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THE UNLAWFUL TRANSFER OR DEPORTATION OF A CHILD, UNJUSTIFIED DELAY IN THE REPATRIATION OF A CHILD, AND THE RECRUITMENT OR USE OF A CHILD TO PARTICIPATE IN ARMED CONFLICT OR MILITARY (COMBAT) OPERATIONS AS A WAR CRIME: CONTROVERSIAL ISSUES OF CLASSIFICATION

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Introduction

The protection of children's rights in situations of armed conflict occupies a special place within the framework of international human rights law, international humanitarian law, and international criminal law. Under international humanitarian law, children constitute the most vulnerable category of the civilian population and require a heightened level of legal protection.

It should be noted that the unlawful transfer or deportation of a child, unjustified delay in the repatriation of a child, and the recruitment or use of a child to participate in armed conflict or military (combat) operations are classified by the international community as international crimes, specifically war crimes, for which liability is established under international criminal law. This follows from the provisions of the 1949 Geneva Conventions and their Additional Protocols, the 1989 UN Convention on the Rights of the Child, the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, as well as the 1998 Rome Statute of the International Criminal Court; in particular, the state shall ensure special protection for children during armed conflicts and refrain from any actions that may lead to their forced displacement, unlawful detention, or involvement in military activities.

International bodies have developed a system for monitoring and responding to crimes against children in armed conflicts. Specifically, UN Security

Council Resolutions 1261, 1379, 1612, and 1998 established the Mechanism for Monitoring and Reporting on Violations of Children's Rights. This mechanism allows for the identification of parties responsible for the recruitment of children, attacks on schools and hospitals, sexual violence, and other serious violations. It also paves the way for sanctions against states or organizations that systematically violate the rights of minors.

At the same time, in response to the Russian invasion, Ukraine adopted a series of legislative measures aimed at ensuring the protection of children. Since the start of the full-scale war, more than 20 regulatory acts have been drafted and adopted, covering areas such as the evacuation of civilians, the creation of humanitarian corridors, the provision of medical and psychological assistance, support for orphans and children separated from their parents, as well as the introduction of electronic record-keeping to simplify the process of obtaining documents[912].

One of the measures taken by the legislature was the adoption of Law of Ukraine № 4499-IX of June 17, 2025, "On Amending Article 438 of the Criminal Code of Ukraine Regarding the Establishment of Liability for the Illegal Transfer, Deportation, or Unjustified Delay of a Child's Repatriation, and the Recruitment and Use of a Child for Military Purposes", specifically, Part 1 of Article 438 of the Criminal Code of Ukraine was amended by adding the words "unlawful transfer or deportation of a child, unjustified delay in the repatriation of a child, recruitment or use of a child to participate in an armed conflict or military (combat) operations" after the words "prohibited by international law". In light of the foregoing, we believe that this has both theoretical and practical significance in connection with the documentation of numerous instances of the unlawful transfer and deportation of Ukrainian children as a result of the Russian Federation's armed aggression, which necessitates a proper assessment of such acts under international law and the prosecution of those responsible.

1 The unlawful transfer or deportation of a child as a war crime

It should be noted that since the start of the Russian Federation's full-scale invasion of Ukraine, numerous violations of children's rights have been documented, including: the right to identity, the right to a family, the right

[912] Войтюк М. П. Захист прав дитини в умовах запровадженого в Україні правового режиму воєнного стану. *Війна в Україні: зроблені висновки та незасвоєні уроки* : зб. тез Міжнародної науково-практ. конф. (22–23 лютого 2024 року) / упор. У. О. Цмоць. Львів : Львів. держ. ун-т внутр. справ, 2024. С. 210.

to education, the right to rest, the right to leisure and participation in cultural life and the arts, as well as the right to liberty and security. This list of violated children's rights is incomplete, as a significant portion of the rights enshrined in the 1989 Convention on the Rights of the Child are being violated by the aggressor state every minute, and there is not a single children's right that has not been violated. However, the most dangerous of the violations of Ukrainian children's rights is their unlawful transfer, deportation, and subsequent change of citizenship.

In the report by Karina Odebryng, a member of the Swedish Parliament and the OSCE PA Parliamentary Support Group for Ukraine, titled "The Abduction and Deportation of Ukrainian Children by Russia", it is noted that "since the beginning of its full-scale invasion of Ukraine, the Russian Federation has systematically carried out a series of actions that can be classified as war crimes, including large-scale attacks on medical facilities, indiscriminate attacks on the civilian population, the deliberate destruction of cultural heritage, the torture and execution of prisoners of war, sexual violence, and looting"[913].

As for the activities of law enforcement agencies, according to data from the Office of the Prosecutor General of Ukraine, in October 2024, investigators documented the unlawful transfer and deportation of 31 children (16 boys and 15 girls) from the temporarily occupied territory of Donetsk Oblast to the Russian Federation. The youngest was 6 years old at the time, and the oldest was 17. They are charged with violating the laws and customs of war, committed by a group of persons acting in concert (Part 1 of Article 438 of the Criminal Code of Ukraine)[914]. This indicates that such criminal acts were classified under Article 438 of the Criminal Code of Ukraine.

But this is not an isolated case of such criminal offenses being documented, as the Office of the Prosecutor General of Ukraine is working to prove the forcible "illegal transfer of children from one ethnic group to another", which the Russians began immediately after the occupation of the Autonomous Republic of Crimea and certain districts of the Luhansk and Donetsk regions in 2014. For example, this fact is confirmed, in particular, by media reports stating that "after the annexation of Crimea, under the 'Train of Hope' program, children were transported to Russian regions where they were put up for adoption. At that time, there were about

[913] Викрадення та депортація українських дітей Росією. Спеціальна доповідачка Каріна Одебрінк. Член парламенту (ШВЕЦІЯ). Парламентська група підтримки України ПА ОБСЄ. URL: https://www.oscepa.org/en/documents/annual-sessions/2025-porto/reports-and-speeches-12/5295-russian-abductions-and-deportations-of-ukrainian-children-by-carina-oedebrink-ukr-1/file

[914] Депортація 31 української дитини до росії – голові так званої «днр» і двом окупаційним посадовицям повідомлено про підозру. *Головна – Офіс Генерального прокурора*. URL: https://gp.gov.ua/ua/posts/deportaciya-31-ukrayinskoyi-ditini-do-rosiyi-golovi-tak-zvanoyi-dnr-i-dvom-okupaciinim-posadovicyam-povidomleno-pro-pidozru

5,000 orphans in Crimea; their current whereabouts are unknown. Since then, deportations have taken place across all occupied territories"[915].

