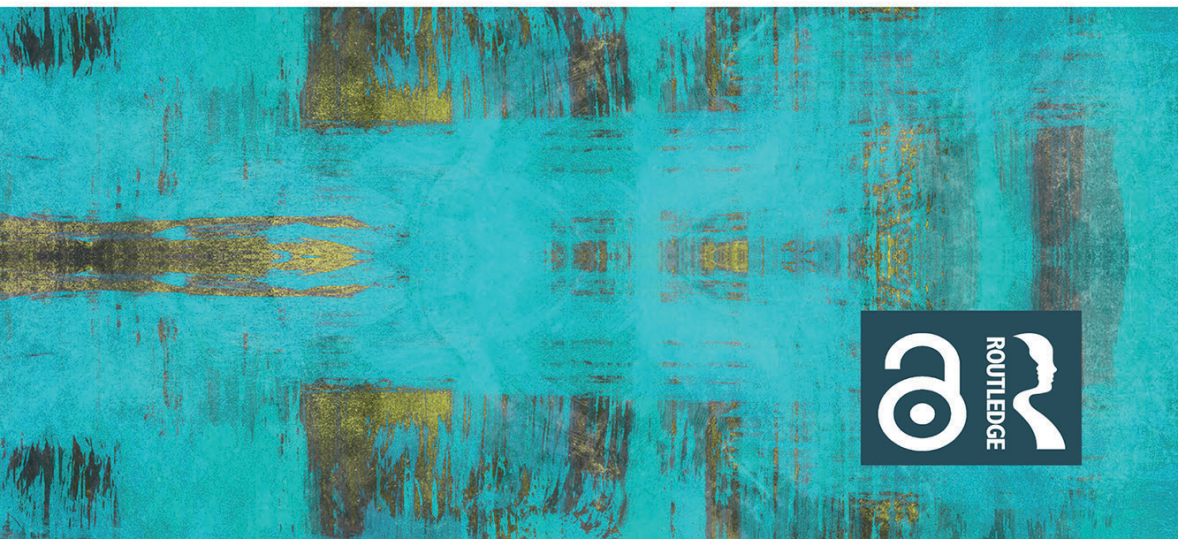
Contemporary Security Studies

THE RUSSIAN-UKRAINIAN CONFLICT AND WAR CRIMES

CHALLENGES FOR DOCUMENTATION AND INTERNATIONAL PROSECUTION

Edited by
Patrycja Grzebyk and Dominika Uczkiewicz



ROUTLEDGE

The Russian-Ukrainian Conflict and War Crimes

This book offers a multidisciplinary examination of the international crimes committed in the Russia–Ukraine War, and the challenges of their prosecution and documentation.

As the largest international armed conflict in Europe since World War II, Russia's war against Ukraine has provoked strong reactions and questions about the post-1945 world order, the utility of the war, and the effectiveness of international criminal justice. Throughout the chapters in this volume, scholars and legal practitioners from Canada, Germany, Poland, Ukraine, the UK, and the United States present the results of interdisciplinary research, insights from the perspective of other post-communist states, and first-hand expertise from directly working on the documentation and prosecution of these crimes. This offers a broader picture of post-Cold War relations and sheds light on the roots and nature of the war and the importance of regional approaches. The chapters also present some possible responses to the crimes committed in the conflict, with a focus on a victims-centered approach to transitional justice.

This volume will be of interest to scholars and students of international criminal and humanitarian law, security studies, peace and conflict studies, and Eastern European history.

Patrycja Grzebyk is Associate Professor at the University of Warsaw and a specialist in public international law. She is the author of *Criminal Responsibility for the Crime of Aggression* (2013) and *Human and Non-Human Targets in Armed Conflicts* (2022).

Dominika Uczkiewicz is a lawyer, historian, and Assistant Professor at the Centre for Totalitarian Studies at the Pilecki Institute in Warsaw. Her recent publications include *Polish and German Perspectives on Transitional Justice: World War Two and its Aftermath* (2021; co-edited with Wolfgang Form).

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Contents

Illustrations

Figures

Table

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Introduction

The rocky road to justice – efforts to document and prosecute crimes in Ukraine from a historical and legal perspective

Patrycja Grzebyk and Dominika Uczkiewicz

Between impunity and selective justice

The first attempts to prosecute core international crimes, i.e., crime of aggression, war crimes, genocide, crimes against humanity, in national courts could be tracked to previous ages and in the case of war crimes even to ancient ones.[1] Looking for the precedent of prosecution of the mentioned crimes in international tribunals, some historians point to the trial of Peter von Hagenbach organized by different city-states in 1474 in Breisach.[2] However, the very first serious international attempt to prosecute all those guilty of starting the war and of war crimes committed therein took place at the end of World War I. In Article 227 of the 1919 Treaty of Versailles,[3] states parties decided to "publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties." For the purpose of Kaiser's trial, a special tribunal was to be established, composed of five judges, one appointed by each of the following states: the United States of America, Great Britain, France, Italy, and Japan. At the same time, other persons guilty of criminal acts against nationals of more than one of the Allied and Associated Powers were to be brought before military tribunals composed of members of the military tribunals of the powers concerned, while persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers were to be brought before the military tribunals of that Power (Article 229). These provisions have never been implemented due to the refusal of extradition. The prosecution of war criminals of World War I ended with the Leipzig Farce, i.e., prosecution of a few criminals before the German Leipzig Imperial Court; they received outrageously short sentences, ranging from a few months to a maximum of 4 years of imprisonment, which they did not even serve in full.[4] When World War II began, the states that fell under German occupation, such as Poland, Czechoslovakia, and Belgium, immediately started the efforts to confirm responsibility of the Germans and their allies for numerous crimes.[5] Those smaller states were the driving force behind the adoption of crucial documents like the St. James's Declaration of 1942.[6] However, ultimately it was the Great Powers, i.e., France, UK, USA, USSR who agreed on the terms of the 1945 London Agreement to which the Charter of the International Military Tribunal was annexed.[7] According to the

