is an historic practice, that aims at the destruction of children's bonds with their culture and promotes assimilation into the society they are brought into (Schneider 2022). As such, the longer children are in Russian territory, the more likely it is that they are permanently adopted, increasing the chance of this cultural fracture between generations to become a reality. Even if children are not adopted and remain in the so-called recreation camps, the longer they are subjected to re-education practices the more difficult it is

to revert such indoctrination. One must also mention that separation from one's family, especially during such a crucial time as childhood, will have major psychological consequences on these children, which ought to be dealt with in due time. Second, it is important in the wider context of the Ukrainian war, and the need for a TJ approach once a peace agreement is finally signed. Third, it is important for the development of the TJ field and the academic literature on TJ, as GNRs have been identified, on various occasions, as the least researched pillar of TJ (Mayer-Rieckh 2017, 417). Fourth, it is relevant given the present state of the art on the Ukrainian war, the disappearance of Ukrainian children, and how TJ can be used in this context. This thesis will thus defend the application of Transitional Justice (TJ), and in particular Guarantees of Non-Repetition (GNRs), in the Ukrainian context, as to achieve the needs exposed above.

Unfortunately, enforced disappearance is a practice that has affected the lives of thousands of children living in contexts of armed conflict before. The enforced disappearance of children during armed conflict extends in space and time, with examples from the dictatorship period in Latin and Central America, Franco's Spain, Sri Lanka, Myanmar, and Syria (United Nations 2018; Vermeulen 2012). Therefore, it is not only important to address the violations of international law committed against Ukrainian children by Russia today, but it is also imperative that the international community take this opportunity to create prevention measures that ensure that this systematic, widespread violation of Human Rights does not happen again in the future - in Ukraine, but everywhere else as well. As such, in addition to the core research question, this thesis will also research on how the international community can use the Ukrainian situation to employ measures of TJ aimed at preventing the occurrence of enforced disappearances of children in the future, worldwide.

III. Establishing the Case of Ukrainian Children

To fundament the claim that the conduct of the Russian Federation is enforced disappearance, a comprehensive view of the events must be given. This chapter will, thus, aim to establish how children are being taken, to where, under what pretenses, why, and by whom. Additionally, this section will also establish what have been the efforts thus far conducted to repatriate these children, and whether they have been effective.

Since the beginning of the large-scale invasion of Ukraine by Russian armed forces in 2022, multiple accounts of Ukrainian children being taken to the Russian Federation or the territories it occupies have come to light. The factuality of this conduct is “well established and uncontested”, as both Russia and Ukraine recognize the practice is taking place (Bilkova et al. 2023, 12). Accounts differ regarding the exact number of children taken, as well as the purposes for doing so and the legality of the practice.

According to investigations previously made, children taken by Russia can be divided into two main groups: orphaned children, and unaccompanied children. Orphaned children are those whose parents have died, are unknown or have abandoned the child (Bilkova et al. 2023, 13). The latter is the most complex category, as it includes children in an array of situations. These include children who were temporarily removed from their families and institutionalized;¹ children who became separated from their families at filtration points and those who became separated from their families due to war circumstances,² as well as those who were sent to the so-called recreational camps and whose return was delayed (Bilkova et al. 2023, 13).

These two groups of children enter Russian territory by different avenues. Orphaned children are brought to Russian territory after evacuations, allegedly for security or medical reasons. Children with parents or clear guardianship are either separated from their families and kept in Russian soil after filtration, or they are sent from Ukrainian territory under control of the Russian Federation to the recreational camps in Russia with consent (albeit questionable) from their parents. Orphan children and those who were evacuated from hospitals and State institutions also pass through the “recreational camps”, however, this is not their destination,

¹ Also known as “children deprived of parental care”.

² For example, children who were sent to stay with relatives to be protected from active fighting.

as these are prioritized for adoption or foster placement in Russian families (Bilkova et al. 2023, 18).

As such, the recreational camps are a crucial component of Russia policy regarding Ukrainian children. Thus far, 43 of these institutions have been found spread all throughout Russian territory, showing a “large scale, systematic network”. At least 6,000 children have passed through these camps during 2022 (Khoshnood, et al. 2023, 4). While they are described by Russia as “recreational stays” or even “summer camps”, their main goal appears to be the re-education: the State provides “Russia-centric academic, cultural, patriotic and military education”, often based on Russia’s perspective of geo-politics and history (Khoshnood, et al. 2023, 5). It has also been reported that children were asked to speak Russian and sing the national anthem of the Russian Federation (Bilkova et al. 2023, 21). Managing these camps implies a large network of actors, and, as such, all levels of the Russian government are involved, amounting to “dozens of individuals” at the “federal, regional, and local” levels (Umland 2024, 11-12). However, thus far only twelve have been included on sanctions lists, and only two - Maria L’vova-Belova and President Putin - have been issued arrest warrants (Umland 2024, 12). One interesting actor in this case is the Republic of Belarus and the Belarusian Red Cross - both are allegedly involved in the process of moving the children to Russia, although to a “relatively smaller degree” (Umland 2024, 4).

While parents do give consent for their children to be taken to Russian territory, such consent is “collected under duress and routinely violated”, and may not be meaningful, according to the Yale University researchers. Parents are often victims of “indirect coercion” resulting of the difficult living circumstances in Ukraine, but also direct coercion, through “implicitly threatening” recruitment tactics. Some were also requested to sign power of attorney over their children, sometimes to unknown persons or entities (Khoshnood et al. 2023, 13). In addition to this, consent is further violated by delaying the return of children from the camps, and moving them across locations without informing the parents, a question that will be developed further in this chapter. When the return of children from the camps is finally allowed, families face a new set of barriers in their path: Russia often demands parents to retrieve their child at the camp, located in Russian or Russian-controlled territory. This is, quite obviously, a tremendous task. Parents must drive thousands of miles by car, as Ukrainian airspace is closed for civilian flights, which implies great financial stress. Additionally, men of military age are prohibited of

leaving Ukraine, and, as such, mothers (potentially with other children) must make the journey, often passing close to zones of active conflict (Khoshnood et al. 2023, 13).

As it has already been stated, orphaned children are prioritized candidates for adoption and placement in Russian families. These adoptions are particularly worrying, as after being adopted in Russia, it will be almost impossible to find the whereabouts of those children. This is because after adoption, children can have their birth certificates changed - including their names, places and dates of birth, and lineage (Bilkova et al. 2023, 18). Additionally, adoption processes in Russia are protected by the principle of secrecy, and as such, there is no database of adopted children (Bilkova et al. 2023, 18). Therefore, the circumstances under which adoption occurs, by erasing a child's identity and by not maintaining public records of the process, make it so that the whereabouts of the children are completely untraceable and unknown.

To accompany this policy, the Russian law had to face amendments. Decree 330 made it possible for the guardians of Ukrainian children or children from the occupied territories residing (even if temporarily) in Russia or Russian territory to apply for Russian citizenship on their behalf (Bilkova et al. 2023, 19; Umland 2024, 6). Other laws were passed in Russia to ease the granting of citizenship to Ukrainian children, such as the amendments to Decrees No. 137 and No. 138, in 2022, and Decree No. 951. These changes have “significantly eased changing the citizenship of orphan or unaccompanied children who find themselves in the territory of the Russian Federation or in the unlawfully annexed” (Bilkova et al. 2023, 20). For the reasons exposed above, this newfound ease in granting Russian citizenship to Ukrainian children is particularly worrying, as it makes them more vulnerable to disappearance.

While the disappearance of Ukrainian children only became a “systematic and mass campaign” after the 2022 invasion, this phenomenon has been occurring since the invasion of Crimea by Russian armed forces in 2014 (Umland 2024, 10). Besides individual accounts of abductions (Fedosiuk 2023, 13), Russia did begin, in 2014, a campaign dedicated to the taking of Ukrainian children to its territory - the “Trains of Hope”. This initiative encouraged Russian families to adopt orphans from the Crimea region, allowing for “more than 1,000 children to be placed into Russian families”, out of the 4323 orphans in Crimean childcare facilities at the time (Bilkova et al. 2023, 16). OSCE claims that their Mission was made aware, by Ukrainian

stakeholders, of “several thousand children” that were taken to Russia beginning in 2014, further claiming that “their traces are lost as of now” (Bilkova et al. 2023, 40).

As it has already been said, Russia justifies the movement of children by calling the deportations “evacuations”, and by claiming children require special medical attention that will be provided in Russia, or by implying they want to give children the opportunity to attend harmless summer camps (Fedosiuk 2023; Bilkova et al. 2023; Khoshnood et al. 2023). The deportations are, in Russian narrative, covered by a veil of humanitarianism. However, academics say these may not be Russia’s true intentions. While some point to a demographic motive - taking children to combat the declining tendency of Russian population (Umland 2024, 6) - others point to a darker reason to do so: namely, to inflict “psychological warfare aimed against Ukrainian people”, as well as “terrorize the enemy and break resistance” (Fedosiuk 2023, 1).

What are the whereabouts of these children?

While Russia does admit to taking children to its territory, the Federation has not disclosed all their whereabouts. Various families still do not know the traces of their children: reportedly, there is a “lack of solid information on the identity and fate of displaced and deported children” (Fedosiuk 2023, 1). Families that eventually do find their lost children do so “as a result of luck” - by recognizing them in pictures made available to the public by the Russian Federation, for example (Umland 2024, 21).

How children disappear also depends on the category they find themselves in. The situation of orphaned children has already been discussed in the previous section: after being adopted by Russian families, orphans can be stripped of their identity, with no records testifying to the details of the adoption, including where and with whom they were placed with. There have also been accounts of children disappearing after evacuations of hospitals and State institutions, but that were not necessarily orphans. For example, a Russian official recounts that during an evacuation, the Russian army “took away all the children from a hospital in Mariupol who were left without parents” (Bilkova et al. 2023, 41). Ukraine never received information on the location of these children, and from investigations made, it appears that “those children likely vanished into the Russian heartland” (Fedosiuk 2023, 4). On another instance, a Ukrainian girl

undergoing medical treatment in a hospital in Mariupol was transferred to the DPR, and later adopted by a Russian family (Fedosiuk 2023, 4). Her family in Ukraine “did not know her fate and whereabouts, (...) [and] they did not have any contact with her as of 31 December 2022”, six months after her initial evacuation (Bilkova et al. 2023, 40).

Regarding children separated from their families during filtration, the OSCE Mission declares that “there was no information provided [to the parents] as to the whereabouts of their children or assistance rendered to ensure the reunification of the family”, and that “parents were left “to fend for themselves” to locate their children and secure their custody” (Bilkova et al. 2023, 40).

Regarding the children taken to camps, it may appear harder to define them as disappeared, as usually parents are aware that the children are going to a certain camp and give (questionable) consent, as seen prior. However, some of these children do, in fact, disappear, even if only momentarily. The OSCE Mission reports that children were moved within Russian territory, not only between camps but also between forms of placement (Bilkova et al. 2023, 50). This practice, done without informing the parents, creates confusion regarding the whereabouts of children. This was the case of a mother that traveled to Crimea to retrieve her child from a camp and was informed on arrival that her child was taken to the Republic of Adygea (Bilkova et al. 2023 61). This also means that a child that was initially placed in a summer camp can be later placed with a foster family or for adoption, without informing the parents. From here, the child can easily disappear, as seen previously. Additionally, it has been reported that often parents consent to their child being placed in a camp, however, they are not informed of its location (Khoshnood et al. 2023, 14).

As such, it can be concluded that the whereabouts of children are often unknown, depending on the category they were included in and how, as well as why, they were brought to Russian or Russian-controlled territory.

What has been done thus far?

As it has been already mentioned previously in this chapter, the Russian Federation paints these moves as evacuations for safety or medical reasons or stays in recreational camps so that children have a “break” from hostilities. As such, it is clear that Russia, at least publicly, does not believe its behavior is reprehensive. In line with this sentiment, Russia has not implemented procedures to reunite families and their children (Khoshnood et al. 2023, 14). Not only has Russia adopted a position of inaction, but it has been established thus far in this thesis that it has actually made this task harder, “creating obstacles for their reunification” (Umland 2024, 17), by “making it difficult for Ukrainian families, as well as Ukrainian authorities, to locate the transferred children by inter alia not having any lists of such children, repeatedly moving the children (...) or using the Russian form of names for Ukrainian children” (Bilkova et al. 2023, 76).

In turn, Ukraine has been vocal on this issue, having already taken some measures. Government members have made various public statements, addressing institutions such as the UNCRC and the Global Alliance of National Institutions (Bilkova et al. 2023, 21). Ukrainian officials have also made appeals to Russian families taking children in, as well as to the Russian government itself (Umland 2024, 12).

In addition to these appeals, the Ukrainian government has started numerous initiatives, such as the Centre for International Resistance, the Child Rights Protection Centre, and the Coordination Council on Child Protection and Safety (Umland 2024, 13). Most importantly, President Zelensky initiated the ‘Bring Kids Back UA Action Plan’, which “united the efforts of the Ukrainian government, partner countries and International Organizations” in bringing back the children (Bring Kids Back UA n.d.). This initiative focuses on the identification, location, rescue and reintegration of disappeared children, as well as in the advocacy and promotion of international diplomacy in this regard. Further, the Plan also aims at the aftercare and development of infrastructures to receive repatriated children and is committed to the documentation of crimes for international prosecution (Umland 2024, 13).

These initiatives have not been exceptionally successful so far. It can also be said that Russia will not, by its own initiative, attempt to “solve” this issue. As such, it has been argued by other academics, and it is the opinion endorsed in this thesis, that until a change of government in

Russia (and also Belarus) is achieved, the responsibility to repatriate these children falls with the international community (Umland 2024, 18). In fact, a “comprehensive and public solution” in collaboration with Moscow has been classified as “currently impossible” (Umland 2024, 18). The international community cannot wait for Russia to suddenly acquire conscience and respect for Human Rights and International Law to deal with such a time-sensitive and urgent matter. As such, this thesis focuses on the actions that Ukraine and the international community can take to attempt to solve this question.

The international community, particularly international organizations, have been vocal about the disappearance of Ukrainian children in Russian territory. Particularly, in September 2022 the European Parliament adopted a resolution calling upon Russia to (European Parliament 2022, 4):

“immediately cease [...] all forced transfers of children to the Russian-occupied territories and the Russian Federation, as well as any inter-country adoptions of children transferred from Ukraine; [...] repeal all legislation facilitating the adoption of Ukrainian children; [...] immediately provide information about the names, whereabouts and well-being of all Ukrainians detained or deported [...] immediately grant international organizations such as the OHCHR [Office of the United Nations High Commissioner for Human Rights] and UNICEF access to all Ukrainian children who have been forcefully deported to the Russian-occupied territories and Russia; [and] ensure the safety and well-being of Ukrainian children while in Russia [...]”.

