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CHILD-TAKING

*Diane Marie Amann**

ABSTRACT

A ruling group at times takes certain children out of their community and then tries to remake them in its image. It tries to rid the child of undesired differences, in ethnicity or nationality, religion or politics, race or ancestry, culture or class. There are too many examples: the colonialist residential schools that forced settler cultures on Indigenous children; the military juntas that kidnapped dissidents' children; and today's reports of abductions amid crises like that in Syria. Too often nothing is done, and the children are lost. But that may be changing, as the International Criminal Court ("ICC") is seeking to arrest Russian President Vladimir Putin and Commissioner for Children's Rights Maria Lvova-Belova for the war crimes of unlawfully deporting or transferring children from Ukraine to Russia.

This article examines the criminal phenomenon that it names "child-taking." By its definition, the crime occurs when a state or similar powerful entity, first, takes a child, and second, endeavors, whether successfully or not, to alter, erase, or remake the child's identity. Using the ICC case as a springboard, this article relies on historical and legal events to produce an original account of child-taking. Newly available trial transcripts help bring to life a bereft mother and five teenaged survivors, plus the lone woman defendant,

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who testified at a little-known child-kidnapping trial before a postwar Nuremberg tribunal. Their stories, viewed in the context of the evolution of international child law, inform this article's definition. These sources further reveal child-taking to be what the law calls a matter of international concern. At its most serious, child-taking may constitute genocide or another crime within the ICC's jurisdiction. Yet even if circumstances preclude punishment in that permanent criminal court, child-taking remains a grave offense warranting prosecution or other forms of local and global transitional justice. This is as true for the Indigenous children of residential schools in North America, Australia, and elsewhere, and for children in Syria and many other places in the world, as it is for the children of Ukraine.

I. INTRODUCTION

Just days before the adoption of the Universal Declaration of Human Rights that she had helped to draft, Eleanor Roosevelt chose to focus attention on a still-festering violation of child rights.¹ Work remained to be done, she told readers of her newspaper column, regarding children who had been taken from their homes and deported to Nazi Germany during World War II. Many had not returned: “Frequently they were reduced to a point where they either had forgotten their families and their nationality or were too afraid to say what nationality they might have had.” The “horrible practice,” she said, “is really a dreadful kind of genocide.” Written seventy-five years ago, by a First Lady of the United States turned diplomat at the United Nations (“U.N.”), these words have resounded far too often since then.

History is rife with instances in which a state or similarly powerful entity severed children from their families and then endeavored to remake the children in its own image. Typically, the child's birth community was deemed different—undesirably different—on account of ethnicity or nationality, religion or politics, race or ancestry, culture or class. Examples abound, in armed conflict and in other violent periods: in this century, the takings of children in places like Syria; at the end of the last century, the kidnappings of dissidents' children by military juntas; and both before and after World War II, the forced placements of Indigenous children into colonialist residential schools, in the Americas,

1. Eleanor Roosevelt, *My Day* (Dec. 6, 1948), http://www2.gwu.edu/~erpapers/myday/displaydoc.cfm?_y=1948&_f=md001142 (writing the same week that the U.N. General Assembly adopted the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]). See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (describing drafting roles played by several U.N. delegates, including Roosevelt, who had been U.S. First Lady from 1933 until 1945). All Roosevelt quotations in this paragraph are from her Dec. 6, 1948, column. All Internet sources cited in this article were last visited August 26, 2024.

Africa, and Oceania.² Despite its recurrence, however, the phenomenon received scant attention in contemporary criminal tribunals.

That changed with the 2023 news that the International Criminal Court (“ICC”) was seeking to arrest Russia’s President, Vladimir Putin, and his Commissioner for Children’s Rights, Maria Lvova-Belova, for having moved children out of Ukraine; to be precise, for the war crimes of “unlawful deportation of population (children)” and “unlawful transfer of population (children) from occupied areas.”³ The choice of these charges, initially in the ICC and later in a Ukrainian national case, built upon prior prosecutions of other crimes against children. Nevertheless, some commentators spoke of these Russia-Ukraine allegations as if they were relatively minor placeholders for ostensibly more important charges yet to come.⁴ This article takes a different view. Conceptualizing the charged incidents as “child-taking,” it finds, in an earlier era of international criminal law, the roots of attention to this criminal phenomenon. It then traces relevant legal developments respecting this and other international crimes against and affecting children. This article demonstrates that because child-taking wreaks an exceptional harm upon the well-being and identity formation of young people—and thus too of the societies from which they were taken—its commission constitutes what is known as “a matter of international concern.”⁵ The most serious cases may draw the attention of an international criminal mechanism like the ICC. In turn, that attention—that naming of the conduct as one of the world’s worst crimes—likely will spur other organizations, states, donors, and advocates to join in combating the conduct. Indeed, all instances of child-taking, as defined in this article, merit one or more forms of transitional justice. To be precise, child-taking must be a priority within those national, regional, and international systems which aim to prevent such harms when that is possible, and to punish and redress them when it is not.

This article makes three principal contributions. First, it describes the incidents that gave rise to the still-sealed ICC and Ukrainian arrest warrants.⁶ Second, this article looks both to international legal history and to international jurisprudence, not only to place the pending cases in context, but also to delineate the phenomenon that those cases confront. With regard to history, this article resurfaces a case from the dawn of international criminal law: *RuSHA*,

2. See *infra* text accompanying notes 156, 295–323, 345–364 (discussing these and other examples).

3. *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INT’L CRIM. CT. (Mar. 17, 2023) [hereinafter ICC, *Judges*], <http://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>. On the relationship between child-taking as theorized in this article and post-1990s international criminal prosecutions for the recruitment or use of child combatants, see *infra* notes 176–179, 190, and accompanying text.

4. See *infra* notes 54–55 and accompanying text.

5. See *infra* text accompanying notes 58–64 (explaining term quoted in text).

6. See *infra* text accompanying notes 15–53.

which put the Nazi regime on trial at Nuremberg for the very kidnappings that had provoked Eleanor Roosevelt's concern.⁷ Using trial transcripts now available online, this article provides thick descriptions of six witnesses—five children and one childless mother—whose testimony gave human voice to the takings they had endured. Comparing the emphatic prosecution case with the tribunal's equivocal verdict, this article further examines the fact that, as in the pending ICC case, one of the accused in *RuSHA* was a woman. The *RuSHA* defendant presented herself as an unwitting and well-meaning caregiver; her gendered rescue narrative benefited both her and several of the men who sat with her in the prisoners' dock. With regard to jurisprudence, this article charts the evolution of international child law following the Nuremberg era. Of central importance are the documents and activities relating to the 1989 Convention on the Rights of the Child, which guarantees, among many other things, children's right to express their views and to have meaningful opportunities to participate in proceedings that affect them.⁸ These foundations of international child law encouraged the inclusion of crimes against and affecting children in the work of post-Cold War tribunals; most notably, in the permanent court established by the 1998 Rome Statute of the International Criminal Court ("ICC Statute").⁹

Third, this article draws upon these sources to theorize child-taking as a complex criminal transaction, occurring when a state or similar powerful entity acts coercively, first, to take a child, and second, to endeavor, whether successfully or not, to alter, erase, or remake the child's identity.¹⁰ Commission of either of these two components is itself a violation of rights constituting a matter of international concern. It may well be a crime, for abduction is prohibited in national as well as international systems, and the targeting of identity also may give rise to criminal charges. Requiring both components thus does not create a new crime; to the contrary, prosecutors are fully able to address child-taking with charges available in existing statutory frameworks. This article's conceptualization of child-taking centers instead on the expressive and performative force of the term, in the courtroom and other justice venues, among policymakers, and in popular discourse. The conceptualization generates a deeper understanding of what happens when abduction and identity alteration occur in tandem, with children as the targets. Child-taking's identity-interference component may place it within the prohibitions of a treaty adopted the same week as Eleanor Roosevelt's newspaper column: With the stated aim of protecting "a national, ethnical, racial or religious group, as such," the 1948 Convention on the Prevention and Punishment of the Crime of Genocide proclaimed "[f]orcibly transferring

7. See *infra* text accompanying notes 56–153.

8. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Child Rights Convention]; see *infra* text accompanying notes 154–175.

9. Rome Statute of the Int'l Crim. Ct., 17 July 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]; see *infra* text accompanying notes 176–217.

10. See *infra* text accompanying notes 229–250.

children of the group to another group” to be an act of genocide.¹¹ But even if an instance of child-taking does not satisfy that difficult-to-prove definition, at the very least it is, to borrow Eleanor Roosevelt’s phrase, *a kind of genocide*.¹² It thus merits attention, perhaps by prosecution for some other international or national crime, perhaps by some other global or local mechanism of transitional justice.¹³ In underscoring that point, this theorization serves law’s compensatory goal of reparation as well as its condemnatory goal of retribution.

Recalling too the child’s right of participation, this article further demonstrates that the stories now told by Ukrainian children bear echo, and not just with the testimony that other European children gave decades ago in *RuSHA*. It thus considers child-taking along spatial and temporal axes that extend well beyond the pending charges against Russian officials.¹⁴ A host of practices will merit further study and thus further shape the contours of child-taking; among these are separations of migrant families detained at national borders, as well as institutionalizations of children that have disproportionately broken up poor families of color. This article focuses on two practices: contemporary removals of children in Syria, as well as histories of Indigenous residential schooling in Australia, Canada, and the United States. Embedding quotations from some of the affected children, this article reveals the resonance among the stories that many children, on many continents and at many times, would have told—and would tell today—if only there were a forum willing to listen.

II. CHILD DEPORTATION OR TRANSFER AS CHARGED IN THE INTERNATIONAL CRIMINAL COURT AND THE RELATED UKRAINE NATIONAL CASE

“I didn’t want to go. But nobody asked me.”

– Anya, 14, on her taking from Ukraine to Russia¹⁵

Attention to child-taking is especially acute today on account of reports that have circulated in the years of war between Russia and Ukraine.

11. Convention on the Prevention and Punishment of the Crime of Genocide, art. II(e), Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; *see infra* text accompanying notes 72–79, 126–134, 167, 204, 251–277, 316, 354–356 (discussing genocide).

12. *See infra* text accompanying notes 278–293.

13. As will become clear in the discussion *infra* Part IV, this article takes a broad view of what constitutes “transitional justice,” recognizing that its mechanisms may be applied in a variety of contexts—even those that do not amount to “transitions” in the sense of movement from one regime to another.

14. *See infra* text accompanying notes 294–364.

15. Emma Bubola, *Using Adoptions, Russia Turns Ukrainian Children into Spoils of War*, N.Y. TIMES (Oct. 22, 2022), <http://www.nytimes.com/2022/10/22/world/europe/ukraine-children-russia-adoptions.html>; *see infra* text accompanying note 37 (reporting on Anya’s situation).

Investigations have led to criminal charges which, in turn, have increased consideration of this phenomenon.

A. Invasion and Forced Displacement

Russia's February 24, 2022, invasion of Ukraine touched off immediate and vast human displacement. In six days, "more than 650 000 displaced persons" were said to have fled Ukraine for countries within the European Union.¹⁶ Out of a population of 44 million, 8.3 million Ukrainians were refugees in Europe a year after the invasion, according to the U.N. Office for Coordination of Humanitarian Affairs; another 5.4 million were internally displaced.¹⁷ From the outset this flight disproportionately affected children; as early as a month post-invasion, the United Nations Children's Fund ("UNICEF") stated that the war had forced three of every five Ukrainian children from their homes.¹⁸

In the midst of such reports—not to mention quotidian accounts of the conflict's myriad other harms—there emerged allegations of a different sort. Many children were moving out of fear,¹⁹ as would be expected in times of armed conflict. But other children allegedly were being moved; that is, they were being deported against their will out of Ukraine. Among those voicing the allegation "that 200,000 children had been forcibly taken to Russia" was Ukrainian President Volodymyr Zelensky.²⁰ Bearded, clad in a black I'M

16. Council Implementing Decision (EU) 2022/382 of 4 March 2022 Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine Within the Meaning of Article 5 of Directive 2001/55/EC, and Having the Effect of Introducing Temporary Protection, 2022 O.J. (L 71), at 1–6, http://data.europa.eu/eli/dec_impl/2022/382/oj. The initial territorial incursion into Ukraine occurred years earlier and resulted in Russia's asserted annexation of Crimea; indeed, the Situation in Ukraine now under investigation by the ICC Office of the Prosecutor dates to Nov. 21, 2013. See *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, INT'L CRIM. CT. (Mar. 2, 2022) [hereinafter ICC, *Investigation*], <http://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>. That said, for sake of clarity this article's use of "invasion" refers to events following Russia's 2022 military attack on Ukraine.

17. U.N. Off. for Coordination of Humanitarian Affs., *Ukraine Humanitarian Response 2023: Situation Report*, at 1 (May 26, 2023), <http://reliefweb.int/report/ukraine/ukraine-humanitarian-response-2023-situation-report-26-may-2023-enuk>; see *Population, Total—Ukraine*, WORLD BANK, <http://data.worldbank.org/indicator/SP.POP.TOTL?locations=UA> (indicating population of about 44 million in 2020).

18. *Two Million Refugee Children Flee War in Ukraine in Search of Safety Across Borders*, UNICEF (Mar. 30, 2022), <http://www.unicef.org/press-releases/two-million-refugee-children-flee-war-ukraine-search-safety-across-borders> (reporting that 60 percent of Ukrainian children had been displaced, 2 million of them to nearby countries and another 2.5 million within Ukraine). For more comprehensive accounts of effects on children, see generally, for example, *365 Days of War and Displacement for Ukraine's Children*, UNICEF (Feb. 24, 2023) [hereinafter UNICEF, *365 Days of War*], <http://www.unicef.org/eca/media/26891/file/365%20days%20of%20war%20and%20displacement%20for%20Ukraine%E2%80%99%20children.pdf>; Diane Marie Amann, *International Child Law and the Settlement of Ukraine-Russia and Other Conflicts*, 99 INT'L L. STUD. 559 (2022).

19. See UNICEF, *365 Days of War*, *supra* note 18, at 6.

20. Martin Belam & Samantha Lock, *Lviv Commemorates 243 Dead Children in Ukraine War with School Buses Memorial*, THE GUARDIAN (June 2, 2022),

UKRAINIAN T-shirt, and seated in his office made of marble columns and gilt-edged wood panels, Zelensky asserted: “The purpose of this criminal policy is not just to steal people, but to make deportees forget about Ukraine and not be able to return.” With a pound of the desk, he insisted that “our children will not become the property of the occupiers.”²¹ Other Ukrainian officials likewise accused Russia of deporting children, with at least one suggesting that the evidence might support charges of forcible transfer as proscribed in the 1948 Genocide Convention.²²

B. *International Criminal Court Arrest Warrants*

Such statements seemed to anticipate national prosecutions. Given the volume of incidents to be investigated, however, international legal systems had been working alongside Ukraine almost since the invasion. Nearly a third of the ICC’s 120-plus states parties quickly had referred the matter,²³ and its Office of the Prosecutor quickly had opened an investigation into the Situation in Ukraine.²⁴ Months later, in September 2022, ICC Prosecutor Karim

<http://www.theguardian.com/world/2022/jun/02/lviv-commemorates-243-dead-children-in-ukraine-war-with-school-buses-memorial>.

21. *Russia Has Forcibly Removed 200,000 Ukrainian Children, Zelenskyy Says*, NBC NEWS (June 2, 2022), <http://www.nbcnews.com/video/russia-has-forcibly-removed-200-000-ukrainian-children-zelenskyy-says-141291077728> (containing embedded video with English-translation subtitles).

22. Anthony Deutsch & Stephanie van den Berg, *Ukraine Probes Deportation of Children to Russia as Possible Genocide*, REUTERS (June 3, 2022), <http://www.reuters.com/world/europe/exclusive-ukraine-investigates-deportation-children-russia-possible-genocide-2022-06-03> (quoting then-Prosecutor General Iryna Venediktova); Natalia Zinets, *Ukraine Accuses Russia of Forcibly Deporting over 210,000 Children*, REUTERS (May 13, 2022), <http://www.reuters.com/world/europe/ukraine-accuses-russia-forcibly-deporting-over-210000-children-2022-05-13> (quoting Lyudmyla Denisova, then Ukraine’s human rights ombudsman); see *infra* text accompanying notes 251–277 (discussing this aspect of the Genocide Convention).

23. See ICC, *Investigation*, *supra* note 16. At the time, 123 of the world’s 200 or so states had joined the ICC Statute; Armenia subsequently became the 124th, while Russia and the United States remained among the nonparty states. *Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (noting further that statute entered into force in 2002). A decade ago, Ukraine formally accepted ICC jurisdiction for crimes committed on its territory since Nov. 21, 2013; it did not then seek ICC membership, however. See *Ukraine*, INT’L CRIM. CT., <http://www.icc-cpi.int/situations/ukraine>. In August 2024, Ukraine’s parliament approved a measure to join the ICC, and the country was expected soon to become the 125th state party to the court. Illia Novikov, *Ukraine Ratifies the Statute for Joining the International Criminal Court*, ASSOC. PRESS (Aug. 22, 2024), <https://apnews.com/article/ukraine-russia-eu-icc-war-crimes-court-bb53bacf0bfe773ddad8b80ec6779d60>.

24. ICC, *Investigation*, *supra* note 16. Numerous investigation initiatives, involving intergovernmental and nongovernmental organizations as well as states, were launched in the invasion’s wake. See, e.g., European Union Agency for Criminal Justice Cooperation, *Joint Investigation Team into Alleged Core International Crimes in Ukraine: One Year of International Collaboration* (Mar. 24, 2023), <http://www.eurojust.europa.eu/news/joint-investigation-team-alleged-core-international-crimes-ukraine-one-year-international>; U.S. Embassy

A.A. Khan KC told the U.N. Security Council that investigating the alleged transfers of Ukrainians, “particularly children,” was a priority.²⁵ Rumors of impending ICC charges sometimes surfaced, and as the invasion’s one-year anniversary neared, Britain’s Prime Minister told the House of Commons, “thanks to the efforts of UK members, I’m hopeful we will see the first indictments very shortly.”²⁶

The first charges were made public three weeks after the first anniversary of Russia’s 2022 invasion of Ukraine. On March 17, 2023, the ICC announced that a pre-trial chamber had issued arrest warrants against Vladimir Vladimirovich Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, his Commissioner for Children’s Rights.²⁷ Although the warrants themselves remained under seal, the ICC specified that the case dealt with the forced movement of children.²⁸ Genocide was not mentioned, a fact that one commentator said “was met with disappointment by Ukrainians.”²⁹ Rather, Putin and Lvova-Belova were alleged to be responsible for two war crimes in violation of the ICC Statute: “unlawful deportation of population (children)” and “unlawful transfer of population (children) from occupied areas of Ukraine into the Russian Federation.”³⁰ ICC Prosecutor Khan separately explained that his office had applied for the warrants, based on evidence of a “pattern of

& Consulates in Italy, *Joint Statement from the EU, U.S., and UK on the establishment of the Atrocity Crimes Advisory Group (ACA) for Ukraine* (May 5, 2022), <http://it.usembassy.gov/joint-statement-from-the-eu-u-s-and-uk-on-the-establishment-of-the-atrocity-crimes-advisory-group-aca-for-ukraine>; see also Charlie Savage, *Biden Orders U.S. to Share Evidence of Russian War Crimes with Hague Court*, N.Y. TIMES (July 26, 2023), <http://www.nytimes.com/2023/07/26/us/politics/biden-russia-war-crimes-hague.html>.

25. United Nations, *ICC Prosecutor on Ukraine—Security Council*, YOUTUBE (Sept. 22, 2022), <http://youtu.be/Y8eBe4TZwk0>.

26. Richard Wheeler, *Sunak Hopeful over Formal Charges at ICC against Russian Officials ‘Shortly’*, THE INDEPENDENT (Feb. 8, 2022), <http://www.independent.co.uk/news/uk/prime-minister-rishi-sunak-volodymyr-zelensky-mps-icc-b2278223.html> (quoting then-Prime Minister Rishi Sunak); see also Marlise Simons, *International Court to Open War Crimes Cases Against Russia, Officials Say*, N.Y. TIMES (Mar. 13, 2023), <http://www.nytimes.com/2023/03/13/world/europe/icc-war-crimes-russia-ukraine.html>.

27. ICC, *Judges*, *supra* note 3.

28. *Id.* (stating “that the warrants are secret in order to protect victims and witnesses and also to safeguard the investigation,” but adding that “in the interests of justice” details including “the existence of the warrants, the name of the suspects,” and “the crimes for which the warrants are issued” had been disclosed “mindful that the conduct addressed in the present situation is allegedly ongoing, and that the public awareness of the warrants may contribute to the prevention of the further commission of crimes”).

29. Yulia Ioffe, *Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide?*, 25 J. GENOCIDE RSCH. 315, 349 (2023) [hereinafter Ioffe, *Transferring*]; see *infra* text accompanying notes 251–77 (describing codification of the crime of genocide, punishable at ICC, and attendant complications).

30. ICC, *Judges*, *supra* note 3 (citing, as basis for charges, ICC Statute, *supra* note 9, arts. 8(2)(a)(vii), 8(2)(b)(viii)).

deportations,” on February 22.³¹ “Incidents identified by my Office include the deportation of at least hundreds of children taken from orphanages and children’s care homes,” Khan said.³² He further alleged that many such children “have since been given for adoption in the Russian Federation”—a process facilitated by Russian Presidential decrees issued in the wake of the invasion.³³

C. Interview with “Anya” and Other Potential Evidence

In the absence of an unsealed charging document, several news articles linked the ICC arrest warrant to a February 14 report issued by the Yale School of Public Health and supported by the U.S. State Department;³⁴ it found that at least 6,000 Ukrainian children had been relocated for purposes of “re-education” and adoption.³⁵ That report was but one of many potential

31. Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants Against President Vladimir Putin and Ms Maria Lvova-Belova, INT’L CRIM. CT. (Mar. 17, 2023) [hereinafter ICC, *Statement by Prosecutor*], <http://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>.

32. *Id.*

33. *Id.*; see Report of the Independent International Commission of Inquiry on Ukraine, U.N. Doc. A/HRC/52/62, Mar. 15, 2023, ¶ 96 n.55 [hereinafter Mar. 2023 Ukraine Inq. Comm’n Rpt.], https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (pinciting Putin’s May 2022 decree); see also Min. For. Affs. Ukr., *Comment of the Ministry of Foreign Affairs of Ukraine Regarding the Adoption by the Russian Federation of a Legal Act That Violates the Legal Rights of Children—Citizens of Ukraine* (Jan. 6, 2024), <http://mfa.gov.ua/en/news/komentar-mzs-ukrayini-shchodoprijnyattya-rf-normativno-pravovogo-akta-yakij-porushuye-zakonni-prava-ditej-gromadyan-ukrayini> (stating that by dint of a decree Putin issued on January 4, 2024, “[h]eads of Russian organizations in which Ukrainian children are forcibly detained can submit an application for their Russian citizenship,” and asking ICC Prosecutor to take note of this development).

34. Yale School of Public Health Humanitarian Research Lab, *Russia’s Systematic Program for the Re-education and Adoption of Ukraine’s Children: A Conflict Observatory Report* (Feb. 14, 2023) [hereinafter Yale Report], <https://hub.conflictobservatory.org/portal/apps/sites/#/home/pages/259fe204b4344f90a865c1e796a232a5>. Articles referring to this February 14 report include: Amy Mackinnon, Christina Lu & Jack Detsch, *Putin Wanted by ICC Over Alleged War Crimes*, FOREIGN POL’Y (Mar. 17, 2023), <http://foreignpolicy.com/2023/03/17/putin-war-crimes-against-humanity-warrant-icc-ukraine-children-reeducation-transfer-territory-lvova-belova>; Alex Leff, Michele Kelemen & Charles Maynes, *The International Criminal Court Issues an Arrest Warrant for Putin*, NPR (Mar. 17, 2023), <http://www.npr.org/2023/03/17/1164267436/international-criminal-court-arrest-warrant-putin-ukraine-alleged-war-crimes>; Amanda Macias, *International Criminal Court Issues Arrest Warrant for Russian President Vladimir Putin Over Alleged Ukraine War Crimes*, CNBC (Mar. 17, 2023), <http://www.cnn.com/2023/03/17/international-criminal-court-issues-arrest-warrant-for-vladimir-putin.html>.

35. Yale Report, *supra* note 34, at 4–5. The precise number of how many children were involved has remained unclear. A website maintained by Ukraine’s government indicated, citing its own National Information Bureau, that between February 24, 2022, and August 26, 2024, 19,546 children were “[d]eported and/or forcibly displaced.” *Children of War*, <http://childrenofwar.gov.ua/en>. Numbers cited by other sources varied greatly. See also ICC, *Statement by Prosecutor*, *supra* note 31 (referring, with regard to the ICC arrest warrants’ factual allegations, to “hundreds of children taken”); Belam & Lock, *supra* note 20 (reporting on President Zelensky’s 2022 reference to 200,000 children); *Moscow Says 700,000 Children from Ukraine*

evidentiary resources, however. In the first year after the invasion, numerous journalists and human rights groups had published their own accounts.³⁶ One centered on a fourteen-year-old Ukrainian girl identified only as “Anya.”³⁷ She had been taken out of a hospital, transported more than 750 miles, and placed with a foster family near Moscow. “I didn’t want to go. But nobody asked me,” Anya told a reporter. Saying she soon would be made a Russian citizen, Anya added, “I don’t want to. My friends and family aren’t here.”

International organizations also had looked into the allegations; at the end of a mission to Ukraine, for example, the head of the U.N. Refugee Agency repeated claims that children were being brought to Russia and then declared that “giving them nationality or having them adopted goes against the fundamental principles of child protection in situations of war.”³⁸ Shortly before the arrest warrants were issued, moreover, an ICC press release recounted the mission of Prosecutor Khan to southern Ukraine, “two kilometres from the frontlines,” where he visited a “care home” from which children allegedly had been forcibly transferred or deported.³⁹ A page-width photograph accompanying the release showed him in black helmet and flak jacket, face grim as he stood amidst empty cribs.

Conflict Zones Now in Russia, REUTERS (July 3, 2023), <http://www.reuters.com/world/europe/moscow-says-700000-children-ukraine-conflict-zones-now-russia-2023-07-03>. Cf. Report of the Independent International Commission of Inquiry on Ukraine, U.N. Doc. A/78/540, Oct. 20, 2023, ¶¶ 90–101 [hereinafter Oct. 2023 Ukraine Inq. Comm’n Rpt.], <http://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A-78-540-En.pdf> (discussing problems with determining numbers and location of children, and suggesting measures including DNA registry).

36. E.g., Bubola, *supra* note 15; EBU Investigative Journalism Network, *The Missing Children of Ukraine*, EUROVISION NEWS (Feb. 14, 2023), <http://missingchildreukraine.news-exchange.ebu.ch/the-missing-children-of-ukraine>; see also “We Had No Choice”: “Filtration” and the Crime of Forcibly Transferring Ukrainian Civilians to Russia, HUM. RTS. WATCH (Sept. 1, 2022), <http://www.hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians> (mentioning children among civilians transferred).

37. Bubola, *supra* note 15 (quoting Anya). All quotations of Anya in this paragraph are from this source.

38. Max Hunder, *U.N. Refugee Chief: Russia Violating Principles of Child Protection in Ukraine*, REUTERS (Jan. 27, 2023), <http://www.reuters.com/world/europe/un-refugee-chief-russia-violating-principles-child-protection-ukraine-2023-01-27> (quoting U.N. High Commissioner for Refugees Filippo Grandi and including video of the interview in which Grandi made the quoted statement); see Mar. 2023 Ukraine Inq. Comm’n Rpt., *supra* note 33, ¶¶ 95–102, 113(e) (determining, in words of this Commission, “that the situations it has examined concerning the transfer and deportation of children, within Ukraine and to the Russian Federation respectively, violate international humanitarian law, and amount to a war crime,” and adding that Russia’s “citizenship and family placement matters which may have a profound implication on a child’s identity are in violation of the right of a child to preserve his or her identity”).

39. ICC Prosecutor Karim A.A. Khan KC Concludes Fourth Visit to Ukraine: “Amidst this Darkness, the Light of Justice Is Emerging”, INT’L CRIM. CT. (Mar. 7, 2023) [hereinafter ICC, *Fourth Visit*], <http://www.icc-cpi.int/news/icc-prosecutor-karim-khan-kc-concludes-fourth-visit-ukraine-amidst-darkness-light-justice> (quoting Khan); see ICC, *Statement by Prosecutor*, *supra* note 31 (recalling visit).

D. *Russia's Rescue Narrative and Further Charges in Ukraine*

The Prosecutor's warrant application might well have been hastened by a meeting that had taken place on February 16, in a Presidential residence outside Moscow.⁴⁰ Seated at either side of a high-sheen mahogany partners' desk flanked by national emblems were the seventy-year-old Russian President, Putin, and his thirty-eight-year-old Commissioner for Children's Rights, Lvova-Belova; his dark suit and thinning hair contrasted with her blonde shag and white dress accented by ruffled collar and pussy-bow. Well aware that cameras were on, the duo conducted a lengthy discussion of her work, their comments peppered with "please" and "thank you." Lvova-Belova admitted that Russia had taken children out of southeastern Ukraine; indeed, she presented the fact as cause for praise:

Since the beginning of the special military operation, of course, the focus has been on families and children in the war zone. Initially, it was emergency assistance, Vladimir Vladomirovich, to help here and now. Children are special, and they need care and conditions. We evacuated infant and toddler homes, orphanages to safe regions. . . .