In the analytical report titled "Deportation of Ukrainian Citizens from Areas of Active Hostilities or from Temporarily Occupied Territories of Ukraine to the Russian Federation and the Republic of Belarus," the authors emphasize that "a significant portion of the deported individuals are children, who are in a particularly vulnerable position due to their age". The Russian army is removing orphaned children and children deprived of parental care from the occupied territories. There is information regarding the placement and adoption of such children into families of Russian citizens. Furthermore, the Russian Federation's Presidential Commissioner for Children's Rights, Maria Lvova-Belova, "adopted" a child from Mariupol"[916].

We also note that these facts have been recognized by the International Criminal Court, as on March 17, 2023, the Pre-Trial Chamber II of the ICC issued arrest warrants for two individuals in connection with the situation in Ukraine: President of the Russian Federation V. V. Putin and the Commissioner for Children's Rights in the Presidential Administration of the Russian Federation M. O. Lvova-Belova. Based on the Prosecutor's Office's requests dated February 22, 2023, Pre-Trial Chamber II concluded that there are reasonable grounds to believe that each suspect is responsible for a war crime in the form of the unlawful deportation of the population (children) and the unlawful transfer of the population (children) from the occupied territories of Ukraine to the Russian Federation, to the detriment of Ukrainian children[917].

At the same time, as I. Shkurat notes, an analysis of Ukraine's criminal legislation and the activities of the Office of the Prosecutor General of Ukraine it can be concluded that domestic legislation lacks a legal provision that would clearly and unambiguously regulate the criminal liability of persons who carried out the forced (as well as fraudulent, through abuse of trust) deportation or displacement of the civilian population, including children who are citizens of Ukraine[918]. Instead,

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[915] Андреєва, М. Україна формує міжнародну коаліцію для повернення дітей, яких викрала росія. УКРІНФОРМ. URL: https://www.ukrinform.ua/rubric-polytics/3827951-ukraina-formue-miznarodnu-koaliciu-dla-povernenna-ditej-akih-vikrala-rosia.html

[916] Депортація громадян України з території ведення активних бойових дій чи з тимчасово окупованої території України на територію Російської Федерації та Республіки Білорусь: Аналітичний звіт (2023). URL: https://zmina.ua/wp-content/uploads/sites/2/2023/01/deportation_ukr.pdf

[917] Політова, А. С., Грушко, М. В. (2023). Юрисдикція Міжнародного кримінального суду як спеціального суб'єкта протидії гендерно зумовленому насильству в умовах збройного конфлікту. *Наукові перспективи*, 8 (34), С. 536. https://doi.org/10.52058/2708-7530-2023-8(38)-529-540

[918] Шкурат І. О. Кваліфікація незаконного переміщення, депортації цивільного населення та дітей на тимчасово окупованій території України. *Актуальні проблеми сучасної науки в дослідженнях молодих учених, курсантів та студентів*. Вінниця, 2023. С. 604–605.

O. Marin notes that for the crime of genocide, a form of which is the forcible transfer of children from one group to another, the context lies in the destruction of a protected group, and is thus part of the so-called mental element, which, according to Ukrainian criminal law doctrine, resembles the subjective aspect of the offense. The aim of the perpetrator of genocide is the complete or partial destruction of the protected group. Regarding crimes against humanity, war crimes, and the crime of aggression, the contextual element lies in the objective conditions: for crimes against humanity, part of the material elements (objective characteristics) of the crime is a widespread or systematic attack on the civilian population, and for war crimes – an armed conflict. It is precisely the existence of an armed conflict that enables Ukrainian law enforcement agencies to classify the acts committed under Part 1 of Article 438 of the Criminal Code of Ukraine. However, such a criminal law assessment lacks precision and does not allow for distinguishing between crimes against humanity and war crimes[919]. However, it was the amendments introduced by Law of Ukraine № 4499-IX that partially implemented international standards by criminalizing the unlawful removal, deportation of children, and the delay of repatriation. However, significant problems remain: the lack of clear definitions of key terms ("unlawful transfer", "deportation"), difficulties in assessing the legality of "consent" to the transfer of children, and the disregard for the legal nullity of the occupying power's acts. This leads to ambiguity in law enforcement practice and reduces the effectiveness of countering war crimes[920].

In this regard, we agree with the scholars' position regarding potential conflicts in classifying criminal offenses under Article 438 of the Criminal Code of Ukraine and Article 442-1 of the Criminal Code of Ukraine. Thus, in substantiating this view, the researchers note that specific competition between legal norms may arise, for example, in cases of the forced removal of children from temporarily occupied territories to the aggressor state for subsequent adoption or placement in foster families. Such acts may simultaneously fall under the definition of "illegal transfer or deportation of a child" in Article 438 of the Criminal Code (as a war crime) and "transfer of a child to the territory of the aggressor state" in Article 442-1 of the Criminal Code (as a special provision describing elements of a genocidal policy).

[919] Марін О. К. Кримінально-правова кваліфікація викрадення дітей представниками держави-агресора. *Теорія та практика протидії злочинності у сучасних умовах* : збірник тез Міжнародної науковопрактичної конференції (3 листопада 2023 року) / упор. Р. М. Шехавцов. Львів : Львівський державний університет внутрішніх справ, 2023. С. 157–158.