Agreement and the Charter, the International Military Tribunal was established (so-called Nuremberg Tribunal due to its final headquarters in the Nuremberg Palace of Justice). The judgment issued by the Tribunal on 1 October 1946 was supposed to be the first in a series, but the Cold War realities prevented the organization of other trials before the IMT. The remaining proceedings concerning World War II crimes took place before national courts, including the famous 12 subsequent Nuremberg trials before American military tribunals[8] and seven trials before the Polish Supreme National Tribunal.[9] For political reasons, no crimes committed by the Allied States, including numerous Soviet atrocities, were judged.

Simultaneously with the Nuremberg trial, based on the decision of American General Douglas MacArthur, the International Military Tribunal for the Far East was established in Tokyo and some Japanese war criminals were sentenced on 9 September 1947.[10] However, in the case of Japanese criminals, politics quickly prevailed over justice and those who were supposed to serve their prison sentences were paroled by the American general. Nevertheless, there was a series of subsequent Tokyo trials organized by Australia, China, France, the Netherlands Indies, the Philippines, the United Kingdom, and the United States, which convicted more than 5,500 lower-ranking war criminals. Justice was not fully served, however, and the problem of impunity e.g. for the abuses against the so-called comfort women still divides Asian states.

After the Nuremberg and Tokyo trials, efforts were undertaken to recognize principles confirmed by the IMT as universally binding. In consequence, the international community could have moved from the victor's justice standard to one of impartial justice for all. This aim has never been achieved. Nevertheless, in 1950 the International Law Commission adopted *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, in which the Commission confirmed among others that "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".[11]

In the post-war period, there was no chance for the establishment of an international criminal court able to prosecute international criminals due to the opposition of states afraid that the jurisdiction of an international court could hamper their sovereignty (this argument was used especially by the Eastern Bloc). Only with the end of the Cold War did there appear an opening for new modes of cooperation. The UN Security Council established the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda in 1993 (S/RES/827) and 1994 (S/RES/955), respectively. Those tribunals ended their works in 2016 (ICTR) and 2017 (ICTY) leaving invaluable heritage, although they met with certain criticism based on the victor's justice narration.[12] Those tribunals clarified definitions of war crimes, genocide, and crimes against humanity and principles of responsibility for them, at the same time answering many procedural questions, related also to admissible evidence.[13]

The above-mentioned two UN-backed sister tribunals created the opportunity to establish a permanent court based on an international treaty (thus with strong legitimacy derived from the properly expressed consent of willing states). The

Rome Statute was adopted in 1998[14] and entered into force relatively quickly, in July 2002.[15] Currently, with the recent Armenian ratification, there are 124 states parties. That is a lot but still not enough, keeping in mind that major international players like China, Russia, and the USA are not parties to it, although they have certain influence on the Court through the UN Security Council, of which they are permanent members.[16]

The ICC jurisdiction is limited to crimes committed on the territory of states parties or crimes committed by nationals of states parties. A situation involving core crimes can also be assessed by the Court if it is referred to the Court by the Security Council (which happened twice – in the case of Darfur and Libya) or if the state in question accepts the jurisdiction of the Court (which happened, e.g., in the case of Ukraine). Different rules concerning jurisdiction of the Court apply to the crime of aggression, the definition of which and conditions of exercising jurisdiction over it by the Court were adopted only in 2010 (RC/RES.6)[17] and came into effect from 2018.[18] In the case of the crime of aggression, it is required that both states – the aggressor and the victim – be parties to relevant amendments on the crime of aggression (the only exception from this rule applies to the SC's referral). The ICC operates on the basis of complementarity, which means that it should be engaged only if states are inactive, unable or unwilling to prosecute crimes within the Court's jurisdiction, and still the Court would deal only with those of sufficient gravity (Article 17 of the Rome Statute) and if this would serve the interests of justice (Article 53 of the Rome Statute). After two decades of work, the Court's achievements cannot be compared to those of the ICTY or ICTR, but we need to keep in mind that the UN tribunals had a priority in the exercise of the jurisdiction, while the ICC is a court of the last resort with many limitations (also in terms of its budget and human resources).

In order to supplement the international criminal justice system, various hybrid tribunals have been established since 2000 (like, e.g., Special Panels in East Timor or the Special Court for Sierra Leone), although their status (whether they are international or rather national tribunals) is debatable,[19] as evidenced also in debates on the best model for the prosecution of international crimes committed during the Russian-Ukrainian conflict.