She then spoke of the camps to which a thousand Ukrainian children already had been brought.⁴¹ These camps had begun in August 2022, she said, at the insistence of "the children themselves" in Mariupol, a Ukrainian port city that had withstood an eighty-day Russian siege.⁴² Responding to a question from Putin, Lvova-Belova confirmed that she herself had adopted a fifteen year old from that city, adding that "it's difficult, but we definitely love each other." "The most important thing," Putin replied.

Lvova-Belova ended her discourse on Ukraine with what she called the "favorite part" of her job, "the placement of children in families."⁴³ Reminding Putin that as early as March 2022 he had told her this should occur without delay, Lvova-Belova reveled in her ability to keep even large sibling groups together. Foster placements offered Ukrainian children "dogs, and

40. Президент России, *Встреча с Уполномоченным по правам ребёнка Марией Львово-Беловой* [President of Russia, *Meeting with Commissioner for Children's Rights Maria Lvova-Belova*] (Feb. 16, 2023) [hereinafter *Meeting*], <http://kremlin.ru/events/president/news/70524>. Unless otherwise indicated, all information in this paragraph and the next two paragraphs may be found in this source. I am grateful to Olha Kaliuzhna, a member of the University of Georgia School of Law J.D. Class of 2025, for her assistance with this translation.

41. Cf. Oct. 2023 Ukraine Inq. Comm'n Rpt., *supra* note 35, ¶¶ 93, 100–02 (describing camps).

42. See Shaun Walker, Isobel Koshiw, Pjotr Sauer, Morten Risberg, Liz Cookman & Luke Harding, *Mariupol: The Ruin of a City*, THE GUARDIAN (Feb. 23, 2023), <http://www.theguardian.com/world/ng-interactive/2023/feb/23/mariupol-the-ruin-of-a-city>.

43. She indicated "that if there are blood relatives," she would try to effect a "reunion" between the child and relatives. *Meeting, supra* note 40; see also Yuliya Talmazan, Daryna Mayer & Bianca Britton, *Where Are Ukraine's Missing Children?*, NBC NEWS (July 1, 2023), <http://www.nbcnews.com/specials/ukraine-missing-children-taken-by-russia-kherson/index.html> (stating that Lvova-Belova repeated this promise).

cats, and brothers and sisters,” Lvova-Belova said, adding: “They go so happy to their parents.”

Russian officials adhered to that sunny rescue narrative even after the ICC’s arrest warrant notice.⁴⁴ They seem to have relied in part on international humanitarian law pertaining to the evacuation of vulnerable persons from battle zones;⁴⁵ indeed, in a controversial move, the Red Cross of Belarus is said to have conducted some movements of Ukrainian children.⁴⁶ But as the head of the U.N. Refugee Agency has stressed, evacuation cannot interfere with children’s identities; moreover, it must aim to reunite children with their families once circumstances permit.⁴⁷

Russian officials spoke of rescue yet again in June 2023, when Ukrainian national prosecutors who had been collaborating with the ICC filed national charges of war crimes against a Russian legislator and two Ukrainians.⁴⁸ The

44. *Reactions to ICC’s Arrest Warrant for Putin Citing Ukraine War Crimes*, REUTERS (Mar. 17, 2023) [hereinafter *Reactions*], <http://www.reuters.com/world/europe/reactions-icc-arrest-warrant-putin-over-ukraine-war-crimes-2023-03-17> (quoting iteration of saving-children narrative by both Lvova-Belova and a Russian Foreign Ministry spokeswoman, as well as Kremlin spokesman’s contention that Russia’s status as a nonparty state to the ICC renders court’s actions “null and void for the Russian Federation from the point of view of law”).

45. See Médecins Sans Frontières, *Evacuation*, THE PRACTICAL GUIDE TO HUMANITARIAN LAW, <http://guide-humanitarian-law.org/content/article/3/evacuation-1>. *Ukraine-Russia War: Children Evacuated from Front Line Villages Ahead of Expected Fighting*, THE TELEGRAPH (Sept. 27, 2023), <http://www.telegraph.co.uk/world-news/2023/09/27/ukraine-russia-war-live-sokolov-black-sea-mod-offensive>.

46. See Ivana Kottasová & Olga Voitovich, *Belarus Red Cross Says It Helped Deport Ukrainian Children to Belarus*, CNN (July 20, 2023) <http://www.cnn.com/2023/07/20/europe/belarus-red-cross-ukraine-children-deportations-intl/index.html>; *Statement: In Response to the Belarus Red Cross Secretary General’s Visit to Luhansk and Donetsk and His Statements to the Media*, INT’L FED. RED CROSS & RED CRESCENT SOCIETIES (July 19, 2023), <http://www.ifrc.org/article/statement-response-belarus-red-cross-secretary-generals-visit-luhansk-and-donetsk-and-his>.

47. See Hunder, *supra* note 38; Convention (No. IV) Relative to Protection of Civilian Persons in Time of War, arts. 26, 49, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Civilians Convention]; Protocol I Additional to Geneva Conventions of 12 August 1949, and Relating to Protection of Victims of International Armed Conflicts, arts. 74, 78, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Fully 174 states, including Russia and Ukraine but not the United States, are parties to Additional Protocol I. Int’l Comm’n Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, <http://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties>. On the universal ratification status of the four Geneva Conventions of 1949, see *infra* note 50.

48. Anthony Deutsch, *Exclusive: Ukraine Brings First Charges for Deporting Kherson Orphans*, REUTERS (June 30, 2023), <http://www.reuters.com/world/europe/ukraine-brings-first-charges-deporting-kherson-orphans-2023-06-30> (reporting that on hearing of new case, Kremlin “again dismissed allegations that Russia had violated children’s rights in Ukraine and said that, on the contrary, its armed forces were rescuing children from conflict zones”); Talmazan, Mayer & Britton, *supra* note 43 (identifying suspects as “Igor Kastyukevich, a Russian parliamentarian” who is “loyal to Putin,” plus “an ex-worker at the orphanage and an official in the region”). Allegations of Belarussian involvement in child-takings reportedly are under investigation, but as of this writing no charges had been filed. See Amy Mackinnon, *Belarus Is Abducting Ukrainian Children in Plain Sight*, FOREIGN POL’Y (Aug. 11, 2023),

case was one of many tens of thousands registered in the national system.⁴⁹ In it, Ukrainian prosecutors alleged that in fall 2022, forty-eight orphans had been taken by force from the Kherson Regional Children's Home in southern Ukraine.⁵⁰ Many were "loaded onto white Russian Ministry of Health vehicles," according to Reuters; indeed, "prosecutors shared a video allegedly showing one of the suspects helping to load the children onto a bus marked with the pro-Russian symbol 'Z'."⁵¹ These infants and toddlers had not been returned.⁵² As late as mid-2024, a Ukrainian governmental source said that fewer than 400 children had been returned, compared with tens of thousands said to have been taken.⁵³

<http://foreignpolicy.com/2023/08/11/belarus-abducting-deporting-ukrainian-children-social-media-networks-kyiv-minsk-camps-russia-war-donbas>; Lorenzo Tondo, *Children Arrive in Belarus After Being Illegally Removed from Ukraine*, THE GUARDIAN (Sept. 19, 2023), <http://www.theguardian.com/world/2023/sep/19/children-arrive-in-belarus-after-being-illegally-removed-from-ukraine>.

49. See U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Statement of Preliminary Findings and Recommendations* (Sept. 10, 2023), <http://www.ohchr.org/sites/default/files/documents/issues/srtorture/statements/20230908-eom-visit-ukraine-sr-torture.pdf> (stating, in report by Special Rapporteur Alice Edwards, that the Ukraine government reported "over 103,000 war crimes proceedings so far registered").

50. Deutsch, *supra* note 48. Both ICC and Ukrainian charges reportedly were based on the four Geneva Conventions of 1949 on protection of victims of armed conflict; these four treaties entered into force in 1950 and have 196 parties, including Russia, Ukraine, and the United States. See *IHL Databases: Geneva Conventions, Additional Protocols and their Commentaries*, INT'L COMM. RED CROSS, <http://ihl-databases.icrc.org/en/ihl-treaties/geneva-conventions-1949additional-protocols-and-their-commentaries>. Given this overlap in charges, analysis in this article is applicable to national proceedings even though it tends to focus on the ICC.

51. Deutsch, *supra* note 48. See Talmazan, Mayer & Britton, *supra* note 43 (featuring embedded video, which one accused had posted on social media to show that "[w]e have saved" children); see also Yousur Al-Hlou & Masha Froliak, *46 Children Were Taken From Ukraine. Many Are Up for Adoption in Russia.*, N.Y. TIMES (June 2, 2024), <http://www.nytimes.com/2024/06/02/world/europe/ukraine-children-russia-war.html> (reporting in detail, with embedded video and still images, on fate of children from Kherson home).

52. See Deutsch, *supra* note 48 (reporting on speculation of "Yuliia Usenko, head of the department for the protection of children's interests in Ukraine's Prosecutor General's office," that children "may have been illegally adopted by Russian citizens, or taken to Russian institutions"); Talmazan, Mayer & Britton, *supra* note 43 (quoting head of nongovernmental organization Save Ukraine as saying that although it "had identified the children . . . [i]t will be very hard to return them"). In early 2024, an inquiry commission's report discussing this incident "concluded that the transfer of a group of children from the Kherson Regional Children's Home to Crimea was not temporary and hence amounted to the war crime of unlawful transfer." Report of the Independent International Commission of Inquiry on Ukraine, A/HRC/55/66, Mar. 18, 2024, ¶¶ 95–97, <https://documents.un.org/doc/undoc/gen/g24/037/31/pdf/g2403731.pdf>.

53. *Children of War*, *supra* note 35 (stating that 388 children had been returned, and that 19,546 were "[d]eported and/or forcibly displaced"). See *Ukraine Successfully Returns Nearly 400 Children Kidnapped by Russia*, NEW VOICE OF UKRAINE (Sept. 14, 2023), <http://english.nv.ua/nation/ukraine-successfully-returns-nearly-400-children-kidnapped-by-russia-50353564.html> (quoting Ukraine governmental officials); *UN Concerned over Lack of System to Return Ukrainian*

E. Training Focus on Child-Taking

Despite the emotional pull of such stories, much commentary about the ICC charges tended to dwell on juridical questions like occupied territory and head-of-state immunity, on the seeming novelty of naming a woman as an international criminal defendant, and on practical matters like whether the indictment impeded Putin's travel and whether Russian suspects ever might find themselves in custody.⁵⁴ Even commenters who gave favorable nods to the actual charges seemed to look to the future—perhaps to genocide counts based on the conduct already at issue, and surely to additional charges encompassing what Prosecutor Khan himself had called a “broad range of alleged international crimes.”⁵⁵

This article takes a different tack. Even as it acknowledges both the apparent breadth of the Russia-Ukraine crime base and associated legal-practical questions, this article finds opportunity in the narrow scope of the initial charges. That narrowness encourages deep thinking about the alleged conduct; about, that is, the nature, content, and significance *vel non* of removing children

Children from Russia, REUTERS (Oct. 9, 2023), <http://www.reuters.com/world/un-concerned-over-lack-system-return-ukrainian-children-russia-2023-10-09>.

54. See Philippa Webb, *EJIL: The Podcast! Episode 19—“From Russia with War: Part Deux”*, EJIL: TALK! (Mar. 24, 2023), <http://www.ejiltalk.org/ejil-the-podcast-episode-19-from-russia-with-war-part-deux> (discussing such matters); Natalie Hodgson, *Arresting “Mother Russia”: Female Defendants and Gender(ed) Justice in International Criminal Tribunals*, EJIL: TALK! (Mar. 27, 2023), <http://www.ejiltalk.org/arresting-mother-russia-female-defendants-and-gendered-justice-in-international-criminal-tribunals> (same); see also *Reactions*, *supra* note 44 (including comments in this vein); Deutsch, *supra* note 48 (noting that “[u]nlike at the ICC, trials in Ukraine can be held in absentia”).

55. ICC, *Statement by Prosecutor*, *supra* note 31 (characterizing child-abduction arrest warrant as a “first, concrete step”); see also *Russia: ICC’s Arrest Warrant Against Putin a Step Towards Justice for Victims of War Crimes in Ukraine*, AMNESTY INT’L (Mar. 17, 2023), <http://www.amnesty.org/en/latest/news/2023/03/russia-iccs-arrest-warrant-against-putin-step-towards-justice> (quoting head of this nongovernmental organization as welcoming ICC warrants as “impressive first step,” yet looking forward to “further arrest warrants” that “reflect the plethora of war crimes and crimes against humanity for which the Russian leadership is potentially responsible”); Simons, *supra* note 26 (quoting expert’s comment that in certain circumstances, alleged conduct could amount to genocide); Webb, *supra* note 54 (including podcast in which experts agreed that charges fell short of “true accountability”); Mackinnon, Lu & Detsch, *supra* note 34 (writing that it was “unclear why the ICC sought to pursue charges of Russia’s alleged transfer of Ukrainian children first”). Nearly a year later, the ICC did file additional charges, by way of arrest warrants alleging that two Russian military officials were responsible for war crimes and a crime against humanity arising out of “missile strikes carried out by the forces under their command against the Ukrainian electric infrastructure.” Press Release, Int’l Crim. Ct., *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov* (Mar. 5, 2024), <http://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and>. Subsequently, charges were filed against the former Russian defense minister and a high-level military official for war crimes and crimes against humanity in June 2024. Press Release, Int’l Crim. Ct., *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov* (June 25, 2024), <http://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-kuzhugetovich-shoigu-and>.

to settings where they are made to forget, or to learn to despise, the families and communities from which they were removed. This article thus examines the all-too-recurrent phenomenon that it labels “child-taking.”

III. CHILD-TAKING AND THE EVOLUTION OF INTERNATIONAL CRIMINAL LAW

*“We were given a little bit to eat – just black coffee and bread,
and the little children were hungry. They cried and asked
for their mothers.”*

– Maria Hanfova, 17, testifying at Nuremberg of her taking by
the Gestapo at age 12⁵⁶

International criminal law provides a lens for this article’s child-taking analysis. Three factors motivate this focus. First, of course, is the fact that actual cases, grounded in international law, are pending at the ICC and in Ukraine.⁵⁷

The second factor relates to what it means to name specified conduct a “matter of international concern.”⁵⁸ At least since the early-twentieth-century League of Nations, invocation of that phrase has served to justify international intervention, on behalf of affected humans, into a matter that otherwise would be the province of a sovereign state.⁵⁹ Labeling actions matters of international concern, or human rights violations, mobilizes a range of actors. As the Princeton University political philosopher Charles R. Beitz wrote in 2009, “human rights have come to function not only as legal standards and as objectives for foreign policy,” which thus engage states and inter-state

56. Official extracts like this one, from Nuremberg’s *RuSHA* kidnapping trial, may be found in volumes IV and V of books nicknamed the “Green Series” on account of their covers’ color. TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Oct. 1946–Apr. 1949) [hereinafter NMT TRIALS, vol. ___], available at <http://www.loc.gov/collections/military-legal-resources/?q=green+series>. For the testimony quoted in the text, see Maria Hanfova Direct Examination, in NMT TRIALS, *id.*, vol. IV, at 1033 [hereinafter Hanfova Direct]; see *infra* text accompanying notes 107–108 (detailing Hanfova’s testimony).

57. See *supra* Parts II.B, II.D.

58. See, e.g., Charles R. Beitz, *International Concern*, in CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 160, 196 (2009); *id.* at 160 (“Human rights are, peculiarly, matters of international concern: they are norms worked out for one among many possible situations of human interaction, that found in a world order in which political authority is vested primarily in territorial states.”).

59. See League of Nations Covenant, arts. 11, 13, 15, 22 (providing, in various ways, for international action on matters not solely within one state’s jurisdiction). An early application of this principle occurred in the 1920 Åland Islands dispute, in which bodies specially appointed by the Council of the League of Nations, having determined that the question at hand did not fall solely within one state’s domestic jurisdiction, prescribed rules for the exercise of internal self-determination by a linguistic minority group residing within the state. See Michael A. Becker, *Challenging Some Baseline Assumptions about the Evolution of International Commissions of Inquiry*, 55 VAND. J. TRANSNAT’L L. 559, 593–94 (2022) (summarizing the dispute).

organizations, “but also as political values that inform and motivate action by nongovernmental group agents”; that is, by “nongovernmental organizations and social movement activists.”⁶⁰ This mobilization dynamic intensifies when matters of international concern additionally are labeled international crimes—to quote the ICC Statute, “the most serious crimes of concern to the international community as a whole,” falling within the categories of genocide, crimes against humanity, war crimes, and aggression.⁶¹ By now it is well accepted that international criminal law serves an expressive function, that everything done by actors within international criminal justice systems carries a social meaning, and that every action, or inaction, is understood to say something.⁶² Accordingly, proclaiming misconduct “most serious” will raise public concern, among local, regional, and global audiences.⁶³ Prosecutions may ensue; so too may both governmental and nongovernmental efforts to prevent and redress the underlying harm. Social meanings of a rather different sort will result if an indictment omits certain allegations, or if a defense argument leads to acquittal—just as the choice and quality of witnesses and other evidence will strengthen, or weaken, the force of a trial narrative.⁶⁴

Finally, the third factor motivating consideration of international criminal law arises out of legal developments in the wake of World War II. That

60. Beitz, *supra* note 58, at 195–96.

61. ICC Statute, *supra* note 9, art. 5.

62. *E.g.*, CARSTEN STAHN, JUSTICE AS MESSAGE: EXPRESSIVIST FOUNDATIONS OF INTERNATIONAL CRIMINAL JUSTICE 1–18 (2020); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 117–32 (2002) [hereinafter Amann, *Genocide*]; Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165 (2007); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265 (2012).

63. *See* Geoffrey Thomas Dancy, *The Hidden Impacts of the ICC: An Innovative Assessment Using Google Data*, 34 LEIDEN J. INT’L L. 729, 730 (2021) (finding, through quantitative analysis, a “statistical relationship . . . between ICC involvement and measurable jumps in a population’s human rights interest,” and suggesting that this public information-seeking may point to the ICC’s often-hidden “‘socio-pedagogical’ effects”); Courtney Hillebrecht & Hannah Roesch Read, *The ICC Beyond the Courtroom: Activities, Warnings, and Impact*, 22 J. HUM. RTS. 62, 75 (2023) (analyzing impact of out-of-court statements by the ICC’s Office of the Prosecutor, and concluding that through such efforts “the ICC may be able to deter atrocity crimes and further motivate national accountability mechanisms”).

64. *See, e.g.*, Tine Destrooper, *Neglecting Social and Economic Rights Violations in Transitional Justice; Long-Term Effects on Accountability: Empirical Findings from the Extraordinary Chambers in the Courts of Cambodia*, 37 J. CURRENT SE. ASIAN AFFS. 95, 119 (2018) (concluding, based on empirical analysis of discourse within and surrounding the hybrid tribunal which adjudicated crimes arising out of the 1970s Khmer Rouge regime, that the tribunal’s disregard of violations of economic, social, and cultural rights contributed to “the invisibilisation of such issues” among Cambodia-focused nongovernmental organizations); Zusanna Godzimirska & Nabil M. Orina, *Scapegoats and Underdogs: Narrative Control and Defense Positioning Within and Beyond the International Criminal Court*, 23 INT’L CRIM. L. REV. 443, 448–54 (2022) (positing international criminal courtrooms as “Discursive Battle Sites” and discussing the importance of constructing narratives on defense and prosecution sides).

period brought the first international convictions of human beings for violating international law.⁶⁵ And with that imposition of individual responsibility came recognition that humans were objects as well as subjects of that law; in other words, that international law entails obligations to protect humans against violations of fundamental rights.⁶⁶ The inclusion of children in such protection likewise has roots in postwar efforts to punish and redress crimes committed against and affecting children.⁶⁷

Therefore, regardless of how a particular instance of child-taking is to be addressed—locally or globally, through legal regimes like human rights, civil rights, refugee law, or transitional justice, or through social measures like psychotherapy or education—careful consideration of international criminal law will aid comprehension of the child-taking phenomenon. Indeed, such consideration will help to shape the contours of the phenomenon under study. This article thus proceeds: first, to a historical exploration of how child-taking was treated at the founding of international criminal law, and second, to a jurisprudential exploration of recent developments in international child law as they pertain to armed conflict and similar extreme violence.

A. *Children and the Nuremberg Era, Dawn of International Criminal Law*

To that first essential inquiry, history, this article now turns. It looks specifically to the Nuremberg era, that post-World War II period when many hundreds were put on trial for international crimes in Europe, Asia, and elsewhere. A milestone was the trial of nearly two dozen Nazi leaders by the International Military Tribunal (“IMT”), a multinational bench convened at Nuremberg’s Palace of Justice. Twelve additional trials followed in the same courthouse, before Nuremberg Military Tribunal panels composed of judges from the United States (“NMTs”).⁶⁸ The eighth of these so-called subsequent proceedings,⁶⁹ *RuSHA*, merits extended treatment. As becomes evident with the study of trial transcripts and related documents newly available online, the *RuSHA* prosecution called five child survivors and one childless mother as witnesses in its effort to prove the charged phenomenon of child-taking against

65. See ELIES VAN SLIEDREGT, *INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW* 4 (2012).

66. See, e.g., Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 *UCLA L. REV.* 1201, 1245–51 (1998) (tracing the jurisprudential transformation described in the text).

67. See *infra* Part III.B.1.

68. See generally KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (2011) (recounting history of this series of post-World War II trials).

69. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 290–91 (1992) (writing that U.S. prosecutors at Nuremberg dubbed these trials “subsequent proceedings”).

the fourteen defendants. One defendant was a woman responsible for managing Nazi-sponsored orphanages and foster placements.

1. The International Military Tribunal Trial

The initial Nuremberg proceeding took place before the International Military Tribunal, comprising judges from four victorious Allies: France, Great Britain, the Soviet Union, and the United States.⁷⁰ When the year-long trial concluded in October 1946, nineteen defendants were found guilty, and twelve sentenced to death, for crimes against peace, war crimes, and crimes against humanity committed during World War II.⁷¹

Confronted with a fathomless crime base, both the indictment and the judgment had placed emphasis on physical destruction; for example, on mass executions in Poland and other occupied territories,⁷² and on massacres like that in Lidice, a Czech village about a dozen miles northwest of Prague.⁷³ The only victim named in the IMT's governing statute had been the "civilian population,"⁷⁴ and the IMT judgment's few references to child victims generally were found in phrases like "men, women, and children" or "women and children."⁷⁵ An exception emerged in the judges' finding that Germany had a "plan to get

70. The bench of the IMT's Asian counterpart, the International Military Tribunal for the Far East, further included judges from seven additional Allied countries: Australia, Canada, China, India, the Netherlands, New Zealand, and the Philippines. See Diane Marie Amann, *Glimpses of Women at the Tokyo Tribunal*, in *THE TOKYO TRIBUNAL: PERSPECTIVES ON LAW, HISTORY AND MEMORY* 103, 106–07 (Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten & Jolana Makraiová eds., 2020).

71. This trial, which took place from Nov. 20, 1945, to Oct. 1, 1946, is officially chronicled in books known as the "Blue Series" because of their covers' color. *TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1947)* [hereinafter *IMT TRIAL*, vol. ___], available at <http://www.loc.gov/collections/military-legal-resources/?q=blue+series>. For IMT sentences, including one levied against the one convicted defendant who had been tried *in absentia*, see Judgment, *United States v. Göring*, Sept. 30–Oct. 1, 1946, in *id.*, vol. I, at 171, 365–67.

72. E.g., Indictment, *United States v. Göring*, Aug. 8, 1945, in *IMT TRIAL*, *supra* note 71, vol. I, at 27, 49–50 (alleging series of "monstrous criminal acts" against men, women, and children in Ukraine); Judgment, *United States v. Göring*, at 236 (detailing atrocities "in the territory of the Soviet Union and in Poland").

73. Indictment, *United States v. Göring*, at 62 (supporting allegation that "Nazi conspirators also practiced the senseless destruction of populated places" by naming Lidice as a place that was "burned to the ground and the inhabitants killed"); Judgment, *United States v. Göring*, at 234, 270 (referring to massacres at Lidice and elsewhere).

74. Charter of International Military Tribunal, Aug. 8, 1945, art. 6, in *IMT TRIAL*, *supra* note 71, vol. I, at 10, 11 [hereinafter *IMT Charter*].

75. Indictment, *United States v. Göring*, at 40, 46, 49, 50, 62, 64; Judgment, *United States v. Göring*, at 235, 236, 237, 245, 248, 251–52, 260, 278, 362; see also CÉCILE APTEL, *ATROCITY CRIMES, CHILDREN AND INTERNATIONAL CRIMINAL COURTS: KILLING CHILDHOOD* 101 (2023) (finding the *Göring* Judgment's express references to children "rare" and lacking in details about age, gender, and "extent of their victimisation," and adding that more often "children are collapsed into unquantifiable, generic umbrella terms, referred to as 'children', 'youth', 'families', 'inhabitants', 'population', 'people/persons', 'group', 'labourers', 'hostages', 'victims', and 'Jews'").

rid of whole native populations.”⁷⁶ In support of that conclusion, the IMT judgment quoted a statement by the head of a Nazi paramilitary organization known by its initials, SS. That leader, Heinrich Himmler, had said in 1943:

“What happens to a Russian, a Czech, does not interest me in the slightest. What the nations can offer in the way of good blood of our type, we will take. If necessary, by kidnapping their children and raising them here with us.”⁷⁷

Reminiscent of a similar statement he had made in Ukraine the year before,⁷⁸ Himmler’s 1943 exhortation to take, and remake, children would form a cornerstone for the eighth of the twelve subsequent proceedings conducted before U.S.-led NMTs.⁷⁹

2. *RuSHA*, Nuremberg’s Child-Kidnapping Trial

This eighth NMT proceeding began a full year after the IMT trial, and ended a half-year later, on March 10, 1948.⁸⁰ It is called “*RuSHA*” after the German acronym for Race and Resettlement Main Office, one of the four SS agencies with which the *RuSHA* accused were affiliated.⁸¹ Indeed, thirteen defendants were alleged to belong to the SS, a group that the IMT had declared criminal.⁸² The only nonmember was defendant Inge Viermetz. When still in her early thirties, she had been put in charge of a department

76. Judgment, *United States v. Göring*, at 237.

77. *Id.* (quoting October 1943 speech by Himmler); *see id.* at 268–73 (recounting history of Himmler and SS—short for die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei—in course of declaring latter a criminal organization).

78. Isabel Heinemann, *The Forced Germanisation of Children from Poland, the Soviet Union and Southeastern Europe during World War II—Historical Background, Practice, Consequences*, in UPROOTED: (HI)STORIES OF STOLEN CHILDREN DURING WORLD WAR II 5, 6 (Tomasz Skonieczny ed., 2022).

79. *See infra* notes 80–153 and accompanying text.

80. *See* NMT TRIALS, *supra* note 56, vol. IV, at 599–600, 607 (setting out *RuSHA* chronology plus names and titles of *RuSHA* lawyers). Whenever relevant proceedings cannot be found in NMT TRIALS, *supra* note 56, this article cites to the complete *RuSHA* proceedings, photostats of which now may be found online at National Archives Collection of World War II War Crimes Records (Record Group 238), English Transcript of the Proceedings of Case No. 8, *United States v. Ulrich Greifelt, et al.*, Oct. 10, 1947–Mar. 10, 1948 [hereinafter *RuSHA* Tr., vols. ____], <http://catalog.archives.gov/id/6217471>. Citations to this source include both the transcript page number and the number at the bottom of the online search box, referred to as “reel.”

81. NMT TRIALS, *supra* note 56, vol. IV, at 599 (stating German full name as “Rasse- und Siedlungshauptamt”).

82. Indictment, *United States v. Greifelt*, July 1, 1947, in NMT TRIALS, *supra* note 56, vol. IV, at 608, 618 (charging, in Count 3, membership in SS as a criminal organization); Judgment, *United States v. Göring*, at 171, 273 (condemning SS involvement in “the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labor program and the mistreatment and murder of prisoners of war”).

within one of the impugned SS agencies;⁸³ within, to quote the *RuSHA* tribunal, “the Well of Life Society,” “commonly known as Lebensborn.”⁸⁴ Lebensborn’s board chairman had been the deceased SS leader and one-time Hitler confidant Heinrich Himmler.⁸⁵

Viermetz and her co-accused stood trial for war crimes and crimes against humanity, often against child victims⁸⁶—crimes that the *RuSHA* indictment alleged “were carried out as part of a systematic program of genocide.”⁸⁷ This last word was not proscribed in the statute governing the *RuSHA* judges, nor indeed any other tribunal.⁸⁸ Rather, the term denoted criminal behavior which

83. See Inge Viermetz, Transcript of Direct Examination, Jan. 28, 1948, at 4492–97/reel 720–25, in *RuSHA* Tr., *supra* note 80, vols. 10–11 [hereinafter Viermetz Direct Tr.], <http://catalog.archives.gov/id/286027972> (stating Viermetz’s birthdate and work history).