[920] Kolomiichuk A. V. Criminal law protection of the children from unlawful transfer during armed conflict: international legal standards. *Uzhhorod National University Herald. Series: Law*. 2026. Vol. 4, no. 93. P. 122. DOI: https://doi.org/10.24144/2307-3322.2026.93.4.17

Pursuant to Article 33 of the Criminal Code of Ukraine, a conflict between a general and a special provision must be resolved by applying the special provision, which defines the elements of the offense in greater detail and takes into account the specific circumstances of its commission. In this context, Article 442-1 of the Criminal Code serves as lex specialis with respect to Article 438 of the Criminal Code, as it describes specific acts related to the aggressive policy of the aggressor state, in particular those aimed at altering the ethnic identity of children through forced adoption or cultural assimilation. However, such competition gives rise to a number of difficulties in practice. To apply Article 442-1 of the Criminal Code, it will be necessary to prove the specific intent of the perpetrator related to the implementation of a policy of genocide or assimilation. This raises the bar for the investigation regarding the collection of evidence confirming not only the fact of the child's removal but also its targeted nature. At the same time, without clear explanations regarding the relationship between these provisions, there will be a risk of duplicated charges or legal uncertainty when classifying acts. This situation requires the legislature or legal practitioners to develop clear criteria for distinguishing between the application of the general Article 438 of the Criminal Code and the special Article 442-1 of the Criminal Code. In particular, it is proposed to take into account the motives and objectives of the crime: to apply Article 442-1 in cases where intent to assimilate or destroy the national identity of children is proven, and Article 438 in cases of other forms of unlawful transfer or deportation without a specific motive. Such an approach would help avoid legal conflicts and ensure a more predictable and consistent application of criminal law[921].

Therefore, based on the foregoing, we believe that criminal law scholars lack a unified approach to the classification of the unlawful removal or deportation of a child. This points to the need to analyze international legal instruments. In particular, the 1949 Geneva Conventions and their Additional Protocols contain provisions prohibiting the forcible transfer of civilians during armed conflicts[922]. The Fourth Geneva Convention "Relating to the Protection of Civilian Persons in Time of War" expressly prohibits the deportation or transfer of persons from occupied territory to the territory of the occupying power or any other state, regardless

[921] Tatarenko H. V., Tatarenko I. V. War crimes against children in the context of hybrid aggression: challenges of criminal law protection. *Analytical and Comparative Jurisprudence*. 2025. Vol. 3, no. 4. P. 115. DOI:https://doi.org/10.24144/2788-6018.2025.04.3.17 (date of access: 23.05.2026).

[922] Питання виконання Женевської конвенції про захист цивільного населення під час війни від 12 серпня 1949 року : Розпорядж. Каб. Міністрів України від 31.05.2022 № 434-р. URL: https://zakon.rada.gov.ua/laws/show/434-2022-p#Text

of the motives for such transfer. Article 49 of this Convention establishes that individual or mass forced transfers, as well as deportations of persons from occupied territories, are prohibited[923]. The Additional Protocols to the Geneva Conventions, adopted in 1977, expand and clarify the protection of the civilian population. The First Additional Protocol, which concerns international armed conflicts, classifies the unlawful deportation or transfer of the population as a grave breach equivalent to a war crime in Article 85[924]. Thus, actions related to the forced deportation of Ukrainians may be considered a gross violation of the norms of international humanitarian law enshrined in the Geneva Conventions and their protocols.

The 1998 Rome Statute of the International Criminal Court establishes the Court's jurisdiction over crimes of genocide, crimes against humanity, and war crimes. Article 7 of the Statute defines deportation or forcible transfer of the population as a crime against humanity if committed as part of a widespread or systematic attack against the civilian population[925]. Deportation or forcible transfer refers to the forced displacement of persons through eviction or other coercive measures from the territory in which they are lawfully present, without grounds permitted under international law. Furthermore, Article 8 of the Rome Statute classifies unlawful deportation or displacement as a war crime in the context of international armed conflicts[926]. Thus, actions related to the forced deportation of Ukrainians during the conflict fall under the jurisdiction of the International Criminal Court and may be subject to proceedings before that institution. Therefore, actions related to the forced deportation of Ukrainians during the conflict fall under the jurisdiction of the International Criminal Court and may be subject to proceedings before that body.

With this in mind, we agree with A. Andrushko that genocide in the form of unlawful deportation or displacement of people involves the intent to destroy, in whole or in part, a specific group through its assimilation or the destruction of its cultural identity, whereas a war crime consists of violations of the laws and customs of war as defined by international treaties, without a specific

[923] Конвенція про захист цивільного населення під час війни (укр/рос) : Конвенція Орг. Об'єдн. Націй від 12.08.1949 : станом на 23 лют. 2023 р. URL: https://zakon.rada.gov.ua/laws/show/995_154#Text

[924] Додатковий протокол до Женевських конвенцій від 12 серпня 1949 року, що стосується захисту жертв міжнародних збройних конфліктів (Протокол I), від 8 червня 1977 року (укр/рос) : Протокол Орг. Об'єдн. Націй від 08.06.1977 : станом на 8 груд. 2005 р. URL: https://zakon.rada.gov.ua/laws/show/995_199#Text

[925] Римський статут міжнародного кримінального суду : Статут Міжнар. судів від 17.07.1998 : станом на 21 серп. 2024 р. URL: https://zakon.rada.gov.ua/laws/show/995_588#Text

[926] Lbid.

intent to destroy such a group (for example, if such actions are committed with the aim of using children as human shields). At the same time, the available evidence leads to the conclusion that the forced relocation of Ukrainian children to the Russian Federation constitutes a form of genocide against the Ukrainian people. This is evidenced by a number of facts: providing a solid legal basis for this practice, forcing children to acquire Russian citizenship, erasing information about their Ukrainian origin by changing their first and last names, instilling Russian values and a Russian worldview in the displaced children, and ultimately – re-educating them into "new Russian citizens". All of this points to the systematic and deliberate nature of the Russian authorities' actions, which are aimed at destroying the national identity of children taken from the occupied territories of Ukraine[927].