In the United Nations, the EU and the delegations from other 22 States issued a joint statement condemning the forced deportation of these children. At the international level, on Children’s Day 2023, 23 diplomatic missions in Ukraine issued a joint statement condemning Russia’s actions. Additionally, Germany, Turkey, Saudi Arabia and Qatar have also conducted bilateral negotiations with Russia, as well as “informal diplomacy” in order to repatriate children. Qatar’s efforts, in partnership with Bring Kids Back UA, were successful, having repatriated 24 children in 2023. Germany, too, repatriated 161 children, in cooperation with Ukrainian law enforcement agencies (National Police of Ukraine 2024).

While there has been an international effort to bring back these children, and even some repatriations, efforts at “finding solutions within multilateral formats and by international

organizations have to date been ineffective” (Umland 2024, 4). Ukraine itself has been critical of the international response to the issue, arguing that “due to the very passive position of international organizations, in particular the ICRC, [the State is] not able to fix the exact number of our children and where they are” (Umland 2024, 13). Kyiv has, as such, been vocal in its pleas for additional international help, namely the OSCE, the UNCRC, the UNHCR, UNICEF, the International Organization for Migration and the ICRC, and even the Vatican (Umland 2024, 14).

Albeit a low number, some repatriations have been carried through - less than 400 children have returned to Ukraine. Most repatriations were completed due to a coalition of efforts between the Ukrainian government, NGOs and civil society actors, as well as children’s relatives: due to the lack of a mechanism in place specially designed to repatriate the children, such efforts fall mostly on individuals and the good will of third States (Bilkova et al. 2023, 44).

Legal aspects in the Ukrainian context

By taking Ukrainian children into its territory or its occupied territories without valid consent, Russia is breaking legal norms across two branches of international law: both IHRL and IHL. While IHL is considered *lex specialis* when an armed conflict is taking place, “human rights law applies at all times, in peace and in war” (ICRC, n.d.). As such, these two branches of International Law apply in parallel during times of armed conflict, being even considered complementary - IHRL grants legal protection to individuals regarding certain crimes that are not explicit in the Geneva Conventions, the Additional Protocols and customary law, for example. Indeed, according to the ICJ “some rights may be exclusively matters of IHL; others may be exclusively matters of IHRL; yet others may be matters of both these branches of IL” (ICJ 2004). As such, it is possible for the same set of facts to simultaneously give rise to both violations of IHL and IHRL - this is one of those cases.

On matters of International Humanitarian Law, Ukrainian children are protected by two important documents: the Fourth Geneva Convention (GCIV) and the First Additional Protocol to the Geneva Conventions (API). The GCIV establishes laws relating to the protection of civilians during armed conflict. Within the GCIV, it can be argued that through its actions

regarding Ukrainian children, Russia has violated the prohibition of deportation and forcible transfer^{3,4} and the obligation to enable communication between family members and facilitate it.⁵ Russia is also violating the provisions on children, particularly the duty to facilitate the identification of children and register them;⁶ the prohibition to change their personal status;⁷ the duty to allow for the maintenance and exercise of their religion;⁸ and the duty to ensure that education is, “as far as possible”, provided by those of similar culture.⁹ Further, Russia still has not created a National Information Bureau, “responsible for receiving and transmitting information in respect of the protected persons who are in its power”,¹⁰ in clear violation of Article 136 of the GCIV. On the API, it can be argued that Russia is violating the duty to facilitate the reunion of families dispersed as a result of the hostilities;¹¹ as well as the provisions ruling the lawful evacuation of children, as according to Article 78 of the document.

While it becomes clear that Russia is possibly incurring multiple violations of IHL, it is important to note that “there are no specific accountability mechanisms under IHL” (Bilkova et al. 2023, 3). The API does, in its Article 90, establish a body tasked with investigating grave breaches of IHL, the International Humanitarian Fact-Finding Commission. However, this is an “investigative body and not a court or other judicial body” - it investigates only into the factuality of alleged grave breaches of IHL (Advisory Service on International and Humanitarian Law of the ICRC 2021). Additionally, the Commission has been “rarely, if ever, put in use in the recent decades”, meaning that accountability for IHL violations is unlikely to be achieved (Bilkova et al. 2023, 77).

If looking at the situation in analysis under the scope of deportation or forcible transfer of civilian population, such conduct could be judicially punished under ICL, at the ICC, according

³ Article 49 of the GCIV: ‘*Deportations, transfers, evacuations*’.

⁴ However, it is important to mention that certain deportations to Russian territory might have been considered lawful at a certain point, particularly those made for security and medical reasons, allowed by Article 49 GCIV, according to the OSCE Mission of Experts Report.

⁵ Articles 25 and 26 of the GCIV: ‘*family news*’ and ‘*dispersed families*’, respectively.

⁶ Articles 24 and 50 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War: ‘*Measures relating to child welfare*’ and ‘*Children*’, respectively.

⁷ Articles 24 and 50 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War: ‘*Measures relating to child welfare*’ and ‘*Children*’, respectively.

⁸ Article 24, of the GCIV: ‘*Measures relating to child welfare*’.

⁹ Article 24, of the GCIV: ‘*Measures relating to child welfare*’.

¹⁰, Article 136 of the GCIV, ‘*National Bureaux*’.

¹¹ Article 74 of the API, ‘*Reunion of dispersed families*’.

to the law of the Rome Statute. Such practice could be considered a crime against humanity, if it can be proven to be a widespread or systematic attack against a civilian population, with the knowledge of the perpetrator;¹² or even a war crime.¹³ More specifically, taking children from one group to another, if proved to be done with intent to destroy the group, can be considered genocide.¹⁴ It is important to note, however, that placing such thresholds on the definition of crimes against humanity (particularly, the need for the conduct to be part of a widespread or systematic attack against civilians) highly hinders the eligibility of most cases of these practices to be criminalized (Anderson 2006, 245).

While the possibility of being charged for such crimes exists, critique surrounding the efficiency and efficacy of the Court are abundant. Example of this is the fact that the ICC has issued arrest warrants for both President Putin and Maria Lvova-Belova, more than a year ago,¹⁵ for the crimes of unlawfully deportation and unlawful transfer of civilians (Ukrainian children) from the occupied territories of Ukraine to Russia; but today, the Court still does not have the suspects in its jurisdiction, as it is dependent on the good-will of States Parties to arrest and surrender criminals in their territory. Thus, it cannot be said at this stage if Putin and Lvova-Belova will or will not be sitting in at the ICC as defendants in the future. However, it can be said with some certainty that the process to do so will be long, and even if it so happens that the defendants are brought to the Hague, the charges may not be proven.

In contrast to IHL, IHRL has established multiple judicial and quasi-judicial bodies, as well as some political ones. Examples of these are the various Human Rights' Courts; the UN's Human Rights Council, and some of the bodies included in the UN's system of Special Procedures. Multiple HR documents can be invoked in the present situation: most notably, the ICCPR, the ICESCR, the ECHR, and the CRC, but also the CAT, the European Convention on the Prevention of Torture and Inhuman Treatment, and the Hague Convention of International Child Abduction. While it is true that various rights across these documents are being violated by the Russian conduct in analysis, there is one right that encapsulates multiple others: the right not to be subjected to enforced disappearance. This crime, and its possible applicability in this context, will be analyzed in the next chapter.

¹² Article 7, para. 1., subpara. d) of the Rome Statute of the ICC

¹³ Article 8, para. 2, subpara. a), §vii) of the Rome Statute of the ICC.

¹⁴ Article 6, para 1, subpara. e) of the Rome Statute of the ICC.

¹⁵ On March 17th, 2023.

Chapter conclusion

This chapter's task was establishing what is known about the trajectories and fates of Ukrainian children taken to Russian territory. However, it is important to remember that the account of the events here made is based on open-source information - as such, important details might have been left out. This chapter further pointed out that while Ukraine has requested the aid of the international community on many occasions, the efforts so far conducted have been ineffective, pointing to a need for new strategies to be devised and implemented.

IV. Enforced disappearance: exploring the concept and historical cases of enforced disappearance of children

As stated previously, while thus far academics have defined the conduct of the Russian Federation regarding Ukrainian children as unlawful displacement and transfer, or even genocide, this work will argue that this conduct can, too, be considered enforced disappearance. To do so, this chapter will lay out the theoretical framework on the concept of ED, by exploring its definition in international law and exposing its core characteristics; additionally, this section will analyze each of the four elements applied to the situation in Ukraine, described in the chapter above.

After this exposition on the theoretical basis of the concept and its applicability to the case at hand, this chapter will explore some cases of ED of children historically, to establish that the ED of children is a practice that spreads through time and space. This will later be the basis of the argument for international intervention at the level of prevention and non-repetition. The historical case studies will also serve to explore how cases of ED have been dealt with historically. To be precise, this section aims to answer if and how TJ has been used in these cases, if these efforts were successful and why, if the children were repatriated, and the level involvement of the international community in these endeavors.

What constitutes an Enforced Disappearance?

An enforced disappearance occurs when an individual is unlawfully taken by the State or with some form of State involvement, while at the same time, the State does not release information on the fate and whereabouts of the individual, or even denies the abduction. Enforced disappearance is a crime that, while only making one direct victim (the individual that was subject to the enforced disappearance), causes suffering to an array of other people, particularly the family of the victim. (Vermeulen 2012, 62).

The main legal document regulating the crime of enforced disappearance is the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. The first Article of this Convention establishes the right not to be subjected to ED as absolute and

non-derogable.¹⁶ According to the Convention's Article 2, enforced disappearance comprises four elements, and can be defined as:

(i) the arrest, detention, abduction or any other form of deprivation of liberty (ii) by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, (iii) followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, (iv) which place the person outside the protection of the law.

The ICPPED also defines who is a victim of enforced disappearance. Article 24(1) of the Convention clarifies that victims of ED are the disappeared individual, as well as any person who has suffered harm as a direct result of the disappearance. It has been argued that this definition is too broad, and leaves space for States to determine the scope of victimization (Vermeulen 2012, 63). However, most judging bodies have considered the 'family', 'relatives', and the 'next of kin' as victims of ED (Vermeulen 2012, 179). Due to its particular "specificity and complexity" (Vermeulen 2012, 58), the definition of ED is difficult to capture fully. As such, Human Rights courts such as the HRC, the IACtHR and the ECtHR, have judged enforced disappearances on a multiple rights approach, even after adopting their own definitions and conventions on ED (Vermeulen 2012 167). Enforced disappearance has thus been considered to include violations to the right to life,¹⁷ the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment¹⁸, and the right to liberty.¹⁹

In its Articles 8 and 24, the ICPPED defines ED as a crime of continuous nature. According to the Articles on State Responsibility for Internationally Wrongful Acts, an international crime of continuous nature "extends over the entire period during which the act continues and remains not in conformity with the international obligation".²⁰ Regarding ED, this means that the crime extends from the time when the individual is abducted to the time when information on the fate or whereabouts is given by the State, which has consequences regarding the temporal jurisdiction of Human Rights courts and judging bodies. The ICPPED does not, however, establish clearly what procedures can constitute the termination of an enforced disappearance

¹⁶ Article 1, para. 1 and para. 2 of the ICPPED.

¹⁷ Article 6 of the ICPPED.

¹⁸ Article 7 of the ICPPED.

¹⁹ Article 9 of the ICPPED.

²⁰ Article 14, para. 2 of the Articles on Responsibility of States for Internationally Wrongful Acts.

- this makes one question, for example, if a declaration of death given by a State, with no other information, can mark the termination of an ED (Vermeulen 2012, 59).

While this definition may be relatively straightforward, certain authors have highlighted its incongruities. Issues regarding the definition of ED focus mostly on its third and fourth elements, as the first two do not pose questions (Vermeulen 2012, 63). These issues will be looked at next. Having clarified the concept of enforced disappearance, let us now look at each element considering the Ukrainian situation.

i) The conduct materializes as an arrest, detention, abduction or any other form of deprivation of liberty.

While the children contemplated in this thesis are not placed under arrest or detention, it can be argued that they were abducted by Russia, as they were unlawfully removed from their State and the institutions caring for them. These children are also deprived of their liberty, particularly the liberty to choose and remain in their country of nationality. Regarding children taken to summer camps with parental consent, it can be argued, on the basis of the consent being coerced and often violated, that they too were abducted. Even if it is considered that they were not abducted due to parental consent, they are, on various levels, deprived of their liberty: by having their returns delayed, by being not being allowed to communicate with their families, or by being forced to speak Russian and demonstrate pro-Russia views, for example.

ii) The conduct ought to be carried out by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State.

The Russian Federation does not deny removing the children; in fact, as said before, Russia has on multiple occasions, admitted to the conduct.

iii) The State must refuse to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person.

It became clear in the previous chapter that while the Russian State does admit having taken the children, thus acknowledging the deprivation of their liberty, it still conceals their fates and whereabouts, as it was made clear in the previous chapter. This fact may raise questions regarding the possibility of defining these acts as ED – since the ICPPED does not clarify what exactly constitutes a “concealment of the fate or whereabouts of the disappeared person” (Vermeulen 2012, 170), it has been questioned if a situation be considered an ED if the State acknowledges the detention of the individual, but does not provide further information on the well-being and location of the disappeared (Vermeulen 2012, 63). Indeed, such occurrences are rare, but there are examples of enforced disappearances where the State acknowledges having the victim: this is the case of the Panchen Lama, a six-year-old Tibetan boy who was abducted by the Chinese State in 1995. In this case, the government admitted to having taken the child; however, it never disclosed information on his whereabouts (Sarkin and Baranowska 2018, 13). As such, it becomes clear that this fact is not an impediment to considering these cases instances of ED.

iv) The conduct places the individual outside the protection of the law.

Whatever is the destination of the children are taken to Russia - either being placed for adoption or in recreational camps – they are no longer protected by Ukrainian law or even international law. This view is supported by the OSCE Report, that claims to have found evidence of children having various rights violated, such as the right to identity, the right to family, the right to education, the right to information, the right of thought, conscience and religion, as well as the right to liberty and security (Bilkova et al. 2023, 77).

Thus far, it has become clear that Russian conduct fits the general definition of ED. However, the 2006 Convention dedicates one of its articles to children stipulating that a child can be considered forcibly disappeared by two types of conduct: the first is through the wrongful

removal of children;²¹ the second, is by “falsifying, concealing or destructing” documents that attest to the true identity of the child.²² In the case in analysis in the present thesis, both forms of conduct can be attested to.

Why classify the case in analysis as enforced disappearance?

This chapter has, thus far, argued that the Russian practice of taking Ukrainian children to Russian territory can be considered ED, although this possibility has been ignored within academic debate. Moreover, considering such conduct ED is not only possible, but it can be more advantageous to victims and to the international community as a whole.