84. Opinion and Judgment, *United States v. Greifelt*, Mar. 10, 1948, in NMT TRIALS, *supra* note 56, vol. V, at 88, 90. The other two agencies were: “Reich Commissioner for Strengthening of Germanism, Staff Main Office,” or “Staff Main Office of RKFDV”; and “Repatriation Office for Ethnic Germans,” known by the German acronym “VoMi.” *Id.* at 89–90.

85. Prosecution Opening Argument, Oct. 20, 1947, at 42/reel 51, in *RuSHA* Tr., *supra* note 80, vols. 1–3 [hereinafter Pros. Opening], <http://catalog.archives.gov/id/286024085>; see also WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 1132–36, 1141 (1960) (writing that just three weeks after April 1945 suicide of his Führer, Adolf Hitler, Himmler committed suicide following his arrest by British authorities).

86. The statute governing NMT trials authorized jurisdiction over these categories of crimes, defining each in one short subparagraph. Control Council Law No. 10, art. II(1), Dec. 20, 1945, in NMT Trials, *supra* note 56, vol. IV, at XVIII [hereinafter Control Council Law No. 10]. War crimes were described as follows:

Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or *deportation* to slave labour or *for any other purpose, of civilian population from occupied territory*, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Crimes against humanity, meanwhile, were defined thusly:

Atrocities and offences, including but not limited to murder, extermination, enslavement, *deportation*, imprisonment, torture, rape, or other inhumane acts *committed against any civilian population*, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

Id. art. II(1)(b), (c) (emphasis supplied). In this statute, as in that of IMT, only the “civilian population,” and not children specifically, earned mention as a potential victim group. See *supra* text accompanying note 74.

87. Indictment, *United States v. Greifelt*, at 609. Quotes in the text derive from Count 1, crimes against humanity, *id.* at 609–17; the same allegations are incorporated by reference in Count 2, war crimes, *id.* at 617–18.

88. The word is absent in IMT Charter, *supra* note 74; Control Council Law No. 10, *supra* note 86; Charter of International Military Tribunal for the Far East at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Apr. 26, 1946, T.I.A.S. No. 1589, *reprinted in* 4 U.S.T. 27 (1946).

the Poland-born American jurist Raphaël Lemkin had given a name in 1944,⁸⁹ but which no statute nor treaty yet defined and prohibited.⁹⁰ A reference to “genocide” had appeared in the 1945 IMT indictment, however, and a 1946 U.N. General Assembly resolution had declared that “genocide is a crime under international law,” the punishment of which “is a matter of international concern.”⁹¹ The prosecution thus framed *RuSHA* as a case about genocidal acts which had victimized hundreds of thousands of persons.⁹² Prosecutors spoke of “genocide” repeatedly in their opening argument.⁹³ Likewise, the core elements of genocide, as it soon would be codified, were evident in their charge that *RuSHA* defendants had “aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of nationalist characteristics.”⁹⁴ The indictment specified:

The object of this program was to strengthen the German nation and the so-called ‘Aryan’ race at the expense of such other nations and groups by imposing Nazi and German characteristics upon

89. RAPHAËL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944); see United States of America Declaration of Intention of Raphael Lemkin (Feb. 7, 1942), available at http://www.ancestrylibrary.com/discoveryui-content/view/38807:2503?tid=&pid=&queryId=3d03b21a-20b5-41f4-a4b8-ec27aca75014&_phsrc=TH1204&_phstart=successSource (indicating, in document submitted in order to become a naturalized U.S. citizen, that Lemkin had been born in Poland in 1900 and entered the United States in 1941). Before and after the IMT trial, Lemkin worked in the U.S. government and met with prosecutors at Nuremberg. John Q. Barrett, *Raphael Lemkin and ‘Genocide’ at Nuremberg, 1945–1946*, in THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS ADOPTION 35, 41–53 (Christoph Safferling & Eckart Conze eds., 2010); see Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT’L L. 145, 151 (1947) (identifying Lemkin as “Adviser on Foreign Affairs, War Department”). For a recent critical study of Lemkin’s generative role, see A. DIRK MOSES, THE PROBLEMS OF GENOCIDE: PERMANENT SECURITY AND THE LANGUAGE OF TRANSGRESSION 136–68 (2021).

90. The U.N. General Assembly would adopt a treaty codifying such a prohibition seven months after the judgment in the *RuSHA* trial. Genocide Convention, *supra* note 11; see also *Convention on the Prevention and Punishment of the Crime of Genocide*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en (stating that this treaty entered into force in 1951 and today has 153 parties, including Russia, the United States, and Ukraine); see also Amann, *Genocide*, *supra* note 62, at 96–102 (sketching conceptual and legal development of crime of genocide).

91. Indictment, *United States v. Göring*, Aug. 8, 1945, in IMT TRIAL, *supra* note 71, vol. I, at 27, 43; G.A. Res. 96 (I), at 188–89 (Dec. 11, 1946); see also Alexa Stiller, *The Mass Murder of the European Jews and the Concept of ‘Genocide’ in the Nuremberg Trials: Reassessing Raphaël Lemkin’s Impact*, 12 GENOCIDE STUD. & PREVENTION 144, 148–60 (2019) (detailing Nuremberg prosecutors’ use of the concept of genocide).

92. Pros. Opening, *supra* note 85, at 124–25/reel 133–34 (referring to “crimes committed by these fourteen defendants in which men’s dearest and most sacred rights were denied to hundreds of thousands throughout Europe”); see *id.* at 39/reel 48 (stating that in mid-1944 “there were still one million ethnic Germans and Poles in the Vomi camps”).

93. *Id.* at 24/reel 33, 30/reel 39, 116/reel 125, 120/reel 129, 125/reel 134; see Stiller, *supra* note 91, at 162–63.

94. Indictment, *United States v. Greifelt*, July 1, 1947, in NMT TRIALS, *supra* note 56, vol. IV, at 609–10.

individuals selected therefrom (such imposition being hereinafter called ‘Germanization’), and by the extermination of ‘undesirable’ racial elements. This program was carried out in part by –

- a. Kidnaping the children of foreign nationals in order to select for Germanization those who were considered of ‘racial value’⁹⁵

Allegations thus pertained explicitly to the abduction of young people for genocidal purposes. Several additional charged acts also affected children and family life; to name a few: compelled abortion and other interference with reproduction; the execution or imprisonment of persons who engaged in forbidden sexual intercourse; and forced evacuation from homelands.⁹⁶

i. Child Witnesses Testify to Their Own Takings

As with other Nuremberg trials, prosecutors sought to prove their case largely through troves of seized Nazi documents.⁹⁷ But *RuSHA* was unique in its presentation of multiple eyewitnesses who had endured the charged crime of child-taking.

a. Lidice

Particularly memorable was the afternoon of October 30, 1947, when three witnesses gave human voice to such charges. First was Ruzena Petrakova, forty-one years old and the mother of two sons and a daughter, aged ten to

95. *Id.* at 610. Throughout this article words in quotations—as with “Kidnaping” in the text above—are spelled as in the original.

96. *Id.* (listing, besides kidnapping charge quoted in text, “[e]ncouraging and compelling abortions on Eastern workers for the purpose of preserving their working capacity as slave labor and weakening European nations”; “[e]xecuting, imprisoning in concentration camps, or Germanizing Eastern workers and prisoners of war who had sexual intercourse with Germans, and imprisoning the Germans involved”; “[t]aking away, for the purpose of extermination or Germanization, infants born to Eastern workers in Germany”; “[p]reventing marriages and hampering reproduction of enemy nationals”; “[e]vacuating enemy populations from their native lands by force and resettling so-called ‘ethnic Germans’ (Volksdeutsche) on such lands”; “[c]ompelling nationals of other countries to perform work in Germany, to become members of the German community, to accept German citizenship, and to join the German Armed Forces, the Waffen SS, the Reich labor service, and similar organizations”; “[p]lundering public and private property in Germany and in the incorporated and occupied territories, e.g., taking church property, real estate, hospitals, apartments, goods of all kinds, and even personal effects of concentration camp inmates;” and “[p]articipating in the persecution and extermination of the Jews”).

97. Extracts from the Closing Statement of the Prosecution, *in* NMT Trials, *supra* note 56, vol. V, at 44 (reiterating documents’ significance) [hereinafter Pros. Closing Extr.]. *But see* Pros. Opening, *supra* note 85, at 104/reel 113, 113/reel 122 (promising to present witnesses as well as documents supporting charges related to Czech and Polish children).

fifteen.⁹⁸ Petrakova had lived for years in the Czech village of Lidice when, on the night of June 9, 1942, Lidice's "men were collected and taken" to a farm. "I and my three children were taken to" a schoolhouse where, she soon realized, all the "[m]others and children were collected." Her money and wedding ring were seized. Early the next morning, "we were reloaded on to trucks and taken across the village where we saw all the damage done," and brought to a high school, "with straw on the floor ready for us." She was questioned about her and her children's physical condition, nationality, and ancestors. "The children were asking for their fathers," Petrakova recalled. "They wouldn't eat and they wanted to go home."

Instead, they were taken from their mothers. One of Petrakova's children ran to her. "One of the Gestapo men jumped after the child and threw it on the floor and ordered me to kneel." A news item underlined the impact of such words: "One witness was so overcome after recounting how her children cried for their parents during the massacre that the judge had to suspend the sitting."⁹⁹ Petrakova then told the tribunal that all the Lidice mothers were transported to Ravensbrück, outside Berlin. She remained in that infamous women's concentration camp until liberation in spring 1945.¹⁰⁰ "When I returned home," she said, "I found only a field—just a grave of our men, and my lost children haven't been returned to me yet."

Next, a golden-haired and baby-faced fifteen year old walked to the stand. Her square-collared tattersall dress, reminiscent of a school uniform, contrasted sharply with other witnesses' sober attire.¹⁰¹ The girl raised her right hand and solemnly repeated: "I swear by God, the Almighty and Omniscient, that I will speak the pure truth and will withhold and add nothing."¹⁰² Photographers captured that moment as well as the first words of Marie Dolezalova, who had been only ten when tragedy befell Lidice.¹⁰³ The noise of their

98. Ruzena Petrakova, Transcript of Testimony, Oct. 30, 1947, at 796, 800/reel 813, 817, in *RuSHA Tr.*, *supra* note 80, vols. 1–3 [hereinafter Petrakova Tr.], <http://catalog.archives.gov/id/286024085>. Unless otherwise indicated, information in this and the next paragraph may be found in *id.* at 796–801/reel 813–18.

99. *Lidice Massacre: S.S. Men on Trial*, DERBY DAILY TELEGRAPH (Eng.), Oct. 31, 1947, at 1.

100. On Ravensbrück, see, for example, SARAH HELM, *IF THIS IS A WOMAN: INSIDE RAVENSBRÜCK: HITLER'S CONCENTRATION CAMP FOR WOMEN* (2015) and *infra* text accompanying notes 137 and 144.

101. Photographs of Lidice witnesses, in Record Group 238: Photographs Relating to the Minor Nuremberg Trials, NATIONAL ARCHIVES COLLECTION OF WORLD WAR II WAR CRIMES RECORDS [hereinafter Trial Photos], <http://catalog.archives.gov/search-within/540130>; see, in particular, *Press Conference*, <http://catalog.archives.gov/id/169157200>.

102. Marie Dolezalova, Transcript of Testimony, Oct. 30, 1947, at 812/reel 829, in *RuSHA Tr.*, *supra* note 80, vols. 1–3 [hereinafter Dolezalova Tr.], <http://catalog.archives.gov/id/286024085>. Unless otherwise indicated, data in this paragraph may be found in *id.* at 812–13/reel 829–30. The photograph of Dolezalova's oath-taking may be found in Trial Photos, *supra* note 101, as *Marie Dolezalova on the Witness Stand*, <http://catalog.archives.gov/id/169157228>.

103. The record variously gives her first name as "Marie" or "Maria," but other witnesses called her "Marie." Petrakova Tr., *supra* note 98, at 801/reel 818; Hanfova Direct, *supra*

cameras made it so “impossible to hear the witness” that the tribunal’s president paused the proceedings.

Pictures completed, Dolezalova related what happened to her and other Lidice children after they were taken from their mothers. Their journey, marked by little food, crying infants, and concrete floors for beds, brought them 300 miles to Lodz, in central Poland.¹⁰⁴ There “three SS men . . . came in and asked our race and selected seven of us,” she said. These seven were taken to “home Puschkau,” a facility that had been established by Lebensborn, the SS organization with which Inge Viermetz and other *RuSHA* defendants were affiliated.¹⁰⁵ Schooled in German and made to work in a garden, Marie Dolezalova eventually was renamed “Inge Schiller” and placed with a German family living in Poznan. “I had to go to school and after school I still had to work,” she testified, “and then when I did something they did not want me to do, they beat me.” She was not returned to Czechoslovakia until a year and a half after the war ended; by then, she told the BBC much later, “I spoke only German and had forgotten the Czech language.”¹⁰⁶

A somewhat fuller account was provided by a somewhat older child; in her high-buttoned suit coat, seventeen-year-old Maria Hanfova appeared quite mature.¹⁰⁷ Hanfova testified that she had been just twelve when “German soldiers surrounded Lidice,” transported villagers to the high school, and separated out 104 children. “[T]old that our mothers would follow us,” Hanfova and the others “were loaded on a train and taken to Lodz.” They were treated “very badly,” she said: “We were given a little bit to eat—just black coffee and bread, and the little children were hungry. They cried and asked for their mothers.”

Soon Hanfova, plus Marie Dolezalova and five others, were split off from the rest of the Lidice children—children whom Hanfova said she never saw nor heard of again.¹⁰⁸ The “selected seven” were transported another hundred miles to the Puschkau home. More than seventy children resided there, Hanfova testified, speakers of Polish and German as well as Czech. Together

note 56, at 1034. An interview made after she had married indicates that she herself used “Marie.” *Survivor of Lidice Massacre ‘Grateful’ to Stoke-on-Trent People*, BBC NEWS (Sept. 7, 2012) [hereinafter *Survivor*], <http://www.bbc.com/news/uk-england-stoke-staffordshire-19506080> (referring to her as “Marie Stupikova”).

104. Unless otherwise indicated, information in this paragraph may be found in Dolezalova Tr., *supra* note 102, at 813–17/reel 830–34.

105. Prosecutors identified this and other facilities as “Lebensborn homes.” Pros. Opening, *supra* note 85, at 43/reel 52; *see id.* at 102/reel 111. Although Viermetz, the witness-accused, quibbled with that characterization, she admitted having advised the facilities. Viermetz Direct Tr., *supra* note 83, at 4515–18/reel 742–45.

106. *Survivor*, *supra* note 103 (relating detail not elicited during her testimony). At the time of her testimony Dolezalova was living with her aunt, witness Petrakova. Dolezalova Tr., *supra* note 102, at 817/reel 834; Petrakova Tr., *supra* note 98, at 802/reel 819.

107. *See Press Conference*, *supra* note 101. Unless otherwise indicated, information in this and the next paragraph of the text may be found in Hanfova Direct, *supra* note 56, at 1033–38.

108. *See* Pros. Opening, *supra* note 85, at 108/reel 117 (indicating that fewer than two dozen of the hundred or so kidnapped Lidice children were accounted for; of those, sixteen had “been returned to their relatives”).

they had to study German reading, writing, and arithmetic. Children caught speaking their mother tongue were denied food and beaten, Hanfova said: “They told us that we would be Germans; that we would probably never come back to Czechoslovakia; that we would be Germans.”

After a year or so, a Puschkau staffer took her 200 miles west, to a family in Dessau, Germany. She underwent a third name change: the girl born Maria Hanfova and called “Maria Hanff” at Puschkau now became “Marga Richter.” “In the beginning it was bad because I was a Czech and I didn’t belong among them,” she recalled. “I was also given a German Hitler Youth uniform. I had to join the Hitlerjugend. Then, later on, when the children became more friendly to me, it was much better.” Hanfova was “found” six months after Germany’s surrender, and so made it home to Czechoslovakia.

b. Lodz

A week after Hanfova left the stand, *RuSHA* prosecutors called three more children, all of them born in Lodz sixteen years earlier.¹⁰⁹ The appearance of these Polish child witnesses seems to have attracted far less public attention, despite the prosecution claim that “Poland was one of the chief sources of children abducted from their families and placed by Lebensborn.”¹¹⁰ Perhaps this was because of the signal resonance of Lidice; indeed, *The New York Times* account of the trial’s opening centered on that massacre and foreshadowed the testimony of “Czech Children Seized by Nazis.”¹¹¹ Or perhaps the inattention was due to the fact that the Polish children testified later, so that their reports of mistreatment seemed redundant. Several distinctions nonetheless warrant a closer look.

No massacre nor any single wartime atrocity explained the fate of the children from Lodz. All three confirmed they were healthy and living comfortably enough in occupied Poland until they were ten or eleven years old.¹¹² Then, in

109. See, in *RuSHA* Tr., *supra* note 80, vols. 1–3: Barbara Mikolaczkyk, Transcript of Testimony, Nov. 6, 1947, at 1109–22/reel 1128–41 [hereinafter Mikolaczkyk Tr.], <http://catalog.archives.gov/id/286024085>; Alina Antczak, Transcript of Testimony, Nov. 6, 1947, at 1122–41/reel 1141–60 [hereinafter Antczak Tr.]; Slavomir Grodomski Paczesny, Transcript of Cross-Examination, Nov. 6, 1947, at 1148/reel 1167 [hereinafter Paczesny Cross Tr.]; see also Extract from the Testimony of Prosecution Witness Paczesny, in *NMT TRIALS*, *supra* note 56, vol. IV, at 1002–06 [hereinafter Paczesny Direct].

110. Pros. Opening, *supra* note 85, at 113/reel 122. Contrary to Lidice witnesses, photographs of the Polish children do not readily surface in web searches.

111. *Lidice Massacre Detailed at Trial*, N.Y. TIMES, Oct. 21, 1947, at 13 [hereinafter *Massacre Detailed*] (focusing, in article subtitled “Czech Children Seized by Nazis Will Testify—Woman Among Accused at Nuremberg,” on Lidice, and anticipating Dolezalova and Hanfova appearances, then adding that a few Polish children also would testify); see Pros. Opening, *supra* note 85, at 103–10/reel 112–19 (recounting “tragedy of Lidice”).

112. One child was living with his parents, Paczesny Direct, *supra* note 109, at 1002–03, and another with her aunt, Mikolaczkyk Tr., *supra* note 109, at 1110–11/reel 1129–30. Due to financial difficulties, Antczak and her three siblings had been staying in a Polish social welfare home. Antczak Tr., *supra* note 109, at 1123/reel 1142.

spring 1942, each was summoned to a German governmental office and made to submit to inspections—inspections which they outlined more vividly than had the Czech witnesses. Barbara Mikolaczyk told the tribunal that “we were examined, X-rayed and samples of our blood were taken.”¹¹³ “Our hair was looked at, and our skin,” Alina Antczak said, while Slavomir Paczesny remembered being photographed “in three positions.”¹¹⁴ Contact with their families was banned, although Paczesny said that he managed to talk to his mother “through the fence” or “when the supervisor was not there.”¹¹⁵

Like the Lidice children, all three Lodz witnesses were taken from their birthplace and transported multiple times at distances well over a hundred miles.¹¹⁶ At the Achern-Baden Lebensborn facility, which Antczak described as “a school for ethnic Germans,” she and fifty or so other girls—called “Ostkinder,” or “Eastern children”—were forbidden to speak Polish and compelled to sing Nazi anthems, to give Nazi salutes, and to wear the uniform of the Nazi girls’ group Bund Deutscher Mädel.¹¹⁷ All three children were renamed: Alina Antczak became “Hilga Antzinger,” Barbara Mikolaczyk “Berbel Mika,” and Slavomir Paczesny “Karl Grohmann,” this last the surname of the German physician who had first examined all three back in Lodz.¹¹⁸ Although the Czech children had been placed in homes where they were to go to school, all three Polish children were sent to persons who expected them to do farm labor; there they stayed until war’s end.¹¹⁹

Antczak spoke bitterly of her placement.¹²⁰ She recalled reading a letter sent by Lebensborn to her putative foster parents: “It stated that it would be a good thing to tell me that my parents were not alive any more, because then I would become a German quicker.” She was not allowed to attend Catholic church, and the woman “beat me and called me ‘Polish swine.’” In reply to a

113. Mikolaczyk Tr., *supra* note 109, at 1112/reel 1131.

114. Antczak Tr., *supra* note 109, at 1123/reel 1142; Paczesny Direct, *supra* note 109, at 1003. *See also* Mikolaczyk Tr., *supra* note 109, at 1113/reel 1132.

115. Paczesny Direct, *supra* note 109, at 1003; *see* Mikolaczyk Tr., *supra* note 109, at 1114–16/reel 1133–35; Antczak Tr., *supra* note 109, at 1126/reel 1145.

116. Paczesny Direct, *supra* note 109, at 1003–04 (Lodz to Kalisz, then to Luxembourg and Salzburg); Mikolaczyk Tr., *supra* note 109, at 1113–16/reel 1132–35 (Lodz to Brokau to Achern-Baden to Salzburg); Antczak Tr., *supra* note 109, at 1124–28/reel 1143–47 (Lodz to Brokau to Achern-Baden to Oftersheim).

117. Antczak Tr., *supra* note 109, at 1125–27/reel 1144–46; *see* Mikolaczyk Tr., *supra* note 109, at 1114–16/reel 1133–35 (similarly describing same home).

118. Antczak Tr., *supra* note 109, at 1127–28/reel 1146–47; Mikolaczyk Tr., *supra* note 109, at 1117/reel 1136; Paczesny Direct, *supra* note 109, at 1002–05. *Cf.* Prosecution Closing Argument, Feb. 13, 1948, at 4810/reel 233 (“Lebensborn also took part in this program for it has been shown that many of the older children whom they brought into Germany were used simply as servants, and were actually being held in peonage.”), in *RuSHA* Tr., *supra* note 80, vols. 12–13, <http://catalog.archives.gov/id/286028788>.

119. Paczesny Direct, *supra* note 109, at 1005; Mikolaczyk Tr., *supra* note 109, at 1117–19/reel 1136–38; Antczak Tr., *supra* note 109, at 1127–29/reel 1146–48.

120. Unless otherwise indicated, information in this paragraph may be found in Antczak Tr., *supra* note 109, at 1127–30, 1133/reel 1146–49, 1152.

cross-examiner's ill-advised inquiry, Antczak elaborated: "She shouted at me and called me a Polish swine, and I had to work very hard with her—not only in her house, but she also sent me away to farmers to work."

The fact that cross-examinations occurred further distinguished this hearing. The defense had asked not one question of the Lidice witnesses; by comparison, multiple counsel sought to impeach the Polish children's testimony.¹²¹ Of particular note was this colloquy between one defense attorney and witness Mikolaczyk:

Q At that time you were twelve years old?

A Yes.

Q Have you got such a good capacity to recall these events that you can remember all these names and happenings?

A Whose names?

Q Unfortunately, I have made no notes, but you mentioned the name of Fraulein Schulz.

A I remember it.

Having admitted his own memory slip, the attorney sat down.¹²²

ii. Emphatic Prosecution, Equivocal Verdict

That exchange between attorney and witness tended to undermine any claim that children are inherently less reliable than other witnesses—just as the subjection of the Lidice three to questioning by a throng of journalists indicated that child witnesses could withstand out-of-court pressures.¹²³ The children's repeated references to their mothers, coupled with the agony conveyed by the mother whose children had been taken, spotlighted the gendered dimensions of the forced separations.¹²⁴ All six witnesses thus provided moving corroboration of the ample documentary evidence that the regime on trial had broken families apart and then tried to recreate the children in its image. That Nazi effort drew ridicule from one *RuSHA* prosecutor. Conjuring an antique and fictitious Scotsman, this prosecutor scoffed: "These people were no more German than Tam O'Shanter."¹²⁵

Testimonial and other evidence in *RuSHA* established, furthermore, that the physical act of taking by agents of the Nazi regime was but one part of the

121. Mikolaczyk Tr., *supra* note 109, at 1119–22/reel 1138–41; Antczak Tr., *supra* note 109, at 1130–41/reel 1149–60; Paczesny Cross Tr., *supra* note 109.

122. Mikolaczyk Tr., *supra* note 109, at 1120/reel 1139 (exploring 1942 arrival of postcard ordering examination of Mikolaczyk).

123. See *Press Conference*, *supra* note 101 (depicting nearly a dozen journalists encircling Dolezalova, Petrakova, and Hanfova). To note the fact of this media-avail is not to condone it.

124. See *infra* text accompanying notes 140–153, 242, 276 (discussing gendered aspects).

125. Pros. Closing Extr., *supra* note 97, at 52 (spelling of character's surname as in official transcript and poem itself); see ROBERT BURNS, TAM O'SHANTER AND SOUTER JOHNNY, A POEM (1830), available at <http://ia800504.us.archive.org/28/items/tamoshanterandso00burnuoft/tamoshanterandso00burnuoft.pdf>.

overall criminal transaction. Another component included the denial of any contact with birth families or any expression of birth culture, coupled with the insistence on a new language, new names, and, through forced membership in Nazi groups, a new way of thinking about the world.¹²⁶ The prosecution's closing argument emphasized the linkage between these acts and the alleged criminal state of mind. One prosecutor stated that what "makes this case so important and justifies its being brought before this international court is the motive"; to be precise, "what the Nazis termed the 'Strengthening of Germanism,' which was their way of describing a program that has generally been known as 'genocide.'"¹²⁷ Any defense contention that kidnapped children were treated well, even if true in some instances, was "completely beside the point," the prosecution maintained, for the reason that the point was not "to mistreat them physically but rather to Germanize them, to make good Nazis of them."¹²⁸ The evidence, moreover, implicated all the impugned SS agencies; not least, the one that *The New York Times* had called "the notorious Lebensborn unit."¹²⁹

But the verdict of the three-judge *RuSHA* tribunal told a somewhat different story. Only eight of the fourteen accused were convicted on the war crimes and crimes against humanity counts.¹³⁰ During this postwar period many such convictions had ended in death by hanging; the maximum sentence levied by the *RuSHA* majority was life in prison, however, with other defendants receiving between fifteen and twenty-five years.¹³¹ Like the IMT judgment,

126. See Pros. Opening, *supra* note 85, at 125/reel 134 (asserting that defendants sought to impose "their conception of a Germanic world").

127. Pros. Closing Extr., *supra* note 97, at 30.

128. *Id.* at 51. Prosecutors made the argument at the trial's start:

But it is no defense for a kidnapper to say he treated his victim well. Even more important, we must ask ourselves why they were so treated. The answer is simple—these innocent children were abducted for the very purpose of being indoctrinated with Nazi ideology and brought up as 'good' Germans. This serves to aggravate, not mitigate, the crime.

See Pros. Opening, *supra* note 85, at 98/reel 107. Some claims of good treatment appear to have come from the testimony of young persons who were called by *RuSHA* defense counsel. See IRA A. HIRSCHMANN, *THE EMBERS STILL BURN: AN EYE-WITNESS VIEW OF THE POSTWAR FERMENT IN EUROPE AND THE MIDDLE EAST AND OUR DISASTROUS GET-SOFT-WITH-GERMANY POLICY 257–58* (1949) (referring to such "well coached" defense witnesses). Analysis of that testimony is beyond the scope of this article.

129. *Massacre Detailed*, *supra* note 111.

130. Opinion and Judgment, *United States v. Greifelt*, Mar. 10, 1948, in *NMT TRIALS*, *supra* note 56, vol. V, at 154–67. All thirteen male defendants were convicted on Count 3, membership in SS as a criminal organization; for that offense, five otherwise-acquitted men received sentences of time served. *Id.* at 166–67.

131. *Id.* at 165–67 (setting out sentences with which tribunal President Lee B. Wyatt and Judge Johnson T. Crawford agreed in full). *But see* Concurring and Dissenting Opinion by Judge Daniel T. O'Connell, in *NMT TRIALS*, *supra* note 56, vol. V, at 168–69 (arguing in dissenting opinion for even more lenient sentences, and urging that life term be cut to

the *RuSHA* judgment never uttered the word “genocide.”¹³² However, and again like their IMT counterparts, *RuSHA* judges pointed to a Himmler quote to explain the motive behind the policy of kidnapping children; specifically, Himmler’s avowal, with reference to what he had called “racially good” parents, “that it is our duty to take their children with us, to remove them from their environment, if necessary by robbing or stealing them.”¹³³ Nearly every convicted person was found to have been involved in the kidnapping of foreign children, moreover.¹³⁴ But that finding stood in stark contrast with the tribunal’s blanket exoneration of one of the four impugned SS organizations.

In four brief paragraphs, the *RuSHA* judgment portrayed the so-called Well of Life Society—Lebensborn—as a benign charity.¹³⁵ “It is quite clear from the evidence that the Lebensborn Society, which existed long prior to the war, was a welfare institution, and primarily a maternity home,” the tribunal began. Even as it accepted that “thousands upon thousands of children were unquestionably kidnaped by other agencies or organizations and brought into Germany,” the tribunal concluded that the allegations of Lebensborn involvement had not been proved “with the requisite certainty.” The tribunal ruled that whenever “foreign children were handed over to Lebensborn by other organizations after a selection and examination, the children were given the best of care and never ill-treated in any manner.” In sum, “Lebensborn was the one organization which did everything in its power to adequately provide for the children and protect the legal interests of the children placed in its care.” Having thus given short shrift both to the prosecution case and to the testimony of the children and mother who had endured kidnappings, the tribunal acquitted every Lebensborn defendant of all war crimes and crimes against humanity charges.

iii. A Woman—and Gender and Race—in the Prisoner’s Dock

In point of fact, a reader of original documents in the *RuSHA* trial is compelled to conclude that even if the tribunal had found the three Lebensborn men guilty as charged, it still would have acquitted the only woman in the prisoners’ dock.

twenty years). In the end no *RuSHA* defendant served his full sentence, and all who had not died in prison were released by 1955. MICHAEL J. BAZYLER, HOLOCAUST, GENOCIDE, AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD 100 (2016).