It should be noted that our analysis of the case law database of the International Criminal Court revealed that the terms "deportation" and "forced displacement" appear in 11 appeals filed with the International Tribunal for the Former Yugoslavia. For example, in the case of KRNOJELAC Milorad (IT-97-25-A) (appeal decision of September 17, 2003), "218. The Appeals Chamber considers that acts of forcible displacement underlying the crime of persecution, punishable under Article 5(h) of the Statute, are not limited to movement across a state border. The prohibition on forcible displacement is intended to protect people's right and desire to live in their communities and homes without outside interference. The forced nature of the relocation and the forced eviction of residents from the territory entails criminal liability on the part of the perpetrator, not the destination to which these residents are sent"[928].

Based on the foregoing, we believe that the addition of "the unlawful transfer or deportation of a child as a war crime" as an element of Part 1 of Article 438 of the Criminal Code of Ukraine creates a conflict in the classification of criminal offenses under Article 438 of the Criminal Code of Ukraine and Article 442-1 of the Criminal Code of Ukraine. Such a conflict of legal provisions may arise in cases of the forced removal of children from temporarily occupied territories to the aggressor state for subsequent adoption or placement in foster families.

Such acts may simultaneously fall under the definition of "unlawful transfer or deportation of a child" in Article 438 of the Criminal Code (as a war crime)

[927] Андрушко А. В. Примусове переміщення українських дітей до РФ як форма геноциду українського народу. *Закарпатські правові читання. Релокація в умовах екстраординарних правових режимів*: матеріали XVII Міжнародної науково-практичної конференції, м. Ужгород, 25–26 квітня 2025 р. Львів – Торунь: Liha-Pres, 2025. С. 437.

[928] Forcible displacement. Офіц. сторінка вебсайту UNITED NATIONS International Residual Mechanism for Criminal Tribunals. URL: https://cld.irmct.org/notions/show/369/forcible-displacement#

and "transfer of a child to the territory of an aggressor state" in Article 442-1 of the Criminal Code (as a special provision describing elements of a genocidal policy). Pursuant to Article 33 of the Criminal Code of Ukraine, a conflict between a general and a special provision must be resolved by applying the special provision, which defines the elements of the offense in greater detail and takes into account the specific circumstances of its commission.

2 Unjustified delay in the repatriation of a child as a war crime

It should be noted that, in accordance with General Comment № 6 of the UN Committee on the Rights of the Child, "The Treatment of Unaccompanied and Separated Children Outside Their Country of Origin," the first category covers minors under the age of 18 who are not in the care of parents, relatives, or other representatives by law or custom, while separated children are persons under 18 who have been separated from both parents or other representatives under law or custom[929]. This indicates that the difference between the two categories essentially lies in whether the child has parents, relatives, or other legal representatives with whom they could potentially be reunited. This is particularly important in the context of repatriation, which effectively encompasses two distinct legal processes – family reunification and return, specifically but not exclusively to residential care facilities, followed by placement in foster families in the child's country of citizenship.

The main obstacle to the timely repatriation of Ukrainian children from territories under Russian control is the refusal of senior Russian officials to grant permission for such a return, at the very least for orphans and children deprived of parental care. To date, the competent authorities of the Russian Federation continue to withhold information about Ukrainian children whom they consider "evacuated," in violation of their obligations under international humanitarian law, in particular Article 50 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, and Articles 74 and 78 of the Additional Protocol to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of International Armed Conflicts, of June 8, 1977, as well as Articles 3, 8, 9, 10, 12, 20, and 21 of the UN Convention on the Rights of the Child.

[929] WAY HOME: внутрішній та зовнішній вимір репатріації, реабілітації та (ре)інтеграції дітей, депортованих, примусово переміщених або в інший спосіб розлучених з родинами у зв'язку зі збройною агресією РФ проти України. URL: https://rchr.org.ua/wp-content/uploads/2024/02/way-home.-kontseptsiia-iedynoho-mekhanizmu-repatriatsii.pdf

It is worth noting that in contemporary international law, the prohibition on the deportation of children exists as a mandatory norm; however, the mechanism for their mandatory return is not codified, which means that repatriation depends not on judicial enforcement but on diplomatic interaction and political influence. This shifts the issue not only to the humanitarian or political sphere but also to the sphere of international law's capacity to implement its own imperatives. Just as it was eighty years ago, international cooperation among states, intergovernmental organizations, and specially authorized humanitarian institutions plays a crucial role, as it is precisely the coordination of legal and diplomatic actions that allows not only for the establishment of the fact of a crime but also for the demonstration of its systemic nature.

Modern mechanisms – ranging from special monitoring missions and intergovernmental requests to instruments of universal jurisdiction, warrants from the International Criminal Court, and procedures of the Hague Conference on Private International Law – fulfill a similar function to that carried out after 1945 by the United Nations Relief and Rehabilitation Administration, the International Committee of the Red Cross, and the Nuremberg Tribunal: establishing the truth, holding those responsible to account, and returning children to their national and legal environment. Thus, cooperation remains not merely a political or humanitarian category, but a legal necessity without which it is impossible to ensure the protection and restoration of the violated rights of minors. In Ukraine, at the national level, the issue of returning illegally deported and forcibly displaced children is addressed through the creation of special institutional and legal mechanisms.