The same conduct can be both classified as enforced disappearance or unlawful transfer or deportation, as has been explained before in this chapter. However, the concepts have vastly different implications. In this section, it will be argued that it is not only possible to classify Russia’s actions as ED, but in fact, it is more appropriate to do so, being that ED is the concept that better fits this situation.

Regarding the definitional aspects, unlawful deportation or transfer has a focus on the movement and relocation of civilians that are lawfully in a given territory. This definition does not include important elements to this case, such as the non-disclosure of the whereabouts of the children, the continuing nature of the crime, or the wider definition of ‘victim’ to extend to the next-of-kin. Additionally, ED is criminal, while unlawful deportation or transfer are only criminal under ICL when certain parameters are met (particularly, the systematic and widespread nature of the conduct), which can, in certain cases, be hard to prove.

Furthermore, enforced disappearances encompass a crucial element that may not be present when we discuss forced transfers or deportations - what the State intends to achieve through the conduct. Particularly, the reasons for a State to commit ED and forced deportation are different: ED allows for a State to spread fear within a group without having to eliminate it fully, in a way to repress and control such a population (Sarkin and Baranowska 2018, 12).

²¹ Article 25, para. 1, subpara. a) of the ICPPED.

²² Article 25, para. 1, subpara. b) of the ICPPED.

Resorting to ED also allows for the conduct to have a deterrent effect within the targeted community - the disappearance of one individual creates fear amongst those around the disappeared, allowing for numerous people to be affected with only one disappearance. In fact, it has been argued that ED has a group dimension that is usually ignored, being a concept that has “tremendous overlaps” with genocide: using disappearances as a tool of repression allows States to achieve the same goals as committing genocide would, however, they require considerably less effort, and allow for a State to still be considered democratic (Sarkin and Baranowska 2018, 29).

The abduction of children during armed conflict has an important component that is not reflected in the definitions of unlawful deportation or transfer of population: ED is used as a method of intimidation of the loved ones and the wider group in general, but it is also used as a tool to incorporate and assimilate the children into the opposite group. These elements make ED a very distinct crime to unlawful deportation or transfer, which, by definition, seems to describe what is happening to Ukrainian children in a more suitable and complete manner.

Finally, classifying these cases as ED opens a wider set of avenues for victims to resort to. The CED, the body that monitors the implementation of the ICPPED by States, allows for individual²³ and interstate complaints,²⁴ as well as country visits,²⁵ for example. However, the CED cannot be invoked in this case, as it only hears complaints concerning State Parties to the Convention.²⁶ The WGEID, however, has competencies regarding all UN Member States, including Russia, as it is one of the HRC Special Procedures. The Working Group “receives, examines and transmits to Governments” reports of ED that are submitted to it; it can request States to carry out investigations on those same cases and request information on those investigations; and it can also carry out country visits (OHCHR, n.d.). It is important to note, however, that the WG does not investigate cases, does not establish criminal responsibility for enforced disappearances, it does not judge nor sanction, and it does not provide measures of satisfaction or reparation to victims of ED.

²³ Article 31 of the ICPPED.

²⁴ Article 32 of the ICPPED.

²⁵ Article 33 of the ICPPED.

²⁶ While Ukraine has ratified the ICPPED, Russia is yet to sign it.

While enforced disappearance may seem like a crime from a past long gone, characteristic of Latin American dictatorships, this is not what transpires in practice. Additionally, academic investigation on enforced disappearance tends to focus on adult victims of the crime. However, children are not immune to this practice: they can be themselves subjected to enforced disappearance, and they can be born into captivity after their mothers were subjected to the crime.²⁷ This chapter will show, through the exposition of various cases, ranging in time and space, that the enforced disappearance of children is an issue that needs to deal with urgently, due to the considerable dimension of the practice and the inadequacy of the existent law (Sarkin and Calvet-Martinez 2022). Additionally, the following sections will attempt to give an overview of what TJ methods, if any, were used in each of the cases, and whether they can be considered to have been successful. The aim of the exercise is to understand what the factors behind a successful TJ approach are when dealing with the ED of children, as well as take from their failures to better tailor the answer to be given in Ukraine.

Enforced disappearances of children during the colonial period: the case of Australia and the Lost Generations

Enforced disappearance of children was a common practice during the colonial period, as it allowed for the “eradication of race in a cultural sense” (Schneider 2022, 69), by blocking cultural traits and traditions from being passed on to the next generations, as children were to be assimilated in the colonizer’s culture (Van Krieken 2004, 128). To this end, British settlers began, in 1869,²⁸ taking Aboriginal and Torres Strait Islander children and placing them in “dormitories, reserves, institutions, or training homes” (Schneider 2022, 69). In 1930 the focus turned to assimilation, and aboriginal children started being adopted into white families, often for labor (Anderson and Tilton 2017, 7). These policies not only negatively impacted the bond between these children and their aboriginal culture (Schneider 2022, 72), but also created issues regarding both their mental and physical health and increased the chances of substance abuse (Anderson and Tilton 2017, 20).

²⁷ Article 25 of the ICPPED.

²⁸ Year of the Aboriginal Protection Act, that allowed for settler governors to have deeper control of aboriginal’s lives.

Transitional justice was used in this case, particularly its pillar of truth: in 1997 the *Bringing Them Home Report* was published, concluding that between the years of 1910 to 1970, there was a removal of “between 1 in 3 and 1 in 10 Indigenous children” (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families 1997, 31). The report lists some of the consequences of the practice, namely “psychological and emotional damage”, as well as “low educational achievement, unemployment, and consequent poverty” (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families 1997, 154). The Report further found that “the Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law” (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families 1997, 231).

The Report made a series of recommendations, such as the awarding of reparations - understood as acknowledgement and apologies, GNRs, restitution, rehabilitation, and monetary compensation (through the establishment of a National Compensation Fund). Regarding GNRs, this thesis will highlight the implementation of commemorations in honor of Indigenous children and a national “Sorry Day”; the inclusion of the concerned events in school curricula; the implementation of international standards, namely the Genocide Convention into national law; changes in national legislation in negotiation with Indigenous representatives, on matters such as adoption, juvenile justice, placement of indigenous children in State institutions, and family law; creation of repositories and preservation of the information relating to Indigenous individuals removed from their families; land restitution; and the creation of a social justice package to mitigate inequalities between Indigenous individuals and the non-Indigenous society (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families 1997).

While the recommendations made are appropriate and holistic, implementation by the government has been considered insufficient (Schneider 2022, 80; Australian Human Rights Commission, n.d.). While the Commonwealth has established “family tracing and counseling services”, as well as a “oral history project” (Australian Human Rights Commission n.d., 4), it failed to implement most recommendations - less than 1 in 10 were realized (Anderson and Tilton 2017, 15). Of these, one ought to highlight the lack of a reparations program, the development of a social justice package, or even the consultation of Indigenous representatives and actors in the recommendations it did implement (Australian Human Rights Commission

n.d., 4). Additionally, while the Report recommended the Government to give a formal apology to the Separation of Aboriginal and Torres Strait Islander, such an apology was only given 11 years later, in 2008 (Anderson and Tilton 2017, 15).

From the above exposed, one cannot evaluate the TJ efforts in Australia as particularly successful. Most importantly, the efforts for TJ indeed implemented in Australia have been considered “under-funded, badly directed, poorly coordinated, and insufficiently targeted to the needs of the Stolen Generations” (Anderson and Tilton 2017, 14), showing that just employing TJ measures will not achieve healing and reconciliation – it ought to be done in a manner that is comprehensive, well-funded, and carefully tailored to the situation at hand.

Enforced disappearances of children in South America: the case of Argentina

From 1976 to 1983, Argentina lived what would become known as the ‘Dirty War’ (or ‘Guerra Sucia’, in Spanish), a campaign against political oppositions waged by the military dictatorship in power, whose main figure was Jorge Rafael Videla (Encyclopedia Britannica 2024). The Dirty War was characterized by the systematic use of enforced disappearances to eliminate those who opposed the regime and thus resistance to the dictatorship (Vermeulen 2012, 6). The final report of CONADEP estimated that at the regime made least 8,960 victims of enforced disappearance (Vermeulen 2012, 11), however, NGOs estimate that this number may be as high as 30,000 (UNHRC 2009, 5).

Children were some of the victims of enforced disappearance of this regime: they became known as ‘*Los Niños de los Desaparecidos*’, and an exhaustive search campaign for these children was conducted by the Abuelas de la Plaza de Mayo, an Argentinian NGO. Children would themselves be victims of enforced disappearance, when captured with their parents, or born into captivity, if a woman was made a victim of ED while pregnant. Children born into captivity would then be given to families of military officers, put into state care, or merely left on the street (Schneider 2022, 82). The regime would also change their names and birth certificates (Schneider 2022, 90). This strategy served a double purpose: it destroyed the political identity of the child, who was removed from their parents’ influence, while at the same time punishing the opponents.

The transitional justice process in Argentina was a complex one, characterized by advances and setbacks according to the government in Office, and in great deal advanced by the Grandmothers (Lessa 2011; Weis 2017). Regarding truth, CONADEP released, in 1984, the *Nunca Más Report*, detailing the crimes of the regime. Some individuals were also prosecuted for their crimes, despite an array of pardons and amnesties (Schneider 2022, 86), and ‘truth trials’ were also conducted (Lessa 2011, 33). Additionally, some financial compensation and GNRs, particularly through legislation reform, were implemented (Weis 2017).

Despite these efforts, in recent years cases of children being victims of enforced disappearance by the State’s security forces have come to light (Lessa 2011, 36). Such news reveals a continuity of past repression in the current context, hinting at insufficient and inefficient measures of non-repetition, particularly an unfulfilled reform of the security forces in the country (Lessa 2011, 33).

Enforced disappearances of children in Central America: the case of Guatemala and El Salvador

The Guatemalan Civil War, between the Guatemalan government and leftist guerrilla forces, was waged between the years of 1960 and 1996. When discussions regarding a peace agreement commenced, both parties agreed that a truth commission should be instituted after the end of the hostilities, to investigate both their conduct and possible violations of HR and IHL (Brett and Malagon 2020, 6-7). The *Comisión para el Esclarecimiento Histórico* (CEH) was thus created by the 1994 Oslo Accord, during a meeting between the parties (Rothenberg and Comisión para el Esclarecimiento Histórico 2012).

The CEH concluded that the Guatemalan government used enforced disappearances systematically with the objective of eliminating those linked to leftist and guerrilla movements, but also to “spread terror among the people” (Commission for Historical Clarification 1999, 35). The Commission registered 6,159 victims of enforced disappearance, but this number may exceed 200,000. The CEH also pointed out that the conflict had an “aggressive racist component of extreme cruelty that led to the extermination *en masse*, of defenseless Mayan communities (Commission for Historical Clarification 1999, 34). Children were also targeted as victims for enforced disappearance (Commission for Historical Clarification 1999, 23). In 2001 a special Commission focused on finding the whereabouts of disappeared children was

created - the National Commission to Locate Disappeared Children of Guatemala. It concluded that roughly 5,000 children disappeared, 90% of these being Mayan children (Ramírez 2005, 380).

Regarding TJ efforts in Guatemala, the government was involved in the establishment of the 1994 Truth Commission; additionally, and after criticisms from NGOs and civil society, an unofficial Truth Commission was also created (Brett and Lina Malagon 2020). Despite similar conclusions by both organs, the State denied involvement in the crimes (Brett and Lina Malagon 2020). The Guatemalan Government established a National Day Against Enforced Disappearance, which amounts to memorialization efforts; and a national reparations process also compensated approximately 32,000 victims. Finally, ED later became criminalized in Guatemalan law, which includes non-State actors in its definition, going beyond the definition in the Convention on ED (Sarkin and Calvet-Martinez 2022, 44). The law further establishes that no amnesty can be given in cases of ED (Sarkin and Calvet-Martinez 2022, 44). Regarding the efforts to find and reunite children with their families, the National Commission for the Search of Disappeared Children had, by 2006, clarified 324 cases, reunited 131 children with their families, carried out 108 exhumations, and provided 1,600 persons with psycho-social treatment (OHCHR 2024).

El Salvador also went through a civil war during which children were specifically targeted. The war began in 1980 and would last for the following 12 years, after which a UN mandated truth commission was established. The Commission operated from July 1992 until March 1993, and its report concluded that more than 5,500 people were victims of enforced disappearance. 1,100 children had been reported as victims of this crime by 2014. (OHCHR 2024) The Inter-American Court found that there was a “*systematic pattern* of disappearance of young boys and girls during military operations” (Inter-American Commission on Human Rights 2005, 19). Children would be taken during military operations, and later they would be placed in orphanages and adopted by third parties, in exchange for monetary compensation, under the pretense that they were orphans and abandoned (Inter-American Commission on Human Rights 2005, 19). Some were adopted by military families, and others were murdered. The consequent Peace Accords, signed in 1992, provided for measures of transitional justice to be implemented, including a Truth Commission. Its final report was presented in 1993, and while it made multiple recommendations regarding non-recurrence and reconciliation, most of these were not implemented (Macías and Marín 2013, 186). It has been argued that this was due to opposition

from key sectors and actors, such as the Supreme Court, the Amnesty Law that was passed, as well as insufficient demands from civil society actors (Macías and Marín 2013, 188).

On the international front, both Guatemala and El Salvador had numerous cases regarding the enforced disappearance of children be prosecuted at the IACtHR. Some of these became landmarks on matters of enforced disappearance, such as *Serrano Cruz v. El Salvador* or *Molina Theissen v. Guatemala*, which had important impacts both regionally and internationally on matters of jurisprudence on the rights to justice, truth, and reparations (Sandoval 2018, 1). Besides this, the Court helped victims receive justice and truth, after years of impunity in the region. The sister of Marco Antonio Molina Theissen, one of the children disappeared by the Guatemalan State, claims the ruling of the Inter-American Court captured “the truth of what happened”, having an “enormous reparative impact for the family” (Theissen 2020, 1). On matters of reparation, the Inter-American Court can be said to be one of the most creative institutions when ordering these measures ensuring that they are holistic, touching on compensation, satisfaction, restitution, and guarantees of non-repetition. Not only did the Court have a clear influence in reparations theory internationally, but it also had an impact within its State Parties. For example, in the *Serrano Cruz Sisters* case, the Court ordered El Salvador to investigate, identify and punish the responsible; create a website for tracing children’s whereabouts; acknowledge responsibility; create a genetic bank; and establish a National Commission for Disappeared Children (Rozov 2014). While the State did not comply with most of these measures, in 2010 the Commission for Children Disappeared During the Internal Armed Conflict was created, as requested by the Court, and by 2019, it had solved 92 cases (Sarkin and Calvet-Martinez 2022, 45).