132. Compare Judgment, *United States v. Göring*, Sept. 30–Oct. 1, 1946, in IMT TRIAL, *supra* note 71, vol. I, at 171–367, with Opinion and Judgment, *United States v. Greifelt*, at 88–169.

133. Opinion and Judgment, *United States v. Greifelt*, at 106 (quoting October 1943 statement by Himmler); see *supra* text accompanying note 77. The prosecution’s closing also cited this speech. Pros. Closing Extr., *supra* note 97, at 58.

134. See Opinion and Judgment, *United States v. Greifelt*, at 154–62.

135. Passages quoted in this paragraph are in Opinion and Judgment, *United States v. Greifelt*, at 163.

Just as Russia's Maria Lvova-Belova is not the first woman accused by a contemporary international criminal tribunal,¹³⁶ Germany's Inge Viermetz was by no means the first woman tried in the post-World War II period; indeed, another NMT already had sentenced Dr. Herta Oberheuser to twenty years in prison for her gruesome medical experimentation on detainees at Ravensbrück.¹³⁷ What is more, the case against Viermetz seemed solid. Her own affidavits admitted that she had arrived at Lebensborn's Munich office in September 1938—the same month and city where European powers acceded to Hitler's takeover of Czechoslovakia.¹³⁸ She was running two Lebensborn departments just a year later, when Hitler's invasion of Poland triggered World War II.¹³⁹ Over time she became a “deputy head,” and traveled to many cities “on orders received directly from the managing director” for the purpose of “conducting negotiations for Lebensborn in areas outside the German Reich.” Viermetz's sworn admissions thus painted the picture of a person who, notwithstanding her sex, possessed the self-confidence and managerial skills then prized as masculine traits.

At certain trials before and after *RuSHA*, prosecutors have essentialized a defendant's identity as a woman in order to present her alleged crimes as so deviant from femininity that they warrant particular rebuke.¹⁴⁰ But Viermetz's defense turned that prosecutorial strategy upside-down. In direct examination, she renounced the affidavits as falsely translated distortions of statements she had made while in pretrial detention¹⁴¹—statements acquired, she said, by

136. See Natalie Hodgson, *Gender Justice or Gendered Justice? Female Defendants in International Criminal Tribunals*, 25 FEMINIST LEGAL STUD. 337, 343 (2017) (analyzing prosecutions of six women charged in tribunals established since 1990) [hereinafter Hodgson, *Gender Justice*]; *supra* notes 27–33 (discussing Lvova-Belova).

137. Judgment, *United States v. Brandt*, Aug. 19–20, 1947, in NMT TRIALS, *supra* note 56, vol. II, at 171, 294–95, 300 (ruling on Oberheuser's individual responsibility and imposing a twenty-year sentence, in twenty-three-defendant proceeding also known as the Doctors' Trial or the *Medical Case*).

138. These and other documents adduced by the *RuSHA* prosecution may be found at the National Archives Collection of World War II War Crimes Records (Record Group 238), Prosecution Exhibits in Case No. [8], *United States v. Ulrich Greifelt et al.*, 1947–1948 [hereinafter *RuSHA* Pros., exs. __–__], <http://catalog.archives.gov/id/6217689>. The earliest Viermetz affidavit indicated that she was “in custody” or “internment” for all but one month between July 30, 1945, and her acquittal on Mar. 10, 1948. Prosecution Exhibit No. 17, Inge Viermetz, Eidesstattliche Erklärung, at 4 ¶ 11/reel 94 (May 15, 1947), in *RuSHA* Pros., *supra*, exs. 1–67 [hereinafter Viermetz May 14, 1947, Aff.], <http://catalog.archives.gov/id/286029624>. Unless otherwise indicated, all information in this paragraph of the text is in this affidavit; translations into English are by this author.

139. See Judgment, *United States v. Göring*, Sept. 30–Oct. 1, 1946, in IMT TRIAL, *supra* note 71, vol. I, at 196–204.

140. See generally Mark A. Drumbl, *She Makes Me Ashamed to Be a Woman: The Genocide Conviction of Pauline Nyiramasuhuko*, 2011, 34 MICH. J. INT'L L. 559 (2013); Hodgson, *Gender Justice*, *supra* note 136.

141. See Viermetz May 14, 1947, Aff., *supra* note 138 (indicating that she was “in custody” or “internment” for all but one month between July 30, 1945, and her acquittal on Mar. 10, 1948).

deception.¹⁴² She maintained that she had no power, no independence, no understanding of legal issues, and no knowledge of Lebensborn's interactions with other SS agencies. Her work had been limited to "matters where a woman was more competent."¹⁴³ Regarding Czech mothers like the witness Petrakova, Viermetz said, "I didn't even have knowledge that there was such a thing as a concentration camp of Ravensbrueck."¹⁴⁴ Viermetz insisted that her only concern was to help children, regardless of nationality.¹⁴⁵ Amplifying that contention, her attorney argued in closing that men were responsible for awful creations like "the atom-bomb," while women acted only out of "loving compassion . . . crowned by the love for the child . . ."¹⁴⁶ This portrayal of Viermetz as an unwitting, caring, subaltern woman seemingly guaranteed her acquittal. By associating the Lebensborn society with caregiving, Viermetz's gendered defense also may have contributed to the acquittals of all the male Lebensborn accused.

Perhaps, too, the *RuSHA* prosecution strategy did not play well before the three men on the NMT bench.¹⁴⁷ Prosecutors in effect had interrogated so-called care homes at a time when, according to one reporter, "[t]here are uncounted American-fathered children in Germany's orphanages."¹⁴⁸ And prosecutors had interrogated racially motivated criminal wrongdoing in a Nuremberg courtroom that was guarded by military police from the still-segregated U.S. Army,¹⁴⁹ at a time when U.S. laws condoned race-based

142. For the complete direct examination, see Viermetz Direct Tr., *supra* note 83, at 4492–4563/reel 720–90, as well as Extract from the Testimony of Defendant Viermetz, in NMT TRIALS, *supra* note 56, vol. IV, at 1064–70. For the balance of her testimony, see Inge Viermetz, Transcript of Cross-Examination, Jan. 28, 1948, at 4564–73/reel 791–800, in *RuSHA* Tr., *supra* note 80, vols. 10–11 [hereinafter Viermetz Cross Tr.], <http://catalog.archives.gov/id/286027972>; Inge Viermetz, Transcript of Redirect Examination, Feb. 2, 1948, at 4778–80/reel 201–03, in *RuSHA* Tr., *supra* note 80, vols. 12–13, <http://catalog.archives.gov/id/286028788>.

143. Viermetz Direct Tr., *supra* note 83, at 4501/reel 728.

144. *Id.* at 4531/reel 758.

145. *Id.* at 4529/reel 756; *see also* Closing Argument for Defendant Viermetz, Feb. 19, 1948, at 5243/reel 668, in *RuSHA* Tr., *supra* note 80, vols. 12–13 [hereinafter Closing for Viermetz], <http://catalog.archives.gov/id/286028788> (reminding tribunal of this declaration); Viermetz Direct Tr., *supra* note 83, at 4496/reel 724, 4500/reel 727, 4504/reel 731, 4511–12/reel 738–39, 4516/reel 743, 4536/reel 763; Viermetz Cross Tr., *supra* note 142, at 4571–72/reel 798–99.

146. Closing for Viermetz, *supra* note 145, at 5237/reel 662.

147. *See* Judgment, *United States v. Göring*, Sept. 30–Oct. 1, 1946, in IMT TRIAL, *supra* note 71, vol. I.

148. Robert Haeger, *No More Conquerors*, in THIS IS GERMANY 1, 13–14 (Arthur Settel ed., 1950).

149. *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948) (mandating desegregation of the U.S. military—precisely, “equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin”—in an order that President Harry S. Truman issued four months after *RuSHA* verdict). For visual indications of the racial diversity among these MPs, *see Defendants’ Dock*, in Trial Photos, *supra* note 101, <http://catalog.archives.gov/id/169157166>; *Max Sollmann Receives Sentence*, in Trial Photos, *supra* note 101, <http://catalog.archives.gov/id/169157186>.

discrimination.¹⁵⁰ Two members of the *RuSHA* bench had been judges in states with laws that forbade Black and White children to attend the same schools, a practice that the U.S. Supreme Court would not hold unconstitutional for another six years.¹⁵¹ One of these judges had used anti-Indigenous stereotypes when called decades earlier before a congressional subcommittee investigating an Indian Rights Association complaint that he mishandled the conveyance of a Choctaw owner's land.¹⁵² More generally, as historian Guillaume Mouralis put it, U.S. officials harbored fears that the international criminal law then taking shape at Nuremberg might become "a universal legal tool that would likely pave the way for international scrutiny of the American racial unequal order."¹⁵³

Within this interplay of considerations lies a cautionary tale for anyone seeking to call today's self-avowed carers of children to account. National as well as international political contexts may influence outcomes—and even the testimony of child survivors and their parents may not outweigh defense

150. DAN PLESCH, *AMERICA, HITLER AND THE UN: HOW THE ALLIES WON WORLD WAR II AND FORGED A PEACE* 88–89 (2011) (discussing tensions between humanitarian initiatives of the United States in the 1940s and "what was going on in the southern states of the USA and US armed forces practice of putting African-Americans in segregated units").

151. See *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding such segregation violative of the guarantee of equal protection expressed in the U.S. Constitution); NMT TRIALS, *supra* note 56, vol. IV, at 602 (describing *RuSHA* panel). One such member was *RuSHA* Presiding Judge Lee B. Wyatt, who had taken a leave of absence from Georgia's Supreme Court, where he served from 1943 until his death in 1960. *Lee Wyatt Dead, Georgia Justice*, N.Y. TIMES, Feb. 7, 1960, p. 84. The other was *RuSHA* Judge Johnson Tal Crawford, who had served for twenty-two years as a state court judge in eastern Oklahoma before becoming a judge both on *RuSHA* and on the *Medical Case*. See ULF SCHMIDT, *JUSTICE AT NUREMBERG: LEO ALEXANDER AND THE NAZI DOCTORS' TRIAL* 146 (2004). The third member, *RuSHA* Judge Daniel T. O'Connell, served from 1928 to 1958 on the Superior Court of Massachusetts, a state that formally had banned *de jure* school segregation in the 1850s but that, in the wake of the decision a century later in *Brown*, would become the site of stiff resistance to court orders to dismantle *de facto* segregation. *Daniel O'Connell, A Retired Justice*, N.Y. TIMES, Mar. 12, 1964, <http://www.nytimes.com/1964/03/12/archives/daniel-oconnell-a-retired-justice-associate-on-massachusetts.html>; see CHARLES J. OGLETREE JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 59–71 (2004) (discussing Massachusetts history and Boston busing controversy).

152. *Statement of Hon. Tal Crawford, County Judge of Pontotoc County, Okla., in Investigation of the Administration of Indian Affairs in the State of Oklahoma: Hearings before a Subcommittee of the Committee on Indian Affairs, House of Representatives, 68th Congress, 1st Session, Pursuant to H. Res. 348, at 319–30 (1924).*

153. Guillaume Mouralis, *Legal Imagination and Legal Realism: 'Crimes Against Humanity' and the US Racial Question in 1945*, in *DEFEATING IMPUNITY: ATTEMPTS AT INTERNATIONAL JUSTICE IN EUROPE SINCE 1914*, at 109, 121 (Ornella Orvetta & Pieter Lagrou eds., 2021); see also WILLIAM SCHABAS, *THE INTERNATIONAL ORDER'S COLOUR LINE: RACISM, RACIAL DISCRIMINATION, AND THE MAKING OF INTERNATIONAL LAW* 118–119 (2023) [hereinafter SCHABAS, *COLOUR LINE*] (writing that U.S. Chief Prosecutor Robert H. Jackson alluded to segregationist practices at home when explaining the narrow scope of the IMT indictment, and adding that his "comment reflected the concerns of American policy makers who feared establishing a legal principle by which States could be held responsible under international [law] for racist crimes committed within their own territory").

presentations of rescue narratives. That warning is of immediate significance to the pending ICC and Ukrainian cases and, more generally, to all efforts to prevent and punish crimes against and affecting children. It is to those overall efforts, and to the evolution of international child law upon which they are founded, that this article next turns.

B. *International Child Law and Contemporary Efforts to Prosecute the Full Range of Crimes Against and Affecting Children*

Explaining why he had sought arrest warrants against Russia's President and Commissioner for Children's Rights, ICC Prosecutor Khan reiterated an earlier statement, made with reference to all manner of crimes, that "we cannot allow children to be treated as the spoils of war."¹⁵⁴ Those words could well have been spoken seventy-five years earlier, in the *RuSHA* trial at Nuremberg. They might even have been repeated more recently, in national trials. France's 1987 conviction of SS man Klaus Barbie, for example, rested in part on his involvement in raiding a home for Jewish children near Grenoble, from which forty-one children, some as young as three, were arrested and transported to concentration camps.¹⁵⁵ In 2012, meanwhile, an Argentine tribunal imposed heavy sentences on two military officers convicted of involvement in the kidnapping of children and infants when the country was ruled by a junta.¹⁵⁶

It is likely that the ICC Prosecutor's condemnation of conflict crimes against children was meant to hark back to the 1990s, the decade that gave rise not only to new international criminal tribunals and a nascent ICC but also to a new campaign to push a particular cluster of crimes, in particular rape and sexual violence,¹⁵⁷ toward the top of those courts' investigative dockets. "In wartime, women were considered part of the booty, the spoils of

154. ICC, *Statement by Prosecutor*, *supra* note 31; *see also* ICC, *Fourth Visit*, *supra* note 39; 'Children Are Not the Spoils of War': ICC Chief Prosecutor on Putin Arrest Warrant, CNN (Mar. 21, 2023), <http://www.cnn.com/videos/tv/2023/03/21/amanpour-khan.cnn>.

155. *See* DE NUREMBERG À IZIEU, JUGER LE CRIME CONTRE L'HUMANITÉ: MÉMOIRE DU PROCÈS BARBIE, 30 ANS APRÈS (Dominique Vidaud dir., 2018).

156. *See* *STOLEN BABIES: Argentina Convicts Two Military Dictators*, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 383 (July 5, 2012) [hereinafter *STOLEN BABIES*], <http://nsarchive2.gwu.edu/NSAEBB/NSAEBB383>. Argentina is by no means the only country that experienced takings during military rule. *See, e.g.*, Nicholas Casey, *Taken under Fascism, Spain's 'Stolen Babies' Are Learning the Truth*, N.Y. TIMES MAG. (Sept. 27, 2022/updated June 15, 2023), <http://www.nytimes.com/2022/09/27/magazine/spain-stolen-babies.html>; Amanda Lee Myers, *Watch the Moment Virginia Man Reunites with Mom 42 Years After He Was Stolen from Chile*, USA TODAY (Aug. 22, 2023), <http://www.usatoday.com/story/news/nation/2023/08/22/virginia-man-stolen-chile-baby-reunites-mother/70644108007>; Mike Lanchin, *Trafficked War Babies of El Salvador Search for Their Long-Lost Families*, BBC NEWS (Apr. 13, 2024), <http://www-bbc-com.cdn.ampproject.org/c/s/www.bbc.com/news/articles/cgxw8n0q7k3o.amp>.

157. *See* KELLY DAWN ASKIN & DOREAN M. KOENIG, *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW: INTRODUCTION TO WOMEN'S HUMAN RIGHTS LAW* 158 (1999) (discussing the case of the conflict in the former Yugoslavia, including indictments for rape issued by the International Criminal Tribunal for the former Yugoslavia ("ICTY")).

war, along with livestock and other chattel,” Kelly Dawn Askin and Dorean M. Koenig had lamented in 1999, even as they and many others worked for change.¹⁵⁸ What the ICC Prosecutor now denominates “crimes involving sexual, reproductive and other gender-based violence,” affecting adults and children of all genders,¹⁵⁹ thus became a prosecutorial priority for the ICC and other tribunals,¹⁶⁰ not to mention for states, other international organizations, and civil society. By invoking the spoils-of-war metaphor, therefore, the ICC Prosecutor proclaimed a commitment to the campaign to prevent and punish the full range of crimes against and affecting children. The proclamation additionally marked out a timeline from Khan’s stated priorities back to efforts by his two predecessors who, as discussed below, themselves had relied on prior global developments in order to locate children’s concerns toward the center of their work.

1. Emergence of International Child Law

Children are not mentioned at all in the 1945 Charter of the United Nations, and what little was said of them in early multilateral instruments mostly concerned giving aid to child victims. In 1924, for instance, the

158. *Id.* at 49; *see also, e.g.*, KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL CRIMINAL TRIBUNALS 34 (1997) (repeating metaphor); ROSEMARY GREY, PROSECUTING SEXUAL AND GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL COURT: PRACTICE, PROGRESS AND POTENTIAL 67–122 (2019) (detailing timeline of legal systems’ treatment of such crimes).

159. *Policy on Gender-Based Crimes: Crimes Involving Sexual, Reproductive and Other Gender-Based Violence*, INT’L CRIM. CT. OFF. OF PROSECUTOR (Dec. 2023), <http://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf> (describing this 2023 document, in its Preface by Prosecutor Khan, as ‘a root and branch review and reconstruction’ of *Policy Paper on Sexual and Gender-Based Crimes*, INT’L CRIM. CT. OFFICE OF PROSECUTOR (Nov. 20, 2014), <http://www.icc-cpi.int/news/policy-paper-sexual-and-gender-based-crimes-0>). Also discussing this topic are, for example, *Policy on Children*, INT’L CRIM. CT. OFF. OF PROSECUTOR (Dec. 2023) [hereinafter 2023 ICC OTP *Policy on Children*], <http://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-children-en-web.pdf>; *Policy on the Crime of Gender Persecution*, INT’L CRIM. CT. OFF. OF PROSECUTOR (Dec. 7, 2022), <http://www.icc-cpi.int/news/policy-crime-gender-persecution>.

160. *See, e.g.*, GREY, *supra* note 158, at 247–307 (evaluating the work of the ICC in its first two decades and concluding, at page 247, that although Office of the Prosecutor “has so far struggled to ensure accountability for gender-based crimes, it is making progress in that regard”); Teresa Doherty, *Jurisprudential Developments Relating to Sexual Violence: The Legacy of the Special Court for Sierra Leone*, in SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 157 (Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens & Larissa van den Herik eds., 2013); Valerie Oosterveld, *Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence*, in THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW: ASSESSING THE ICTY’S AND THE ICTR’S MOST SIGNIFICANT LEGAL ACCOMPLISHMENTS 197 (Milena Sterio & Michael Scharf eds., 2019); Patricia Viseur Sellers & Louise Chappell, *Lessons Lived in Gender and International Criminal Law*, in NEW DIRECTIONS IN WOMEN, PEACE AND SECURITY 111 (Soumita Basu, Paul Kirby & Laura Shepherd eds., 2020) (discussing continued shortfalls in achieving accountability for such crimes).

League of Nations had urged that children “be the first to receive relief in times of distress.”¹⁶¹ Similarly extending “social protection” to children was the 1948 Universal Declaration of Human Rights, drafted within a U.N. commission that Eleanor Roosevelt chaired.¹⁶² The 1949 Geneva Civilians Convention, applicable during armed conflict and occupation, likewise set out requirements for the identification, education, health, and well-being of children,¹⁶³ especially of orphans and other children separated from their families.¹⁶⁴ Although the statutes governing the international criminal tribunals of the 1940s omitted mention of children, the trial narratives of that period did give children passing comment.¹⁶⁵ Of special note, of course, was the focus on crimes against children—in particular, the kidnapping of foreign children—in the *RuSHA* case.¹⁶⁶ And though the *RuSHA* tribunal did not

161. Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, p. 43 (1924). For extended accounts of this history, see, for example, APEL, *supra* note 75, at 28–58; SHAHEED FATIMA, PROTECTING CHILDREN IN ARMED CONFLICT 1–33 (2018); Diane Marie Amann, *The Child Rights Convention and International Criminal Justice*, 84 NORDIC J. INT’L L. 248, 250–62 (2015) [hereinafter Amann, *Child Rights*]; Diane Marie Amann, *Children and the First Verdict of the International Criminal Court*, 12 WASH. U. GLOB. STUD. L. REV. 411, 414–18 (2013).

162. Universal Declaration, *supra* note 1, art. 25(2); see *supra* note 1 and accompanying text. See also Ninth International Conference of American States, *American Declaration of the Rights and Duties of Man*, arts. VII, XXX, U.N. Doc. E/CN.4/122 (June 10, 1948) (guaranteeing special protection for “[a]ll women, during pregnancy and the nursing period, and all children,” and further specifying duties of children to parents); *The Rights of the Child in the Inter-American Human Rights System*, Second Edition, INTER-AM. COMM’N ON HUM. RTS., <http://www.cidh.org/countryrep/infancia2eng/Infancia2Cap1.eng.htm> (detailing efforts on behalf of children within auspices of the regional system of the Americas). By contrast, the original version of Europe’s human rights treaty contained no reference to children; today, the amended treaty mentions children solely with respect to spousal relations. Compare European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, http://www.echr.coe.int/documents/d/echr/Archives_1950_Convention_ENG, with European Convention on Human Rights, as amended, art. 5, http://www.echr.coe.int/documents/d/echr/Convention_ENG. See also *Children’s Rights*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/children> (describing initiatives within the region said to derive from Europe’s human rights convention). On the African regional system, see *infra* note 171.

163. Geneva Civilians Convention, *supra* note 47, arts. 14, 17, 23, 24, 38(5), 50, 82, 89, 94, 132; see Additional Protocol I, art. 77(1), *supra* note 47 (“Children shall be the object of special respect and shall be protected against any form of indecent assault.”).

164. Geneva Civilians Convention, *supra* note 47, art. 24 (requiring that parties to the conflict “take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances,” and furthermore that parties “facilitate the reception of such children in a neutral country for the duration of the conflict”); *id.* art. 50 (mandating that if “local institutions” prove “inadequate for the purpose, the Occupying Power shall,” during the period of occupation, “make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend”).

165. See *supra* notes 58–79 and accompanying text.

166. See *supra* text accompanying notes 80–153 (describing *RuSHA* trial).

accept prosecutors' invitation to call the abduction of children for an identity-altering purpose "genocide," within months of its verdict that label was applied to some such child-takings: the Genocide Convention adopted by the U.N. General Assembly on December 9, 1948, listed as genocide the act of "[f]orcibly transferring children of the group to another group" when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."¹⁶⁷

These Nuremberg-era developments were followed by a range of initiatives within U.N. entities; as discussed in a recent book by William A. Schabas, often these initiatives were spearheaded by Global South states.¹⁶⁸ Of particular note was the 1973 multilateral treaty that contemplated establishment of "an international penal tribunal" empowered to prosecute persons alleged to have committed acts of racial segregation and discrimination falling within the treaty's definition of the crime of apartheid.¹⁶⁹ Yet no such tribunal was established with regard to any international crime for another couple of decades—until the Cold War's end spurred further interest in international criminal justice.

In the interim, international child law burgeoned. The United Nations adopted a declaration on children in 1959,¹⁷⁰ and this blazed a trail for the adoption in 1989 of the Child Rights Convention,¹⁷¹ which today has been joined by every U.N. member except one, the United States.¹⁷² Four general principles

167. Genocide Convention, *supra* note 11, art. II(e).

168. See SCHABAS, COLOUR LINE, *supra* note 153, at 314–25 (describing these efforts).

169. G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid, arts. I–II, V, at 75 (July 18, 1976); see *International Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&clang=en (stating that treaty entered into force in 1976 and now has 110 parties, including Russia and Ukraine, but not the United States); SCHABAS, COLOUR LINE, *supra* note 153, at 342–50 (describing negotiations, adoption, and significance of this treaty).

170. G.A. Res. 1386 (XIV), Declaration of the Rights of the Child, at 20 (Nov. 20, 1959).

171. Child Rights Convention, *supra* note 8, at 1. Also important in this time frame are two instruments of the African regional system. The African Charter on Human and Peoples' Rights, art. 18, June 26, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5 (entered into force in 1986), "ensure[d] the protection of the rights of the woman and child as stipulated in international declarations and conventions," while the African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 20, 1999), set forth a plethora of child rights.

172. *Convention on the Rights of the Child*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4 (stating that the Convention entered into force in 1990, and listing 196 parties, among them two nonmember observer states, Holy See and State of Palestine). The United States (along with Russia and Ukraine) does belong to the first two protocols to this treaty, both of which entered into force in 2002. *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=en (listing 173 parties); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_

are said to undergird this comprehensive treaty: first, respect for and ensuring of children's rights, without any kind of discrimination; second, treatment of a child's best interests as a primary consideration in actions affecting the child; third, ensuring the child's inherent rights to life and survival; and fourth, assuring the right of the child to express views freely in matters that affect the child, those views receiving due weight according to the child's age and maturity.¹⁷³ Within those principles may be found provisions of the 1989 Child Rights Convention that correspond to guarantees of child protection in international humanitarian law instruments like the 1949 Geneva Civilians Convention¹⁷⁴— as well as provisions that articulate child rights with regard to family separation and foster or adoptive care, to identity and privacy, to thought and expression, to “illicit transfer and non-return,” and to liberty and cross-border movement.¹⁷⁵ From the start, the enforcement of international child law has relied on the preventive, retributive, and reparative efforts not only of national systems, but also of international and regional treaty bodies, international entities like UNICEF, and related civil society actors. The revival of international tribunals in the 1990s held out a new promise: Violators of international child law norms now might risk individual punishment, imposed by courts of law with jurisdiction over international crimes.

no=IV-11-c&chapter=4&clang=_en (listing 178 parties). Ukraine belongs to the third, which entered into force in 2014, while Russia and the United States do not. *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en (listing 52 parties).

173. See Comm. on Rts. of the Child, General Comment No. 5, ¶ 12, U.N. Doc. CRC/GC/2003/5 (2003) (articulating four general principles, citing Child Rights Convention, *supra* note 8, arts. 2, 3, 6, 12). The principles apply equally in Africa's human rights system. See African Comm. of Experts on Rts. & Welfare of the Child, General Comment No. 1, ¶ 2, U.N. Doc. ACERWC/GC/01 (2013).

174. Child Rights Convention, *supra* note 8, art. 38 (reiterating international humanitarian law rules relating to children in armed conflict); *id.* art. 39 (requiring states to “promote physical and psychological recovery and social reintegration of a child” victimized by circumstances including “armed conflicts”). On the Geneva Civilians Convention, see *supra* note 163 and accompanying text.

175. *Id.* art. 8 (undertaking to respect a child's right to identity, “including nationality, name and family relations,” and requiring restoration if an element of identity “is illegally deprived”); *id.* art. 9 (conditioning states' separation of children from parents on judicial review and other safeguards); *id.* art. 11 (requiring measures to fight illicit transfer); *id.* arts. 12–13 (articulating freedoms of expression and thought, including religion); *id.* art. 16 (ban on “arbitrary or unlawful interference” with child's “privacy, family, home or correspondence”); *id.* arts. 20–21 (outlining requirements related to foster placements and adoptions); *id.* art. 22 (setting out rights of child refugees); *id.* art. 37 (circumscribing deprivations of liberty). For a comprehensive survey of child human rights related to family reunification, see Yulia Ioffe, *The Right to Family Reunification of Children Seeking Protection Under the Convention on the Rights of the Child: Misplaced Reliance on Travaux?*, 34 INT'L J. REFUGEE L. 215 (2022).

2. Children and the International Criminal Court

That 1990s revival of international criminal tribunals coincided with global outrage over reports of crimes against and affecting children. Not least among these was the recruitment or use in Africa, the Americas, Asia, and the Middle East of children as armed combatants, known colloquially as “child soldiers.”¹⁷⁶ News accounts often focused on the most egregious abductions of the youngest children, and on the heinous crimes that indoctrination or intoxication had compelled those children to commit.¹⁷⁷ Studies revealed that experiences in fact varied and that while some children had been conscripted by means of brute force, others, adolescents in particular, had presented themselves to armed groups.¹⁷⁸ A campaign to ban the recruitment or use of anyone under eighteen—driven by concern for the ensuing harms to children and by the view that children cannot give lawful consent—culminated in two treaties outlawing forcible recruitment.¹⁷⁹ Continued interest in

176. E.g., U.N. Secretary-General, *Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157*, ¶ 34, U.N. Doc. A/51/306 (Aug. 26, 1996) [hereinafter Machel Report], <https://www.refworld.org/reference/themreport/unga/1996/en/91739> (discussing recruitment and use of children in armed service in Sierra Leone, Afghanistan, El Salvador, Ethiopia, Lebanon, Myanmar, South Africa, and Sri Lanka, and mapping conflicted-related harms to children including forced displacement, sexual and gender-based violence, unexploded weapons, and ruptures in education, health care, and food supply); Bill Keller, *In Mozambique and Other Lands, Children Fight the Wars*, N.Y. TIMES, Nov. 9, 1994, at A14 (writing of child combatants in countries as varied as Mozambique, “Sudan and Liberia, Angola and Rwanda, Afghanistan, Cambodia and the Middle East”). When referring to the crimes of recruitment and use enumerated in the founding charters of contemporary international criminal tribunals—for example, ICC Statute, *supra* note 9, arts. 8(2)(b)(xxvi), 8(2)(e)(vii)—this article avoids “child soldier,” a popular term that is imprecise and subject to misapplication.