Despite the long history of development of international criminal law, some principles still seem to be in need of clarification or at least strong confirmation. One of them is the Nuremberg principle III: "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law." Although it is now accepted that this principle should be applied in international courts (Article 27 of the Rome Statute), doubts are raised concerning its application to officials of third states, i.e., non-parties to the Rome Statute,[20] or in national proceedings against representatives of other states (especially the troika).[21] The current works of the International Law Commission seem to confirm that there is a division of opinions (especially in the case of the crime of aggression), which precludes development of general customary law.[22] However, Russian aggression might trigger changes in the states' approach to the problem.

Ukrainian lawfare

Russian aggression, which started in 2014 with the annexation of Crimea and which was followed by the eruption of hostilities in Eastern Ukraine and then the invasion of February 2022, forced Ukraine not only to defend itself with military measures, but also to use all possible legal tools against the aggressor. Therefore, Ukraine engaged in an unprecedented legal warfare in various institutions.

Ukraine submitted two declarations on recognition of the ICC's jurisdiction. The first, submitted on 9 April 2014, concerned the alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014 (the Ukrainian intention was to focus on events which took place in Kyiv during so-called "Euromaidan"). The second declaration was submitted on 8 September 2015 in order to allow the Court to extend its jurisdiction over crimes committed throughout the Ukrainian territory from 20 February 2014 onwards. After the Russian invasion in 2022, the ICC prosecutor announced on 28 February 2022 that he would ask for authorization to open an investigation into the situation in Ukraine (the preliminary examination was ongoing since April 2014). In order to speed up the whole procedure related to the opening of the investigation, 43 states referred the situation in Ukraine to the Court. This allowed the Prosecutor to open the investigation on 2 March 2022 without submission of a request for formal authorization of the investigation by the Pre-trial Chamber. One year later, on 17 March 2023, ICC Pre-Trial Chamber II issued arrest warrants for Vladimir Vladimirovich Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation. Pre-Trial Chamber II confirmed that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied area. An arrest warrant for the incumbent head of the state was met with furious reaction of Russia, which, among others, imposed sanctions against the Court's officials (including its president, Judge Piotr Hofmański).[23] One year later, on 5 March 2024 two other arrest warrants against Russian high commanders – Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov – were issued by the ICC as Pre-Trial Chamber confirmed that there are reasonable grounds to believe that suspects were involved in committing war crimes and crimes crime against humanity. On 26 June 2024 the same instance issued arrest warrants against former Russian Defense Minister Sergei Shoigu and the Chief of the General Staff Valery Gerasimov for alleged international crimes, war crimes and crimes against humanity.

The work of the ICC could not be a remedy for the impunity related to all crimes committed in Ukraine. The Court does not have jurisdiction over the crime of aggression (as neither Russia nor Ukraine are parties to the RS and its relevant amendments, and there is no chance for the SC's referral due to the veto of Russia and, most probably, China). The ICC is also not able to prosecute all war crimes or crimes against humanity, as it needs to focus only on the most serious ones (in the case of war crimes – "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes"). The whole construction

of the Court's jurisdiction clearly indicates that the main burden of prosecution of core crimes needs to be on national jurisdiction, and in the case of the crime of aggression, the establishment of a new tribunal might be needed. That is the reason why Ukraine has promoted the idea of creation of a Special Tribunal for the Crime of Aggression against Ukraine[24] and has cooperated with other states (e.g., with the International Centre for the Prosecution of the Crime of Aggression against Ukraine, judicial hub at Eurojust) so that evidence of crimes would be collected by as many of them as possible.

The first trials concerning war crimes have already taken place in Ukraine, and other states have also opened their investigations into the alleged crimes (as extensively analyzed in this volume in a number of chapters). The engagement of third states should not be surprising, as it results from international obligations concerning violations of the *ius cogens* norms, including prohibition of aggression, genocide, war crimes and crimes against humanity.[25] Third states are obliged to "cooperate to bring to an end through lawful means any serious breach" of peremptory norms; moreover, "no State shall recognize as lawful a situation created by a serious breach" of peremptory norms, "nor render aid or assistance in maintaining that situation."[26] This also entails efforts to prosecute those responsible for international crimes – an obligation which can be derived from treaty law (e.g., obligations concerning grave breaches of the 1949 Geneva Conventions[27] and the 1977 Additional Protocols[28] or violations of the 1948 Genocide Convention[29]) and customary law, as it was codified by the International Law Commission, e.g., in the 1996 Code of Crimes against the Peace and Security of Mankind.

This volume focuses mainly on individual responsibility, however it is worth mentioning that Ukraine also sought justice in courts dealing with state's responsibility, like the International Court of Justice and the European Court of Human Rights. In the World Court, Ukraine initiated proceedings against Russia based on the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination as early as in 2017. The merit judgment in this case was issued on 31 January 2024, and although the majority of Ukrainian claims was dismissed, the Court still found Russia responsible for "failing to take measures to investigate facts contained in information received from Ukraine regarding persons who have allegedly committed an offence set forth in Article 2 of the International Convention for the Suppression of the Financing of Terrorism" and for violation of the CERD by the way in which it has implemented its educational system in Crimea after 2014 with regard to school education in the Ukrainian language.[30] In another case, which was initiated by Ukraine only a few days after the invasion, i.e., on 26 February 2022, and which concerned allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide, Ukraine claimed that Russia abused the Convention by using allegations of genocide committed by Ukraine in order to justify its attack. In its judgment of 1 February 2023 on preliminary objections, the Court decided that it does not have jurisdiction concerning the compatibility of Russia's military operation with the Genocide Convention.[31] The Court will proceed with the merits' phase, but its focus will be on verification of

the allegations of Ukrainian genocidal acts. The final judgment concerning merits can easily be predicted (so far, no international body has confirmed the Russian accusations; additionally, before 2022, Russia did not address any international institution concerning the alleged abuses in Eastern Ukraine).