In 2023, Ukraine launched an interagency coordination system that includes a specially established Coordination Council on Child Protection and Safety[930], as well as a separate government initiative to support families affected by deportation. The regulatory framework for procedures related to the identification, repatriation, and reintegration of children was established by Resolutions of the Cabinet of Ministers of Ukraine of May 14, 2024, № 551[931] and January 21, 2025, № 66[932], which approved the procedure for locating

[930] Про Координаційну раду з питань захисту та безпеки дітей : Указ Президента України від 08.08.2022 № 568/2022. URL: https://zakon.rada.gov.ua/laws/show/568/2022#Text

[931] Про затвердження Порядку виявлення та повернення дітей, депортованих або примусово переміщених внаслідок збройної агресії Російської Федерації проти України : Постанова КМУ від 14.05.2024 № 551. URL: https://zakon.rada.gov.ua/laws/show/551-2024-п

[932] Деякі питання виявлення та повернення дітей, депортованих або примусово переміщених внаслідок збройної агресії Російської Федерації проти України : Постанова КМУ від 21.01.2025 № 66. URL: https://zakon.rada.gov.ua/laws/show/66-2025-п

children, mechanisms for interagency coordination, as well as protocols for international cooperation with partner states and humanitarian organizations.

In Ukraine's 2023 National Report to the UN, the repatriation of unlawfully displaced children was defined for the first time not as a humanitarian measure, but as an international legal obligation of the state. Thanks to Ukrainian diplomatic initiatives, this issue was brought before the institutions of the Council of Europe, resulting in the the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution officially recognizing the deportation of Ukrainian children by the Russian Federation as bearing the hallmarks of genocide and constituting a violation of international humanitarian law[933]. At the UN level, this issue has been included in the security and human rights track, which has made it possible to involve mediating states in the process. Such mediation (in particular, the models applied by Qatar) relies on the mechanism of good offices – neutral facilitation by third parties, which enables negotiations between the victim state and the aggressor state in the absence of a direct diplomatic channel.

Our analysis of Ukraine's laws and regulations reveals that only two of them provide a definition of "repatriation," but this definition is not linked to the terminology used in Part 1 of Article 438 of the Criminal Code of Ukraine – unjustified delay in the repatriation of a child. In particular, Resolution № 413 of the Cabinet of Ministers of Ukraine dated April 5, 2022, № 413 "On Approval of the Procedure for the Detention of Prisoners of War", it is stated that repatriation is the return to the homeland with the restoration of civil rights of prisoners of war who, during military operations, found themselves outside their country and remained for a long time away from their homeland, taking into account Ukraine's international obligations to uphold the principle prohibiting the return or extradition of any person to another state if there are serious grounds to believe that they may face torture, persecution, or other serious human rights violations there[934]. Furthermore, repatriation should be understood as the return to the state of citizenship, permanent residence, or origin of persons who, due to various circumstances, have found themselves on the territory of other states[935].

[933] Parliamentary Assembly of the Council of Europe. Resolution 2495 (2023) Deportations and forcible transfers of Ukrainian children to the Russian Federation. 27 April 2023. URL: https://pace.coe.int/en/files/31776/html

[934] Про затвердження Порядку тримання військовополонених : Постанова Кабінету Міністрів України від 5 квітня 2022 р. № 413. URL: https://zakon.rada.gov.ua/laws/show/413-2022-п/ed20220405#n31

[935] Про затвердження Інструкції про порядок виконання норм міжнародного гуманітарного права у Збройних Силах України : Наказ Міністерства оборони України 23 березня 2017 р. № 164. URL: https://zakon.rada.gov.ua/laws/show/z0704-17/ed20170323#n183

Based on the foregoing, we believe that the concept of "unjustified delay in the repatriation of a child" may include the following acts:

– failure to fulfill obligations established by international humanitarian law to facilitate the reunification of families separated as a result of armed conflicts,

– creating obstacles to the work of humanitarian organizations that facilitate the repatriation of children and family reunification, and failing to provide information about the child (form) to the Central Tracing Agency of the International Committee of the Red Cross,

– intentionally entering false information about the child on the form,

– failure to take all necessary measures to establish the child's identity and register their family ties,

– actions taken with the aim of changing the child's citizenship or civil status, in particular entering information about the child into databases for the purpose of forcibly placing them in foster care or for adoption[936].

3 The recruitment or use of a child to participate in an armed conflict or military (combat) operations as a war crime

It should be noted that, according to UNICEF, thousands of children are recruited and used in armed conflicts around the world. Between 2005 and 2022, it was confirmed that more than 105,000 children were recruited and used by parties to the conflict, but the actual number of cases is believed to be much higher[937].

It should be noted that paragraph 20 of UN Security Council Resolution S/RES/2427(2018) states: "…emphasizes that children recruited by armed forces or armed groups in violation of international law and accused of committing crimes during armed conflicts must be treated first and foremost as victims of violations of international law…"[938]. However, this is not the only instance in which Resolutions have addressed the recruitment or use of children in armed conflict. In particular, UN Security Council Resolutions 1261 (1999),

[936] Незаконне переміщення та затримка репатріації дітей: чи потрібна нова стаття? *Юридична газета – онлайн версія*. URL: https://yur-gazeta.com/publications/practice/inshe/nezakonne-peremishchennya-ta-zatrimka-repatriaciyi-ditey-chi-potribna-nova-stattya.html (дата звернення: 24.05.2026).

[937] Ukrinform. У збройні конфлікти в світі втягнуті близько 250 тисяч дітей – ЮНІСЕФ. *Укрінформ – актуальні новини України та світу*. URL: https://www.ukrinform.ua/rubric-world/2638076-u-zbrojni-konflikti-v-sviti-vtagnuti-blizko-250-tisac-ditej-unisef.html (дата звернення: 24.05.2026).

[938] Resolution 2427 (2018) Adopted by the Security Council at its 8305th meeting, on 9 July 2018. URL: https://docs.un.org/en/S/RES/2427(2018) (дата звернення: 24.05.2026).

1882 (2009), 1998 (2011), and 2225 (2015) identified six grave violations against children in the context of armed conflict at the international level.

Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict states: "1. Armed groups other than the armed forces of a State shall under no circumstances recruit or use in hostilities persons under the age of 18.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of the necessary legal measures to prohibit and criminalize such practices"[939].