Enforced disappearances of children in Europe: the cases of Germany and Spain

Facing of a demographic decline caused by a declining birthrate and the death of soldiers on the battlefield, Nazi Germany established, in 1935, the Lebensborn program (Sarkin and Calvet-Martinez 2022, 40), with the intention of increasing the population with “Aryan” characteristics (United States Holocaust Memorial Museum 2020). One of the manners by which the Lebensborn program tried to achieve its goals was also by kidnapping children with Aryan traits from the occupied territories. The SS Race and Resettlement Office (RuSHA) would conduct racial examinations of children, and those deemed desirable to the regime would

be sent to Germany to be “Germanized”, and later placed into German families through adoption, often having their birth certificates changed (Sarkin and Calvet-Martinez 2022, 40). It is estimated that around 50,000 children were victims of this practice Europe-wide, 20,000 of those being Polish (Zahra 2011, 341). During the Nuremberg Trials fourteen SS officials were accused of participating or being in some form complicit to this crime; eight of them were convicted.

Besides justice, not much has been done for these children. After the war terminated, the Allied forces only repatriated 15% to 20% of the Polish children disappeared (Kaczorowska 2022, 36). Today, the now adults that were made to disappear claim to have been ‘forgotten’ by the German State – as they were ‘racially pure’, and thus, not a category of people discriminated against, Germany does not recognize them as victims, and as such, does not award them compensation (DW 2018).

Enforced disappearance was used largely during Spain’s Civil War and the dictatorship that followed, led by General Francisco Franco. During this period, which ranged from July 1936 to December 1951, 114,226 Spanish people were disappeared (Sarkin and Calvet-Martinez 2022, 41). It has been estimated that around 30,000 children also fell victim to this practice during Franco’s forty years in power (Sarkin and Calvet-Martinez 2022, 41).

The policy regarding the ED of children was particularly devised by Antonio Vallejo-Nájera, military psychiatrist to the regime (Marre and Gaggiotti 2021, 575). Vallejo-Nájera believed that race was a “cultural acquisition” (Druliolle 2018, 80), and that the ‘Hispanic Race’ could be undermined by communism (Sarkin and Calvet-Martinez 2022, 42). As such, the psychiatrist believed that to protect children’s ‘Hispanidad’ they had to be segregated from their Republican families, in a form of positive eugenics (Marre and Gaggiotti 2021, 576). To support this plan Franco put in place a wide array of legislation (Marre and Gaggiotti 2021, 576). Children would be abducted by Auxilio Social, a state agency, and taken to State institutions (Sarkin and Calvet-Martinez 2022, 41). They would be removed from their captive mothers, have their birth certificates and names changed, and would then be adopted by families favorable to the regime.

While Franco’s regime fell in 1975, the abduction of children remained common practice after the transition to democracy (Sarkin and Calvet-Martinez 2022, 42). There have been estimates

of a total of 300,000 children disappeared (Sarkin and Calvet-Martinez 2022, 42). It is important to mention that efforts to locate the disappeared children and their families have not been supported by the State; in fact, the Spanish government has not permitted access to important classified information on the possible whereabouts of these children. Transitional justice regarding this question was not sought after by the Spanish government: after Franco's death, a pack of amnesty laws was passed, commonly known as the "Pact of Forgetting" (Marre and Gaggiotti 2021, 578).

Enforced disappearances of children in the Middle East

In the 1930s, Dersim was a culturally and politically distinct region from the remainder of Turkish society (Deniz 2020, 20), as well as the only Turkish region still not under the sovereignty of the central government (van Bruinessen 1994, 4). After multiple attempts by the government to "Turkify" Anatolia (Deniz 2020, 20; van Bruinessen 1994, 12), in March 1937, the local tribes conducted a rebellion against the central government. In suppressing the rebellion, the Turkish forces conducted, between 1937 and 1938, what would later be called the "Dersim massacre".

While the exact number is not known, it is believed that fourteen thousand civilians died in the massacre, and around twelve thousand were displaced (Schneider 2022, 183). Thousands of children were abducted from their parents and families; however, numbers are not easy to pinpoint, as most were not registered (Deniz 2020, 29). Boys were taken to State institutions, such as orphanages and the military (Schneider 2022, 174). Girls, however, had their names changed and were adopted into Turkish families, where they would have to convert to Islam and learn Turkish (Schneider 2022, 175). Girls were seen as valuable due to their role within the family, particularly their reproductive ability, useful to perpetuate a Turkish and Islamic state (Schneider 2022, 175).

The international community can be said to have had an important role in this case. It is known that the League of Nations and the world powers (Britain, France and the United States) were aware of what was happening to the Dersim population in general and their children in particular, as the leader of the community sent letters to these actors pointing out the atrocities and asking for international support. None of these actors replied (Schneider 2022, 120).

Measures of transitional justice in this case were few and fell short of expectations. Additionally, what was done concerned the Human Rights violated in the overall massacre, and not the ED of children specifically. Even so, in 2009 the Turkish President Erdoğan apologized for the massacre, apology the President expanded in 2011. This apology marked a breakthrough with previous policy regarding the State's massive HR violations, and ignited discourse and mobilization of Turkish civil society (Alici 2023). This led to the creation, in 2012, of a sub-commission to investigate the massacre, which collected testimonies and official State documents on the matter (Alici 2023). It was also meant to give policy recommendations. Nevertheless, the sub-commission's work "neither led to a broader attempt at, nor a concrete measure for, dealing with the past" (Alici 2023, 99). Erdoğan's apology also lacked accompanying measures such as reparations, and while it was a step in the right direction, "it did not have a transformative impact", being later labelled a political tool by the Kurdish society (Alici 2023, 100).

Enforced disappearances of children in Asia: the case of Timor-Leste during Indonesian occupation

Enforced disappearances of children were also reported during the years of Indonesian occupation of Timor-Leste, that lasted from December 1975 to October 1999. The Commission for Reception, Truth and Reconciliation in East Timor (CAVR) estimates that "several thousand East-Timorese children were taken or moved to Indonesia during the years of occupation" (Commission for Reception, Truth and Reconciliation in East Timor 2006, 76). Children were taken by different actors and for different purposes: during the initial years of the occupation, from 1976 to 1979, children found alone were taken by individual, low and middle-ranking soldiers; but they would often also be abducted from their families by those individuals (Commission for Reception, Truth and Reconciliation in East Timor 2006, 2). Children would also be taken by government officials and high-profile charities and placed in orphanages or given into forced adoptions (Commission for Reception, Truth and Reconciliation in East Timor 2006, 78). Children were also taken to serve as child soldiers by both sides of the war, and some were recruited into sexual exploitation (Commission for Reception, Truth and Reconciliation in East Timor 2006, 98; Sarkin and Calvet-Martinez 2022, 48).

Regarding the motives for taking East-Timorese children, the Commission “found little evidence” that the practice was official military policy (Commission for Reception, Truth and Reconciliation in East Timor 2006, 84). The Commission found, however, that the disappearance of children was a “systematic practice” and that the decision to abduct the children was based on a belief by Indonesian officials that control of Timor-Leste’s territory also implied control over East-Timor’s children (Commission for Reception, Truth and Reconciliation in East Timor 2006, 76). Additionally, from 1980 to 1989, children began being taken by “high-level civilians and military officials”: these abductions and public adoption by respected Indonesian families were supposed to consolidate the idea that Timor-East belonged to Indonesian territory (Commission for Reception, Truth and Reconciliation in East Timor 2006, 87).

The UN Transitional Administration for East Timor (UNTAET) began administration of East-Timorese territory after the withdrawal of Indonesian armed forces in 1999. At this point, transitional justice was called for to deal with the legacy of HR abuses that occurred during the occupation (Cross 2021). The UN led the efforts for TJ, and multiple mechanisms were implemented in the territory, among these commissions of inquiry, two truth commissions (CAVR and the CTF, the Commission of Truth and Friendship of East Timor and Indonesia), an Ad Hoc Human Rights Court, a Serious Crimes Investigation Team and a Serious Crimes Unit (Cohen and Lipscomb 2012, 264-265). While the TJ efforts and mechanisms implemented were multiple, they have not been positively evaluated (Cross 2021). Kyoko Cross argues that TJ efforts, particularly those aimed at criminal justice, were “flawed from the very beginning” (Cross 2021, 157).

Regarding the disappeared children specifically, the CTF recommended that both governments create a commission for enforced disappearances, also tasked on finding the whereabouts of the children in question (Sarkin and Calvet-Martinez 2022, 48). However, location and reconnection efforts by both States have been considered insufficient by relevant actors (Sarkin and Calvet-Martinez 2022, 49). It is important to mention that Asia Justice and Rights, an NGO, has partnered with the National Commission on Human Rights and the Provedoria dos Direitos Humanos e Justiça of Timor-Leste, to achieve reunifications, since 2023. So far, 176 survivors have been identified, and 161 have been reunited with their families (Sarkin and Calvet-Martinez 2022, 49).

Enhancing the Present Impact of Transitional Justice Through Lessons from the Past

Transitional Justice methods were used, whether in larger or smaller capacities, in each of the examples discussed above, except in Spain, where there was an absence of TJ efforts to deal with the undemocratic past (Escudero 2014). However, in most of these cases, evaluations were not the most positive, even in countries where TJ efforts were varied, such as Australia and Guatemala. One can argue, however, that these negative evaluations of TJ are not due to an inherent issue to the discipline, but indeed with its application by governments. In many of these cases holistic recommendations were given, but later, they lacked implementation. Even when reforms are implemented, other factors hinder their efficiency, such as lack of funding or overall political will. It is important to mention, however, in most of these cases the ED of children was committed amongst many other violations of IHL and IHRL. As such, often TJ mechanisms don't focus on the practice – for example, while the El Salvadorian Truth Commission acknowledged children were taken by the State, it did not issue recommendations on this demographic (Sarkin 2012, 8). Despite all this, in most cases victims saw their rights to justice and truth complied with, aiding with reconciliation; and in many of these cases, identification and repatriation of children was achieved – even if by initiative of civil society actors.

Despite these efforts, GNRs, particularly aimed at ensuring children are protected during conflict, seem to be lacking. Besides a lack of preventive programs, this analysis shows that when countries do engage in prevention methods, they tend to focus on the traditional forms of GNRs – namely, legislative and security sector reform, to the detriment of other, more holistic forms of GNRs. An illustration of this is the case of Argentina, where despite having employed measures across all four pillars of Transitional Justice, including GNRs, new cases of disappeared children occurred after the transition to democracy, showing these were not effective.

Moreover, the fact that children are again disappearing today, in the 21st century, shows that not enough has been done internationally to prevent these atrocities, although the enforced disappearance of children is a reoccurring crime that does not discriminate in time and space. While across regional and international law there are a “constellation of rules (...) aimed at

protecting children from enforced disappearance” (Sarkin and Calvet-Martinez 2022, 55), children remain being made victims of the practice, and those responsible remain going unprosecuted, demonstrating an issue with the law, its interpretation and application by Courts (Sarkin and Calvet-Martinez 2022, 50).

The international community can have an important role in this regard, by improving existent doctrine and establishing more efficient prevention mechanisms. On matters of IHL for example, and particularly the Geneva Conventions and the Additional Protocols, do not have specific provisions ruling on the ED of children, and as such, are insufficient in protecting them from such practice (Sarkin and Calvet-Martinez 2022, 83). As such, the ICRC ought to codify this crime in IHL, and work to ensure that the right not to be forcibly disappeared is respected. Regarding ICL, it is imperative that the specific crime of enforced disappearance of children is codified, as the criminal branch of international law has crucial flaws in this regard (Sarkin and Calvet-Martinez 2022, 98). The lack of such codification can be considered one of the factors contributing to the impunity that reigns on matters of the ED of children (Sarkin and Calvet-Martinez 2022, 98). When thinking of such codification, it will be important to ensure that this text has specific provisions protecting children that are separated from their parents, particularly institutionalized and hospitalized children, that tend to be more vulnerable to such predatory practices. Additionally, it is also imperative that the ICC, and particularly the Prosecutor-General, start giving priority to the investigation and prosecution of crimes of enforced disappearance, particularly enforced disappearance of children, as to foster a more effective deterrent effect (Sarkin and Calvet-Martinez 2022, 100).

Chapter conclusion

Besides laying out the theoretical foundations needed to fully grasp the concept of enforced disappearance, this chapter verified the hypothesis that the conduct of the Russian Federation can be considered enforced disappearance, as expected. Additionally, it was argued that such classification is also more favorable to victims. Further, this chapter has established this case is not isolated, and that children have been disappeared across cultures for decades, in contexts ranging from colonization, international and non-international armed conflict to dictatorships, showing a clear need for more effective preventive strategies. While in many cases TJ was used, and in some it was useful, there is still a clear lack of focus on disappeared children;

additionally, both States and the international community in general should better commit and support TJ efforts in future cases. A lack of focus on GNRs, specifically of a holistic nature was also verified. These observations will be particularly important when devising a TJ approach to Ukraine, as to make it as efficient as possible.

V. Transitional Justice: Exploring Theory, Historical Evolution, and Critical Debates

The purpose of the present chapter is to give an overview of what is TJ, while at the same time explore how the tools offered by the field can be used in the case of Ukrainian children. It will also theorize how they can be useful and why they are important. However, TJ will not be a panacea to the issues concerned in this thesis; additionally, some critiques can be expected, which will also be dealt with. Particularly, this chapter will give a brief overview of the extensive critique that has been made to TJ, analyze those critiques, and argue that TJ remains a relevant subject with prospect of success. This chapter will further defend that while TJ is a discipline that, by definition, focuses on the past, it can and it ought to be used in an ongoing armed conflict, such as the one in analysis.

The definition(s) of Transitional Justice

Transitional justice is relatively new as a concept, having emerged in the late 1980s and early 1990s in response to the transformations occurring in Latin America and Eastern Europe, particularly in Uruguay, Argentina and former Yugoslavia (ICTJ 2009). However, transitional justice can be traced back to the post-Second World War context (Bickford 2004).

Transitional justice is a field of activity that focuses on how societies address and confront past social trauma, particularly violations of human rights abuses and atrocious international crimes, such as genocide, crimes against humanity, and war crimes (Bickford 2004). There is not one set definition of TJ, but multiple definitions (Yusuf and van der Merwe 2022, 4; Werle e Vormbaum 2022). However, certain common characteristics of these definitions can be compiled. TJ is often characterized as a framework, or a set of tools, both legal and non-legal, that post-conflict societies employ in moments of political transition to effectively deal with gross violations of IHRL and IHL and ensure a sustainable transition to peace and democracy (Yusuf and van der Merwe 2022, 4; Werle e Vormbaum 2022). TJ is thus often described as being backward and forward-looking: it deals with and confronts the past, so that the transitional society can transform, and avoid recurrence in the future (Werle e Vormbaum 2022, 31). When a society decides to engage in a TJ process, it does so to achieve certain goals, such

as reconciliation and peace (Werle e Vormbaum 2022, 31). TJ measures can fit within four categories, or the four pillars of TJ: justice, truth, reparations, and GNRs.