In the above-mentioned proceedings, Ukraine did not decide to ask the Court to verify whether Russia was planning or committing the crime of genocide against Ukrainian nationals. This approach is understandable, having in mind the traditional problems with proving special intent required by the definition of genocide.[32] In this context, it must be emphasized that other core crimes such as war crimes or crimes against humanity are as important and serious and worth prosecuting.[33]

In the case of the European Court of Human Rights, there are several interstate proceedings initiated by Ukraine against Russia concerning human rights abuses[34] related to Russian aggression. Interestingly, both types of proceedings – in the ICJ and the ECHR – provoked an unprecedented wave of interventions by third states.

Justice for all crimes despite the fog of disinformation

The responsibility of states to engage in prosecution of international crimes concerns all international crimes, no matter who is responsible for them and in what territory they were committed. In the context of the Russian-Ukrainian war, not only crimes committed against Ukrainians need to be investigated, but also crimes committed against Russians.[35]

It is also important to note the disturbing fact that Ukraine delayed ratification of the Rome Statute, even though there were no legal obstacles to proceeding with it. Ukraine signed the Rome Statute as early as on 20 January 2000, and in 2014 and in 2015 submitted two declarations on recognition of the jurisdiction of the ICC, which raised strong expectations that the ICC Statute would be ratified.[36] The reluctance to ratify was sometimes explained by the wish to avoid any Court's proceedings against Ukrainians. It is noticeable that in the second submission to the ICC, Ukraine indicated that jurisdiction of the Court should concern "crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations 'DNR' and 'LNR,' which led to extremely grave consequences and mass murder of Ukrainian nationals." This limitation has no impact on the ICC's jurisdiction and the Court is able to prosecute perpetrators on both sides, thus the mentioned justification for non-ratification seems invalid.

In recent years, Russia has done its best to convince the world that its actions are lawful and justified. It was quite symbolic that almost immediately after the issuance of the arrest warrant, on 5 April 2023, Russia organized a UN Security Council Arria formula meeting "Children & armed conflict: Ukrainian crisis. Evacuating children from conflict zone" during which Maria Lvova-Belova was convincing the world that the purpose of her activities was to save children from the conflict area. Similar meetings of the UN SC initiated by Russia and presenting the allegedly criminal Ukrainian policy against (in particular) the Donbas people (on 20 January 2023) or the Orthodox Church (on 20 May 2023) were quite frequent and even if they seem to be just propaganda tools, all information about alleged

Ukrainian crimes need to be verified and appropriately processed. No allegations which would appear in the future should be neglected. The policy of one-sided justice should be abandoned in order to build the credibility of the international criminal justice system as such.

In the current volume, discussing the challenges of the documentation and prosecution of international crimes, the focus lies on crimes committed against Ukrainians, which does not mean a biased perspective. There are several reasons behind this approach. First, there is no doubt that the Russian Federation (together with Belarus) is an aggressor state (as it was confirmed by the UN General Assembly resolution ES-11/1 of 2 March 2022) and only agents of the aggressive state can be prosecuted for the crime of aggression. Second, the Russian–Ukrainian war is a blatant example of aggression, therefore the situation is different from the circumstances examined by the ICTY or ICTR. The UN tribunals dealt with the situation of internal armed conflict, in the case of former Yugoslavia internationalized at a certain moment. Third, in the case of Ukraine we have a clear example of a superpower engaged in aggression against its neighbor state despite the previous security guarantees (1994 Budapest Memorandum on Security Assurances) and despite the fact that Russia, together with other states of Eastern Europe, built a regional system of norms prohibiting aggression.[37] Fourth, it is true that also other P-5 states committed aggression (the example of Iraq 2003 is often quoted in this context), but it cannot be forgotten that Russia's aim is the annexation of at least part of Ukrainian territory (confirmed already by the annexation of Crimea), which means that it is engaged in a continuous act of aggression. Fifth, there are many institutions and experts who argue that Russia is engaged in a systematic commission of war crimes and crimes against humanity, to the extent that the commission of war crimes became Russia's mode of conduct.[38]

Presentation of the volume

As the largest international armed conflict in Europe since World War II, Russia's aggressive war against Ukraine provoked strong international reactions and questions about the roots of Russian aggression, the post-1945 world order, the utility of the war and the effectiveness of international criminal justice. This book attempts to contribute to these discussions and to help understand the diverse dimensions of the conflict in Ukraine and the demands of the post-war justice. The inspiration for this volume were the debates among academics, practitioners, and civil society representatives that were held in February 2023 during an international conference marking the first anniversary of the full-scale invasion: "Russia's War of Aggression against Ukraine. Challenges of Documenting and Prosecuting War Crimes,"[39] organized by the Pilecki Institute, a Polish research and archival institute in cooperation with the Berlin-based think-tank Zentrum Liberale Moderne.