It is also worth noting that the international community has established a coalition to end the use of children as soldiers. Specifically, the coalition was established in May 1998 by leading international human rights and humanitarian organizations. The coalition works to prevent the recruitment and use of children as soldiers and to ensure their rehabilitation and reintegration into society. The coalition's primary goal is to promote the adoption and observance of national, regional, and international legal norms (including the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict), which prohibit the military recruitment and use in hostilities of any person under the age of 18, as well as the recognition and implementation of this standard by all armed groups, both governmental and non-governmental forces[940].

It should be noted that it was precisely the amendments to Part 1 of Article 438 of the Criminal Code of Ukraine that created certain complications. Thus, in particular, A. Gutnik argues that, first, it is incorrect to claim that "liability has been established for the recruitment and use of children for military purposes" or that "liability for crimes against children has been strengthened", since, until July 17, 2025, such actions were covered by "other violations of the laws and customs of war" under Article 438 of the Criminal Code of Ukraine. This is not about criminalizing certain types of acts, but rather an effort to unify legislation and simultaneously bring it in line with current developments in Ukraine, as we noted earlier. Second, the terms "recruitment" and "enlistment" refer to the inclusion of a child in the national armed forces. The term "use" should be interpreted broadly. The ICC and the ICCR have recognized the use of children for

[939] Факультативний протокол до Конвенції про права дитини щодо участі дітей у збройних конфліктах (укр/рос) : Протокол Орг. Об'єдн. Націй від 01.01.2000 : станом на 23 черв. 2004 р. URL: https://zakon.rada.gov.ua/laws/show/995_795#Text (дата звернення: 24.05.2026).

[940] Chernobuk V. International legal standards for the protection of children's rights in the conditions of armed conflicts. *Analytical and Comparative Jurisprudence*. 2023. No. 3. P. 439. DOI: https://doi.org/10.24144/2788-6018.2023.03.79

active participation in hostilities in cases such as: guarding military officials in conflict zones; reconnaissance missions or the collection of intelligence; attacks on civilians and civilian objects; participation in armed patrols behind the front lines; espionage; in missions to search for food, at least where this was additionally linked to hostilities; as well as for transporting ammunition and looted property. In fact, the specific category of "exploitation" of a child is the only one that can cover acts involving the indirect (online) involvement of minors in arson, sabotage, espionage, and the like, unlike "recruitment" or "enlistment", which involve inclusion in armed formations. Academic research has already highlighted the challenges of criminally assessing the actions of minors themselves who commit such acts under martial law. Third, these amendments do not comply with the Rome Statute. Specifically, the legislature did not include "enlistment into national armed forces" as a form of committing a crime against children. This form of conduct could potentially occur in the practices of an aggressor state, particularly in temporarily occupied territories, through the forced conscription of children into armed formations. The amendments to Article 438 of the Criminal Code of Ukraine have also affected the definition of the age criterion for the victim. Until July 17, 2025 – that is, until the relevant amendments take effect – such acts could be classified as "other violations of the laws and customs of war," with reference to international law, particularly the provisions of the Rome Statute. This, in turn, objectively established a threshold of 15 years as the criterion for recognizing an act as a war crime. Following the amendments, the legislature explicitly prohibited the recruitment of "children" without specifying age limits; given the provisions of national law (in particular, the definition of a child as a person under 18), this provides grounds for asserting that the age threshold has been raised to 18. Thus, the amendments to Article 438 of the Criminal Code of Ukraine are aimed at clarifying liability for the recruitment and use of children in armed conflict; however, they do not criminalize new acts, but rather clarify existing forms of violations of the laws and customs of war[941].

As for the criminal legislation of foreign countries, the laws of most European Union member states, including Germany, France, the Netherlands, and Italy, provide for criminal liability for the recruitment of minors into armed groups,

[941] Гутнік А. В. Набір, вербування і використання дитини у збройному конфлікті: проблеми кримінально-правової кваліфікації в умовах оновлення ст. 438 КК України. *Воєнні злочини в сучасних збройних конфліктах: виклики для міжнародного та національного кримінального права* : матеріали круглого столу за участі міжнар. наук.-практ. спільноти (м. Харків, 23 квіт. 2026 р.): [Електронний ресурс] / [редкол.: М. Л. Пахнін, В. Л. Давиденко та ін.]; Харків. нац. ун-т внутр. справ, Каф. кримінал. права та кримінології, Навч.-наук. ін-т № 5. Харків : ХНУВС, 2026. С. 21–22.

forced separation from family, participation in armed conflicts, and war propaganda, especially when it concerns a child. For instance, the German Criminal Code provides a separate classification for the recruitment of children into military operations or armed groups as part of a war crime. The French Criminal Code (Art. 461-26) contains a similar provision, reinforced by additional provisions regarding crimes against humanity, which include deportation and the mass displacement of the civilian population, including minors.

But are such cases actually occurring in Ukraine amid the "hybrid" nature of the armed conflict and since the start of the Russian Federation's full-scale invasion of Ukrainian territory? Yes, numerous media reports and reports by international observers attest to the involvement of children in criminal activities through their recruitment into combat operations in the "Donetsk People's Republic" and the "Luhansk People's Republic". In particular, representatives of the OSCE Monitoring Mission in Ukraine noted in their report that children aged 15–17, and even those under 15, are participating in active hostilities as part of combined separatist forces in eastern Ukraine. Militants actively recruit them into paramilitary groups, where they are trained to use and handle weapons; those who demonstrate particular aptitude are even permitted to form their own combat units (reconnaissance, sabotage) and engage in subversive activities. Militants of the "Donetsk People's Republic" and the "Luhansk People's Republic" also use boys and girls for sexual exploitation, as "human carriers" for smuggling goods through checkpoints and roadblocks, and for attaching GPS trackers to military equipment. In addition, the U. S. State Department report emphasizes that pro-Russian separatists use children as "human shields" and informants[942]. Further evidence of the involvement of minors in armed conflicts is provided by numerous propaganda videos depicting children participating in paramilitary groups such as the "Vostok Battalion", the "Ghost Brigade", and the St. Gregory the Victorious Children's Sabotage Battalion in the media of the "Donetsk People's Republic" and the "Luhansk People's Republic". According to the children themselves, they were brought into these formations by adults – some by their own parents, others by clergymen. For example, in November 2014, in an interview with Russia Today journalist Graham Phillips, 15-year-old Andriy Ivakhno said that he was assisting fighters of the "Vostok" battalion and was undergoing training at their base in combat skills and the handling of weapons. Another young man noted that he manages an arsenal of weapons[943].