TJ academic Ruti Teitel (2017, 71) defines the field as:

“the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes”.

Some would argue that this definition is incomplete, however: it concerns mostly countries emerging from repressive regimes, such as dictatorships, and also privileges legal instruments, which are not the only ones used in TJ. Furthermore, it neglects violations of social, economic and cultural rights (Yusuf and van der Merwe 2022, 6).

In contrast, and in a more complete manner, Roht-Arriaza (2006, 2) defines TJ as:

“a set of practices, mechanisms and concerns that arise following a period of armed conflict, civil strife or repression and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law”.

The United Nations has played, since the 1980s, an important role in the promotion and dissemination of TJ worldwide. The United Nations defined Transitional Justice in 2004, in the Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (UN Secretary-General 2004, 4). Here, TJ is defined as:

“the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”.

This definition was later used again in the 2010 Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice. Additionally, this is the definition used by the European Union (Council of the European Union 2015). This seems to be the most complete definition of the field so far, and thus, will be the definition used in this thesis.

The Four Pillars of TJ: Justice, Truth, Reparations, and Guarantees of Non-Repetition

Transitional Justice has an important foundation in the discipline of international law (United Nations 2008, 2). This legal basis traces back to 1988, the year when the Inter-American Court of Human Rights found, on the Velásquez Rodríguez v. Honduras case, that all States have four fundamental obligations regarding violations of Human Rights (United Nations 2008, 2):

- i. to take all necessary measures to prevent them;
- ii. to effectively and seriously investigate them, when they occur;
- iii. to impose suitable sanctions on those who committed them; and
- iv. to ensure reparation for their victims.

These four obligations were, after 1988, further affirmed and endorsed by other regional and international organizations. They are now fully incorporated into the international legal jurisdiction: they have been highlighted in decisions of the ECtHR and the UNHRC, for example (United Nations 2008, 2). These four obligations can, too, be translated into the four pillars of TJ: justice, truth, reparations, and guarantees of non-repetition. A debate exists within the field regarding a fifth pillar of TJ - reconciliation. However, some argue that reconciliation is a goal that is common to all other pillars and TJ in general, and thus, not a pillar on its own. This is the opinion endorsed in this thesis.

Justice

Justice as a pillar of TJ is usually understood in its retributive form - meaning, justice is achieved through criminal trials and prosecutions of those responsible for HR violations, aiming to ensure their criminal accountability. Retributive justice is a critical component of TJ, and serves multiple purposes: trials make it clear that past abuses are no longer tolerated and thus play a strong deterrence role; they help satisfy victims' needs for retaliation and punishment and help heal and restore social harmony; they help create an account of the victims that ought to benefit from reparation programs; they serve an important educational role, by shining light on the abuses committed and providing a detailed record of events; they improve public confidence in the State and the Rule of Law; additionally, they help delegitimize perpetrators, by making their actions public and punishing them (Landsman 1996, 81; UN Secretary-General 2004, § 39).

Criminal prosecutions will thus be crucial in the Ukrainian case. Families want justice and will benefit from the cathartic experience of seeing those who took their children being punished. Prosecutions would also benefit the Ukrainian society at large, as it validates what has happened to them, by creating a public record of the violations and their unlawfulness. Prosecutions in cases of the enforced disappearance of children are also necessary to the international community as a whole, due to their deterrent power.

Ideally, criminal prosecutions should be pursued by the domestic justice system of the concerned State (UN Secretary-General 2004, §40). However, the State is not always willing or capable of doing so, as is the case regarding the Ukrainian conflict. Ukraine cannot currently prosecute the Russian Federation in its Courts, due to State immunity from foreign prosecutions. The same is true for President Putin, who enjoys immunity *ratione personae*, and other State officials, that enjoy immunity *ratione materiae*. In theory, it would be possible to overcome these obstacles: immunity *ratione personae* is only valid during one's time in office, which means that, in principle, Ukraine (or other States with universal jurisdiction) could prosecute President Putin when his time in office is over. However, due to Russia's internal politics, it is hard to predict when that will be. On matters of immunity *ratione materiae*, while immunity persists after termination of functions, it does not apply in cases of grave international crimes, including enforced disappearance. As such, in theory it would be possible for Ukraine to prosecute other Russian state officials connected to the crimes; however, that will not be likely while the State is under attack; additionally, even after the termination of the conflict, Ukraine may lack resources to do so – in terms of legal infrastructure or personnel, for example.

On the Russian side, domestic prosecutions also don't seem likely. Generally, if the perpetrators of massive HR violations are still employed in the State apparatus, there will likely be an unwillingness to put them through trial. Being that Russia is considered an "authoritarian political system", where power is fully concentrated on the hands of its President (Freedom House 2024), prosecution becomes an even further possibility.

In situations such as this one, where parties are unable or unwilling to intervene, the international community plays an important role in administering retributive justice after massive HR violations. This was the case with the ad-hoc international tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), established by the UNSC in 1993 and 1994,

respectively. While both tribunals were crucially important to the prosecution of violations in their respective countries and to the development of international criminal law, they were context specific and limited to their respective jurisdictions (Sarkin 2020, 28). As such, the need was felt for a permanent institution that could deal with grave violations of international law globally – such an institution was born as the ICC, through the adoption of the Rome Statute, in 1998.

The ICC has jurisdiction over four major crimes, as in accordance with Article 5 of the Rome Statute: genocide, crimes against humanity, war crimes, and the crime of aggression. Regarding spatial and temporal jurisdiction, the Court has jurisdiction over crimes that have occurred in the territory of a State Party or have been committed by a national of a State Party, after the Rome Statute has entered into force.²⁹ Additionally, the Court may have jurisdiction over territories of non-State Parties if they consent to its jurisdiction or if the UN Security Council refers the situation to the Prosecutor. It is important to note the ICC operates under secondary jurisdiction - meaning that the UN and State Parties to the Rome Statute must cooperate with the court, but other States don't have that obligation. So far, 123 States are members of the Rome Statute. It is also relevant to note that the ICC operates under the principle of complementarity, meaning that it only intervenes in situations where the concerned State is unwilling or unable to prosecute.

The ICC is an important tool to fight impunity and plays a crucial deterrent role, as there is a higher risk for offenders to be prosecuted after its creation. It is also crucial to deliver justice where justice is not applied by the States, ensuring that no victim is left behind. Example of this is that in line with its capacities and responsibilities, on March 2nd, 2022, the Court has initiated an investigation in Ukraine, after referral from multiple State-Parties, encompassing “any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards” (ICC 2022). In connection to this investigation, on March 17th, 2023, the Court issued arrest warrants for both President Putin and Lvova-Belova, regarding the “war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children” (ICC 2022). Additionally, in March of this year, the Court also issued arrest warrants

²⁹ 2002.

for two high-level officials of the Russian armed forces, for war crimes of targeting and causing excessive harm to civilians (ICC 2022). Its investigation into the situation in Ukraine and consequent arrest warrants are a clear example of the work of the Court reaching places where otherwise justice would not be administered, at least so soon.

Despite its potential in prosecuting those responsible for violations of Human Rights and alleviating the situation of victims, many critiques have been made to the Court's work. First is the question of jurisdiction: most conflict zones fall outside its jurisdiction; additionally, major powers such as the US, China or Russia have not ratified the Rome Statute. This critique becomes even more serious when considering that UNSC can refer cases from countries that are not State Parties to the Rome Statute to the Prosecutor; however, those five nations are not themselves Parties to the ICC. This latter fact has given rise to claims that the Court is imperialistic, which is exacerbated by the fact that the majority of those indicted by the Court have been nationals of African States (McCargo 2015, 6). While these are valid criticisms, it is important to note that the Court has, since 2020, taken a more active role in dealing with such condemnation (Sarkin 2021, 14). Examples of these are the investigations made to the situations in Palestine, Afghanistan and Iraq, which will, by default, deal with Israel, the United States and the UK (Sarkin 2021, 15). The case to the Situation in Ukraine will also add to these efforts for reform, as arrest warrants have been issued for high-level officials of a nation that is not a State Party to the ICC, and, additionally, is a permanent member of the Security Council.

A lot of the criticism made to the Court is also directed at its efficiency and effectiveness, particularly, it regards the number of cases closed by the Court *vis-a-vis* its budget - just in 2023 the ICC was allocated €169,649,200, but since it started to function over two decades ago, it has only given 10 convictions and 4 acquittals (ICC n.d.). While this is a valid critique, two considerations ought to be made. First, one might consider that the value of the Court, in terms of both deterrence but also in dealing with the cases it does deal with, few as they may be, far outweighs its costs. Second, it is important to remember that a lot of the Court's work is hindered by outside factors, particularly non-cooperation and even hostility from both State and non-State parties (Sarkin 2020). This is because the Court requires States' cooperation to investigate situations, but also to arrest and extradite suspects. Unfortunately, there is a great deal of resistance from States in these matters: former President Al Bashir of Sudan, for example, was able to travel among State-Parties to the ICC, without ever being surrendered

(Sarkin 2020, 31). Certain cases were closed due to lack of cooperation, such as the one involving Kenya; others were not even opened, such as the case regarding the situation in Afghanistan in 2019 (Sarkin 2020, 34). This is an unfortunate precedent for President Putin's arrest and the conclusion of justice for Ukraine by the ICC.

Due to these restraints, many have argued for a reform of the ICC, allowing for its work to be carried out more efficiently; additionally, better communications strategies, making the work of the Court more well-known, are also necessary (Sarkin 2021, 11). While President Putin and Lvova-Belova were indicted by the ICC, they remain at large, and there is, thus far, no prediction of when or if they will be seated at The Hague. This is not a new problem – State non-cooperation on matters of investigation, funding, arresting and extraditing suspects actively hinders the work of the Court and, by doing so, also victims' rights to justice and truth. As such, reform of the ICC is also crucial, so that the Court is allowed to do its work properly and actively deter new violations of grave crimes (Sarkin 2021). To that end, the relationship between the Court and the States parties ought to be improved, especially with those that are the most hostile to the institution. Additionally, States and individuals should be better informed on the work of the Court and how it functions, to combat hostility based on misinformation (Sarkin 2021). To do so, the Court ought to engage in dialogue both with States and other international and regional institutions (Sarkin 2021, 20). It should improve its communication strategy, so that its work is better understood, and effectively address critiques, showing improved resilience (Sarkin 2021, 17-18). Additionally, it would be useful if the Court invested in its complementarity powers, aiding States in investigating and prosecuting crimes committed in their territories, so that claims of imperialism and interference in national affairs can be combatted while, at the same time, ensuring respect for Human Rights and International Law (Sarkin 2021, 27).

Truth-seeking

The right to know the truth about gross violations of HR is an individual and collective right under international law, that is derived from the right to remedy in the ICCPR.³⁰ It was later reaffirmed in the Set of Principles for the Protection and Promotion of Human Rights Through Action Combat Impunity, particularly Principle 1, Principle 2, and Principle 4 (Commission on Human Rights 2006). Truth-seeking is thus crucial in transitioning States, and it entails a

³⁰ Article 2, para. 3 of the ICCPR

complete investigation of the past abuses, who committed them, how, and why. The most common truth-seeking mechanisms are truth commissions, but commissions of inquiry and fact-finding missions are also available tools.

Truth commissions are useful in many ways. Besides helping realize the right to justice, TCs can be used to prevent abuses in the future and achieve non-repetition, by bringing to light to underlying causes and consequences of the violence, as well as giving reform recommendations (The United Nations High Commissioner for Human Rights 2006, 29). They also promote reconciliation between the divided societies, by shining light on the victim's stories and promoting dialogue between victims and abusers (United Nations 2006, 2). While TCs ought to be integrated with a holistic TJ approach, they are truly a well-rounded instrument: besides promoting reconciliation and GNRs, the information they uncover can be used for future prosecutions, and they are able to advocate for reparations (United Nations 2006, 20). Thus, while primarily being about truth, TCs touch upon all pillars of TJ.

Notwithstanding what has been said so far, some critiques have been made to the work of truth commissions and other truth-seeking tools. Call argues that truth commissions show serious flaws, failing to meet their budgets and conclude their work, and often being “second-best alternatives to judicial punishment”, that can't obtain full accounts of the events (Call, 2004, 104).

Remembering the need for an effective truth process, the Human Rights Committee of the UN should establish a Truth Commission on the situation of Ukrainian children affected by the conflict. Being that the HRC decisions are made on the principle of majority and do not need to pass through the Security Council, it is more likely to become a reality. It is important that this Truth Commission publishes its own set of recommendations, to both Ukraine and Russia, at the end of this exercise.

A truth process in Ukraine, both regarding the issue of disappeared children but also IHRL and IHL violations committed in association with the conflict would have the potential to fulfill victim's right to justice. It would also be useful regarding reconciliation between two very fractured societies; it would, additionally, add to the public knowledge of Russia's actions and would likely deter negationist narratives. Regarding the issue of children particularly, such a truth process would certainly focus on creating an official account of the events, particularly

the location and working of the recreational camps; who were the actors involved in the evacuations that took the children into Russian territory; the location of children still missing; and the overall experience of the children during their stay in Russia. Such an official account of events is crucial to give accurate recommendations and to establish an adequate reparations program. However, two issues arise: first, is the ethics of involving children in such a process. Truth commissions rely heavily on victims' detailed account of the events to reach conclusions. The ethics of a truth commission given such parameters ought to be analyzed, as putting children through a process during which they need to relive a traumatic event may be psychologically harmful. Second, Russia's cooperation with investigations would be crucial. Investigators would likely need access to Russian territory and to certain confidential documentation. The testimony of Russian officials would be particularly useful, as they have a more complete account of the facts and the logistics of the carrying out of the violations. However, at this time, cooperation in these molds is unlikely – Russia certainly will not cooperate with investigations; additionally, those involved may face serious repercussions if they share their testimonies.

While truth processes ought to be led and owned by national actors, namely NGOs, civil society, and victim communities (The United Nations High Commissioner for Human Rights 2006, 34), the international community can, and should, take an active role in the implementation of such a process in Ukraine. First, the UN and the OHCHR can give a valuable contribution to the work of the commission, particularly through its expertise (The United Nations High Commissioner for Human Rights 2006, 34). Most important, however, is the possible appointment of international staff and commissioners, as doing so will ensure the process is impartial, which in turn has the potential to more effectively reach those more skeptical in Russia.