The aim of this conference was to initiate an interdisciplinary debate on the causes and consequences of the war and the best responses to Russian crimes, as well as to shed light on differing historical narratives and political approaches in

Eastern and Western Europe, which impact the ways of understanding the Russian–Ukrainian war.[40]

This book presents the results of interdisciplinary research by international scholars from Canada, Germany, Poland, Ukraine, the United Kingdom, and the United States, thus offering a broad research expertise and unique approach, integrating the knowledge from various fields to address the legal, historical, social, and political aspects of crimes committed during the conflict in Ukraine. The volume aims to overcome the problem of "Westplaining" by giving voice to Eastern scholars, mostly directly engaged in the works concerning the documentation and prosecution of crimes in Ukraine, and by presenting a broader picture of the post-Cold War relations in the region which have a strong impact on the current conflict. As a result, we hoped to achieve a better understanding of the roots and nature of the Russian–Ukrainian war, as well as to present possible responses to Russian crimes and challenges to their documentation. A strong focus is placed on the victims-centered approach to transitional justice, the experiences and expectations of civilians who suffered from the Russian invasion, and the activities of leading institutions collecting witness accounts in Ukraine and Poland. The underlying hypothesis of this volume is that the dissolution of the Soviet Union did not end Moscow's imperial policy towards its neighboring countries. The present Russian atrocities against Ukrainian civilians may be regarded as the newest phase in a long history of the Soviet/Russian domination and violence that shaped the history of East-Central Europe throughout the 20th century. Therefore, to understand the origins, course, and consequences of Russian aggression against Ukraine, a comprehensive approach, including legal, historical, political, and social contexts, is the most desirable.

The first section of the book, "The Soviet legacy and *Ruskii Mir*," clarifies the links between current Russian policy and its Soviet legacy, as well as explaining the concept of *Ruskii Mir* and its role in the criminal conduct of Russian politicians and soldiers (see chapters by Kramer and Lachowski). The authors also attempt to answer the question whether systemic impunity for crimes of the Soviet regime had an impact on the actual conduct of Russian troops. This question is discussed not only by recalling the lacking prosecutions and investigations into crimes of the past in Russia, but also from the perspective of other post-communist states, e.g., Germany, Poland, and Ukraine, their memory laws and policies (chapters by Weinke, Lachowski, Kaparulin). In this context and with reference to the crime of the Holodomor (the famine of 1932–1933), the issue of classification of crimes committed in Ukraine as genocide is elaborated. The role of post-truth narratives, created and spread by the Russian Federation to advance its domestic and international political goals, including the justification of crimes committed in Ukraine, is also evaluated (chapter by Yurtayeva). This section is concluded with a case study on how young generations in Russia are influenced with Soviet-era notions and ways of thinking and how the social media war propaganda can enhance the public acceptance of militarism in Russian society.

The overview of crimes committed during the war in Ukraine, based on verified reports of international organizations, as well as problems related to the collection

of war crime evidence are discussed in the second section: "International Crimes in Ukraine and Their Documentation." By analyzing available reports on atrocities committed in Ukraine and violations of international humanitarian law rules by the Russian troops, the question of employing war crimes as tools of warfare is addressed in the opening chapter (Bieńczyk-Missala). Then the process of documentation is examined, not only for the purposes of criminal proceedings (Kuczyńska), but also for the sake of establishing the truth, identifying victims and perpetrators, as well as for historical, legal and sociological research purposes. Institutions and networks engaged in collecting evidence and witness testimonies are introduced (see chapters by Nekoliak, and Konopka and Wiciarz), along with different problems which those centers encounter, including for example, the ethical principles to comply with (Wylegała). As a result, the reader is able to understand the methods of documenting crimes in Ukraine and the systematic efforts undertaken by public institutions and civil-society actors to collect evidence and witness accounts of Russian aggression. This section ends with lessons learnt from the United Nations War Crimes Commission – the main body with extensive experience in documenting crimes of World War II and coordinating international efforts to bring the perpetrators of those crimes to justice (chapter by Plesch, Thaler, Uczkiewicz).

The third section, "Prosecution of crimes committed during the war in Ukraine," focuses on the available means of national and international law to pursue accountability for war-related crimes and on the obstacles faced by the international criminal justice system as regards the conflict in Ukraine. The efforts of the national courts of Ukraine (see chapters by Nuridzhanian, Kuc), Poland (Krzan) and Germany (Bock) to prosecute crimes committed during the Russian–Ukrainian war are presented here, along with the struggle to engage international courts in the whole process. The problem of imposing the Western approach to the prosecution of crimes is tackled from both a theoretical (Labuda) and a practical (Korynevych) perspective. Another lesson included in this section refers to the UK's investigative failures in the Iraq and Afghanistan wars (Williams). This example is important for the Ukrainian case, as often the UK's efforts – or lack thereof – to deal with alleged crimes of UK politicians and soldiers are indicated as a reason to block international initiatives for the establishment of a new international court to prosecute, for example, aggression.

We hope that this book has a potential to impact the general debate on the challenges to the prosecution and documentation of international crimes. At the same time, it proves how important it is not to neglect the regional approach to those problems in order to properly understand the context of and intentions behind the crimes committed.

At the end, we would like to express our gratitude to all the authors who went through several rounds of changes, corrections, and clarifications, to the translators and editors who helped us become more intelligible to the wider English-reading public, to the peer reviewers whose comments were extremely valuable in finding the proper balance between neutral analysis and opinions, and also to the Pilecki Institute for their unceasing support.