177. See, e.g., Keller, *supra* note 176; Jan Goodwin, *Sierra Leone Is No Place to Be Young*, N.Y. TIMES MAG. (Feb. 14, 1999), <http://www.nytimes.com/1999/02/14/magazine/sierra-leone-is-no-place-to-be-young.html>.

178. See Machel Report, *supra* note 176, ¶¶ 34–48 (reporting these variations, yet indicating that children suffer greatly from, and cannot give voluntary consent to, armed service). See generally MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY (2012) (surveying social science research as a basis for questioning what, on page 9, is called “the faultless passive victim image” that “fills the international legal imagination” regarding “child soldiers”).

179. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *opened for signature* June 17, 1999, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222 [hereinafter CRC-OPAC], <http://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-involvement-children>. The first treaty entered into force in 2000 and has 187 parties, while the second entered into force in 2002 and has 173 parties; Russia, Ukraine, and the United States are parties to both treaties. See Int’l Lab. Org., *C182—Worst Forms of Child Labour Convention, 1999 (No. 182)*, http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327; *supra* note 172.

combating the full range of international crimes against and affecting children further gave rise to the appointment of the first Special Representative of the U.N. Secretary-General for Children and Armed Conflict and to the adoption of the first U.N. Security Council Resolution on children and armed conflict.¹⁸⁰

Meanwhile, the desire to punish the humans perpetrating crimes against children was manifest in the preparation of the charters for the new international criminal tribunals. A Children's Caucus of nongovernmental organizations joined with UNICEF to lobby delegates at the 1998 Rome Diplomatic Conference that concluded by adopting the final text of the statute establishing the ICC.¹⁸¹ The efforts of such groups, and those of the drafters themselves, drew from earlier developments in child rights and child protection.¹⁸² The result was a statute that evinced concern for children in its preamble,¹⁸³ in its requirement that proceedings accommodate children's needs,¹⁸⁴ and in its mandate that both the ICC's judges and Office of the Prosecutor possess expertise respecting violence against children.¹⁸⁵ Among the crimes placed

180. G.A. Res. 51/77, ¶ 37 (Feb. 20, 1997), <http://undocs.org/A/RES/51/77> (mandating Special Representative); S.C. Res. 1261 (Aug. 30, 1999) (addressing children and armed conflict).

181. Per Saland, *International Criminal Law Principles*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 201 (Roy S. Lee ed., 1999) (stating that these groups "lobbied hard"). In this same period, civil society groups similarly sought to influence the founding statute for the internationalized tribunal that was to have jurisdiction over crimes committed during the 1990s civil war in Sierra Leone. See Amann, *Child Rights*, *supra* note 161, at 248, 260 n.48. The resulting Special Court for Sierra Leone, among other contemporary tribunals, also helped to develop international child law. See Cecile Aptel, *Unpunished Crimes: The Special Court for Sierra Leone and Children*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY* 340 (Charles Jalloh ed., 2014). This article concentrates on the ICC, as that is the focal point for ongoing investigations related to Ukraine.

182. See Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 117–18 (Roy S. Lee ed., 1999) (describing Rome Conference debate over whether to retain fifteen as minimum age for recruitment and use of children in armed service, thus following *inter alia* Child Rights Convention, *supra* note 8, art. 38, or, conversely, to raise the minimum age to eighteen); see also MARLIES GLASIUS, *THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* 28 (2006) (writing that failure to raise minimum age for recruitment and use of children in armed service, see ICC Statute, *supra* note 9, art. 8(2)(b)(xxvi), 8(2)(e)(vii), led to the eventual adoption of CRC-OPAC, *supra* note 179).

183. ICC Statute, *supra* note 9, at pmb1. (establishing a permanent court "for the sake of present and future generations," and recognizing that "during this century millions of children, women and men have been victims of unimaginable atrocities").

184. *Id.* art. 54(1)(b) (requiring adjustments based on victim or witness circumstances, including age or crimes involving violence against children); *id.* art. 68(1) (setting out protection measures for victims and witnesses, with particular attention to age and to crimes involving violence against children); *id.* art. 68(2) (permitting *in camera* or other special proceedings if victim or witness is a child).

185. *Id.* art. 36(8)(b) (stating qualifications for judges); *id.* art. 42(9) (requiring Prosecution to "appoint advisers with legal expertise on . . . violence against children").

within the ICC's jurisdiction were several that clearly pertained to children: prevention of births and the forcible transfer of children from a protected group to another group, both as acts of genocide; trafficking of children, as a form of enslavement constituting a crime against humanity; and conscription, enlistment, and use in active hostilities of children under fifteen, as war crimes.¹⁸⁶ Also enumerated were crimes that often affect children disproportionately; for instance, torture and related crimes,¹⁸⁷ sexual and gender-based crimes,¹⁸⁸ and attacks on buildings dedicated to education and health care.¹⁸⁹ These statutory indications of the importance of children consequently were reflected in the work of the court; not least, in the work of the court's Prosecutors.

i. Focus on Children in the ICC's First Trial

Violence against children was the sole focus of the first ICC trial, in which a Congolese militia leader was charged with the war crimes of conscripting, enlisting, and using underage children in hostilities. Speaking on the occasion of the 2006 arrest of the defendant in *Prosecutor v. Lubanga*, the first ICC Prosecutor, Luis Moreno Ocampo, proclaimed a "special duty" to prosecute such "extremely serious crimes," whose commission, he said, "jeopardises the future of mankind."¹⁹⁰ But litigation laid bare a fact well known to anyone familiar with the *RuSHA* trial of the Nuremberg era: Securing conviction in any international criminal forum is hard, even in what may seem to some an easy case.¹⁹¹ It proved difficult for ICC prosecutors to establish that the children in question had not yet reached their fifteenth birthday, as the ICC Statute's definition of these war crimes required.¹⁹² Another difficulty

186. *Id.* art. 6(d), (e) (defining acts of genocide mentioned in text); *id.* art. 7(2)(c) (defining enslavement as a crime against humanity as "exercise of any or all of the powers attaching to the right of ownership," including "in the course of trafficking in . . . children"); *id.* arts. 8(2)(b)(xxvi), 8(2)(e)(vii) (proscribing war crimes of recruitment and used discussed in text).

187. *Id.* arts. 7(1)(f), 7(1)(k), 8(2)(a)(ii), 8(2)(a)(iii), 8(2)(c)(ii) (describing these variously as war crimes and as crimes against humanity).

188. *Id.* arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(b)(vi) (enumerating such criminal conduct as war crimes and as crimes against humanity).

189. *Id.* arts. 8(2)(b)(ix), 8(2)(e)(iv) (defining such attacks as war crimes).

190. *Statement by Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, Press Conference in Relation with the Surrender to the Court of Mr Thomas Lubanga Dyilo*, INT'L CRIM. CT. (Mar. 18, 2006), http://www.icc-cpi.int/NR/rdonlyres/699D1671-4841-4AAC-BFF4-1F1BF3F9DFEC/143842/LMO_20060318_En1.pdf.

191. On difficulties in *RuSHA*, see *supra* text accompanying notes 130–153. On suppositions that *Lubanga* would be easy to prove, see Dieneke de Vos, *Complementarity's Gender Justice Prospects and Limitations: Examining Normative Interactions Between the Rome Statute and National Accountability Processes For Sexual Violence Crimes in Colombia and the Democratic Republic of Congo* 58 (Oct. 12, 2017) (Ph.D. dissertation, European University Institute), http://cadmus.eui.eu/bitstream/handle/1814/48486/deVos_2017.pdf; Robert Marquand, *Lubanga Trial: Is an Army of Child Soldiers a War Crime?*, CHRISTIAN SCI. MONITOR (Oct. 8, 2009), <http://www.csmonitor.com/World/Global-News/2009/1008/lubanga-trial-is-an-army-of-child-soldiers-a-war-crime>.

192. ICC Statute, *supra* note 9, arts. 8(2)(b)(xxvi), 8(2)(e)(vii).

involved the young adults whom the prosecution called to testify to their experiences while children in the defendant's militia. The first of these witnesses, identified only as "Dieumerci," recanted his prior statements when he took the stand; weeks later, he returned to give testimony.¹⁹³ Additional issues prompted ICC judges to reject all testimony from these young witnesses. In the end, convictions and a sentence of fourteen years' imprisonment were entered and affirmed on appeal.¹⁹⁴ Yet they were grounded not in the words of persons who said they had survived the crimes charged, but rather in the testimony of other adults and in physical evidence.

ii. Shaping ICC Policy and Practice on Children

Fatou Bensouda, the Deputy Prosecutor who had examined Dieumerci, was elected the ICC's second Prosecutor in 2011; at once, she pledged to address children's issues more expansively. "[I]n addition to focusing on 'children who are forced to carry arms'"—an allusion to child combatants on whom the *Lubanga* trial had focused—"we must also address the issue of 'children who are affected by arms,'" Bensouda said in a keynote speech.¹⁹⁵ That initiative led to the publication in 2016 of the ICC Office of the Prosecutor *Policy on Children*.¹⁹⁶ The *Policy* pledged that in all aspects of its work, the Office would take "a child-sensitive approach" based on the four general principles undergirding the 1989 Child Rights Convention.¹⁹⁷ Stating "that children are capable of giving credible evidence," it signaled that young persons might again be called as ICC witnesses notwithstanding the obstacles

193. See Rachel Irwin, *Witness Admits to False Statements*, INT'L JUST. MONITOR (June 19, 2009), <http://www.ijmonitor.org/2009/06/witness-admits-to-false-statements> (describing difficulties with testimony, including that of Dieumerci and of a witness who admitted to giving false statements).

194. See *Lubanga Case*, INT'L CRIM. CT., <http://www.icc-cpi.int/drc/lubanga> (archiving relevant ICC decisions, including Prosecutor v. Lubanga, ICC-01/04-01-06, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012); Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against His Conviction (Dec. 1, 2014); Prosecutor v. Lubanga, ICC-01/04-01/06 A 4 A 6, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the "Decision on Sentence pursuant to Article 76 of the Statute" (Dec. 1, 2014)).

195. Fatou Bensouda, *Children and International Criminal Justice*, 43 GA. J. INT'L & COMP. L. 591, 593 (2015); see also Alliance of NGOs on Crime Prevention & Crim. Justice, *The International Day of the African Child—The Incidence of the Female Soldier and the International Criminal Court* (July 6, 2012), <http://cpcjalliance.org/international-day-african-child> (quoting similar statement by Prosecutor-elect Bensouda in speech delivered in New York on June 4, 2012, shortly before her swearing-in as ICC Prosecutor).

196. *Policy on Children*, INT'L CRIM. CT. OFF. OF PROSECUTOR (Nov. 2016) [hereinafter 2016 ICC OTP *Policy on Children*], http://www.icc-cpi.int/sites/default/files/20161115_OTP_ICC_Policy-on-Children_Eng.PDF.

197. *Id.* ¶ 22. See generally Diane Marie Amann, *The Policy on Children of the ICC Office of the Prosecutor: Toward Greater Accountability for Crimes Against and Affecting Children*, 101 INT'L REV. RED CROSS 537 (2019) (presenting overview of 2016 *Policy*'s contents and implications).

that the *Lubanga* trial had exposed.¹⁹⁸ “Almost all crimes within the jurisdiction of the Court affect children,” the *Policy* declared.¹⁹⁹ It drew parallels between those crimes and the “grave violations” on which U.N. entities concentrate;²⁰⁰ to quote a 2023 Report of Secretary-General António Guterres, such violations include “the recruitment and use of children, the killing and maiming of children, rape and other forms of sexual violence perpetrated against children, attacks on schools, hospitals and protected persons in relation to schools and/or hospitals, and the abduction of children.”²⁰¹

The 2016 *Policy* stressed the value of children’s identities. By way of example, the ICC Statute lists “political, racial, national, ethnic, cultural, religious, gender” grounds for persecution—along with “other grounds that are universally recognized as impermissible under international law”²⁰² Referring to that last phrase, this *Policy* stated that “acts targeting children on the basis of age or birth may be charged as persecution ‘on other grounds,’” and added “that children may also be persecuted on intersecting grounds, such as ethnicity, religion and gender.”²⁰³ Despite its stated concern with attacks on identities, however, the *Policy* referred to child-taking solely in relation to forcible transfer as an act of genocide.²⁰⁴ It thus pretermitted the attention that others had paid to child abduction, and also the ICC Statute’s own enumeration of crimes that may entail child-taking; for example, unlawful deportation and

198. 2016 ICC OTP *Policy on Children*, *supra* note 196, ¶ 68.

199. *Id.* ¶ 38. Its inclusion of crimes that “make explicit reference to children” and those “directed specifically against children or those that disproportionately affect them” paralleled terminology advanced by child rights expert Cécile Aptel, who has posited a “distinction between ‘child-specific offences’ and other ‘generic’ offences.” APTEL, *supra* note 75, at 26 n.98.

200. 2016 ICC OTP *Policy on Children*, *supra* note 196, at 19 n.38.

201. U.N. Secretary-General, Children and Armed Conflict—Report of Secretary-General, ¶ 1, U.N. Doc. A/77/895-S/2023/363 (June 5, 2023) [hereinafter Secretary-General Report], <http://undocs.org/en/A/77/895>; *see also* Off. of the Special Representative of the Secretary-General for Child. & Armed Conflict, *The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation*, at 9 (Oct. 2009/updated Nov. 2013) [hereinafter *Six Grave Violations*], http://childrenandarmedconflict.un.org/publications/WorkingPaper-1_SixGraveViolationsLegalFoundation.pdf (adding “denial of humanitarian access” to quoted list, which derives from S.C. Res. 1261, *supra* note 180, and subsequent related resolutions).

202. ICC Statute, *supra* note 9, art. 7(1)(h).

203. 2016 ICC OTP *Policy on Children*, *supra* note 196, ¶ 51 (quoting ICC Statute, *supra* note 9, art. 7(1)(h)); *see also id.* ¶¶ 18, 24, 30, 37 (acknowledging the child’s right to identity, the impact that crimes against children may have on identities, and the need to accommodate these concerns); *accord* APTEL, *supra* note 75, at 21 (adopting similar intersectional approach, and adding “that identity is a multi-layered paradigm: one simultaneously self-characterises and is characterised by others in terms of nationality, race, language, gender, religion, culture, socio-economic background, education and many other attributes, in addition to age”). For a book-length elaboration of this aspect, see SONJA C. GROVER, *THE PERSECUTION OF CHILDREN AS A CRIME AGAINST HUMANITY: THE CASE FOR THE PROSECUTION* § 2.2 (2021) (referring to “The as Yet Unfulfilled Promise of 2016 ‘ICC Policy on Children’”).

204. *See* 2016 ICC OTP *Policy on Children*, *supra* note 196, ¶¶ 16, 19, 44–46, 85.

transfer of populations as war crimes and as crimes against humanity.²⁰⁵ One reason may be that the leading ICC decision interpreting the crime against humanity of deportation—with relation to both children and adults in Myanmar—was not issued until three years after the 2016 *Policy*.²⁰⁶

As for the post-*Lubanga* ICC cases that directly addressed crimes against children, results were mixed. The scope of charges was enlarged to allege sexual and gender-based crimes as well as recruitment and use. But ICC judges entered acquittals in some of these cases; although acknowledging that children had been harmed, these judgments concluded that the prosecution had failed to prove beyond reasonable doubt that the accused bore individual criminal responsibility for those harms.²⁰⁷ Exceptions were *Prosecutor v. Ntaganda* and *Prosecutor v. Ongwen*, involving a Congolese and a Ugandan defendant, respectively: ICC appeals chambers affirmed the convictions of both men, on charges that included recruitment and use of children under fifteen, as well as sexual and gender-based crimes against children.²⁰⁸

By the time the latter appellate judgment was released, Karim A.A. Khan had been serving for a year and a half as the ICC's third Prosecutor. Khan routinely mentioned children in statements regarding matters on his docket, asserted that his office had "made important inroads in ensuring accountability for crimes against and affecting children, including those abducted or

205. See *Six Grave Violations*, *supra* note 201, at 21–22 (detailing the nature and consequences of abduction, plus many regional and international instruments prohibiting it); FATIMA, *supra* note 161, at 286–302 (providing overview). See also ICC Statute, *supra* note 9, arts. 7(1)(d), 8(2)(a)(vii), 8(2)(b)(viii); ICC, *Judges*, *supra* note 3 (naming provisions as statutory basis for pending ICC arrest warrants against Putin and Lvova-Belova); *infra* text accompanying note 278 (describing array of enumerated crimes which may involve child-taking).

206. See generally Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Pre-Trial Chamber Decision (Nov. 14, 2019), http://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06955.PDF. For this ICC Pre-Trial Chamber's interpretation of deportation, see *id.* ¶¶ 97–99, 104–08, 110. See also *id.* ¶¶ 100–03, 109–10 (construing as well the grounds supporting conviction for persecution as crime against humanity); *id.* ¶¶ 29, 37, 81 (citing allegations of harm to and targeting of children).

207. *Prosecutor v. Bemba*, ICC-01/05-01/08 A 1/80, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶¶ 116–17, 196 (June 8, 2018), http://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF; *Prosecutor v. Katanga*, ICC-01/04-01/07 1/660, Judgment Pursuant to Article 74 of the Statute, ¶ 1088 (Mar. 7, 2014), http://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF; *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-3-tENG, Judgment Pursuant to Article 74 of the Statute, ¶ 516 (Dec. 26, 2012), http://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_02993.PDF.

208. *Prosecutor v. Ntaganda*, ICC-01/04-02/06 A A2, Public Redacted Version of Judgment on the Appeals of Mr. Bosco Ntaganda and the Prosecutor Against the Decision of Trial Chamber VI of 8 July 2019 Entitled 'Judgment', ¶¶ 790, 821, 856, 977 (Mar. 30, 2021), http://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_03027.PDF; *Prosecutor v. Ongwen*, ICC-02/04-01/15 A, Public Redacted Version of Judgment on the Appeal of Mr. Ongwen Against the Decision of Trial Chamber IX of 4 February 2021 Entitled "Trial Judgment," ¶¶ 927, 977, (Dec. 15, 2022), http://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_07146.PDF.

otherwise recruited for military purposes,” and pledged to “do more and be unyielding in our resolve to discharge our responsibilities ever better.”²⁰⁹ As had his predecessor, he appointed an expert to serve as Special Adviser on children’s issues,²¹⁰ and he continued the practice established in 2013 of listing the effective pursuit of crimes against and affecting children as a strategic goal of the Office of the Prosecutor.²¹¹

In March 2023, of course, ICC judges approved Prosecutor Khan’s application for arrest warrants on charges that the President and a top official of Russia were responsible for the unlawful deportations or transfers of Ukrainian children.²¹² That same month, he launched a review of children’s policies, and in December 2023 his Office issued a superseding *Policy on Children*.²¹³ “Every investigation and prosecution of acts of genocide, crimes against humanity and war crimes should include the assumption that children have been victims, witnesses or otherwise affected,” this 2023 *Policy* began.²¹⁴ It proceeded to discuss the nature and scope of crimes against and affecting children, as well as the impact of those crimes,²¹⁵ and also to elaborate the Office’s approaches, labeled “child rights, child-sensitive, and child-competent,” “intersectional,” and “survivor-centred, trauma-informed.”²¹⁶ Challenging what

209. *Statement of ICC Prosecutor Karim A.A. Khan QC on the Occasion of the 2022 International Day Against the Use of Child Soldiers*, INT’L CRIM. CT. (Feb. 14, 2022), <http://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-occasion-2022-international-day-against-use-child>; see also, e.g., *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, Following the Application for an Expedited Order Under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan*, INT’L CRIM. CT. (Sept. 27, 2021), <http://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> (including “persecution of women and girls” and “crimes against children” in the recitation of allegations to be investigated); ICC, *Statement by Prosecutor*, *supra* note 31 (stressing that “we also must put the experiences of children in conflict at the centre of our work”).

210. *ICC Prosecutor Mr. Karim A.A. Khan QC Appoints Seventeen Special Advisers*, INT’L CRIM. CT. (Sept. 17, 2021), <http://www.icc-cpi.int/news/icc-prosecutor-mr-karim-aa-khan-qc-appoints-seventeen-special-advisers> (naming Véronique Aubert as Special Adviser on Crimes Against and Affecting Children); see APTEL, *supra* note 75, at 52 (referring to this article’s author as inaugural appointee to this advisory post).

211. *Office of the Prosecutor Strategic Plan—2023–2025*, INT’L CRIM. CT., ¶¶ 58–64 (June 13, 2023), <http://www.icc-cpi.int/news/office-prosecutor-strategic-plan-2023-2025> (capitalization in original omitted); see also *Office of the Prosecutor Strategic Plan June 2012–2015*, INT’L CRIM. CT., ¶ 32 (Oct. 11, 2013), <http://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Strategic-Plan-2013.pdf>.

212. See *supra* notes 27–33 and accompanying text.

213. *The Office of the Prosecutor Launches Public Consultation to Renew the Policy Paper on Crimes Against or Affecting Children*, INT’L CRIM. CT. (Mar. 9, 2023) [hereinafter ICC, *Office*], <http://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-renew-policy-paper-crimes-against-or-affecting>; see also 2023 ICC OTP *Policy on Children*, *supra* note 159, ¶ 12 (stating that the new *Policy* “supersedes the original 2016 version”).

214. 2023 ICC OTP *Policy on Children*, *supra* note 159, ¶ 20.

215. See *id.* ¶¶ 21–36.

216. *Id.* ¶¶ 37–62.

it called “stereotypes and assumptions about children” which “impede the extent to which justice actors engage them,” the 2023 *Policy* asserted that “children may safely provide reliable evidence if they are properly questioned by competent, trained and experienced interviewers, using evidence-based and trauma-informed methods appropriate to the particular child.”²¹⁷

IV. CHILD-TAKING AS A MATTER OF INTERNATIONAL CONCERN MERITING PROSECUTION AS WELL AS OTHER FORMS OF TRANSITIONAL JUSTICE

*“At the end of 10 years, I did not know who I was as a
Native person.”*

– Aqpayuq / Jim LaBelle, 75, on his forced residence at U.S. schools
for Indigenous children²¹⁸

Child witnesses had proved their mettle, of course, in *RuSHA*.²¹⁹ The testimony of five Czech and Polish teenagers at that trial demonstrated that children should not automatically be excluded. A child’s potential ought to be determined in much the same way as that of other prospective witnesses, and it ought to conform to the participatory rights articulated in the 1989 Child Rights Convention.²²⁰ The *RuSHA* indictment had recited a grim catalog of international crimes, many of which had affected children—not least, the takings of thousands of children, with the purpose of indoctrinating them into the language, culture, and ideology of their Nazi abductors. The words spoken by the five children who appeared before the *RuSHA* tribunal contributed to an evidentiary base that led to the conviction of eight SS men.²²¹

217. *Id.* ¶¶ 5–6; see also ICC, *Office*, *supra* note 213 (quoting Khan’s statement, upon launching a review of the 2016 *Policy*, that children’s “voices must be heard and their experiences inform every step of the process from preliminary examination to investigations and trial”). On concerns about children’s testimony, see, for example, Chelsea Swanson, Elizabeth Devos, Chloe Rieke & Andy Shin, *Expert Workshop Session: Child Witnesses: Testimony, Evidence, and Witness Protection*, 43 GA. J. INT’L & COMP. L. 649 (2015) (summarizing expert discussion of same); *supra* notes 190–194 and accompanying text (discussing this aspect of the *Lubanga* case).

218. Boarding School Survivor, Hearing on H.R. 5444, Truth and Healing Commission on Indian Boarding School Policies Act, 117th Cong. 3 (May 12, 2022) (statement of James “Jim” LaBelle Sr.) [hereinafter LaBelle], <http://docs.house.gov/meetings/II/II24/20220512/114732/HHRG-117-II24-Wstate-LaBelleJ-20220512.pdf>; see also *infra* text accompanying notes 322–323 (detailing his story).

219. See *supra* text accompanying notes 97–122 (describing children’s testimony).

220. See Child Rights Convention, *supra* note 8, arts. 3, 5, 12. This right is considered one of the convention’s four general principles. See *supra* notes 161, 171, and accompanying text; see also Jonathan Todres, Charlene Choi & Joseph Wright, *A Rights-Based Assessment of Youth Participation in the United States*, 94 TEMPLE L. REV. 411, 418–21 (2023) (discussing the scope of this right).

221. See *supra* Part III.A.2.i.

That tribunal did find the four Lebensborn defendants not guilty of those charges. Remarkably, however, their acquittals did not free Lebensborn itself from notoriety. The online encyclopedia of the U.S. Holocaust Memorial Museum states that Lebensborn “became complicit in the kidnaping of foreign children with physical features considered ‘Aryan’ by the Nazis,” and other sources make similar statements.²²² The *RuSHA* trial narrative doubtless contributed to this historiography of the Nazi kidnappings; so, too, both the presentations and the very presence of the child witnesses. The photograph of the Czech child Marie Dolezalova taking her testimonial oath resurfaced in her 2021 obituary—its publication in the United States’ newspaper of record a testament to its place in the popular imaginary.²²³ At some level, moreover, the *RuSHA* judgment’s reference to “stealing” children influenced the harsh reproof that is implicit in contemporary uses of the same term.²²⁴

In short, that Nuremberg-era trial, and the post-World War II developments in international child law, greatly assist in the conceptualization of the phenomenon that this article calls child-taking. Below, the article restates and elaborates its definition of child-taking.²²⁵ It then considers that definition’s relationship both to the crime of genocide as codified in the 1948 Genocide Convention and to instances better described via Eleanor Roosevelt’s phrase, a “kind of genocide.”²²⁶ The article then argues for more focus on the nature

222. U.S. Holocaust Memorial Museum, *Lebensborn Program*, in HOLOCAUST ENCYCLOPEDIA, <http://encyclopedia.ushmm.org/content/en/article/lebensborn-program>; see also, e.g., INGRID VON OELHAFEN & TIM TATE, HITLER’S FORGOTTEN CHILDREN: A TRUE STORY OF THE LEBENSBORN PROGRAM AND ONE WOMAN’S SEARCH FOR HER REAL IDENTITY (2016); Theresia Bauer, *Die Europäische Dimension des Lebensborn e.V.—Eindeutschungsprogramme und Kriegskinder*, in KINDER FÜR DEN „FÜHRER“: DER LEBENSBORN IN MÜNCHEN 137–45 (Angelika Baumann & Andreas Heusler eds., 2013); Jewish Virtual Library, *The Nazi Party: The “Lebensborn” Program (1935–1945)*, <http://www.jewishvirtuallibrary.org/the-quot-lebensborn-quot-program>. See generally UPROOTED: (HI)STORIES OF STOLEN CHILDREN DURING WORLD WAR II (Tomasz Skonieczny ed., 2022) [hereinafter UPROOTED] (collecting essays that frequently mention Lebensborn).

223. Richard Sandomir, *Marie Supikova, Survivor of Nazi Terror in Czech Village, Dies at 88*, N.Y. TIMES (Apr. 20, 2021), at A22; *Maria Dolezalova on the Witness Stand*, *supra* note 102 (reproducing the photograph); see also NMT TRIALS, *supra* note 56, vol. IV, at 606; BAZYLER, *supra* note 131, at 100 illustration 10.

224. *Supra* text accompanying note 133 (quoting *RuSHA* judgment’s quotation of Himmler); *supra* text accompanying note 21 (quoting Zelensky); see Talmazan, Mayer & Britton, *supra* note 43 (quoting Ukrainian prosecutor general as saying alleged takings by Russia are “not about the war itself,” but rather “about the intention to steal children from the Ukrainian nation”); see also UPROOTED, *supra* note 222; *STOLEN BABIES*, *supra* note 156; Carlotta Gall, Oleksandr Chubko & Cora Engelbrecht, *Ukraine’s Stolen Children*, N.Y. TIMES (Dec. 27, 2023), <http://www.nytimes.com/interactive/2023/12/26/world/europe/ukraine-war-children-russia.html>; Leslie Felperin, *Stolen Review—Chilling Account of Ireland’s Mother-and-Baby Homes Horror*, THE GUARDIAN (Nov. 1, 2023), <http://www.theguardian.com/film/2023/nov/01/stolen-review-chilling-account-of-irelands-mother-and-baby-homes-horror> (reviewing *Stolen* (Margo Harkins dir., 2023)).