Truth efforts can also be considered a form of GNRs (deGreiff 2005, 13). By engaging in truth processes, the State is making public and acknowledging the wrongful conduct; it validates the victim's experiences; and it makes it known to the community in general what happened, so that denial-based narratives are less likely. Ukraine should, with the support of the international community, establish a platform that allows for the ONG's that have been working on locating the children to deposit the information retrieved, particularly the children taken and their whereabouts, as well as other relevant information. This would allow for more productive and efficient efforts to bring children home but could also serve as a way to collect and register

information that may be useful for future criminal prosecution or truth processes - this will be discussed later in this chapter. To this end, this thesis sees in a positive light the implementation of the Bring Kids Back UA initiative.

Reparations

Reparations for HR violations and other grave international crimes have their roots in private law, particularly torts law (Moffet 2017, 378). Although the right to effective remedy is well established in international law, being mentioned in multiple international and regional documents, such as the UDHR, the ICCPR, the ECHR, and the IACHR, the same cannot yet be said about the right to reparation. Some argue that yes, the right to reparations is already established in IHRL and IHL, while others argue that that is not the case yet. Notwithstanding this debate, in practice, there is a “growing customary practice of individuals right to reparation against the State and non-State actors” (Moffet 2017, 379). The most influential and complete document on reparations, the 2005 Basic Principles on Reparations, does establish that States have a duty to provide remedy for gross violations of IHRL and IHL; it also establishes that victims entitled to it by right, which includes “*adequate, effective and prompt reparation for the harm caused*”. It is important to note, however, that the 2005 Basic Principles are soft law, and thus, not binding on States.

According to the 2005 Basic Principles, reparations can take five forms:

1. Restitution, where there is an effort to restore the situation the victims were in before the crimes were committed;
2. Compensation, in monetary form;
3. Rehabilitation, which includes medical and psychological care, but also legal and social services;
4. Satisfaction, including cessation of internationally wrongful acts, but also truth-seeking measures, apologies, declarations, judicial and administrative sanctions, and memorialization;
5. Guarantees of non-repetition.

The attribution of reparations, in all its forms, has many benefits. First, they are meant to culminate the consequences of a wrongful act.³¹ They are intended to rebuild victims' trust in the State and restore their dignity (Magarrel 2007, 7), but they are also a tool for the State to acknowledge and recognize wrongful conduct. They also help affirm the Rule of Law and acknowledge the facts publicly, avoiding negationist rhetoric (Moffet 2017,379).

While reparations are crucial in transitioning societies, there are usually some tensions when establishing what reparations are to be given, and to whom. First, widespread and systemic HR abuses imply the existence of high numbers of victims; usually in contexts where resources, especially financial ones, may not be abundant. Additionally, many victims may not have enough resources or proof to reach the courts. Thus, developing a reparations program is usually an arduous task, as it implies a "prioritization" of certain victims, as well as establishing the value of their losses and who will fund the program. Additionally, awarding individual monetary compensations can exacerbate existing tensions between divided groups (Magarrel 2007, 5). As such, there is a need for collective reparations programs, that reach a wide set of victims, with fewer resources (Magarrel 2007, 5). Collective measures also help avoid a hierarchization of victims, and they provide a better answer to collective interests and needs (Moffet 2017, 387). However, such collective programs can fall short of meeting victims' expectations (Magarrel 2007, 4). These shortfalls imply that the best route to follow is that of a holistic reparation program, that involves both collective and individual reparations, ranging in all their five formats. Additionally, it is important to involve victims and civil society in the design and implementation of such programs, so that their views and ideas are included, and they feel ownership of the process, improving the chances of success.

It is important to note that, like the other pillars of TJ, reparations ought to be used in conjunction with other TJ mechanisms. Awarding only monetary reparations can be perceived as "blood money", while focusing on symbolic reparations, such as apologies and memorials, can be seen as empty promises and words.

³¹ Separate Opinion of Judge Cançado Trindade, Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Compensation Judgment, 2012, §26.

Ukrainian children and their families have a right to reparation. However, various questions remain: first, is what body will establish the need for reparations and order them; second, is what form the reparations will take; and third, who will fund the reparations.

On the question of the responsible body for establishing the need and the manner reparations are to be awarded, and to whom, this is usually done through administrative programs created by legislation (Magarrel 2007, 3). However, reparations can also be recommended by a future Truth Commission or ordered by an international Court or Tribunal. To this end, there is a possibility that, if the ICC can prosecute President Putin and Lvova-Belova, reparations are awarded from the Trust Fund for victims.

The first form of reparations necessary is restitution and satisfaction – children’s identities and whereabouts need to be identified, and they need to be returned to the situation they were in before the violations, meaning, repatriated and reunited with their families. Rehabilitation, particularly in the form of psychological support, will be crucial to ensure the well-being of repatriated children; legal services can also be offered to victims’ families that may have to revert adoption processes in Russia.

Countries that have been successful at finding children and repatriating them, such as Qatar, can also have an important role in helping other States to follow their footsteps. These States ought to share best practices and findings with other States and the overall international community, so that such strategies can be implemented now, regarding the Ukrainian State, or in the future. Additionally, States should create and place their findings on a shared information database. Such a database would allow for better coordination of efforts, which in turn would ensure the process of repatriation is done quicker and more effectively; furthermore, such a database can be useful, in a later time, to fund judicial actions. To this end, more States ought to partner with the Bring Kids Back initiative.

A symbolic monetary compensation can also be awarded to victims’ families, particularly for any physical or mental harm, moral damages, and lost opportunities, such as education.³² However, for the reasons explained above, collective reparation efforts would be more

³² Paragraph 20 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

appropriate. These could entail the construction of infrastructure particularly aimed for children, such as schools and other facilities, and the investment in education programs, as well as the award of scholarships and grants.

Regarding whom should fund the reparations, in theory, the State responsible for the violations has a moral and legal responsibility to repair the damages it caused. However, in this case, it will be difficult to compel Russia to fund the reparations. To this end, and according to paragraph 16 of the Basic Principles on Reparation, Ukraine can itself establish a national reparations program.³³ However, it is unlikely that after an armed conflict of this magnitude Ukraine will have the financial means to do so. To that end, the international community may play an important role by contributing to the funding of the reparations program. While the international community is usually “reluctant to contribute” to reparations programs (Magarrel 2007, 14), this attitude has come to change over the last decades: there is a “growing recognition” on the international arena that victims must be prioritized, as “in certain instances it is clear that the international community bears positive obligations to assist poorer states in fulfilling their responsibilities” (Evans 2012, 230). Examples of such practice are the Peace-Building Fund for Sierra Leone, and the urgent reparations program in East Timor, by the World Bank (Evans 2012, 230). Considering the amount of support given by the international community to Ukraine since the beginning of the full-scale invasion – €143.6 billion in financial, humanitarian and military aid up to January 2023 - such a participation in the reparations program is a possibility (Trebesch et al. 2023, 2).

As discussed previously in this thesis, reparations can be considered Guarantees of Non-Repetition, as they strengthen “the hand of victims to claim redress for the past and future violations and to enforce their rights more assertively” (Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence, §24). Additionally, reparations can be seen as a recognition by the State of how a certain conduct was wrong, and a commitment that violations are not to be repeated. As such, reparations can be an important form of GNRs given in this case. Financial compensation seems unlikely in a post-war context, as monetary means will need to be allocated to the reconstruction of the Ukrainian State. However, reparation can also be given through memorialization efforts for these children, such

³³ Paragraph 16 of the Basic Principles on Reparation reads: “*States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations*”.

as creating a special day for Children Rights, or installing a monument in their celebration; making efforts to reconstitute children and families to their previous situation; provide rehabilitation for children that were placed in Russian custody, particularly psychological support and trauma counseling.

Guarantees of non-repetition

Societies that go through an armed struggle tend to live in a vicious cycle of conflict, reverting to violence after periods of peace (Sarkin 2021b, 191; Lumsden 1997, 377; Bara et al., 2021, 913), which implies periods of increased HRs violations and other grave violations of international law (Sarkin 2021b, 195). Such examples are Bosnia, Rwanda, and Burundi, in the 1990s (Lumsden, 1997, 2); but also, Liberia and Nepal, more recently (Bara et al., 2021, 2). As such, it is important for post-conflict States, but also the international community, to put in place measures that aim at preventing a recurrence of violence, thus breaking this cycle. In TJ, these measures are called guarantees of non-repetition or non-recurrence (GNRs). GNRs are the exercise of looking into the violations that occurred and their motivations, subsequently establishing mechanisms, such as laws, processes, statements and deeds, to ensure that such violations do not recur (Sarkin 2021b, 197).

As has been explained in the introduction of this thesis, GNRs have been described as the least researched and studied pillar of TJ (Mayer-Rieckh 2017, 416; Sarkin 2021b, 203; Davidovic 2021, 387). This is unfortunate, as GNRs are crucial for effective TJ processes, and importantly interconnected to peacebuilding, state-building and nation-building (Sarkin 2021b). They are also an obligation on States after massive violations of HR, as mandated by the Principles on State Impunity, the Guidelines on the Right to Reparations, and the Draft Articles on State Responsibility. The theory on GNRs, such as their normative foundation and history, will be further developed later in this thesis.

Transitional Justice: Limitations, Challenges, and Critique

Transitional justice has received a vast, complex and diverse set of critiques since coming to light in the academic discussion. These critiques focus on various aspects of TJ, from its core concepts to its mechanisms and actors, or even the branch of IHRL it focuses on. To group such a diverse set of critiques, this thesis will follow the division proposed in Turner's work,

which divides them into two distinct groups: the internal critique, which is those that are critical of the way TJ works but do not question the legitimacy of the field and the need for its existence; and the external critique, which scrutinizes the model of TJ itself, arguing that it is fundamentally flawed (Turner 2017, 78).

External critique

Some of the core concepts of TJ have been highly scrutinized. It has been argued that the field is under-theorized: that the concepts at its core are not defined clearly and are mostly contested (concepts such as justice or transition, for example) (Clark and Palmer 2012, 3; Turner 2017, 78). Others argue, however, that academic attention on the theory of TJ has been abundant, in efforts to give it “a stronger theoretical basis” (Sarkin and Davi 2017, 9). Particularly problematic is the idea of a universal truth, that must be established and acknowledged, when in fact, ‘truth’ is a “multilayered and complex process” (Turner 2017, 80). However, truth is usually established through the works of a Truth Commission, which investigates the facts and gathers testimony from both victims and perpetrators. If the establishment of a Truth Commission is adequate – if there is victim consultation, if the commissioners are impartial and if the mandate and resources are satisfactory – then it will, “like no other mechanism, illuminate the full extent of abuses committed during a violent conflict or as part of an oppressive regime” (Sarkin and Davi 2017, 21). Truth may not be universal, but investigated facts are, and as such, if established correctly, that is what a Truth Commission does.

‘Forgiveness’ is also seen as a problematic concept, as there may be victims who don’t want to forgive perpetrators for what happened to them and feel like forgiveness is the price to pay for peace (Turner 2017, 82). These two concepts also risk being instrumentalized for the achievement of political goals (Turner 2017, 84). Another concept that raises issues with academics is the idea of reconciliation (Turner 2017, 84). This is mostly because for reconciliation to happen, first a society must achieve truth and forgiveness - as seen, some would argue that these are not truly achievable, which implies that reconciliation is based on shaky conceptual grounds, and thus, also not achievable (Turner 2017, 84).

TJ is multidisciplinary, being a field that takes on law, politics, international relations, sociology, and criminology, just to name a few. This makes it so that the field has a richer, more complete view of the object it deals with. However, it has been pointed out that TJ academics often ignore what has already been written by academics in these areas on recurring

themes, not making the most of already existing literature (Clark and Palmer 2012, 4). Additionally, TJ has been criticized for being based on advocacy rather than “empirical, fact-based analysis” (Clark and Palmer 2012, 5), as well as placing “institutions before objectives” - meaning, the field often rushes to give technical, pre-thought institutional responses, which undermines the attribution of the TJ process to local actors (Clark and Palmer 2012, 6). Often, these constraints are imposed without a clear articulation of objectives, while at the same time being overly ambitious (Clark and Palmer 2012, 8). McCargo (2015, 4) goes as far as arguing that TJ can have damaging effects in transitional societies: he claims that “transitional justice all too often proves counterproductive” and can create “unrealistic hopes, stir up fears and hatreds, hijack transition processes, and even strengthen corrupt elites”. The author raises some pertinent arguments in his work, particularly the author's critiques on international criminal justice. However, the author's argument that TJ is counterproductive is based on the shortfalls of international courts. This cannot, by itself, be an argument against TJ, as TJ is about much more than just prosecutions - which is just one of its four pillars - and about much more than the ICC.

Internal critique

On what TJ can do to improve itself as a field, which would allow for it to achieve better results, there are two critiques of major relevance. First is the feminist critique, which argues that a gendered approach ought to be incorporated in the field, as men and women experience conflict and peace differently (Turner 2017, 71). Second, there is the critique of social justice, which argues that both in theory and in practice, TJ ought to improve its focus on social and economic rights, which are often overlooked in favor of civil and political rights (Turner 2017, 75). As such, the concept of justice ought to be extended to also include the idea of social and economic justice (Turner 2017, 75).

Other common critiques made to transitional justice have been those arguing that the field perpetuates an ideology that is imposed on transitional countries, that it is intrinsically imperialistic. Authors argue that TJ, its goals and tools are rooted in a very specific ideological tradition, particularly the Western liberal ideology, that is then imposed on transitional countries (Turner 2017, 86). As such, it has been argued that transitional justice and its mechanisms might be unjust, reinforcing a dichotomy between the global north and the global south (Call 2004). Western powers are accused of instrumentalizing TJ, without ever submitting themselves to it, remaining unpunished for their crimes while being quick to support

prosecutions in developing countries (Call 2004; McCargo 2015, 7). A prime example of this is the ratification status of the ICC.

Nickson and Braithwaite (2014) theorize how to overcome some of the shortfalls exposed so far. The authors point out that victims and members of societies undergoing transitional justice processes often have unrealistic expectations for transitional justice and what it can achieve, coining this phenomenon as “transitional justice’s expectation problem” (Nickson and Braithwaite 2014, 447). Often criminal trials are limited to just senior officials; additionally, they are lengthy and resource-consuming, having very limited results. As such, the authors argue for a ‘deeper, broader, and longer transitional justice’: broader, in the sense of having a holistic definition of justice and broadening what counts as justice, not being only focused on judicial justice and prosecutions, but being forward and backwards looking, as well as having a focus on restorative justice; deeper, in the sense of involving victims and stakeholders in the definition of what is justice and in the drawing of the TJ measures to be applied; and longer, in the sense of ensuring that justice remains present after the transition, making sure that the peace, institutions and values TJ creates are present in a society long after the transition is completed (Nickson and Braithwaite 2014, 447). This ensures that justice, truth, reconciliation, and peace, the four goals of TJ mentioned above, last for years to come.