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Part I

The Soviet legacy and *Ruskii Mir*

1 War crimes in Russia's invasion of Ukraine

The Soviet legacy and the wellsprings of Moscow's disregard of international humanitarian law

Mark Kramer

1.1 Introduction

This chapter discusses the historical roots of the Russian Federation's approach to international humanitarian law (IHL) and the implications for the war Russia launched against Ukraine in February 2022. Modern IHL – the set of norms and commitments governing the conduct of armed conflict (*jus in bello*) – dates back to the nineteenth century, but the most important agreements were concluded just after (and in response to) the extreme abuses of the Second World War. Of particular importance are the four Geneva Conventions of 1949 and the two Additional Protocols to the conventions adopted in 1977.[1] The four Geneva Conventions brought together and strengthened the principles of earlier Geneva treaties (signed in 1864, 1906, and 1929) and added a fourth treaty focusing on the protection of civilian populations in times of war.

After the Soviet Union broke apart, the government of the newly independent Russian Federation pledged to comply with the four Geneva Conventions, the two Additional Protocols, and other international humanitarian norms. Nonetheless, in subsequent decades the Russian armed forces repeatedly committed war crimes and atrocities and showed no willingness to uphold any of the country's IHL commitments. In October 2019, amid criticism of extensive destruction of civilian areas in Syria caused by Russian aerial bombardment, the Russian government decided it would no longer even pretend to adhere to fundamental norms of IHL. Russian President Vladimir Putin issued a decree that month that formally curtailed Russia's Geneva Conventions obligations by rescinding the Soviet-era instrument of ratification of the first Additional Protocol.[2] This action marked the only time that a signatory of the seminal postwar IHL documents had revoked its ratification of documents it had earlier signed. A month later, the Russian parliament adopted a law codifying Russia's withdrawal from the Additional Protocol.[3]

The chapter begins by tracing the USSR's policies toward the Geneva Conventions and Additional Protocols and the effects (or lack thereof) of these documents on Soviet military operations both abroad and at home from the late 1940s through the early 1990s. The experience with the Conventions and Additional Protocols during the Soviet era helped to shape the policies of the

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Russian Federation, which, as a legal successor state to the USSR, inherited the Soviet government's obligations under international treaties and agreements. The chapter then highlights the changes and continuities in post-Soviet Russia's stance vis-à-vis IHL, including during Russian military interventions in Georgia, Moldova, Tajikistan, Ukraine, Syria, and Libya, as well as during the two brutal wars the Russian army and security forces fought in Chechnya in 1994–2009 to crush insurgencies and retain federal control over the territory.

The chapter sheds light not only on Soviet and Russian approaches to warfighting but also on recent scholarly literature regarding international norms and state behavior. A norm in international relations, including the tenets of IHL, can be defined as a shared conception of the appropriate way to behave or the appropriate stance to take on a particular issue.[4] Over time, as a norm becomes more prevalent, actors in the system come to expect that other actors will comply with it.[5] The growing acceptance of a norm, coupled with a solid record of compliance, does not preclude the establishment of mechanisms to monitor and, if necessary, enforce compliance with it, but, in principle, a widely recognized norm could eventually become self-enforcing or nearly so.[6]

Scholars who analyze international norms have sought to explain how norms emerge and spread, how they come to be accepted and internalized, and why individuals and states comply (or fail to comply) with them.[7] The focus here is on the last of these topics – compliance (or non-compliance) with norms relating to IHL and the infliction of harm on civilian populations and prisoners of war. A key aspect of this issue is the second of the three topics just mentioned, the process of internalization.[8] Although political leaders and military personnel might comply with a norm of international humanitarian law even when they have not internalized it – out of fear of punishment or of public disgrace, for example – the odds of compliance will almost certainly be greater when internalization has occurred and when specific obligations are widely understood.

Russia's multiple wars over the past three decades illustrate why compliance with international humanitarian norms becomes much more problematic when internalization has not occurred. The brutality of Russia's military operations in foreign countries and on Russian territory has stemmed not so much from a lack of awareness of these norms as from a lack of willingness to comply with them, regardless of the country's supposed commitment to uphold them. Policymakers in Moscow may have pledged their acceptance of humanitarian principles by signing and ratifying international treaties, but when faced with the exigencies of military conflict they simply ignored their commitments and gave the Russian army and internal security forces a free hand. The commanders of Russian military and security forces, for their part, were in many instances aware of the basic norms of international humanitarian law, but they had no desire or incentive to abide by them. On the contrary, they were often rewarded for committing atrocities. Russia's whole approach to warfare in the post-Soviet era thus underscores what can happen when internalization at all levels of political and military power is non-existent and when other factors that might induce compliance (e.g., supranational enforcement bodies) are also absent.

The chapter is based on declassified Soviet documents, publicly available Russian government documents (both published and unpublished), analyses by

Russian experts on international law, the training manuals and guidelines used by officers and soldiers affiliated with the Russian Ministry of Defense and the Russian Ministry of Internal Affairs (MVD), other materials from the main military and MVD academies, unpublished information regarding the rules of engagement given to Russian commanders and servicemen, and dozens of interviews from 2005 through 2018 with senior Russian military and MVD officers, with Russian servicemen who at various times after 1991 were deployed in military operations abroad or in Chechnya, with Russian international law specialists, with experts at international human rights organizations focusing on Russia, and with Russian policymakers.[9] Some interviewees requested anonymity, but several of the key figures I interviewed gave me permission to identify them by name.