[942] Trafficking in Persons Report (June, 2016) // U. S. Department of State: офіц. сайт. URL: https://www.state.gov/j/tip/rls/tiprpt/2016/index.htm

[943] Діти окупованого Донбасу стали одним із видів зброї в руках терористів. *Рубрика*. URL: https://rubryka.com/article/dity-okupovanogo-donbasu-staly-odnym-iz-vydiv-zbroyi-v-rukah-terorystiv/ (дата звернення: 24.05.2026).

Even before the Russian Federation's full-scale invasion on February 24, 2020, some researchers had pointed out that the involvement of children in armed conflicts falls under Article 304 of the Criminal Code of Ukraine: Involvement of Minors in Criminal Activity. Involvement of Minors in Criminal Activity under the Criminal Code of Ukraine. At the same time, they emphasized that criminal liability for involving minors in armed conflicts should be strengthened and proposed amending the provision of Article 438 of the Criminal Code of Ukraine to include liability for recruiting, involving, or coercing minors or young children into engaging in combat operations, committing acts of sabotage, or carrying out terrorist acts, and the provision of Article 304 of the Criminal Code of Ukraine with liability for involving minors and young children in the criminal activities of illegal paramilitary or armed groups. But even then, they emphasized that lowering the age of criminal responsibility for minors from 14 to 16 years of age for such criminal offenses as sabotage (Article 113), terrorist acts (Article 258), damage to transportation routes and vehicles (Article 277), attempts on the life of a law enforcement officer, a member of a public formation for the protection of public order and the state border, or a military servicemember (Art. 348), etc.

In the current context of the Russian Federation's military aggression, it is worth noting that starting in 2022, and gradually gaining momentum, reports have begun to appear in the media regarding actions committed by children in various regions of Ukraine aimed at collecting and transmitting information to the enemy about strategically important facilities, organizing attacks on military personnel and their property, and so on. According to the National Police of Ukraine, in the first six months of 2025 alone, 65 cases of criminal offenses of a sabotage nature were identified, involving 62 children aged 13 to 17. According to various sources, the number of cases involving children in such offenses is already in the hundreds. However, the recruitment and use of children in armed conflict are expressly prohibited by international law. This is Article 77 of the Additional Protocol to the 1949 Geneva Conventions, which concerns the protection of victims of international armed conflicts; Article 38 of the Convention on the Rights of the Child; and Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict[944].

[944] Діти, завербовані ворогом, – жертви воєнного злочину чи правопорушники? Незручна проблема, яка потребує негайного вирішення. URL: https://www.helsinki.org.ua/articles/dity-zaverbovani-vorohom-zhertvy-voiennoho-zlochynu-chy-pravoporushnyky-nezruchna-problema-iaka-potrebuie-nehaynoho-vyrishennia/ (дата звернення: 24.05.2026).

We find it interesting to examine the practice of holding individuals accountable for the recruitment and use of children in armed conflicts by Special Tribunals and international criminal courts. It should be noted that one of the first and most landmark decisions was the case of the Special Court for Sierra Leone-Prosecutor v. Brima, Kamara, and Kanu (the AFRC case). On June 20, 2007, the court found Alexa Tambu Brima, Brima Bazzi Kamara, and Santigie Borbor Kanu guilty of recruiting and using children under the age of 15 to actively participate in hostilities. This marked the first time in the history of international criminal justice that an international tribunal had handed down a guilty verdict specifically for the crime of using child soldiers. The ruling found that children had been forcibly recruited to participate in combat operations, guard checkpoints, carry out attacks on the civilian population, and engage in other military operations. The court emphasized that such practices constitute a gross violation of international humanitarian law and customary international law[945].

Another important example is the case of Prosecutor v. Issa Sesay, Morris Kallon, and Augustine Gbao (the RUF case), in which, on February 25, 2009, the Special Court for Sierra Leone found the defendants guilty, in particular, of recruiting child soldiers and using them in armed conflict. The court found that members of the Revolutionary United Front systematically abducted children, forced them to participate in hostilities, and subjected them to violence and psychological coercion[946].

The case of Thomas Lubanga Dyilo at the International Criminal Court is of particular significance for international practice. In 2012, the International Criminal Court found Thomas Lubanga guilty of recruiting, enlisting, and using children under the age of 15 to actively participate in hostilities in the Democratic Republic of the Congo. This was the first conviction in the history of the International Criminal Court. The court concluded that the children were used not only as combatants but also as guards, scouts, and weapon carriers[947].

Another important development is the ruling in the case of Dominic Ongwen, a former commander of the Lord's Resistance Army (LRA). In 2021, the International Criminal Court found him guilty of numerous war crimes and

[945] The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused). URL: https://www.refworld.org/jurisprudence/caselaw/scsl/2007/91904 (дата звернення: 24.05.2026).

[946] Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment). URL: https://www.refworld.org/jurisprudence/caselaw/scsl/2009/92027 (дата звернення: 24.05.2026).

[947] ICC, The Prosecutor v. Thomas Lubanga Dyilo. URL: https://casebook.icrc.org/case-study/icc-prosecutor-v-thomas-lubanga-dyilo (дата звернення: 24.05.2026).

crimes against humanity, including the abduction and use of children in armed conflict. A distinctive feature of the case was that Ongwen himself had been abducted as a child and turned into a child soldier; however, the court ruled that this did not exempt him from responsibility for the crimes committed in his capacity as a commander[948].