225. See *infra* text accompanying notes 228–250.

226. Roosevelt, *supra* note 1; see *infra* text accompanying notes 251–293.

and harmfulness of the misconduct and less on what charge is lodged to address it. That broader scope allows consideration of the extent to which other incidents may be understood to be child-takings; that is, incidents involving times other than the present, places other than Europe, and children identified by traits other than nationality.²²⁷ The interconnection of such incidents is evident in the quotes of child-survivors embedded in this article: the contemporary quote from Anya, a Ukrainian teenager; the 1947 testimony of Maria Hanfova, a Czech child taken by the Gestapo; and the recent statement by Aqpayuq/Jim LaBelle, an Alaska Native septuagenarian compelled long ago to attend boarding schools for Indigenous children.²²⁸ This article demonstrates that even as a relative few allegations of child-taking are selected for criminal prosecution—as with the pending ICC and Ukraine cases—many instances may benefit from the preventive and reparative aspects of other forms of transitional justice.

A. Child-Taking Defined

Drawing upon the preceding historical and jurisprudential inquiries, this article defines child-taking as the commission by a state or similar powerful entity of, first, a taking of a child, and second, an effort, whether successful or not, to alter, erase, or remake that child's identity. Each aspect is considered in turn below.

1. State or Similarly Powerful Entity

The Nuremberg-era tribunals established that human beings may be held individually responsible for violations of international law.²²⁹ Nevertheless, even today convictions on such charges typically depend on proof that the individual acted on behalf of or in concert with a state or similarly powerful entity.²³⁰ Other matters of international concern, such as alleged violations of human rights, likewise tend to implicate states.²³¹ States must answer not only if the violation stems from an official act but also if the violation's source is

227. See *infra* text accompanying notes 285–364.

228. On Anya, see *supra* text accompanying notes 15, 37; on Hanfova, see *supra* text accompanying notes 56, 107–108; on LaBelle, see *supra* text accompanying note 218 and *infra* text accompanying note 322–323.

229. See *supra* text accompanying note 65.

230. See ICC Statute, *supra* note 9, arts. 7, 8, 8*bis* (requiring that crimes against humanity occur “as part of a widespread or systematic attack directed against any civilian population”; war crimes “as part of a plan or policy or as part of a large-scale commission of such crimes”; and aggression “by a person effectively to exercise control over or to direct the political or military action of a State”); see INT’L CRIM. CT., ELEMENTS OF CRIMES 2–3 (2013) [hereinafter ICC ELEMENTS], <http://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> (including, as element of genocide to be proved in ICC proceedings, that “conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”).

231. See Beitz, *supra* note 58, at 160.

a private actor; in the latter case, states may be held liable for failing in their positive duty to ensure the aggrieved person's rights.²³²

This article's definition works within that construct. Child-taking may be the result of acts of state such as legislative statutes or executive decrees, of omissions of state, and of actions by a state's agents or collaborators. Child-taking also may result from the acts of other entities—nonstate actors that, like states, exercise significant power. Potential examples are organized armed groups and entities that claim statehood but are not recognized as such. Corporate actors, ranging from private military contractors to self-avowed charities, also may qualify. The precise contours will develop over time.²³³ What is now clear is that isolated actions by individual natural persons, as when one parent engages in the transnational abduction of a child from the other parent, fall outside the scope of this definition.²³⁴

2. Taking

There are many names for the first essential component of this child-specific phenomenon. This article chooses "taking" because the term is easily grasped and not yet in such wide use that its intended meaning is distorted. In contrast, "abduction" already is used to describe the cross-border taking of a child by its parent—a matter that often is dealt with civilly rather than criminally, in national family law courts.²³⁵ Ironically, "kidnapping" is too vague, as that crime may befall victims of all ages. "Deportation," "transfer," "stealing," and "robbing" likewise apply without regard to the victim's age. Such terms also include elements unnecessary to child-taking—for example, the permanent-deprivation requirement of theft—and yet omit child-taking's second essential component, identity alteration.

Some form of coercion is implicit in this theorization. The means will vary. Takings might be effected by deception and forced removal by armed

232. On states' dual obligation to "respect" and "ensure" rights, see Samantha Besson & Eleanor Kleber, *Article 2: The Right to Non-Discrimination*, in *THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY* 50–56 (John Tobin ed., 2019) (discussing Child Rights Convention, *supra* note 8, art. 2, and referring to other similar human rights treaties).

233. See generally Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 *AM. J. INT'L L.* 334 (2013) (tracing evolution of interpretations of this set of considerations, sometimes called "the policy element," in doctrine relating to crimes against humanity, among other international crimes, and contesting claims that perpetrators must be very like nation-states).

234. International and national legal frameworks address this conduct. *E.g.*, Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Child Abduction Convention], <http://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction> (indicating that this treaty entered into force in 1983 and has 103 parties, including Ukraine, Russia, and the United States); *Legal Information*, U.S. DEP'T OF STATE, <http://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers.html> (providing information on U.S. efforts to implement its obligations as a member of this 1980 treaty on child abduction).

235. See generally *supra* note 234. *But cf.* 18 U.S.C. § 1204 (classifying certain instances of "[i]nternational parental kidnapping" as felonies, punishable by up to three years in U.S. prison).

officers, as litigated in the *RuSHA* trial; without parents' prior notice and consent, as alleged in Ukraine; and, as occurred elsewhere, through enforcement of laws giving a parent no real freedom to withhold consent.²³⁶

As must be expected, separating children from their families greatly injures both. The Committee on the Rights of the Child has cited the increased risk of discrimination and all manner of abuse.²³⁷ Studies of separated migrant and refugee families likewise have confirmed a range of harms. Mental health suffers as individuals experience loss and continue to worry about far-away family members; many feel they lack necessary social support.²³⁸ Separation may impair neurobiological development and also may give rise to emotional and behavioral problems, post-traumatic stress disorder, and other mental illnesses. Stressors may linger even after reunification, and over time may contribute to reproductive, cardiovascular, and other physical illnesses.²³⁹ Although family members of all ages will be affected, such harms may have a disproportionate impact on children, who are younger, often more vulnerable, and more likely to carry the memories of their experiences for many more years.²⁴⁰

The presence of such harms was evident in the testimony at the *RuSHA* trial, in the Polish boy's recollection of sneaking out when he could not talk to his own mother through a fence, and in the Czech mother's anguish at having lost her children—anguish so great that it forced a pause in the session.²⁴¹ Archived accounts given by Holocaust survivors, moreover, have exposed gendered aspects of family separation; in the words of one scholar: "Many women articulate such separation as a physical assault on their own person, concentrated on their own experienced sense of being female, and aimed at undermining their sexual identity by taking away the expression of that reproductive self—the child."²⁴²

236. See *supra* text accompanying notes 20–22, 28–53, 98–122; *infra* text accompanying notes 318–322. Children, especially those in their teens, also may object; laws differ on the weight that will be given to their consent or refusal.

237. See Comm. on Rts. of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, ¶ 3, U.N. Doc. CRC/GC/2005/6 (2005) [hereinafter Comm. on Rts. of the Child, GC 6] (listing these and other concerns in comment).

238. Michael Savic, Anna Chur-Hansen, Mohammad Afzal Mahood & Vivienne Moore, *Separation from Family and Its Impact on the Mental Health of Sudanese Refugees in Australia: A Qualitative Study*, 37 AUSTRALIAN & N.Z. J. PUB. HEALTH 383, 385 (2013).

239. CHILDREN'S EQUITY PROJECT, PREVENTING FAMILY SEPARATIONS AND DETENTION IN THE U.S. IMMIGRATION SYSTEM: PROTECTING CHILD HEALTH, SAFETY, AND WELLBEING 4–5 (2023), <http://childandfamilysuccess.asu.edu/sites/default/files/2023-03/preventing-fam-separation-detention-032323.pdf> (citing studies).

240. See, e.g., APTEL, *supra* note 75, at 22–25 (discussing disproportionate impact of atrocity crimes on children).

241. See *supra* text accompanying notes 98–99.

242. Fionnuala Ni Aolain, *Sex-Based Violence and the Holocaust—A Reevaluation of Harms and Rights in International Law*, 12 YALE J.L. & FEMINISM 43, 60 (2000).

3. Identity Alteration

That comment directs attention to the second component of child-taking: The taker's effort, whether successful or not, to alter, erase, or remake the taken child's identity. Numerous quotations set forth in this article evidence the centrality of this component. What had made the Nazi deportation of Polish children to Germany "dreadful," in Eleanor Roosevelt's view, was that "they were reduced to a point where they either had forgotten their families and their nationality or were too afraid to say what nationality they might have had."²⁴³ At the core of the *RuSHA* indictment lay charges that Nazi defendants had worked for the "elimination and suppression of nationalist characteristics" among victim groups.²⁴⁴ The *RuSHA* child witnesses outlined how these goals were pursued: through insults, lies, and beatings; and through forced renaming, forced labor, and forced schooling in the language, ideology, and culture of a nation unlike their own.²⁴⁵ Those children's complaints were distilled into a few words by Anya, the Ukrainian teenager transported to Moscow who objected to being made a Russian citizen: "My friends and family aren't here."²⁴⁶ Her President, Volodymyr Zelensky, insisted that Russia's "purpose" was "to make deportees forget about Ukraine and not be able to return."²⁴⁷ Together, these comments are evocative of the harms that identity interference inflicts on communities and on the children themselves.

Today, of course, a child's identity is understood to encompass not only nationality or ethnicity—not only what in the Nuremberg era often was called "race"—but also a range of other traits. The 1989 Child Rights Convention lists "name and family relations" as well as "nationality" in discussing the right to identity, and its guarantee of non-discrimination extends to "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."²⁴⁸ Subsequent interpretive documents have supported an expansive and inclusive understanding of identity.²⁴⁹ "Where a child is illegally deprived of some or all of the elements

243. Roosevelt, *supra* note 1.

244. Indictment, *United States v. Greifelt*, July 1, 1947, in *NMT TRIALS*, *supra* note 56, vol. IV, quoted *supra* text accompanying note 94.

245. See *supra* text accompanying notes 101–122.

246. See *supra* text accompanying notes 15, 37.

247. *Supra* text accompanying note 21; see President of Ukraine, *Nowadays Humanity Must Act in Full Solidarity to Save Lives—President Volodymyr Zelenskyy's Speech During the General Debate of the UN General Assembly* (Sept. 19, 2023), <http://www.president.gov.ua/en/news/sogodni-lyudstvo-maye-diyati-v-povnij-solidamosti-shob-urya-85705> (stating that Ukrainian "children in Russia are taught to hate Ukraine, and all ties with their families are broken").

248. Child Rights Convention, *supra* note 8, arts. 2, 8.

249. *Id.* art. 2; see ICC Statute, *supra* note 9, art. 21(3) (containing a similar list, and similarly ending with the words "or other status"); see also Comm. on Rts. of the Child, General Comment No. 26, at ¶¶ 14–15, 20, 58, U.N. Doc. CRC/GC/2023/26 (2023) (placing emphasis on "other status" in article quoted in text, and noting "intersectionalities" in children's identity, with references to disability and indigeneity); Comm. on Rts. of the Child, General Comment No. 20, ¶¶ 34–36, U.N. Doc. CRC/GC/2023/20 (2016) (discussing, in General Comment on

of his or her identity,” the Convention mandates that “States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”²⁵⁰

B. Genocide, and a “Kind of Genocide”

A criminal prohibition centered on identity and taking components already exists, of course. That prohibition—genocide—and its legal cognates—a “kind of genocide”—are discussed below.

1. Forcible Transfer of Children as Genocide

As first codified in the 1948 Genocide Convention and eventually made punishable both in national systems and in tribunals like the ICC:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²⁵¹

The profound social meaning of the word “genocide” is as apparent today as when prosecutors spoke of it decades ago at Nuremberg.²⁵² Recent years saw genocide invoked to describe violence in places as disparate as Iraq,

children’s rights during adolescence, “sexual orientation, gender identity or intersex status,” as well as “cultural identities”); Comm. on Rts. of the Child, GC 6, *supra* note 237, ¶ 20 (describing as aspects of identity “upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs”).

250. Child Rights Convention, *supra* note 8, art. 8. *See generally* John Tobin & Jonathan Todres, *Article 8: The Right to Preservation of a Child’s Identity*, in *THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY*, *supra* note 232, at 281 (detailing nature and scope of identity right).

251. Genocide Convention, *supra* note 11, art. II; *see also* ICC Statute, *supra* note 9, arts. 5, 6 (conferring jurisdiction over these same acts as genocide, defined in the same words).

252. *See supra* text accompanying notes 87–96, 127–128, 132–133. Indeed, the term has come to be applied to events before the trials at Nuremberg; for example, to the forcible transfers of Armenian children and other acts imputed to the Ottoman government during World War I. *See* Edita Gzoyan, Regina Galustyan & Shushan Khachatryan, *Reclaiming Children After the Armenian Genocide: Neutral House in Istanbul*, 33 *HOLOCAUST & GENOCIDE STUD.* 395, 395–99 (2019).

China, and Sudan.²⁵³ Efforts to affix the label to Russia's movement of Ukrainian children began in 2022 and then persisted, with President Zelensky declaring in his speech at the September 2023 opening session of the U.N. General Assembly: "This is clearly a genocide."²⁵⁴ A few weeks later, several U.N. experts raised the specter of genocide with regard to the conflict in the Gaza Strip.²⁵⁵ In December, an application asking the International Criminal Justice to determine whether genocide was occurring there joined pending applications related to Myanmar and to the Ukraine-Russia war.²⁵⁶ Such proceedings raised the potential for authoritative interpretations of the Genocide Convention; nevertheless, it must be said that every contested utterance of "genocide" carries risk that the social meaning of the word, and of the crime itself, may be diluted. As Professor A. Dirk Moses demonstrated in his 2021

253. See UK Parliament House of Commons Library, *UK Acknowledges Yazidi Genocide by Daesh/Islamic State* (Aug. 9, 2023), <http://commonslibrary.parliament.uk/uk-acknowledges-yazidi-genocide-by-daesh-islamic-state> (reporting on Britain's formal determination that 2014 atrocities against Yazidi minority in northern Iraq constituted genocide); *Sudanese Official Urges Investigation into Violence in Darfur, Saying It's a Return to Past Genocide*, ASSOC. PRESS (June 20, 2023), <http://apnews.com/article/sudan-war-military-rsf-darfur-6e13139742d52564e47847cb9bd4d2a5>; U.S. Dep't of State, *Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma* (Mar. 21, 2022), <http://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum> (announcing government's determination that genocide had taken place in Myanmar/Burma, and referring to findings of genocide by China against Muslim Uyghurs and "past acts of genocide" in the Darfur region of Sudan).

254. President of Ukraine, *supra* note 247; see also EUR. PARL. ASSEMB., Res. 2516 *Ensuring a Just Peace in Ukraine and Lasting Security in Europe*, ¶ 8 (adopted Oct. 12, 2023) [hereinafter PACE Res. 2516], <http://paceafter.PACE Res. 2516>, <http://paceafter.PACE Res. 2516> (asserting, with reference to "the deportation of Ukrainian children," that Russia is "waging a genocidal war").

255. Press Release, U.N. Off. of High Comm'r for Hum. Rts., *Gaza: UN Experts Decry Bombing of Hospitals and Schools as Crimes Against Humanity, Call for Prevention of Genocide* (Oct. 19, 2023), <http://www.ohchr.org/en/press-releases/2023/10/gaza-un-experts-decry-bombing-hospitals-and-schools-crimes-against-humanity>; see also Tuvan Gumrukcu & Burcu Karakas, *Turkey's Erdogan Calls on Israel to Stop Attacks on Gaza 'Amounting to Genocide'*, REUTERS (Oct. 20, 2023), <http://www.reuters.com/world/middle-east/turkeys-erdogan-calls-israel-stop-attacks-gaza-amounting-genocide-2023-10-20>.

256. See Press Release, Int'l Ct. Just., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Modification of the Order of 28 March 2024* (May 24, 2024), <http://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-pre-01-00-en.pdf> (reporting that court had reaffirmed previous provisional measures and indicated new measures in response to South Africa's request, filed as part of its December 29, 2023 application launching the case); Press Release, Int'l Ct. Just., *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)* (Feb. 2, 2024), <http://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-pre-01-00-en.pdf> (reporting on Judgment issued same day, in which court found that it had jurisdiction and that request was admissible, thus permitting case to continue); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Judgment on Preliminary Objections, 2022 I.C.J. 178 (July 22) (ruling admissible Gambia's application seeking court's consideration of whether Myanmar had violated Genocide Convention, thus permitting litigation to proceed).

monograph, too-ready embraces of the label on the one hand, and too-ready efforts to excuse conduct that may warrant the label on the other, are among most crucial “problems of genocide.”²⁵⁷

Legal analysis reveals additional problems. Since the adoption of the 1948 Genocide Convention, relatively few cases alleging any of genocide’s enumerated acts have been brought; a smattering of genocide convictions, mostly related to Cambodia, Rwanda, and Srebrenica, have withstood appeal.²⁵⁸ More to the point, in this seventy-five-year period not one person ever has been convicted of genocide for the specific act of forcibly transferring children.²⁵⁹ There are reasons for this. All acts of genocide require proof that the accused possessed a *dolus specialis*, or specific intent—“the intent to destroy, in whole or in part,” one of the four named groups “as such.”²⁶⁰ That verbiage assigns this crime the most stringent level of mens rea. The actus reus for this particular form of genocide, meanwhile, demands proof that children were transferred from a protected group to some other group,

257. MOSES, *supra* note 89, at 5–7; see also Alexander K.A. Greenawalt, “*With Intent to Destroy, in Whole or in Part*”: Genocide, Ethnic Cleansing, and a Lost History, 2024 WIS. L. REV. 933, 936 (“The perpetration of international crimes and serious human rights abuses often brings with it accusations of genocide, and that question of genocide then assumes an outsized importance in the debate over the appropriate legal characterization.”).

258. See ICTY Upholds Genocide Convictions of Bosnian Serb Officials, VOA NEWS (Jan. 30, 2015) (writing that appeals chamber of the ICTY had affirmed two defendants’ convictions for genocide and conspiracy to commit genocide, stemming from July 1995 massacre of about 8,000 men and boys in Srebrenica, Bosnia); Marlise Simons & Marc Santora, *Ratko Mladic Loses Final Appeal in Genocide Conviction*, N.Y. TIMES (June 8, 2021), <http://www.nytimes.com/2021/06/08/world/europe/ratko-mladic-trial.html> (reporting that an appellate chamber of the same tribunal had sustained just one of two Srebrenica-related genocide convictions against defendant); Alastair Leithead, *Rwanda Genocide: International Criminal Tribunal Closes*, BBC NEWS (Dec. 14, 2015), <http://www.bbc.com/news/world-africa-35070220> (reporting that “dozens” of defendants had been convicted of genocide by the International Criminal Tribunal for Rwanda, but adding that most of the persons “convicted in connection with the genocide were tried not in the ICTR, but in Rwandan community-based ‘gacaca’ courts which completed their work in 2012”); cf. David Pettigrew, *Mandate Interrupted: The Problematic Legacy of the United Nations International Criminal Tribunal for the Former Yugoslavia*, 19 WASH. U. GLOBAL STUD. L. REV. 381, 384–88 (2020) (criticizing Yugoslavia tribunal for not returning many genocide convictions); J. Andrew Boyle, *Justice, Interrupted: A Death at the Khmer Rouge Trials and Reasons for Optimism*, 43 FORDHAM INT’L L.J. 1089, 1091 (2020) (summarizing paucity of such convictions by Cambodia tribunal).

259. Ioffe, *Transferring*, *supra* note 29, at 321–24 (citing mentions of this proscription in the International Court of Justice, International Criminal Tribunal for Rwanda, and several international or national inquiry bodies).

260. Genocide Convention, *supra* note 11, art. II(e); ICC Statute, *supra* note 9, art. 6(e); see Payam Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 62 MCGILL L.J. 243, 250 (2016) (referring to genocide’s “specific intent or *dolus specialis*” as “the most exacting mental element in criminal law”). ICC regulations also specify a requirement of proof that the accused “knew, or should have known” the child’s age, a factor that proved a prosecutorial challenge in the ICC’s first trial, *Lubanga*; it likely would be less so in this instance, given that the pertinent age is under eighteen in contrast with the under-fifteen requirement in *Lubanga*. See ICC ELEMENTS, *supra* note 230, art. 6(e); *supra* text accompanying notes 190–194.

“forcibly.”²⁶¹ Within the ICC system the quoted word is said not to require “physical force” but rather “may include threat of force or coercion.”²⁶² Thorough understanding of what evidence will suffice to establish that impugned takings were impermissible and nonconsensual awaits litigation.

The Genocide Convention’s prohibition on the forcible transfer of children, without more, is enough to make that act fully punishable in any forum with jurisdiction over the crime of genocide. This is so even though forcible transfer, unlike all other prohibited acts, does not hinge on proof that humans suffered actual mental or bodily harm.²⁶³ Treaty negotiators had proved ready to qualify harms of a physical or biological nature as genocide but reluctant to accord the same qualification to harms of a cultural nature; forcible transfer of children was the only act in the initial “cultural genocide” category that found its way into the Convention.²⁶⁴ An oft-quoted authority thus characterized the prohibition on forcibly transferring children as “almost an afterthought, with little substantive debate or consideration,” and as

261. Genocide Convention, *supra* note 11, art. II(e); ICC Statute, *supra* note 9, art. 6(e).

262. ICC ELEMENTS, *supra* note 230, at 3 n.5 (continuing, with respect to threat, “such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage or by taking advantage of a coercive environment”).

263. See *supra* text accompanying note 251 (listing, as other prohibited acts, killings, severe mental or bodily harm, preventions of birth, and conditions intended to cause physical destruction); cf. GLOBAL JUSTICE CENTER, BEYOND KILLING: GENDER, GENOCIDE, AND OBLIGATIONS UNDER INTERNATIONAL LAW 2 (Dec. 2018), <http://www.globaljusticecenter.net/files/Gender-and-Genocide-Whitepaper-FINAL.pdf> (criticizing overemphasis on “genocide as a crime committed predominantly through organized mass killings,” to the exclusion of the crime’s nonlethal manifestations). This article focuses on forcible transfer because that is the only act enumerated in the Genocide Convention which expressly mentions children; consideration of the extent to which other enumerated acts may be applied to children’s experiences is beyond the scope of this article. See Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland Pursuant to Article 63 of the Statute of the International Court of Justice in the Case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Nov. 15, 2023), ¶¶ 39–47, <http://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf> (positing that certain crimes against children may be pursued as causing serious bodily or mental harm in violation of Genocide Convention, *supra* note 11, art. II(b)–(d), and stating that interpretation should occur “in light of the distinctive needs and vulnerabilities of children”).

264. Hirad Abtahi & Philippa Webb, *Secrets and Surprises in the Travaux Préparatoires of the Genocide Convention*, in ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS 299, 305 n. 26, 305–06 (Margaret M. deGuzman & Diane Marie Amann eds., 2018) (quoting and discussing an early draft which included as acts of “cultural genocide” not only the forcible transfer of children, but also the exiling of individuals representative of a group’s culture, the prohibition on use of disfavored language, and the destruction of books and monuments linked to disfavored language, culture, or religion); see Greenawalt, *supra* note 257, at 969 (pointing to inclusion of forcible transfer of children in “the actual text” of the Genocide Convention as confirmation “that it is possible to commit genocide without physical harm to anyone”).

“enigmatic, because the drafters clearly rejected the concept of cultural genocide.”²⁶⁵ Later studies placed emphasis on evidence of deliberation; for example, scholars have documented the role of Greece in the negotiation of this provision, including in an article published in 2023.²⁶⁶ Labeling this act of genocide as neither cultural nor physical, but rather as biopolitical, Greece argued that the prohibition on the forcible transfer of children is, in one scholar’s words, “intended to protect a given group as a biopolitical entity, securing the right of its dominant powers to govern not just the individual bodies of the children but, more importantly, their ideological affinities, ethnonational identity, and political allegiances.”²⁶⁷ This argument finds support in statements, by bereft mothers and embattled presidents alike, which placed weight on child-taking’s injuries to themselves and their communities.²⁶⁸ Another scholar underscored drafters’ statements “that the transfer of newborn children was *morally* indistinguishable from acts of biological genocide such as compulsory abortion.”²⁶⁹ Still other studies noted that prohibiting the forcible transfer of children had won the support of leading figures who otherwise opposed the inclusion of cultural genocide.²⁷⁰ One such figure was the French jurist Henri Donnedieu de Vabres who, as a co-author of Nuremberg’s IMT judgment, had cited Heinrich Himmler’s exhortation to take and remake foreign children as evidence of the Nazis’ “plan to get rid of whole native populations.”²⁷¹ No doubt, that judge and his fellow Genocide Convention drafters also knew of the evidence adduced in *RuSHA* of the severe bodily and mental harms that had accompanied child-kidnappings; for instance: the physical destruction of a Czech village that had precipitated the Lidice takings; the physical beatings and mental abuse about

265. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 175 (2000); see also Florian Jessberger, *The Definitions and the Elements of the Crime of Genocide*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* 87–102 (Paola Gaeta ed., 2009) (agreeing that “this form of genocide borders on cultural genocide”). *Contra* Akhavan, *supra* note 260, at 260.

266. Dimitrios A. Kourtis, *The Greek Civil War and Genocide by Forcible Transfer of Children*, 26 *J. GENOCIDE RSCH.* 142 (2024); see also Abtahi & Webb, *supra* note 264, at 308 (also mentioning Greece); Akhavan, *supra* note 260, at 261–62 (same).

267. Kourtis, *supra* note 266, at 145.

268. See *supra* text accompanying notes 21, 98–99, 241–242, 254.

269. Greenawalt, *supra* note 257, at 971 (emphasis in original).

270. Henri Donnedieu de Vabres, described *infra* note 271 and accompanying text, along with Vespasian Pella of Romania, reportedly supported including forcible transfer of children yet opposed the concept of cultural genocide. Among the proponents of including the forcible transfer of children was Raphaël Lemkin, inventor of the term “genocide,” see *supra* note 89 and accompanying text, who further endorsed the concept of cultural genocide. See Abtahi & Webb, *supra* note 264, at 306, 310–11; Akhavan, *supra* note 260, at 261–62.

271. See *supra* text accompanying notes 75–76 (quoting Judgment, *United States v. Göring*, Sept. 30–Oct. 1, 1946, in *IMT TRIAL*, *supra* note 71, vol. I, at 237); see also Judgment, *United States v. Göring*, at 342 (listing Donnedieu de Vabres among the judges signing that judgment).

which child survivors testified in *RuSHA*; and the presumed killings of the many kidnapped children who never returned home.²⁷²

In the pending Ukraine cases, precise details have yet to be made public,²⁷³ yet it may be that all requisite elements of the forcible transfer of children as genocide will be proved. By way of example, in a 2023 study, University College London Law Professor Yulia Ioffe set forth data supporting her conclusion that this crime had occurred in the Russia-Ukraine war.²⁷⁴ Since the ICC arrest warrants were issued, moreover, allegations have surfaced that children have been subjected to schooling in Russian, encouraged to repudiate their Ukrainian nationality, and made to undergo military training in Russia.²⁷⁵ Yet difficulties in securing conviction remain apparent, not least when one considers the rescue narrative, which Russia has promoted, in light of the *RuSHA* defendants' success with analogous gendered rescuer-caregiver claims.²⁷⁶ To these formidable obstacles must be added the contextual elements, individual criminal responsibility requirements, and other factors which have proved obstacles to convictions at the ICC, especially in cases involving crimes against children.²⁷⁷

2. Child-Takings as a Kind of Genocide

Despite the evidentiary and interpretive uncertainties attending the forcible transfer of children as genocide, what remains certain is the seriousness of the underlying behavior. Historical and jurisprudential sources show that the taking of a child, coupled with an effort to alter the child's identity, is grave, no matter what legal label is attached to it. Genocide is one such label, for proof of forcible transfer as genocide surely would be sufficient to establish child-taking as theorized in this article. But such proof is not necessary. The essential components of child-taking also may form part of the facts of many other crimes or human rights violations; for example, deportation or transfer of a population, enforced disappearance, recruitment for armed service, enslavement, trafficking, sexual and gender-based crimes, and persecution.²⁷⁸ To quote once again the 1948 column by Eleanor Roosevelt: Not all child-takings will constitute genocide, but every child-taking deserves

272. See *supra* text accompanying notes 98–122; see also Akhavan, *supra* note 260, at 260–61 (linking the inclusion of the forcible transfer of children as an act prohibited in the Convention to *RuSHA* proceedings).

273. See *supra* note 34 and accompanying text (explaining that ICC warrants were sealed).

274. See generally Ioffe, *Transferring*, *supra* note 29.

275. E.g., Gall, Chubko & Engelbrecht, *supra* note 224.

276. See *supra* notes 40–53, 140–153, and accompanying text.

277. See *supra* text accompanying notes 191–194 and 208. On requirements related to individual criminal responsibility, see ICC Statute, *supra* note 9, arts. 25–26, 28; see generally Miles Jackson, *The Attribution of Responsibility and Modes of Liability in International Criminal Law*, 29 LEIDEN J. INT'L L. 879 (2016).

278. For exemplary enumerations of these violations, as crimes against humanity and war crimes, see ICC Statute, *supra* note 9, arts. 7, 8.

international as well as local attention for the reason that it “really is a dreadful *kind of genocide*.”²⁷⁹

An exclusive focus on genocide would be ill-advised, moreover, even if that crime were easier to establish. States parties to international child law instruments have expressed opposition to mistreatment on an array of grounds, often suggesting broad application by way of the catchall phrase “or other status.”²⁸⁰ But the crime of genocide protects only groups that may be described as “national, ethnical, racial or religious”; reliance on that crime alone would fail to protect children taken because of one or more other identities.²⁸¹ Additionally, genocide’s absolutist nature—the sense that it applies only when the perpetrator hopes for utter destruction—creates the risk that less salient, more insidious,²⁸² and yet still grave encroachments into the child’s identity formation will receive less than due attention.