The next two sections of the chapter draw on work I published in 2017 and 2019, but I have revised, expanded, and updated all the material to underscore the pernicious impact of the Soviet legacy and to highlight the Russian Federation's long track record since 1991 of violating international humanitarian law.[10] The Soviet legacy and the demonstrated unwillingness of Russian leaders to uphold their binding international legal obligations – especially their commitments to comply with basic norms of IHL – bode ill for Russia's military operations in Ukraine.

1.2 The Soviet legacy

Because the Russian Federation is the main successor state to the Soviet Union under international law, and because the Russian Ministry of Defense and Russian MVD inherited the bulk of the personnel and equipment of the Soviet Defense Ministry and Soviet MVD, Russian policy toward the Geneva Conventions and Additional Protocols has been influenced by the Soviet Union's approach to warfighting. Hence, a brief overview of the Soviet Union's compliance (or lack thereof) with IHL during Soviet military operations after 1949 is essential here.

1.2.1 Signing, ratifying, and incorporating the Conventions

The Soviet Union signed the four Geneva Conventions (though with reservations regarding Conventions III and IV) in December 1949 and ratified them in April 1954.[11] From 1974 to 1977, Soviet officials played an active role in the Geneva Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which ended in June 1977 with agreement on two Additional Protocols to the Geneva Conventions. These two protocols, one dealing with "international armed conflicts" and the other with "non-international armed conflicts" (i.e., civil wars), were supposed to broaden "the 1949 Geneva Convention protection of victims of war" by taking account of "changes in the nature of armed conflicts in the past quarter century."[12] From the Soviet Union's perspective, this expansion of coverage was a welcome step in giving a privileged status to anti-Western guerrilla movements in the Third World, especially to guerrillas waging war against Israel and to Marxist-Leninist fighters that were

directly combating the United States and its allies.[13] The Soviet government signed the two Additional Protocols in December 1977 but did not end up ratifying them until September 1989, shortly after Soviet military forces completed their withdrawal from Afghanistan after a lengthy war.

Conventions I and II were incorporated into the legal guidelines for Soviet military commanders and servicemen in February 1958 when the Soviet defense minister, Marshal Rodion Malinovskii, issued Directive No. 20, titled "Instructions for the Adoption within the Armed Forces of the USSR of the Geneva Conventions of 12 August 1949 on the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and of Individuals Shipwrecked at Sea."[14] At the behest of leaders of the Communist Party of the Soviet Union (CPSU), the Soviet legislature followed up in December 1958 by including provisions (Articles 32 and 33) relating to Conventions I and II in the amended Law on Criminal Responsibility for Crimes against the State.[15] Until February 1990, however, Conventions III and IV (regarding treatment of prisoners-of-war and protection of civilian populations) and the two Additional Protocols were not incorporated into either the Soviet Defense Ministry's legal guidelines or the USSR's legal code.

On 19–20 January 1990, Soviet military and internal security forces undertook a large-scale incursion into Soviet Azerbaijan and quickly crushed the separatist Azerbaijani Popular Front – an operation that, unlike military crackdowns elsewhere in the Soviet Union over the previous few years, did not provoke controversy or criticism in Moscow.[16] A few weeks later, with the fighting in Azerbaijan over, Soviet Defense Minister Dmitrii Yazov signed Directive No. 75 "On the Proclamation of the Geneva Conventions regarding the Protection of Victims of War."

The issuance of this directive marked the first time that legal guidelines for the Soviet armed forces took at least nominal account of the full range of IHL (*mezhdunarodnoe gumanitarnoe pravo*, or MGP, in Russian).[17] Yazov's signature of the directive was preceded by a contentious debate within the Soviet High Command and Soviet Defense Council, a top-level military-political body headed by the CPSU General Secretary (Mikhail Gorbachev at the time).[18] Some of the most influential Soviet military commanders, such as Vladislav Achalov (the commander of Soviet Airborne Forces) and Valentin Varennikov (the commander-in-chief of Soviet Ground Forces), spoke strongly against the directive. Yazov himself was initially skeptical of it, citing the "unfounded criticism and malicious hostility" that supposedly were already being directed against the Soviet armed forces for their role in operations to suppress political and nationalist unrest in the Caucasus and elsewhere. Some of the civilian and military proponents of the directive argued that the severe abuses perpetrated by Afghan guerrillas against Soviet POWs during the 1979–1989 war were ample reason to emphasize Convention III and the Additional Protocols. Other supporters argued that the directive would give a boost to the "new political thinking" espoused by Gorbachev. Ultimately, Yazov acquiesced in the decision by the Soviet Council of Ministers (at the behest of Gorbachev, who had just assumed the new post of Soviet president while remaining party leader) to authorize promulgation of the directive.

1.3 Soviet military interventions abroad: the Geneva Conventions in practice

Even though the four Geneva Conventions and two Additional Protocols were not formally incorporated into Soviet military guidance until 1990, this did not mean that Soviet troops invariably acted with unrestrained brutality in earlier years when engaging in armed combat. On five occasions after 1949, Soviet soldiers openly took part in military operations abroad – in East Germany in June 1953, in Hungary in October–November 1956, in Czechoslovakia in August 1968, at several disputed sites along the lengthy border with the People's Republic of China (PRC) in March and August 1969, and in Afghanistan from December 1979 to February 1989. (Soviet military pilots also surreptitiously engaged in aerial combat during the Korean War, the Vietnam War, and Arab–Israeli conflicts in the Middle East, but their participation in those instances was not openly acknowledged until many years later.[19]) In the five cases of openly acknowledged operations abroad, the Soviet armed forces' record of compliance with norms of IHL was dismal overall but in two instances was not as deficient as one might have expected.