Many of these are relevant critiques that deserve credit; as such, TJ practitioners and advocates must be aware of them and ought to keep them in mind, to continuously improve the field. This will allow for more inclusive, effective and efficient TJ, which can benefit thousands. However, while critiques are valid, this does not take away from the relevance of TJ as a field and concept; neither do they take away from what TJ has already achieved and its successes. Turner argues that while there is a vast critique made to TJ, “there is little sense from the literature that there is no role for the concept”, which is evidence to the resilience of TJ (Turner 2017, 88).

Can Transitional Justice be used in the present and during an ongoing conflict?

TJ concerns, by definition, events that happened in the past, after a transition. Ongoing conflict can be an obstacle to the application of TJ, and even influence its results negatively (Kiss 2013, 124). As such, one could be reluctant to claim TJ could be used at this stage of the Ukrainian conflict, which has not reached an end yet. This chapter will, however, attempt to show that not only it is possible to apply TJ mechanisms in such a situation, but it may also be beneficial to do so.

Engstrom argues that there has been, in the last decades, a shift within TJ practices towards the pursuit of accountability and the fight against impunity during active armed conflicts (Engstrom 2013, 42). This shift has come mainly in the form of criminal prosecutions, which in the context of active armed conflict, can raise particular challenges (Engstrom 2013, 42). Rushing to indict for criminal prosecutions can hinder the achievement of peace and a peace agreement (the popular peace vs. justice dilemma); additionally, the “internationalization of TJ”, and international judicial processes, can impede local accountability processes (Engstrom 2013, 47). Finally, such judicial processes lead to a further judicialization of TJ, which ought to use its other four pillars (Engstrom 2013, 47).

Even when facing such challenges, there is a case to be made that some form of accountability should be pursued to end ongoing conflict (Engstrom 2013, 46); to this extent, the ICC (despite its many flaws) plays an important role, as it can be seen precisely in the case this thesis concerns. Even so, while the arguments exposed here are accurate, Engstrom focuses only on the retributive justice aspect of TJ, neglecting the possibility of applying an extensive array of other TJ mechanisms. As such, other forms of TJ tools other than criminal prosecutions can help overcome these challenges: for example, truth mechanisms, reconciliation efforts, reparation programs and GNRs (Sarkin 2016). To do so, however, both the international community and civil society must have a central and active role in dynamizing these efforts (Sarkin 2016, 228). It is important to mention that while it is difficult to achieve retributive justice in active conflict, it isn't impossible: in the case in analysis in this thesis, ICC indictments have already been issued. However, because this is an ongoing armed conflict, without a prevision for its end, prosecutions alone are not enough. To this end, GNRs (as well as other TJ tools) can be useful to mitigate some of the difficulties of prosecuting during armed conflict.

Transitional justice has often been criticized for not being efficient, effective, and its overall lack of success (Ambos 2013, 175). Studies have concluded that TJ has moderate to no impact in transitional societies, and in some cases, it can even have negative effects on democratization and reconciliation (Ambos 2013, 175). TJ can fail at various points - during the formulation, adoption, or implementation of its strategies - and the causes of its failure can be attributed to multiple actors and factors (Kiss 2013, 124). Kiss (2013) gives a comprehensive view of such factors and actors. While a complete account of all these is not necessary at this stage of this thesis, two issues are particularly relevant to mention: first, is the lack of engagement by international organizations that mainly deal with HR abuses; as well as ongoing conflict (Kiss 2013, 124).

Many arguments have been made against the application of TJ measures during active conflict. First, waiting for the conflict to come to an end allows for more resources to be allocated to TJ, that before would be allocated to maintaining the conflict; additionally, it means that it isn't necessary to prioritize between addressing present or past HR violations (Ambos 2013b, 147).

While most TJ programs have been implemented in situations where conflict and HR violations have ceased (Ambos 2013b, 146), this does not always have to be the case. The terms 'transition' and 'transitional' do imply a passage from one context to another, situated at different points in time - one in the past, and one in the future: in this case, a process of transformation within a society (Yusuf 2021, 4). TJ's definition is based on the idea that the concept of transition is a well-defined one (Hansen 2017, 35). While this may be the case in theory, in practice, TJ is devised and applied both before and after transitions have occurred, especially in recent years, where TJ has been used in contexts where the violations are yet to occur or ongoing. However, due to the complex nature of transitional societies and TJ processes, these concepts remain debatable and problematic (Yusuf 2021, 4). Transitions are not linear processes, and societies are in constant metamorphosis (Sarkin 2016). For instance, countries such as Sudan, Colombia, Congo, and Uganda decided to begin their TJ journeys while HR abuses were still occurring, in the 1990s (Kiss 2013, 147); more recently, Canada and Finland have also embarked on TJ processes, despite not being transitional States, but established and secure democracies (Sarkin 2016, 298). Such examples show that 'transition' is a malleable concept that should not be looked at from a rigid perspective.

It has been argued, so far, that practically and conceptually TJ can focus on present and future violations, and as such, the field does not need to focus solely on past events. By also being employed in present occurrences, as well as in a preventive role, TJ can confront and adjust to some of the criticisms that have been made to the field and previously exposed (Sarkin 2016). Using TJ before and during conflicts and massive HR violations will have better results than dealing with the events after they occurred - lives can be spared and the incidence of HR violations would decrease, making cleavages less entrenched (Sarkin 2016). Additionally, it is easier to solve such issues when they are happening, rather than doing so later (Sarkin 2016). Example of this is the situation in analysis in this thesis: Transitional Justice efforts to repatriate children ought to be applied now, as the longer the international community and Ukraine wait, the harder it will be to *i)* find the identities and whereabouts of the children; *ii)* revert possible re-education and assimilation endeavors by Russia; *iii)* prevent bonds and attachment of adopted children to their new families.

Chapter conclusion

It was exposed, throughout this chapter, the ways in which truth, justice, and reparations could be applied in the situation at hand, and the benefits of doing so. This chapter did not analyze GNRs at that level of depth as this pillar will have a chapter dedicated to it, where these ideas will be developed. However, it has been shown that TJ can play a pivotal role not only in reuniting children with their families and bringing them back to their country, but also in fulfilling their rights to justice and truth, while at the same time aiding the Ukrainian society in overcoming such violations. This chapter further argued that despite heavy critiques to TJ as a field, the discipline is still relevant and can play a pivotal role in the matter at hands. These critiques could not have gone unnoticed, as they are crucial for the development and improvement of TJ strategies, such as the one being theorized in this thesis.

VI. Guarantees of Non-Repetition: an In-Depth Analysis

The following chapter will, first and foremost, give a deeper theoretical overview of GNRs. Additionally, throughout this section, recommendations will be given to both Ukraine and the international community on matters of prevention – so that the ED of children can be dealt with in this case while, at the same time, having a lasting impact across borders.

History of GNR and their normative foundations

While TJ is a relatively recent project, GNRs have a long history with roots in Public International Law, particularly Diplomatic and Consular Law and the resolution of inter-state disputes. These roots go as far back as the 19th century (Roht-Arriaza 2016, 8; Bayor 2021, 46), and are codified under two main sources of law: the 2001 decision of the ICJ in the LaGrand case; and the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, also from 2001.

Departing from inter-State law, GNRs were further studied and developed conceptually within IHRl. Here, two documents stand out: the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of International Human Rights Law and International Humanitarian Law (or Principles on Reparation) and the Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (or Principles on Impunity), in their multiple versions.

The first version of the Principles on Reparation was drafted by Theo Van Boven in 1993. In this version, GNRs are included in the principle on reparations, and grouped with measures of satisfaction. While both GNRs and measures of satisfaction are contemplated under Principle 11, paragraph h) is specifically dedicated to the “prevention of the recurrence of violations” - which points to a certain distinction between both types of measures. As such, in the ‘93 version of the Basic Principles, Principle 11 states that preventing the recurrence of violations may include measures such as ensuring the effective civilian control of military and security forces, restricting the jurisdiction of military tribunals; strengthening the independence of the

judiciary; protecting the legal profession and human rights workers, and providing human rights training to all sectors of society (van Boven 1993, 58).

This classification remained unchanged in the revised version of the Principles of 1996, but not in the adopted version of 2006. In this final version, prepared in 2005, measures of satisfaction and GNRs are separated into different Principles, albeit still being forms of reparation. Some of the existing measures that can be included within GNRs were slightly changed; but more importantly, the article was expanded, adding 3 new measures: promoting the observance of codes of conduct and ethical norms by public servants, as well as by economic enterprises; promoting mechanisms for preventing and monitoring social conflicts and their resolution; and reviewing and reforming laws contributing to or allowing gross violations of international human rights and humanitarian law.

Regarding the Principles on Impunity, the evolution of the norm on non-recurrence developed slightly differently. In the final version of 1997, prepared by Louis Joinet, GNRs were written as a stand-alone principle, being completely separated from the principle on reparation. In this version, GNR are comprised of three measures of reform: the disbandment of parastatal armed groups; the repeal of all emergency laws, abolition of emergency courts and recognition of the inviolability and non-derogability of habeas corpus; and the removal from office of senior officials implicated in serious violations (Joinet 1997, §43). The Principles on Impunity were updated in 2005, based on a study conducted by Diane Orentlicher. In this version of the Principles, Orentlicher reinserted GNRs within the clause on reparations, because “HR treaty bodies ha[d] often treated GNR as a component of reparations” in the past (Orentlicher 2005, §76). Orentlicher argued that the Principles on Non-Recurrence had to be revised as to “reflect recent developments in State practice and in relevant principles of international law” (Orentlicher 2005, §64). To that end, GNRs in the updated document included the reform of State institutions; the disbandment of parastatal armed forces or the demobilization and social reintegration of children; (principle 37); and the reform of laws and institutions contributing to impunity (principle 38). It can thus be understood that by 2005 there was a convergence between the two most important documents regarding GNRs in IHRL regarding the debate, being that both documents see GNR as a form of reparation.

Are GNRs conceptually clear? The efforts of the Special Rapporteur on the promotion of truth, justice, reparations and GNRs, Pablo deGreiff

At the current stage of this thesis, some considerations on the concept of GNRs can be made. First, it has been established that the core aim and function of GNRs is preventing the recurrence of internationally wrongful acts. The three legal documents so far analyzed each propose a variety of measures that can be applied in transitional contexts in order to achieve non-repetition.

It would be easy to assume that the development of the norm of non-repetition in IHRL influenced the development of the same norm in TJ. However, some argue that this is not the case (Davidovic 2021, 398). José Zalaquett, a lawyer involved in the Chilean Truth Commission, did important work on the subject, while not calling them, at the time, GNRs (Davidovic 2021, 397). Zalaquett wanted to design a way of preventing recurrence of HR violations, as well as repair damage caused by them (Davidovic 2021, 397). In his 1990 seminal work on confronting HR violations, the author “outlines nearly all of the measures known today as GNRs, before any of the [reference] documents were drafted” (Davidovic 2021, 396). His work was later used in other TCs, such as the Guatemalan and the El Salvadorian TCs. Additionally, authors of the reference documents have mentioned the influence of TJ and the work of Latin American TJ experience in the drafting process of those documents, such as Professor van Boven and Diane Orentlicher.

The UN has been one of the most active actors in the field of TJ and GNRs since 2004, both being priorities in the Organization’s agenda (Davidovic 2021, 399). This culminated with the appointment of the Special Rapporteur on the promotion of truth, justice, reparation and GNRs by the Human Rights Council, in 2011. The establishment of this office also affirmed GNRs as their own pillar and not a form of reparations, a debate that had been lingering on for decades at that point (Davidovic 2021, 400).

As it has already been stated in this thesis, GNRs are the least studied pillar of TJ. As such, then Special Rapporteur on the promotion of truth, justice, reparation and GNR, Pablo de Greiff, argued that more conceptual clarity on this pillar was needed, specifying 4 areas to which theorization was lacking: the offer, the object, the subject, and the duty bearers of GNRs. deGreiff made an important contribution to the field, by providing conceptual clarity and

further theory on these issues, in his first report as Special Rapporteur. From his report and the insights given and theory developed by the Special Rapporteur on these matters, a more complete definition of GNRs can be conceived (deGreiff 2015, 10):

GNRs are a “combination of deliberate, diverse interventions” that “contribute to a reduction in the likelihood of recurrence” (the *offer*) of “gross HR violations and serious violations of IHL” (the *object*). GNRs are meant to benefit a previously victimized society, seen at large, thus not limited to direct and indirect victims (the *subject*). Finally, GNRs are mainly a duty of States; however, the bearers of this right are ultimately manifold, due to a diversity of potential elements that constitute a non-recurrence programme (the *duty bearers*).

In his report, Special Rapporteur de Greiff made one other particularly important contribution regarding the existing theory on GNRs. He pointed out that in the reference documents that have been analyzed in this thesis so far, GNRs are mostly measures that are taken at the institutional level, meaning, measures that are mostly aimed at reforming the State, its apparatus, and its laws. These are measures that concern what the Special Rapporteur calls the ‘institutional sphere’. Examples of interventions made to the institutional sphere are, according to deGreiff, provision of security and legal identity for all; the ratification and incorporation of international treaties into national law; and legal, judicial and constitutional reforms. As such, this thesis congratulates Ukraine’s intentions of amending its Criminal Code “to make it better suited for the prosecution of crimes against children”, for example, as a GNR within the institutional sphere (Bilkova et al. 2023, 75). However, as stated in the literature review, ED in Ukraine mostly goes unpunished, hinting at a need for more effective prosecution efforts and application of the legal norm on ED (Denysiuk 2023, 18).

In his Report, deGreiff mentions the ratification of international treaties as a GNR that also intervenes within the institutional sphere. As of today, the most important document that Ukraine is still yet to ratify is the Rome Statute, thus giving jurisdiction to the Court to investigate crimes committed by Ukrainian forces or in Ukrainian territory. As such, and in line with a culture of accountability and respect for international law and Human Rights, Ukraine should ratify the Rome Statute.

On the international ground, measures of institutional character are also possible. International organizations ought to analyze their decision-making bodies and reform them, ensuring that individual States are not allowed to hijack the decision-making process – this would make IHRL and IHL violations are less likely, and States more likely to be held accountable. It would also allow for international organizations to more effectively deal with these situations. Examples of this would be the UNSC and the OSCE consensus-based decision-making process.

Additionally, more ought to be done for bodies tasked with investigating and dealing with ED. Bodies such as the Working Group on Enforced or Involuntary Disappearance ought to receive better funding and States should collaborate on the questions demanded (Sarkin and Calvet-Martinez 2022, 60). Additionally, it is not only important to foment the signature and ratification of legal documents on ED, such as the ICPPED and the Inter-American Convention on Forced Disappearance of Persons, but effectively apply these legal norms, especially when dealing with children (Sarkin and Calvet-Martinez 2022, 67).