This article, in short, has sought to describe child-taking in a manner that is descriptively accurate and sufficiently inclusive. Its definition does not require some new codification, as occurred with enforced disappearance after the fall of military dictatorships in Latin America.²⁸³ To the contrary, this conceptualization of child-taking neither demands new legislation nor imposes additional burdens of proof upon prosecutors. And though it rests on the formal foundation of international criminal law, it embraces as well the

279. Roosevelt, *supra* note 1 (emphasis added); *cf.* MOSES, *supra* note 89, at 43 (criticizing conventional construction of “a hierarchy of mass crimes with genocide as its apex” on the ground that it “make[s] subgenocidal violence less grave and commemoration of its victims less urgent”); Greenawalt, *supra* note 257, at 944 (cautioning against “over-emphasizing genocide to the exclusion of other serious crimes”).

280. See *supra* notes 248–250 and accompanying text (underlining “other status”); *cf.* *supra* notes 202–206 and accompanying text (discussing ICC crime of persecution in relation to children).

281. Genocide Convention, *supra* note 11, art. II; see also *supra* text accompanying note 251 (quoting art. II of the Genocide Convention); Amann, *Genocide*, *supra* note 62, at 102–14 (discussing difficulties presented by protected-groups list).

282. Less gradual alterations of identity may occur. One example is the case of Basque orphans who were evacuated to the Soviet Union near the end of the Spanish Civil War; finally able to return decades later, many of them found they “did not feel at home either in Spain or the USSR.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 3216 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987). Such incidents may relate more to *dolus eventualis*—a level of intentionality sometimes translated as recklessness—than to the *dolus specialis* expressed in Genocide Convention, *supra* note 11, art. II; *supra* text accompanying note 251. Whether the former level of intent may support a claim of genocide is a matter of debate. See Rafael Leme, *Individual Criminal Liability and State Responsibility for Genocide: Boundaries and Intersections*, 34 AM. U. INT’L L. REV. 89, 136 (2018). Given the more expansive definition of child-taking set forth in this article, that debate may prove irrelevant, at least outside the narrow context of courts applying the international law of genocide.

283. See generally Emmanuel Decaux, *The International Convention for the Protection of All Persons from Enforced Disappearance, as a Victim-Oriented Treaty*, in ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS, *supra* note 264, at 57 (tracing treaty’s drafting history and contents).

expressive functions of that body of law.²⁸⁴ The formulation thus anticipates that narratives set forth by lawyers' pleadings or judges' opinions will underscore the identity-changing component of child-taking, even though no statute requires formal proof of that component.

Such comprehension of child-taking's nature, gravity, and ensuing harms will have multiple effects. It may influence both sentencing and reparations,²⁸⁵ not to mention the degree to which survivors receive humanitarian assistance from actors outside the courthouse. It has the further benefit of reinforcing popular articulations of why child-taking is wrong: To paraphrase Ukrainian President Zelensky, the purpose is not just to take children, but also to make them forget, or to come to hate, the family, culture, and country into which they were born.²⁸⁶ Embracing this conceptualization additionally may serve reparative goals; that is, it may vindicate more fully the harms experienced by children and their communities.

In truth, the ICC Office of the Prosecutor already may have set out on this path without so stating. The 2023 ICC arrest warrants were based on war crimes provisions that apply to populations without further distinction—and yet the ICC specified, by way of a parenthetical, that the victims of concern are children.²⁸⁷ According to the instant theorization, that insertion need not heap upon the Prosecutor the burden of proving that all the persons taken were under the age of eighteen; it should, however, reinforce the prosecutorial narratives respecting the gravity both of this criminal phenomenon and also of crimes against children more generally.²⁸⁸ In Ukraine, this narrative was reinforced by President Zelensky's pound of the desk.²⁸⁹ Its reinforcement at the ICC came via the photograph of Prosecutor Khan at the putative crime scene: a room filled with empty cribs.²⁹⁰

Many instances of child removal jump to mind that are condemnable but that may not satisfy the strict requirements of the crime of genocide. Consideration of whether they nonetheless fit within this article's definition

284. On expressivism, see generally Amann, *Genocide*, *supra* note 62.

285. See ICC Statute, *supra* note 9, art. 78(1) (requiring court to “take into account such factors as the gravity of the crime” when determining the sentence of a convicted person); Tomas Hamilton & Göran Sluiter, *Principles of Reparations at the International Criminal Court: Assessing Alternative Approaches*, 25 MAX PLANCK Y.B. U.N. L. ONLINE 272, 286–87, 290–91 (Dec. 23, 2022), http://doi.org/10.1163/18757413_02501018 (discussing significant of gravity and harms caused by crimes in ICC reparations awards); 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, G.A. Res. 60/147, ¶ 15 (Mar. 21, 2006) (“Reparation should be proportional to the gravity of the violations and the harm suffered.”).

286. See *supra* notes 21, 247, and accompanying text (quoting Zelensky).

287. See *supra* notes 3, 27, and accompanying text (quoting ICC, *Judges*).

288. On the significance of narratives, see *supra* note 64 and accompanying text.

289. See *supra* text accompanying note 21.

290. ICC, *Fourth Visit*, *supra* note 39. The video of Putin and Lvova-Belova, described *supra* in the text accompanying notes 40–43, thus is revealed as counternarrative.

of child-taking is advisable, and indeed will help to shape the contours of this phenomenon. One example worth considering is the practice, occurring to varied degrees in the United States and in Europe, of separating migrant children from adults as they try to cross national borders.²⁹¹ Also called into question are past and present policies, again in the United States and elsewhere, by which children have been institutionalized—placed into institutions variously called care homes, orphanages, sanitariums, asylums, reformatories, detention centers, or prisons—without the full consent of their parents or guardians. Numerous studies demonstrate that such placements have worked disproportionate harm upon children and families who are, alone or in combination, Black, Brown, Indigenous, disabled, or poor.²⁹² Whether such examples constitute “child-taking” as it is defined in this article depends on the presence or absence of requisite components: on the extent to which a state or similar powerful entity is involved; on the degree to which the taking was coercive; and on the extent to which the taker then endeavored to alter or erase the child’s identities. Even if one or more such examples fall outside this article’s definition, all of them most likely violate other

291. See generally EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, CURRENT MIGRATION SITUATION IN THE EU: SEPARATED CHILDREN (Dec. 20, 2016), http://fra.europa.eu/sites/default/files/fra_uploads/fra-december-2016-monthly-migration-report-separated-childr.pdf; *Family Separation—A Timeline*, SOUTHERN POVERTY LAW CENTER (Mar. 23, 2022), <http://www.splcenter.org/news/2022/03/23/family-separation-timeline>; Camilo Montoya-Galvez, *U.S. Border Agents Are Separating Migrant Children from Their Parents to Avoid Overcrowding, Inspector Finds*, CBS NEWS (Sept. 16, 2023), <http://www.cbsnews.com/news/migrant-children-separated-parents-u-s-border-agents-overcrowding>; Elliot Spagat, *US Identifies 3,900 Children Separated at Border Under Trump*, ASSOC. PRESS (June 8, 2021), <http://apnews.com/article/az-state-wire-donald-trump-immigration-lifestyle-government-and-politics-54e2e5bbff270019d8bda3c81161c7c7>.

292. See, e.g., MIROSLAVA CHÁVEZ-GARCIA, STATES OF DELINQUENCY: RACE AND SCIENCE IN THE MAKING OF CALIFORNIA’S JUVENILE JUSTICE SYSTEM 20 (2012) (analyzing evolution of the juvenile justice system in California and “its impact on Mexican, Mexican American and African American young people,” compared with “Euro-American and European youngsters”); CARL SUDDLER, PRESUMED CRIMINAL: BLACK YOUTH AND THE JUSTICE SYSTEM IN POSTWAR NEW YORK 5 (2019) (demonstrating, with focus on 1930s–1960s New York City, “that black youths faced a more punitive justice system by the post-war era that restricted their social mobility and categorically branded them as criminal—a stigma they continue to endure”); Alyssa Couchie, *ReBraiding Frayed Sweetgrass for Nijjaansinaink: Understanding Indigenous Child Welfare Issues as International Atrocity Crimes*, 44 MICH. J. INT’L L. 405, 429–41 (2023) (describing late-twentieth-century Canadian policies, occurring alongside residential schooling practices discussed *infra* text accompanying notes 305–317, 345–352, of removing Indigenous children ostensibly for their own welfare); Robert B. Hill, *Institutional Racism in Child Welfare*, 7 RACE & SOC. 17, 17–23 (2004) (tracing U.S. history by which Black children have been “overrepresented in the child welfare system” to the early part of the twentieth century, attributing overrepresentation to “institutional racism” that is “strongly correlated with classism and sexism,” and demonstrating links among child welfare, mental health juvenile justice, and education systems).

fundamental child and human rights.²⁹³ Accordingly, the article now turns to consider other examples.

C. *Different Children, Different Times, Similar Child-Taking Stories*

A considerable timespan separates the recent charges against Putin, Lvova-Belova, and others from the 1948 convictions of Nazis in *RuSHA*. Yet, as the discussion above of other separations demonstrates, an analysis of child-taking based exclusively on Ukraine and *RuSHA* would be far too narrow.²⁹⁴ It is a sad truth that the phenomenon did not begin some eighty years ago, but rather has recurred over many centuries, so that redress may require measures other than criminal prosecution. Nor is child-taking limited to Europe; then and now, incidents may be found around the globe.

1. Spatial Axis: Syria and Other Child-Takings across Continents

The geographic expanse of child-taking and other international crimes against children was all too apparent in U.N. Secretary-General Guterres' report for 2022, the first year of Russia's invasion. He wrote that the United Nations had verified nearly 30,000 grave violations against children—a number presumed far lower than actual occurrences—in two dozen conflict situations including Ukraine.²⁹⁵ These verified violations included nearly 4,000 abductions of children, in Ukraine and in other places as varied as Afghanistan, Burkina Faso, Cameroon, Central African Republic, Chad, Colombia, the Democratic Republic of the Congo, Ethiopia, Iraq, Israel and the State of Palestine, Libya, Mali, Mozambique, Myanmar, Nigeria, the Philippines, Somalia, South Sudan, Sudan, Syria, and Yemen.²⁹⁶ Children of all genders and ages were abducted, by national armed forces, armed groups, and other actors.

In an echo of the identity-altering allegations both in Ukraine and in *RuSHA*, “indoctrination” was said to have motivated some abductions in Somalia.²⁹⁷ Many other abductions were said to have occurred for purposes such as sexual violence, recruitment and use in hostilities, or punishment, without specific reference to whether the abductors also sought fully to sever

293. By way of example, a U.N. experts' statement on separations resulting in prohibited transnational adoptions cited numerous child rights: rights to non-discrimination; rights of family protection; the right of children to preserve aspects of identity including name, nationality, and family relations; rights to privacy; and rights to truth and reparation. Press Release, U.N. Off. of High Comm'r for Hum. Rts., *Illegal Intercountry Adoptions Must Be Prevented and Eliminated: UN Experts* (Sept. 29, 2022); see also *supra* notes 173–175 and accompanying text (listing numerous rights contained in the Child Rights Convention, *supra* note 8).

294. See *supra* notes 2, 155–156 and accompanying text.

295. Secretary-General Report, *supra* note 201, ¶¶ 4, 6–7 (noting issue of underreporting, even while reporting high overall numbers or year-to-year increases in Afghanistan, Burkina Faso, Colombia, Democratic Republic of Congo, Israel and State of Palestine, Lebanon, Libya, Mali, Nigeria, Myanmar, Somalia, South Sudan, Sudan, Syria, Ukraine, and Yemen).

296. Secretary-General Report, *supra* note 201.

297. *Id.* ¶¶ 4, 157, 318.

the children's ties to their families and communities. As shown in studies of so-called "child soldiers"—children in armed forces or armed groups—circumstances and experiences vary.²⁹⁸ Any taking thus might involve an effort to alter a child's identity, even if accounts of it give primary consideration to some other purpose.

Evidence of this surfaced in two reports from Syria, since 2011 the site of armed conflict and consequent mass displacement. In 2016, the Independent Inquiry Commission on Syria reported that the armed group ISIS had "taken from their mothers" children of the Yazidi religious minority.²⁹⁹ The girls were "sold as sex slaves" and the boys taught "how to fight," the report stated, adding that boys were "converted," or "instructed on how to follow Islam as interpreted by ISIS," while girls were "prevented from practising their religion," thus eroding "Yazidi children's concept of themselves as Yazidi, erasing their attachment to the Yazidi religion."³⁰⁰ Then in 2023 came a U.N. expert's account of the harms caused by the takings of boys in detention camps run by the Syrian Democratic Forces, takings based on a blanket presumption that adolescence had made the boys a security risk.³⁰¹ "Every single boy child I met was clearly traumatised by the separation from their mothers, often reported as violent," said Fionnuala Ní Aoláin, then serving as U.N. Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, immediately after her visit to the camps.³⁰² She challenged the camps' stated desire for the children's "rehabilitation," stressing instead "the enormous trauma and harm" likely to result from the forced separation.³⁰³ These two reports thus identified, within allegations of sexual violence, recruitment, and security detention in Syria, contemporary examples of child-taking as theorized in this article.

298. See *supra* notes 176–178 and accompanying text.

299. U.N. Hum. Rts. Council, Rep. of the Indep. Int'l Comm'n of Inquiry on Syrian Arab Republic on Its Thirty-second Session, "They Came to Destroy": ISIS Crimes Against the Yazidis, A/HRC/32/CRP.2 (June 15, 2016).

300. *Id.* ¶¶ 147–49.

301. Press Release, U.N. Off. of High Comm'r for Hum. Rts., *Syria: UN Expert Calls for an End to Mass Arbitrary and Indefinite Detentions and Urges Protection for Children in Northeast Syria* (July 21, 2023) [hereinafter UN Expert], <http://www.ohchr.org/en/press-releases/2023/07/syria-un-expert-calls-end-mass-arbitrary-and-indefinite-detentions-and-urges>; U.N. Off. of the High Comm'r for Hum. Rts., Technical Visit to the Northeast of the Syrian Arab Republic: End of Mission Statement, ¶ 9 (July 21, 2023) (quoting from Special Rapporteur's written account of the same visit, that "[s]he is appalled by the forced arbitrary separation of hundreds of adolescent boys from their families, specifically mothers," and concluding that the "practice constitutes at a minimum . . . a disappearance under international law, in direct contravention of inter alia the Children's Rights Convention.").

302. UN Expert, *supra* note 301.

303. *Id.*; cf. *supra* note 242 and accompanying text (quoting the same expert's description of the harm that such separations cause to mothers).

2. Temporal Axis: Residential Schools for Indigenous Children and Other Child-Takings across Centuries

Looking back centuries, the stories that the Polish and Czech child witnesses recounted in *RuSHA*, and that Ukrainian children tell today, resonate not least with accounts given by Indigenous persons who spent their childhoods in state-mandated residential schools. “Over time, Indigenous children in places as distant from one another as East Africa, Australia, and Siberia would be separated from their parents and sent to residential schools,” stated one official commission in North America.³⁰⁴ The school systems’ global, colonialist context was stressed in that Canadian commission’s 2015 report—as it had been earlier in the 1997 report of an analogous Australian commission.³⁰⁵ In North America these schools operated, without full consent of the families involved, as early as the 1700s and as late as the 1990s.³⁰⁶

From the nineteenth century until after the Cold War, there were at least 150,000 such Indigenous residential schoolchildren in Canada alone.³⁰⁷ One was Melvina Stonechild, born about 1927 into the Peepeekisis First Nation in southern Saskatchewan.³⁰⁸ Her family “were very traditional,” with “sweats,” “pow-wows and feasts, all the Indian ways of life.”³⁰⁹ But such ceremonies

304. TRUTH AND RECONCILIATION COMM’N OF CANADA, HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 44 (2015) [hereinafter TRC CANADA], http://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf; see also Ioffe, *Transferring*, *supra* note 29, at 319–20, 322–24 (writing of schools in Australia, Canada, the Soviet Union, and the United States). See generally ANDREA SMITH, INDIGENOUS PEOPLES AND BOARDING SCHOOLS: A COMPARATIVE STUDY (Jan. 26, 2009).

305. TRC CANADA, *supra* note 304, at 43–53; AUSTRALIAN HUM. RTS. & EQUAL OPPORTUNITY COMM’N, BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES 27–29, 91–98, 219–22 (1997) [hereinafter AUSTRALIAN COMM’N].

306. BRYAN NEWLAND (ASSISTANT SECRETARY—INDIAN AFFAIRS), FEDERAL INDIAN BOARDING SCHOOL INITIATIVE: INVESTIGATIVE REPORT at 64–65 (May 2022) [hereinafter 2022 U.S. INDIAN BOARDING SCHS. RPT.], http://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf (citing the establishment of schools in Alaska, by the then-ruling Russian Empress, in 1793, as well as the United States’ continuation of such schools until 1969); TRC CANADA, *supra* note 304, at 3 (stating that Canada’s federal residential schools began in 1883 and ended in late 1990s); see also AUSTRALIAN COMM’N, *supra* note 305, at 33–51 (describing similar timeframe in Australia).

307. TRC CANADA, *supra* note 304, at 3 (estimating “150,000 First Nation, Métis, and Inuit students passed through” Canada’s federal residential schools).

308. *Obituary: Melvina Isabelle McNabb*, LEADER-POST (Regina, Sask.) (Aug. 9, 2003) [hereinafter *McNabb Obituary*], <http://www.newspapers.com/newspage/498687504> (indicating her death on Aug. 8, 2003, at Peepeekisis First Nation in Saskatchewan, her probable birth year, and her parents’ surname).

309. Ann B. Callahan, *On Our Way to Healing: Stories from the Oldest Living Generation of the File Hills Indian Residential School* 66, 67–68 (2002) (M.A. thesis, University of Manitoba) (quoting Melvina McNabb, Aug. 8, 2001), <http://mspace.lib.umanitoba.ca/items/23c01c46-b309-4feb-8cc9-8264046da1c6>. Unless otherwise indicated, McNabb’s recollections in this paragraph may be found in *id.* at 66–73.

were forbidden at File Hills, the church-run industrial school where Melvina was taken to live until turning sixteen.³¹⁰ Decades later, when she was a seventy-four-year-old great-grandmother known as Melvina McNabb, she told a researcher of her experience. She had been made to “work hard” in the school’s bakery, dairy, and kitchen, and she still bore a ten-inch scar from the school’s laundry machine. “I went to school when I was seven years old and I couldn’t talk a word of English,” she recalled. “I talked Cree and I was abused for that, hit, and made to try to talk English.”

McNabb died two years to the day after that 2001 interview,³¹¹ without ever having told her story in a court of criminal law. Indeed, during the century of Canadian residential schools, no one ever was tried for child-taking, and very few persons were prosecuted even for physical abuse.³¹² Yet the absence of a criminal law forum failed to efface McNabb’s story. Survivors and other advocates forced the schools’ history onto the national agenda, with an eventual civil-litigation settlement requiring the establishment of the Truth and Reconciliation Commission of Canada.³¹³ In 2015 McNabb’s words, along with those of thousands of other survivors, became part of the Commission’s official record.³¹⁴ That record documented a system whose primary purpose, the Commission found, was “separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Canadian society.”³¹⁵ Through compelled attendance at the residential schools, Canada had targeted Indigenous groups for “cultural genocide” characterized by “the destruction of those structures and practices that allow the group to continue as a group,” the Commission asserted; in particular, “families are disrupted to prevent the transmission of

310. Established in 1889 by Presbyterian Women’s Missionary Society, File Hills was operated by the United Church of Canada from 1925 until the school’s closure in 1949. Many of these years, more than a hundred students were overcrowded into the school. SHUANA NIESSEN, *SHATTERING THE SILENCE: THE HIDDEN HISTORY OF INDIAN RESIDENTIAL SCHOOLS IN SASKATCHEWAN* 56–59 (2017); Callahan, *supra* note 309, at 4–5.

311. See *McNabb Obituary*, *supra* note 308; Callahan, *supra* note 309, at 68.

312. TRC CANADA, *supra* note 304, at 164–66 (acknowledging that Canada’s legal system secured “fewer than fifty convictions,” compared with “nearly 38,000 claims of sexual and serious physical abuse”).

313. *Id.* at v.

314. *Id.* at 82 (quoting Aug. 8, 2001, statement by McNabb in Callahan, *supra* note 309, at 68); see *id.* at v (stating that over 6,000 persons had been heard by Commission).

315. *Id.* at v; cf. Rabiat Akande, *An Imperial History of Race-Religion in International Law*, 118 AM. J. INT’L L. 1, 8–9 (2024) (citing the forced residential schooling of Indigenous children in the Americas as exemplary of “European colonial ambition”). The Truth and Reconciliation Commission further linked Canada’s schools to “reformatories” in England and United States, into which were placed poor, urban children. TRC CANADA, *supra* note 304, at 58. These examples are certainly not comprehensive, but exploration of all such incidents is beyond this article’s scope.

cultural values and identity from one generation to the next.”³¹⁶ The Commission laid blame for the Canadian practice at the feet of Canada’s first Prime Minister and of many other governmental, law enforcement, and church officials who followed him.³¹⁷

Even as Canada’s process continued, the United States undertook new steps in its own process of reckoning with what a 2022 U.S. Department of Interior report called “Indian Child Removal”; that is, a century-plus U.S. policy intended “to compel Indian parents to send their children” to off-reservation boarding schools.³¹⁸ Having identified more than 400 “Federal schools across 37 states or then-territories,” the 106-page report set forth the legal framework that supported the schools.³¹⁹ “The Federal Indian boarding school system deployed systematic militarized and identity-alteration methodologies to attempt to assimilate American Indian, Alaska Native, and Native Hawaiian children through education,” the report said.³²⁰ Citing techniques familiar to readers of Canada’s Truth and Reconciliation report, the Department of Interior report stated that U.S. schools engaged in: “renaming Indian children from Indian to English names”; “cutting hair of Indian children”; and, for the purpose of compelling the children “to adopt western practices and Christianity,” “discouraging or forbidding” speaking Indigenous languages, following Indigenous cultural practices, or exercising Indigenous religions.³²¹

316. TRC CANADA, *supra* note 304, at 1 (distinguishing cultural genocide from what report termed “physical genocide,” or “mass killing of members of a targeted group,” and “biological genocide,” or “destruction of the group’s reproductive capacity”) (emphasis omitted). On the debates regarding various forms of genocide, see *supra* text accompanying notes 251–78 and *infra* text accompanying notes 354–357.

317. On that first Prime Minister, John A. Macdonald (1815–1891), see TRC CANADA, *supra* note 304, at 2–3.

318. 2022 U.S. INDIAN BOARDING SCHS. RPT., *supra* note 306, at 35. Earlier steps in that process occurred, as University of Pennsylvania Law Professor Dorothy E. Roberts has written, when “Native activism pressured Congress to conduct hearings in 1974, 1976, and 1977 to listen to testimony from Native people on the damage inflicted by its child-taking policies.” DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 106–07 (2022). Those efforts led to passage of the Indian Child Welfare Act, 25 U.S.C. §§ 1901–63, a statute upheld in *Haaland v. Brackeen*, 599 U.S. 255 (2023). The concurrence in that judgment relied in part on 2022 U.S. INDIAN BOARDING SCHOOLS RPT., *supra* note 306, for its account of the taking of Indigenous children coupled with efforts to alter their identities. *Haaland*, 599 U.S. at 296, 298–301 (Gorsuch, J., concurring).

319. See 2022 U.S. INDIAN BOARDING SCHS. RPT., *supra* note 306, at 6. This initial federal report listed 408 such schools. *Id.* That number was changed to 417 in a subsequent report, issued in mid-2024. BRYAN NEWLAND (ASSISTANT SECRETARY—INDIAN AFFAIRS), FEDERAL INDIAN BOARDING SCHOOL INITIATIVE: INVESTIGATIVE REPORT, Vol. II, at 5, 13 (July 2024) [hereinafter 2024 U.S. INDIAN BOARDING SCHS. RPT.], http://www.bia.gov/sites/default/files/media_document/doi_federal_indian_boarding_school_initiative_investigative_report_vii_final_508_compliant.pdf.

320. *Id.* at 7.

321. *Id.* at 7, 53.

Among the many children forced to attend such schools was a boy given the Alaska Native name of Aqpayuq upon his birth in Fairbanks in 1947—the same year that U.S. judges at Nuremberg were adjudicating the child-kidnapping charges lodged against the Nazi defendants in *RuSHA*.³²² Eight years later the boy’s mother was widowed and suffering from alcoholism. Authorities made her relinquish Aqpayuq—also known as Jim LaBelle—and his brother to a boarding school 700 miles away. LaBelle’s recollections of the decade that he spent in first one and then another such school resonate with those of Melvina Stonechild McNabb. “The children who could not speak English did not know how to follow the rules and every time they opened their mouths they spoke in their own language. They were constantly beat,” LaBelle told a congressional committee in 2022. “Those who spoke their language were placed on a high stool and given dunce caps. We unwittingly became part of the process of helping our classmates assimilate.” Abuse was endemic, and the traditions of his people, even his ties with his mother, were erased. “At the end of 10 years,” he said, “I did not know who I was as a Native person.” LaBelle’s account places such experiences well within this article’s conceptualization of child-taking.³²³

D. *Selectivity, Randomness, and the Situation in Ukraine*

Many of the Canadians implicated in the report of the Truth and Reconciliation Commission were deceased, and given the passage of decades, the same is likely true of the United States’ Indian boarding-schoolmasters. Time, therefore, has rendered individual accountability beyond reach. That fact conjures consideration of the asymmetries by which criminal behavior incurs punishment—or not. Even within national systems, many crimes never are reported to authorities;³²⁴ as for reported crimes, the extent to which prosecutions are pursued, or not, depends on a host of internal and external factors including financial resources, staffing, stated priorities, and societal

322. For the quotations and biographical information in this paragraph, see LaBelle, *supra* note 218; Dana Hedgpeth, ‘12 Years of Hell’: Indian Boarding School Survivors Share Their Stories, WASH. POST (Aug. 7, 2003), <http://www.washingtonpost.com/history/2023/08/07/indian-boarding-school-survivors-abuse-trauma/>; Bill Roth, ‘Healing Event’ at Alaska Native Heritage Center Commemorates Children Who Died at Residential Schools in Canada, ANCHORAGE DAILY NEWS (last updated July 24, 2021), <http://www.adn.com/alaska-news/rural-alaska/2021/07/23/healing-event-at-alaska-native-heritage-center-commemorates-children-who-died-at-residential-schools-in-canada>.

323. On that conceptualization, see *supra* text accompanying notes 230–250; for more on the experiences of Alaska Native children, see Holly Mohawk Guise, *Alaskan Segregation and the Paradox of Exclusion, Separation, and Integration*, in TRANSFORMING THE UNIVERSITY: ALASKA NATIVE STUDIES IN THE 21ST CENTURY 274 (2014).

324. See generally John Gramlich, *What the Data Says (and Doesn’t Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), <http://www.pewresearch.org/short-reads/2020/11/20/facts-about-crime-in-the-u-s> (setting forth data and chart demonstrating that “[f]ewer than half of crimes in the U.S. are reported, and fewer than half of reported crimes are solved”).

distributions of power and prejudice. This dynamic is amplified in international systems, not least because they operate at greater physical distance from the scene of the crime. Also more important is international systems' complicated relationship with national systems. The ICC's mandate of complementarity, for example, requires the ICC to rely on state cooperation, and even to cede jurisdiction whenever a state is willing and able to mount its own investigations.³²⁵

International criminal law commentators frequently label this complex of issues selectivity.³²⁶ It may be more useful to think instead of selectivity and randomness.³²⁷ The term "selectivity" might better be reserved for internal factors—for the choices made by actors operating within the four corners of a particular statute. Prosecutorial choices include: the kinds of cases they pursue, where, and with what intensity; whom they investigate and seek to convict; which witnesses they call; and what other evidence they adduce at trial. Also relevant are tribunal results; that is, the choices that a tribunal's judges make based on submissions they have received not only from lawyers for the prosecution but also from lawyers for the defense and, in systems like the ICC, from lawyers for victims. Equally of interest are the choices not made, the incidents and the individuals not pursued.³²⁸

Meanwhile, "randomness" points to external factors. These factors result from selections made by external actors, and so remain beyond the full control of individuals acting within a particular tribunal. One such factor is who comes into custody. International criminal forums typically have no power of arrest, so that whom they prosecute depends on happenstance; on capture by cooperative states, for instance, or on calculated surrender by the accused themselves. Similarly beyond internal control is the question of which accused persons manage to elude custody or conviction, whether by use of power or fact of death. The late Serbian President Slobodan Milošević is a prime example of the latter, and Russian President Vladimir Putin may prove

325. See ICC Statute, *supra* note 9, arts. 1, 17, 86–102 (describing complementarity and ICC-state cooperation); KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME III: INTERNATIONAL CRIMINAL PROCEDURE 266 (2016) (distinguishing the national-international relationship of complementarity and distinguishing it from a relationship of primacy).