Thus, the cases mentioned above are of fundamental importance for the development of international criminal law, as they confirmed the existence of individual criminal liability for the recruitment and use of children in armed conflicts, and also established an international standard for the protection of children from participation in hostilities.

As for the analysis of Ukrainian case law, an examination of judgments from 2022 to the present under Article 438 of the Criminal Code of Ukraine in the Unified State Register of Court Decisions revealed that no convictions have been handed down for the recruitment or use of a child to participate in an armed conflict, or military (combat) operations as a war crime.

Thus, we believe that the amendments to Article 438 of the Criminal Code of Ukraine are aimed at clarifying liability for the recruitment and use of children in armed conflict; however, they do not constitute the criminalization of new acts, but rather a clarification of existing forms of violations of the laws and customs of war.

Also, the provisions of the national legislation are not fully consistent with the approaches of international criminal law, in particular regarding the forms of committing the act and the age criterion of the victim: on the one hand, there was an expansion of criminalization due to the increase of the age threshold to 18 years, which ensures a wider level of protection for children, while, on the other hand, there is no such form as “recruitment into the armed forces”.

Conclusions

The following conclusions can be made based on the results of the conducted research on the illegal transfer or deportation of a child, unjustified delay in the repatriation of a child, recruitment or use of a child to participate in an armed conflict, military (combat) actions as a war crime:

1. Supplement to part 1 of Art. 438 of the Criminal Code of Ukraine as well as the sign of “illegal transfer or deportation of a child as a war crime” creates competition in the qualification of criminal acts under Art. 438

[948] Information for victims Ongwen Case. URL: https://www.icc-cpi.int/victims/ongwen-case (дата звернення: 24.05.2026).

of the Criminal Code of Ukraine and Art. 442-1 of the Criminal Code of Ukraine. Such a competition of norms may arise in cases of forced removal of children from temporarily occupied territories to the aggressor state for further adoption or placement in foster families. Such actions may simultaneously fall under the signs of "illegal transfer or deportation of a child" in Article 438 of the Criminal Code (as a war crime) and "transfer of a child to the territory of an aggressor state" in Article 442-1 of the Criminal Code (as a special norm describing the elements of genocidal policy). According to Art. 33 of the Criminal Code of Ukraine, the competition between general and special norms must be resolved by applying a special norm, which defines the features of the crime in more detail and takes into account the specific circumstances of its commission.

2. The term "unjustified delay in the repatriation of a child" requires regulatory approval. We believe that "unjustified delay in the repatriation of a child" includes such illegal acts, which consist in failure to fulfill the obligations established by international humanitarian law to facilitate the reunification of families separated as a result of armed conflicts; creating obstacles in the work of humanitarian organizations that promote the repatriation of children and family reunification, failure to provide the Central Reference Agency of the International Committee of the Red Cross with information about the child (cards); intentionally entering false information about the child into the card; failure to take all necessary measures to establish the child's identity and register his family ties; actions taken with the purpose of changing the citizenship or civil status of a child, in particular, entering information about a child into databases for the purpose of forcibly handing him over to custody (guardianship) or for adoption (adoption).

3. It was noted that amendments to Art. 438 of the Criminal Code of Ukraine is aimed at detailing responsibility for the recruitment and use of children in armed conflict, but it is not a criminalization of new acts, but rather a clarification of already existing forms of violations of the laws and customs of war. Also, the provisions of the national legislation are not fully consistent with the approaches of international criminal law, in particular regarding the forms of committing the act and the age criterion of the victim: on the one hand, there was an expansion of criminalization due to the increase of the age threshold to 18 years, which ensures a wider level of protection for children, while, on the other hand, there is no such form as "recruitment into the armed forces".

Summary

He study is devoted to the analysis of the provisions of the Law of Ukraine dated June 17, 2025 № 4499-IX "On Amendments to Article 438 of the Criminal Code of Ukraine on Establishing Liability for Illegal Transfer, Deportation, Unjustified Delay of Repatriation of a Child, Recruitment and Use of a Child for Military Purposes" regarding the amended part 1 of Art. 438 of the Criminal Code of Ukraine after the words "prohibited by international law" with the words "illegal transfer or deportation of a child, unjustified delay in the repatriation of a child, recruitment or use of a child to participate in an armed conflict, military (combat) actions".

A comprehensive analysis of the international legal and criminal law aspects of responsibility for war crimes related to the violation of children's rights in the context of armed conflict was conducted. The peculiarities of the qualification of the illegal transfer or deportation of children as a gross violation of the norms of international humanitarian law have been studied. The content of the ban on the forced transfer of children from temporarily occupied territories is disclosed, as well as the provisions of international treaties, the practice of international judicial institutions and modern trends in bringing guilty parties to justice are analyzed.

Particular attention is paid to the unjustified delay in the repatriation of a child as an independent war crime, which violates the child's right to return to the family, the country of origin and a safe living environment. The legal nature of the repatriation of children in the context of international humanitarian law is defined, as well as problematic aspects of ensuring the return of children during and after the end of the armed conflict are outlined.

The issue of recruiting or using children to participate in an armed conflict or military (combat) actions has been investigated. International standards for the protection of children from being involved in military activities are analyzed, in particular the provisions of the Geneva Conventions, the Rome Statute of the International Criminal Court, and the UN Convention on the Rights of the Child. Attention is focused on the criminological consequences of the militarization of children, their psychological traumatization and the need to create effective mechanisms of international and national response to such crimes.

It was concluded that the amendments to Part 1 of Art. 438 of the Criminal Code of Ukraine regarding illegal transfer or deportation of a child, unjustified delay in repatriation of a child, recruitment or use of a child to participate in an armed conflict, military (combat) actions as a war crime need improvement.

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