While interventions in the institutional sphere are crucial for non-repetition, deGreiff points out that “prevention and non-recurrence cannot be achieved by institutional reforms alone” (deGreiff 2015, §32). To this end, the Special Rapporteur argues that there are two other spheres of importance for non-repetition, that have been neglected by lawyers, academics, and practitioners of TJ: the sphere of civil society, and the cultural and individual sphere. These interventions, made outside the State institutions can even achieve non-recurrence more effectively – this is because, according to deGreiff, these spheres are “by nature relatively immune to deliberate change”, and intervention within them allows for “lasting societal transformations” (deGreiff 2015, §32).

Regarding interventions that actively promote civil society, these are relevant because the State, in transitional contexts, is “often weak, inefficient and/or corrupt” (deGreiff 2015, §78). As such, interventions in the institutional sphere can sometimes be difficult to achieve, highlighting the need for including societal interventions that promote an active role of civil society within a State, in a prevention policy. Interventions in this sphere can include various measures, such as ceasing attacks and threats to civil society and removing obstacles to its operational activity; legal empowerment of victims and victim groups; and creating enabling environments for the work of civil society groups.

On these issues, Ukraine ought to sufficiently support its civil society, especially those that deal with Human Rights abuses, and create efficient protection mechanisms. At the international level, it would be useful if the international community would increase its efforts to empower and support NGOs, particularly those focusing on repatriating Ukrainian children, such as Save the Children, Save Ukraine, and Child Rights Connect, but also other ones focused on enforced disappearance and children's rights in general. Besides funding, international organizations can also empower NGO's by involving them in their decision processes and initiatives, but also by providing education on human and children's rights

Finally, regarding the cultural and individual spheres, examples of such measures are the promotion of an education and school curricula that foster critical thinking and historical accuracy, not leaving space for the suppression of events or one-sided narratives; the development and arts and culture; the creation of historical archives containing information about the abuses; and trauma counseling and psychological support to both victims and perpetrators. To this end, Ukraine ought to develop a culture of Human and Child Rights, which would include providing education to armed forces, law enforcement, heads of institutions and professors and educators on child rights, IHL, IHRL, and enforced disappearance. Such initiatives should also be extended to children and civil society at large. Additionally, psychological support to repatriated children and their families will be crucial. At the international level, a truth commission (which has already been recommended earlier in this thesis), would also contribute to change in these spheres, particularly by establishing an accurate depiction of events.

Why and how can be GNRs useful?

It has been said, in the previous section, that GNRs have not been explored, studied and applied to their fullest extent, as most focus on the reform of State institutions and laws, while an effective non-recurrence policy must extend beyond these frontiers. Besides, GNRs have not been studied and put in practice enough by academics and TJ practitioners. However, GNRs can play an important role after conflict, both nationally and internationally, by being particularly aimed at the non-recurrence of violations in the future.

In the Ukrainian case, GNRs will be useful to the extent in which they will imply measures so that a culture children's rights can be developed, and that the rights can be better protected in the future. Additionally, GNRs are intrinsically connected to issues of peacebuilding and state (re)building – an effective non-repetition program would likely advance Ukraine's progress in these matters, which are crucial after a conflict (Sarkin 2021b). As such, a focus on non-repetition would improve Ukrainian resilience to future conflicts, stopping the possible recurrence of violence. Furthermore, engaging and supporting GNRs at the international level – by regional and international institutions, as well as third states – will create measures to ensure that violations of children's right not to be subjected to enforced disappearance are more effectively prevented in the future, not only in Ukraine but hopefully world-wide.

The conflict in Ukraine has gathered a large amount of attention and support from the international community and the public in general. As such, one can say that TJ efforts and their outcomes, positive or negative, will be under careful observation in this case. It is thus essential that TJ measures be carefully devised, so that it can have long lasting effects and counter some of the critiques previously exposed. To this end, a comprehensive non-repetition strategy, comprising a wide and varied array of GNRs, can help combat some of the shortcomings and critiques made to TJ, previously mentioned. As such, giving due attention to GNRs can make it so that TJ efforts are more effective and productive, improving its chances of success and positive impact in Ukrainian society, but also improving the evaluations on TJ processes.

Roht-Arriaza, for example, points out that there are currently “frustrations” regarding the effectiveness of TJ (Roht-Arriaza 2016, 1). Even so, the author argues that the field should not transform itself into transformative justice nor include economic and socio-cultural rights, as this will over expand the scope of transitional justice (Roht-Arriaza 2016, 3). In fact, expanding the scope of the field may even contribute to a worsening of TJ's ‘expectation problem’, by overpromising its benefits (Roht-Arriaza 2016). A comprehensive non-recurrence plan can help achieve the goals of transformative justice without incurring an overexpansion of TJ and the dangers that may imply, by fomenting structural change in society (Roht-Arriaza 2016, 40). This would be possible by looking at the root causes of conflict and not just its symptoms, and by tackling those causes. Additionally, it would focus on collective, and not just individual rights (Roht-Arriaza 2016, 40). A broad approach to GNR allows for the structural change transformative justice calls for, without the dangers of over-expansion (Roht-Arriaza 2016, 40).

On the question of economic and socio-cultural rights, Roth-Arriaza says those rights have “not been central to the agenda of TJ”. However, Special-Rapporteur deGreiff claims they should be a priority. A variety of studies have shown a correlation between poverty and inequality and violence and violation of rights: most conflict-ridden countries also suffer from poor economic development and inequality. As such, it is crucial to look at non-repetition measures also through a lens of economic and poverty analysis. Thus, it is important to go beyond civil and political rights when devising non-repetition strategies, and include economic and socio-cultural rights, if the cycle of violence is to be broken. Applying such GNRs in transitional contexts can help bridge the usual lack of inclusion of such rights in TJ strategies, which has been so adamantly denounced.

This ought to be done when devising a prevention strategy in Ukraine. For example, and as it has been exposed before, the great majority of children taken to Russia were children that were institutionalized in facilities of the Ukrainian State, whether in orphanages or in hospitals. This fact is particularly relevant in an optic of prevention, as Ukraine has the second highest number of institutionalized children in Europe, after Russia (Van Esveld 2023, 3). The Ukrainian State is aware of the need to walk towards deinstitutionalization, having made reform plans in 2007, however, these have not been efficient (Van Esveld 2023, 3). Adding to the background of institutionalization in Ukraine, 90% of the children in State care facilities were removed from their families for poverty related matters; however, these children have at least one parent alive (Van Esveld 2023, 3).

Keeping this context in mind, Ukraine ought to create and implement an effective deinstitutionalization plan, in line with the UN Guidelines on Deinstitutionalization. These measures should aim at lowering the number of institutionalized children and placing them in family or community-based alternatives, such as foster families. Nevertheless, it is important to aim prevention efforts at the root cause of these institutionalizations - poverty of the immediate relatives. As such, Ukraine ought to apply more measures aimed at the eradication of poverty, as well as provide parents and families with the necessary means to raise a family - free, quality education and healthcare, financial aid, and other measures aimed at helping families. Ukraine is already taking some steps in this direction: its accession to the EU, for example, will imply an effort to equate the other European economies, which will likely have positive results in the lives of families.

Third States can also aid Ukraine in its deinstitutionalization efforts: when giving financial aid destined at these children it is important that this money is “earmarked” and allocated specifically to these efforts, as well as to improve family and community-based alternatives to institutionalization (Van Esveld 2023, 7). Third States should accept more institutionalized children in their care, with adequate procedures and reunification strategies. Ukraine attempted to enter agreements with 23 European States on this matter, however, it only succeeded in agreements with Poland and Lithuania (Van Esveld 2023, 6). Not only is it important to enter such agreements in this case and in the future, but it is also crucial that the receiving States adapt their legislation to the children's best interest: Portugal, for example, after receiving 15 children accompanied by a Ukrainian adult, only recognized their guardianship to 5 of these children (Van Esveld 2023, 6). These 10 children had later difficulties accessing healthcare, education, and financial aid in Portugal (Van Esveld 2023, 6).

Earlier in this thesis the critique made by Nickson and Braithwaite (2014) was presented. The authors argued for broader, longer, and deeper TJ. GNRs, through their forward and backwards-looking nature, are essential to broaden TJ, making justice more holistic. They are also essential in ensuring longer justice, justice that persists over time, by ensuring non-repetition. Finally, GNRs, by involving the societal and individual and cultural spheres, and giving center stage to victims and civil society, as deGreiff (2015) advocates, can make TJ deeper. As such, and based on Nickson and Braithwaite's (2014) argument, GNRs can have a useful and important role in achieving broader, longer and deeper TJ, thus combating the field's ‘expectation problem’. One can thus conclude that GNRs have repercussions that go beyond the practical realm, also being crucial for the establishment of TJ as an effective and reliable answer to IHL and IHRL violations, as it intends to be.

Chapter conclusion

This subchapter argued that investing in a prevention strategy, focused on GNRs, could be beneficial on a threefold axis: first, it would benefit Ukrainian children in particular, by ensuring their rights are more protected in the future, but also Ukrainian society in general, as these efforts are intimately connected to peacebuilding and state rebuilding, crucial at this time. Second, it would help the international community better protect children's right not to be

subjected to enforced disappearance more effectively. Third, it would benefit TJ as a field, by allowing it to adequately respond to critiques on effectiveness made so far.

VII. Conclusion

Enforced disappearance is an issue that has made thousands of children, their families and their communities' victims across space and time for decades. While many believe this is a problem of the past, contemporary armed conflicts, like the one today battled between Ukraine and Russia, show that that is not the case. While numbers are not certain, it can be said that after the 2022 invasion, the Russian Federation abducted thousands of children from Ukrainian territory, under the disguise of evacuations or temporary stays in so-called recreational camps.

While certain authors classify Russia's conduct as forcible transfer, deportation, or even genocide, no matter which term is used, Russia is incurring grave violations of IHL, IHRL, and ICL. This demonstrates that while this is a pressing issue, States and the international community have not dealt with it sufficiently as to create structures of prevention and deterrence. From this context, one can draw two issues that are in need of an answer: first, it is necessary to find measures to repatriate the Ukrainian children taken; second, it is necessary to create measures, at the international level, that protect children from such conduct in the future.

It is important to mention, however, that even though protection networks at the international level are lacking, the international community is aware of this issue. Multiple international organizations have emitted opinions and reports on the matter, such as the OSCE and the Council of Europe. Most notably, the ICC has issued arrest warrants in connection to this situation, for President Putin and Maria Lvova-Belova. However, these measures do not seem to be enough: criminal prosecution is not guaranteed, and even if it does happen, it will not be enough to adequately resolve the situation and prevent future violations of the same character.

With this background in mind, this thesis presented Transitional Justice, with a focus on Guarantees of Non-Repetition, as possible tools to give a solution to the two questions posed above. This is because TJ presents itself as the discipline of reconciliation and peace, by providing States and other relevant actors, such as the international community, with the tools necessary to rebuild the relationship between fractured societies. The recommendations given in this work focused on possible Guarantees of Non-Repetition, as this is the tool that is by definition associated with prevention of violations. As such, this project proposed to explore

how Transitional Justice tools, particularly GNRs, could help repatriate Ukrainian children taken to Russia, while at the same time creating protection structures to prevent future cases.

To do so, this thesis explored why transitional justice mechanisms are used, and their benefits to societies that find gross violations of Human Rights and mass atrocities in their past. It was claimed that, despite arguments saying otherwise, TJ can and should be applied in societies that have not yet transitioned and during ongoing conflicts, to justify applying the discipline in this case. The limitations of the transitional theory were also exposed in this text; however, it became clear that while it is possible (and healthy) to critique TJ, such critique is not the be-all and end-all of the field and its relevance.

This work's second objective was to expose how and why international actors can give GNRs to the international community at large, demonstrating that they are committed to the prevention of such crimes in the future. To this end, this work gave an overview of multiple cases, spread through time and space, of child abductions during contexts of armed conflict. Such an account corroborated the argument that child abduction in these contexts is a pressing issue, expanding through various continents, and making thousands of victims. On matters of theory, this thesis argued, to support its hypothesis, that while States are the main bearers of responsibility for TJ and GNRs, international actors can, and should, engage in these processes as well.

Finally, this thesis argued that what is happening to Ukrainian children can be considered enforced disappearance, a classification that, amid accusations of genocide and forcible transfer of civilians, has been lacking in the academic space. This was done through a exploration of what is today known about these children, how they are taken from their communities and what happens to them in Russian territory, and evaluating how the facts fit the definition of ED.

Based on this introductory work, this thesis concluded with examples of measures able to be put into place by Ukraine and international actors that can classify as GNRs. These focused mostly on the reform of existing institutions, creation of investigation bureaus based on international cooperation, ratification of laws and drafting of new ones, as well as the promotion of a culture of human and child rights, at the national and international levels. While these are only recommendations, and as such, this thesis did not test their possible efficacy, it can be argued that their implementation would likely translate to positive developments

regarding the reunification of Ukrainian children and the prevention of the recurrence of this crime.

Therefore, this study is relevant on two levels: the academic and the practical implications. At the academic level, this work adds to the discussion by first proposing the classification of this crime as enforced disappearance and exploring its implications. This has not been done yet, as literature on the matter has focused on analyzing the conduct through the lens of forcible transfer or deportation of civilians, or even genocide. It further adds by focusing on TJ and GNRs - while some reports do provide recommendations on the matter (Bilkova et al. 2023; Van Esveld 2023), none have explored specifically the possibilities of using transitional theory to answer these questions.

On the level of practical implications, its main contribution is clearly regarding the recommendations made. If implemented, these recommendations would first expedite the repatriation process of the children in Russian territory, allowing for more productive and efficient investigation. These recommendations, would, in principle, also result in further deinstitutionalization in Ukraine, something the State has been fighting to achieve. Finally, at the international level, the implementation of these recommendations will also imply, in principle, a protection network more adequate at preventing such cases in the future. Not only that but engaging in TJ efforts could also result in improved deterrence, hopefully contributing to a more equal international society, as well as more respect for international law and fundamental human rights.

Finally, some limitations to this study ought to be mentioned. First is the lack of information open to the public, as much is confidential. As such, some crucial facts might have been left out of this work. After a cease fire and an official truth commission, certain conclusions in this work may need to be reconsidered.

It must also be mentioned that due to this study being conducted before the end of the armed conflict, one cannot predict the national landscapes of both Ukraine and Russia, let alone of the international order. It remained clear that transitional justice measures don't have to wait until the end of a conflict to be used, however, reality is in constant shift during an armed conflict. As such, when and if the concerned actors decide to implement TJ measures, significant

changes to what has been considered in this thesis might have happened, and thus, certain conclusions might also need to be reconsidered.

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