326. See, e.g., STAHN, *supra* note 62, at 7; René Provost & Myriam Denov, *From Violence to Life: Children*, 53 N.Y.U. J. INT'L L. & POL. 1, 58 (2020); Theodor Meron, *The Humanization of International Humanitarian Law*, 94 AM. J. INT'L L. 239, 277 (2000); Ingrid Wuerth [Brunk], *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 313, 335 (2017).

327. See Amann, *Genocide*, *supra* note 62, at 116–17 (outlining, with citations to tribunal decisions, a framework of selectivity and randomness upon which this article builds); see also ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 191 (2005) (quoting Timothy L.H. McCormack, *Selective Reaction to Atrocity*, 60 ALB. L. REV. 681, 683 (1996–97) (positing a "dual selectivity" that pertains both to "acts the international community is prepared to characterize" as "war crimes" and to "atrocities the international community is prepared to collectively prosecute").

328. See *supra* note 64 and accompanying text.

to exemplify the former.³²⁹ A profoundly important external factor is what this author elsewhere labeled the “random confluence of political concerns” leading to the creation, or not, of forums for individual criminal accountability.³³⁰ Throughout many long centuries, geopolitical power brokers stymied the creation of any court that could call to account their own crimes—crimes of war, empire, colonization, and related practices. Eventually such courts did emerge, in the form of the 1940s post-World War II tribunals and their 1990s post-Cold War counterparts. Both of these, however, were the products of milestone moments with no guaranteed longevity. Both have been constrained by jurisdictional boundaries embedded in their governing statutes.³³¹ At times, moreover, both have been affected by developments among the five permanent, veto-wielding members of the U.N. Security Council.³³²

Combined, selectivity and randomness go a long way to explain the caprices of international criminal law. A read of the *RuSHA* transcripts, for instance, suggests that the suicides of Hitler and Himmler—the Nazi leaders most responsible for the genocidal program on trial—sapped efforts to convict all the lower-ranking defendants.³³³ As for child-takings related to the Indigenous residential schools in North America, Australia, and other colonialist settings, international prosecutions were unimaginable before and after World War II. The Allies did not put themselves on trial in the Nuremberg era. Philippe Sands has reminded that IMT prosecutors, seeking to defend the practices of Allied victors even as they condemned the Nazi defendants, “contrasted Germany’s behaviour with ‘legitimate’ British and French approaches to colonialism.”³³⁴ What is more, international jurisdiction over crimes committed against a state’s own nationals was not fully confirmed until the turn

329. See ICTY, *Update from the President on the Death of Slobodan Milosevic* (Mar. 17, 2006), <http://www.icty.org/en/sid/8781>; Alexandra Sharp, *Putin to Miss Upcoming BRICS Summit to Evade ICC Warrant*, FOREIGN POL’Y (July 19, 2023), <http://foreignpolicy.com/2023/07/19/icc-putin-warrant-ramaphosa-brics-summit-south-africa-russia>.

330. Amann, *Genocide*, *supra* note 62, at 116.

331. Compare, e.g., IMT Charter, *supra* note 74, art. 6 (limiting jurisdiction according to *inter alia* war context, subject matter, and “European Axis” affiliation of prospective defendants), with ICC Statute, *supra* note 9, arts. 6–8*bis*, 11–16, 24–26 (limiting jurisdiction according to *inter alia* time, place, nationality, and subject matter).

332. A recent empirical study demonstrated that even in the absence of an overt external constraint, internal actors’ perception that such a constraint is present likewise may affect their choices. Nicola Palmer & Tomas Hamilton, *Legal Humility and Perceptions of Power in International Criminal Justice*, 23 INT’L CRIM. L. REV. 416, 442 (2022).

333. See *supra* notes 77–79, 85, 133, and accompanying text.

334. PHILIPPE SANDS, *THE LAST COLONY: A TALE OF EXILE, JUSTICE AND BRITAIN’S COLONIAL LEGACY* 19 (2022); see *supra* note 70 (stating that judges in Allied tribunals came not only from Britain and France, but also other countries discussed in this article—Australia, Canada, Russia, and the United States). Many works explore aspects of this double standard. See generally PETER MAGUIRE, *LAW AND WAR* (2001); MOSES, *supra* note 89; SCHABAS, *COLOUR LINE*, *supra* note 153; MOURALIS, *supra* note 153.

of the millennium;³³⁵ by then, of course, most perpetrators of the colonialist child-takings were long gone.

Today, many acts that constitute the phenomenon that this article calls child-taking are crimes that may be subject to international prosecution.³³⁶ But that fact matters little unless two other considerations align: first, a confluence of external political factors must place those crimes within a tribunal's jurisdiction; and second, the tribunal's internal staff must choose to pursue them with efficacy. Just such a process propelled to the top of the ICC's agenda Russia's alleged takings of Ukrainian children, even as the overall conduct of the Russia-Ukraine war seized the attention of myriad states, international organizations, and civil society actors.³³⁷ But misalignment of the same factors has precluded the exercise of international criminal jurisdiction over the alleged takings of children in Syria, not to mention the myriad of crimes committed against victims of all ages and identities since the start of that country's civil war.³³⁸ The same is true for allegations of coercive residential school practices ongoing in China and for any number of other situations throughout the world.³³⁹

This state of affairs might stir concern that Ukraine ought to be downplayed—that prosecutions for alleged international crimes in Ukraine ought

335. See Marco Sassòli & Laura M. Olson, *International Decision: Prosecutor v. Tadić*, 94 AM. J. INT'L L. 571, 572–73 (2002) (explaining “arguably revolutionary interpretation” by which ICTY Appeals Chamber extended protection against war crimes to victims of same nationality as defendant); *Prosecutor v. Akayesu*, ICTR-96-04, Appeals Chamber Judgement (June 1, 2001), available at <http://ucr.irmct.org/scasedocs/case/ICTR-96-04> (confirming conviction, by International Criminal Tribunal for Rwanda Trial Chamber, of Rwandan local official on charges of committing genocide against other Rwandans).

336. See *supra* notes 231–294 and accompanying text.

337. See *supra* Part II.B.

338. See Secretary-General Report, *supra* note 201, ¶ 191 (discussing the “2,438 grave violations against 2,407 children (2,059 boys, 312 girls, 36 sex unknown)” that the United Nations verified in Syria during 2022). See also BETH VAN SCHAACK, *IMAGINING JUSTICE FOR SYRIA* 53–120 (2020) (discussing absence of international criminal jurisdiction over Syria by analyzing the U.N. Security Council).

339. See Press Release, U.N. Off. of High Comm’r for Hum. Rts., *China: Xinjiang’s Forced Separations and Language Policies for Uyghur Children Carry Risk of Forced Assimilation, Say UN Experts* (Sept. 26, 2023), <http://www.ohchr.org/en/press-releases/2023/09/china-xinjiangs-forced-separations-and-language-policies-uyghur-children> (reporting on the expression of “grave concern,” regarding boarding school system operated by Chinese government in its Xinjiang province, by three U.N. Special Rapporteurs—respectively, for minority issues, on the right to education, and in the field of cultural rights—on the ground that this system “fails to provide education in the children’s mother tongue and forcibly separates Uyghur and other minority Muslim children from their families and communities, leading to their forced assimilation”); U.N. Off. of High Comm’r for Human Rts., *China: UN Experts Alarmed by Separation of 1 Million Tibetan Children from Families and Forced Assimilation at Residential Schools* (Feb. 6, 2022), <http://www.ohchr.org/en/press-releases/2023/02/china-un-experts-alarmed-separation-1-million-tibetan-children-families-and> (reporting on 2022 communication to China, by same three U.N. Special Rapporteurs, on allegations of the forced placement of Tibetan children into boarding schools). See *supra* text accompanying notes 254, 291–296 (mentioning other contemporary examples).

to be postponed until other serious allegations receive equivalent attention.³⁴⁰ But that cannot be correct. The degree of damage already is incalculable, in a country and region that endured similar harms in the not-too-distant past.³⁴¹ Rather, the lack of equivalence should be heard as a clarion call for renewed attention to all the world's conflicts and for a redoubling of efforts to investigate, prosecute, and punish international crimes wherever they may occur.

E. *Justice beyond the Criminal Courtroom*

Even with the best efforts, often no criminal cases ever will take shape. Those that do are likely to seem inadequate. Charges may not reflect the full scope of alleged culpability. Courtroom strategies will turn on evidentiary factors, without consideration of any person's desire to bear witness. Few of the persons deemed most responsible ever may be brought into custody. Those who do may escape conviction, and the sentences levied on the convicted may fall short of what some consider just deserts. These are the plain facts of criminal justice, national or international. They should not, however, be cause for despair.

The goals of justice—redress as well as prosecution, and prevention perhaps above all—are better served when criminal justice forms one part of a comprehensive system. Often this system goes by the name of “transitional justice,”³⁴² notwithstanding that preventive efforts need not wait until the actual commission of harm requires a transition to something less harmful. Regardless of label, the system should aim for a “bespoke” justice, as Temple

340. Such concerns find voice not infrequently in the classroom. A recent article provides a hypothetical example: “One student enquires about the legality of the 2003 invasion of Iraq. Other than religion and skin colour, what’s so different about Ukraine, they wonder? Will the ICC issue arrest warrants for Blair and Bush?” Mohsen al Attar & Rafael Quintero Godínez, *TWAIL Pedagogy: Un-Learning Colonial Ways of Teaching International Law*, OPINIO JURIS (Mar. 23, 2023), <http://opiniojuris.org/2023/03/23/twail-pedagogy-un-learning-colonial-ways-of-teaching-international-law>. On public debates regarding Ukraine, see Patryk I. Labuda, *Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law’s Selectivity in the Wake of the 2022 Ukraine Invasion*, 36 LEIDEN J. INT’L L. 1095, 1098–1112 (2023).

341. By way of example, official extracts of the *RuSHA* trial spoke of World War II-era harms in Ukraine nearly two dozen times. NMT TRIALS, *supra* note 56, vol. IV, at 718, 772, 782, 822, 836, 853, 869, 934, 938, 966, 1021, 1141; *id.*, vol. V, at 96, 122, 134, 141–42, 184; Heinemann, *supra* note 78, at 6 (linking Nazi child-takings to Ukraine). *See also* PACE Res. 2516, *supra* note 254 (recognizing Holodomor, the famine which ravaged Ukraine in 1932–33, when it was part of the Soviet Union, “as an act of genocide intended to break the backbone of Ukrainian nationhood, language and culture”); Denys Azarov, Dmytro Koval, Gaiane Nuridzhanian & Volodymyr Venher, *Understanding Russia’s Actions in Ukraine As the Crime of Genocide*, 21 J. INT’L CRIM. JUST. 233, 240–61 (2023) (discussing relevant Ukrainian history and interactions); Labuda, *supra* note 340, at 16–19 (articulating Ukraine’s status as post-colonial society); Maria Mälksoo, *The Postcolonial Moment in Russia’s War against Ukraine*, 25 J. GENOCIDE RSCH. 471, 473 (2023) (calling Ukraine “among the most flagrantly neglected cases of Soviet colonialism”).

342. *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000).

University Law Professor Jaya Ramji-Nogales aptly put it.³⁴³ Depending on the setting, particular initiatives will be selected from an array of mechanisms. Forensic mechanisms may include criminal prosecutions at international, national, and hybrid levels, as well as investigating mechanisms, civil lawsuits, truth commissions, and commissions of inquiry. Some of the latter initiatives may afford opportunities for members of affected communities to describe their experiences, express their views, and otherwise participate.³⁴⁴ With an eye to restoration and prevention, moreover, monetary damages, promises of non-repetition, and other forms of reparation will be available, as well as political, educational, and psychosocial reforms. The custom-made mix of mechanisms chosen will vary with time and place, reflecting the realities of what, at any given moment, is both possible geopolitically and meaningful locally.

Canada's ongoing processes respecting Indigenous boarding schools may offer models, some of which the United States, among others, might consider adapting.³⁴⁵ Canada's reckoning with its history of child-taking—its placement of Indigenous children into residential schools designed to indoctrinate them into the dominant non-Indigenous culture—did not and could not entail criminal proceedings.³⁴⁶ Instead, this reckoning has played out in multiple forums: civil litigation, academic research, and cultural production. At the House of Commons in Ottawa, the Prime Minister declared in 2008 that “the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. . . . Nous le regrettons / We are sorry / Nimitataynan / Niminchinowesamin / Mamiattugut.”³⁴⁷ The Truth

343. Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 67–70 (2010).

344. See, e.g., UNICEF INNOCENTI RSCH. CTR. WITH INT'L CTR. FOR TRANSITIONAL JUST., CHILDREN AND TRUTH COMMISSIONS, U.N. Sales No. E.10XX.3, at xiii (Aug. 2010), available at <http://reliefweb.int/report/world/children-and-truth-commissions> (stating, based on study of post-conflict processes in several countries, that “[t]ruth commissions present an important venue for children’s voices to be heard and for their needs to be addressed,” and setting forth guidelines).

345. Recommendations in the 2022 Department of Interior report included: identifying living survivors of the schools as well as gravesites of children who died in those schools; revitalizing Indigenous languages; promoting health research; and establishing a memorial. 2022 U.S. INDIAN BOARDING SCHS. RPT., *supra* note 306, at 94–100. See also *Interior Department Launches Effort to Preserve Federal Indian Boarding School Oral History*, U.S. DEP'T OF INTERIOR (Sept. 26, 2023), <http://www.doi.gov/pressreleases/interior-department-launches-effort-preserve-federal-indian-boarding-school-oral> (stating a second volume of this report soon would be published and announcing initiative to “document and make accessible the experiences of the generations of Indigenous children who attended the federal boarding school system”).

346. See *supra* text accompanying notes 311–317; see also Ioffe, *Transferring*, *supra* note 29, at 322–24 (discussing efforts related to similar schools in Australia and the United States).

347. *Statement of Apology to Former Students of Indian Residential Schools*, GOV'T OF CANADA (June 11, 2008), <http://www.rcaanc-cimac.gc.ca/eng/1100100015644/1571589171655> (transcript of statement by Prime Minister Stephen Harper); see also Linda Diebel, *Harper 'Sorry' for Native Residential Schools*, TORONTO STAR (June 12, 2008),

Commission, which operated from 2008 to 2015, held events across the country, fought to secure sealed official documents, and created a national research center.³⁴⁸ That Canadian commission's multi-volume report was supported by an easy-to-access 535-page executive summary containing survivors' statements, histories of the schools, apologies by some institutions, and calls for future action.³⁴⁹ More recently, in 2023, the government agreed to pay well over \$2 billion to settle a class action arising out of the residential schools practice.³⁵⁰ The government's effort nevertheless has drawn criticism for the narrowness of its scope.³⁵¹ What is more, it was not until late 2022 that Pope Francis, leader of the Roman Catholic Church, made what he called "a penitential pilgrimage" to Canada in order to "ask forgiveness, in particular, for the ways in which many members of the church and of religious communities co-operated, not least through their indifference, in projects of cultural destruction and forced assimilation promoted by the governments of that time, which culminated in the system of residential schools."³⁵²

Australia's process also provides lessons, with even greater notes of caution.³⁵³ The nearly 700-page report that Australia's Human Rights and

http://www.thestar.com/news/harper-sorry-for-native-residential-schools/article_98d17e16-88b3-5d0a-98fb-04e601df01db.html (describing event).

348. See TRC CANADA, *supra* note 304, at 23–35.

349. See *id.*

350. See *Federal Court Approves Band Class Litigation Settlement Agreement*, GOV'T OF CANADA (Mar. 21, 2023), <http://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2023/03/federal-court-approves-band-class-litigation-settlement-agreement0.html>. (In this article, amounts have been converted to their equivalent value in U.S. dollars.) For another, related development, see NAT'L INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, RECLAIMING POWER AND PLACE: THE FINAL REPORT OF THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS (2019), discussed generally in Umut Özsu, *Genocide as Fact and Form*, 22 J. GENOCIDE RSCH. 62 (2020).

351. See, e.g., Couchie, *supra* note 292, at 408 (asserting that governmental action "remains myopically focused on a narrow subset of the harms and forms of violence inflicted upon Indigenous peoples in Canada"—in particular, on the residential schools policies—even as "other forms of settler-colonial atrocity violence . . . remain largely overlooked").

352. See The Canadian Press, *Read the Full Text of Pope Francis' Apology to Residential School Survivors*, NAT'L POST (Toronto), July 25, 2022, <http://nationalpost.com/news/canada/deplorable-evil-full-text-of-the-popes-residential-school-apology>.

353. Investigation of past treatment of children is also under way in New Zealand, but its focus differs from the Australian, Canadian, and U.S. processes. Since 2018, a commission has looked into New Zealand's history of separating children said to have special needs from their communities and placing them into so-called care homes—facilities that, given the age of their charges, also engaged in schooling. A 370-page interim report attributed the separation policy to "the strength of . . . eugenics and ableism . . . that informed this country's social policy at the time," and further stated that many institutionalized children were "street kids." ROYAL COMM'N OF INQUIRY INTO HIST. ABUSE IN STATE CARE & IN THE CARE OF FAITH-BASED INSTS. (ABUSE IN CARE ROYAL COMM'N OF INQUIRY), *STOLEN LIVES, MARKED SOULS*, ¶¶ 2, 6 (2023), <http://www.abuseincare.org.nz/assets/page-banners/Stolen-Lives/Stolen-Lives-Marked-Souls.pdf>. The commission's final report was made public on July 24, 2024. Abuse in Care Royal Comm'n of Inquiry, *About the Royal Commission*, <http://www.abuseincare.org.nz/about-us/about-the-royal-commission> (describing process leading to final report,

Equality Commission issued in 1997 resembles the 2015 Canadian report in that both contain historical surveys, survivors' statements, and recommendations. But where the latter spoke of "cultural genocide" in a sociological rather than a legal sense, the former report categorically concluded that the "forcible removals" of Australia's Indigenous children, with the "primary objective of" cutting them off from their "entire community," violated the law of the 1948 Genocide Convention.³⁵⁴ The Australian commission's "genocide conclusion," wrote La Trobe University Professor Robert Manne, generally "was treated by the Australian government, by the popular media, and by the right-wing intelligentsia with levity and derisive contempt."³⁵⁵ Within months of that commission's report, moreover, Australia's highest court set aside an invocation of genocide in the course of rejecting claims that a law authorizing removals of Indigenous children had violated the Australian Constitution.³⁵⁶ Subsequent restorative efforts have been fraught. An Australian Prime Minister's official apology for Indigenous school practices predated that of his Canadian counterpart; however, having resulted from heated political debate, the Australian apology touched off new rounds of national controversy.³⁵⁷ More than a dozen years later, and a quarter-century after the Australian commission's report, Australia made an offer of \$280 million in reparations for harms caused by its

WHANAKETIA—THROUGH PAIN AND TRAUMA, FROM DARKNESS TO LIGHT: WHAKAIRIHIA KI TE TIHI O MAUNGARONGO, <http://www.abuseincare.org.nz/reports/whanaketia>.

354. Compare AUSTRALIAN COMM'N, *supra* note 305, at 190, 270–75 (analyzing findings against precise requirements of Genocide Convention, *supra* note 11) with TRC CANADA, *supra* note 304, at 1, also discussed *supra* in note 316 and accompanying text. For criticism of the Canadian commission's approach, see generally Akhavan, *supra* note 260; Couchie, *supra* note 292.

355. Robert Manne, *Aboriginal Child Removal and the Question of Genocide, 1900–1940*, in GENOCIDE AND SETTLER SOCIETY: FRONTIER VIOLENCE AND STOLEN INDIGENOUS CHILDREN IN AUSTRALIAN HISTORY 217, 218 (A. Dirk Moses ed., 2004) [hereinafter GENOCIDE AND SETTLER SOCIETY]. Compare *id.* at 238 (reviewing history and concluding, in opposition to those who derided the commission's report, that practices took on a genocidal dimension in the 1930s, when policymakers, in the author's estimation, overtly adopted "a long-term plan for the elimination of the Aboriginal people"), with Russell McGregor, *Governance, Not Genocide: Aboriginal Assimilation in the Postwar Era*, in GENOCIDE AND SETTLER SOCIETY, *supra*, at 290, 307 (characterizing policy as one of "Aboriginal assimilation," which, "I contend, cannot be comprehended within the conceptual framework of genocide").

356. *Kruger v Commonwealth* [1997] HCA 27; 190 CLR 1 (1997); see also Tony Buti, *Kruger and Bray and the Common Law*, 21 U.N.S.W. L.J. 232, 237–38 (1998) (providing succinct summary of complex judgment by High Court of Australia, including its discussion of genocide).

357. See Parliament Australia, *Apology to Australia's Indigenous Peoples*, http://www.aph.gov.au/Visit_Parliament/Art/De-commissioned/De-Commissioned_Pages/Custom_Media/Apology_to_Australias_Indigenous_Peoples (containing text of Feb. 13, 2008, formal apology by brand-new Prime Minister Kevin Rudd); Danielle Celermajer & A. Dirk Moses, *Australian Memory and the Apology to the Stolen Generations of Indigenous People*, in MEMORY IN A GLOBAL AGE: DISCOURSES, PRACTICES AND TRAJECTORIES 32, 36–46 (Aleida Assmann & Sebastian Conrad eds., 2010) (explaining context and significance of Rudd's apology).

Indigenous schooling system.³⁵⁸ Aiming to press for reconciliation on a range of anti-Indigenous practices, the present Prime Minister called an October 2023 vote on whether “to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.”³⁵⁹ But that referendum failed by a wide margin, in the wake of an electoral campaign marked by a former Prime Minister’s overt embrace of colonization and by online memes attacking specific Indigenous women activists.³⁶⁰ These developments shed light on the challenges confronting even bespoke transitional justice.

International law may play a role in meeting such challenges. International legal instruments have provided a framework in both the Australian and Canadian processes; for instance, cited in addition to the 1948 Genocide Convention were the 1945 U.N. Charter, 1965 International Convention on the Elimination of All Forms of Racial Discrimination, and 2007 U.N. Declaration on the Rights of Indigenous Peoples.³⁶¹ The U.N. Secretariat, Special Rapporteurs, and Special Representatives, among others, have figured in Ukraine, Syria, China, and other situations.³⁶² International legal institutions

358. Rachel Pannett, *Australia to Pay Hundreds of Millions in Reparations to Indigenous ‘Stolen Generations’*, WASH. POST (Aug. 5, 2021), <http://www.washingtonpost.com/world/2021/08/05/australia-indigenous-school-reparation>. This represented a fraction of the amount that Canada would pay a couple years later. See *supra* text accompanying note 350.

359. Australian Gov’t, Nat’l Indigenous Australians Agency, *Culture and Empowering Communities*, <https://www.niaa.gov.au/our-work/culture-and-empowering-communities> (quoting referendum text); see also Annabel Crabb & Brett Worthington, *Unlikely Alliances, Free-Flowing Misinformation, and Emotional Speeches Mark the Beginning of the Voice Campaign*, AUSTRALIAN BROAD. CORP. NEWS (Aug. 31, 2023), <http://www.abc.net.au/news/2023-09-01/the-voice-campaign-begins/102803246> (describing actions by Prime Minister Anthony Albanese).

360. Praveen Menon, *‘Reconciliation Is Dead’: Indigenous Australians Vow Silence after Referendum Fails*, REUTERS (Oct. 15, 2023), <http://www.reuters.com/world/asia-pacific/australian-indigenous-leaders-call-week-silence-after-referendum-defeat-2023-10-15>; Crabb & Worthington, *supra* note 359 (reporting on “scratchy and hostile” online commentary); Natasha Frost, *Colonization Was the ‘Luckiest Thing’ to Happen to Australia, Ex-Leader Says*, N.Y. TIMES (July 26, 2023), <http://www.nytimes.com/2023/07/26/world/australia/colonization-australia-britain.html> (quoting John Howard, who was Australia’s Prime Minister from 1996 to 2007 and, as described in Celermajer & Moses, *supra* note 357, at 38–39, the immediate predecessor of the Prime Minister who issued the 2008 apology).

361. AUSTRALIAN COMM’N, *supra* note 305, at 266–75 (applying *inter alia* U.N. CHARTER, Genocide Convention, *supra* note 11, and International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 165 (entered into force in 1969)); TRC CANADA, *supra* note 304, at 21–22 (discussing U.N. Declaration on Rights of Indigenous Peoples, Sept. 13, 2007, GA Res. 61/295, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf). The recent official U.S. process concentrates on its national legal framework; that said, its second report cited developments in other countries and encouraged “engagement on international Indigenous issues.” 2024 U.S. INDIAN BOARDING SCHS. RPT., *supra* note 319, at 104; *id.* at 21, 67–77.

362. See *supra* notes 49, 295–303, 339, and accompanying text (Syria, China, Ukraine). See also Off. of the Special Representative of the U.N. Secretary-General for Child. & Armed Conflict, *Syria*, <http://childrenandarmedconflict.un.org/tag/syria>, and *Ukraine*, <http://>

even may prod national processes, as with a U.N. committee's 2011 statement that it was "gravely concerned at the failure" of Ireland "to protect girls and women who were involuntarily confined between 1922 and 1996 in the Magdalene Laundries," the residential workhouses "where it is alleged that physical, emotional abuses and other ill-treatment were committed."³⁶³ International institutions may prove essential, in fact, especially for redress that requires cross-border cooperation. In this regard it is worth taking a last look at the 1948 newspaper column which opened this article: Eleanor Roosevelt raised an alarm about the Nazis' child-takings not to push for prosecutions, but rather to urge an international commitment to the return of lost boys and girls.³⁶⁴

V. CONCLUSION

The day may come when the Anya quoted in this article, or other Ukrainian children like her, testify to their experiences in a court applying international criminal law. If so, they will follow in the footsteps of other children, not least Maria Hanfova and the four other Czech and Polish children who took the witness stand seven decades ago at Nuremberg. Their testimony served a central and still-developing norm, that of children's right of participation.³⁶⁵ What is more, their moving courtroom presentations—along with that of a Czech mother who had lost her children—gave concrete meaning to the criminal conduct for which some, though not all, of the accused would be convicted. This article labels that conduct "child-taking." The term applies when a state or similar powerful entity, first, physically takes a child from its community, and second, endeavors, whether successfully or not, to alter, erase, or remake that

childrenandarmedconflict.un.org/tag/ukraine (describing work in these situations by Special Representative discussed *supra* text accompanying note 180).

363. Comm. Against Torture, Concluding Observations of the Comm. Against Torture: Ireland, ¶ 21, U.N. Doc. CAT/C/IRL/CO/1 (June 17, 2011), http://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f1&Lang=en, discussed in Maeve O'Rourke, *The Justice for Magdalenes Campaign*, in INTERNATIONAL HUMAN RIGHTS: PERSPECTIVES FROM IRELAND 145, 147 (Suzanne Egan ed., 2015). *But see* Máiréad Enright, *Coppin v. Ireland: Depressing Conservatism from the UN Committee Against Torture*, OPINIO JURIS (Feb. 12, 2023), <http://opiniojuris.org/2023/02/12/coppin-v-ireland-depressing-conservatism-from-the-un-committee-against-torture> (criticizing most recent consideration of Magdalene Laundries by same U.N. committee, which held in favor of Ireland's efforts in interim years). For an excellent case study of the interplay among justice mechanisms at all levels, see *generally* NAOMI-ROHT ARRIAZA, *THE PINOCHET EFFECT* (2005).

364. Roosevelt, *supra* note 1. *See* HIRSCHMANN, *supra* note 128, at 252–61 (1949) (describing, in book by envoy for head of U.N. Relief and Rehabilitation Administration ("UNRRA"), efforts made within that agency to locate and return Eastern European children who had been kidnapped during the war); PLESCH, *supra* note 150, at 138 (describing "UNRRA's painstaking and heart-rending social work" in this regard, which ended when, "in January 1947, the Truman Administration cancelled the programme and handed it over without any resources" to a new U.N. refugee agency).

365. *See supra* notes 107–122 and accompanying text.

child's identity. This theorization of child-taking derives from analysis of developments in international child law; formal definitions of international crimes like genocide, war crimes, and crimes against humanity; and exposition of historical and contemporary examples. Those examples include the World War II kidnappings at issue in the *RuSHA* trial at Nuremberg, as well as the pending ICC charges arising out of the Ukraine-Russia war. This article's analysis extends to other child-taking incidents, too, such as the forced placements of Indigenous children in residential schools and the ongoing separations of children from their families in Syria and elsewhere. Child-taking is shown to constitute a matter of international concern, which, like other rights violations, merits response through various forms of local or global transitional justice. Indeed, this article demonstrates that child-taking counts among the most serious violations, and thus may warrant prosecution in the ICC or other courts with power to adjudicate international crimes.

This article's formulation of child-taking does not require new legislation. It does not impose heavier burdens of proof upon prosecutors seeking convictions, nor upon advocates seeking redress. It relies instead on law's expressive force. The article imagines child-taking as a way of explaining, through narratives that play out in trial, in other transitional justice venues, and in popular discourse, the nature of the criminal phenomenon at issue. Within the courthouse, this deeper understanding of child-taking may affect charging, sentencing, and reparations. Elsewhere, it may open forums that will amplify voices like that of the onetime Alaska boarding-schoolchild Aypayuq/Jim LaBelle—voices of children, adults, and communities too long overlooked.