1.3.1 East Germany, 1953

The first external military operation by Soviet troops occurred in East Germany a few months after the death in March 1953 of the long-time Soviet dictator Joseph Stalin. On 16–17 June 1953, more than a million East Germans – roughly 20 percent of the adult population – in some 650 cities and towns went out into the streets to rise up against Communist rule and Soviet domination.[20] At the time of the rebellion, the Soviet Union had not yet ratified the Geneva Conventions and was only 8 years away from the end of a devastating war in which Soviet and German troops had clashed with unremitting ferocity. The Soviet occupation of eastern Germany from 1945 on had been extraordinarily harsh, facilitating the imposition of Communist rule.

Nonetheless, when 17 Soviet tank and mechanized divisions, supplemented by artillery, communications, and logistics regiments and battalions, were swiftly deployed in East Germany on 17 June to quell the unrest, they behaved with surprising decorum, relying mainly on intimidation rather than the direct use of force.[21] The limited fighting that took place was mostly over within a day. A top-secret U.S. intelligence report at the time noted that during the operation to put down the rebellion, "the Soviet troops demonstrated a remarkable discipline, restraint, and cool-headedness, which came as a surprise to all, foremost to the East Germans."[22] Whether this restraint would have continued if large-scale violent resistance had erupted and had been sustained for a prolonged period in numerous East German cities is, of course, a different matter.

1.3.2 Hungary, 1956

The Soviet Union's next external military operation occurred in Hungary in October–November 1956. After mass political protests erupted in Hungary on 23 October, CPSU leaders hastily decided to send Soviet military forces to "restore order." The initial Soviet intervention involved only a limited number of troops, but the introduction

of even this small contingent of Soviet forces into Budapest merely fueled the rebellion and converted it from a mass revolt against the Stalinist regime in Hungary into an anti-Soviet (as well as anti-Stalinist) uprising aimed at breaking Hungary away from the USSR.[23] On 27 October, the Hungarian Red Cross, whose headquarters and vehicles had been largely destroyed by Soviet gunfire and bombardment in the first 2 days, urged the International Committee of the Red Cross (ICRC) to undertake an emergency relief operation and to "ensure that the provisions of the Fourth Geneva Convention for the protection of the civilian population are strictly respected."[24] The ICRC made a preliminary delivery of relief supplies via the Hungarian Red Cross on 29 October, but Soviet commanders prevented the ICRC from bringing in additional supplies by air 2 days later. The ICRC managed to deliver food and other materials by ground on 1 November, but from then until 11 November the Soviet Union blocked any further ICRC deliveries by either air or ground.

Starting on 31 October, the ICRC repeatedly broadcast an appeal on shortwave radio exhorting "all concerned" to abide by "several fundamental principles contained in the Geneva Conventions."[25] On 4 November, at the urging of the Hungarian Red Cross, the ICRC issued a further urgent appeal calling on all "commanders and combatants in Hungary" to allow the ICRC to evacuate and care for all wounded personnel "in accordance with the provisions of Article 15 of the Fourth Geneva Convention."[26] Soviet political leaders and military commanders brushed aside this plea as they continued with a much larger invasion of Hungary, using more than 200,000 Soviet soldiers. The crackdown on Hungarian rebels and bystanders was brutal and caused great destruction and bloodshed among civilians. By the time the fighting diminished on 9 November 1956, more than 2,500 Hungarian civilians were dead, and more than 19,000 were wounded.[27]

Afterward, the Soviet Union did permit the ICRC to resume relief operations in Hungary, which lasted from 11 November 1956 until 25 June 1957, despite occasional disruptions and harassment. Nonetheless, overall, the invasion of Hungary was notable mostly for the Soviet Union's failure to comply with key provisions of the Geneva Conventions and its disregard of humanitarian norms. Subsequent investigations by international legal organizations and by a United Nations (UN) special committee on the crisis concluded that Soviet forces in Hungary had been culpable of "flagrant violations" of the Geneva Conventions, including "shooting indiscriminately" at civilians and unarmed fighters who were trying to surrender as well as "many cases of shooting at ambulances, Red Cross vehicles, and the doctors and nurses in those vehicles."[28] Investigators also highlighted instances of torture. Soviet officials dismissed these accusations out of hand and refused to respond on a point-by-point basis when the UN General Assembly convened a special emergency session on 4–10 November 1956 to discuss the situation in Hungary. Under Soviet pressure, the matter was eventually removed altogether from the UN's agenda.

1.3.3 Czechoslovakia, 1968

In the first 8 months of 1968, Czechoslovakia underwent sweeping reforms that rejuvenated the country's political, cultural, social, and economic life.[29] The reforms, widely known as the "Prague Spring," earned overwhelming popular

support in Czechoslovakia and a great deal of sympathy in the West (including from major West European Communist parties), but the process soon sparked dismay among orthodox Communist leaders of Czechoslovakia's Warsaw Pact allies, particularly the USSR. After months of Soviet threats and intimidation, accentuated by military exercises in and around Czechoslovakia, failed to bring an end to the Prague Spring, the Soviet Union and four other Warsaw Pact countries sent a huge invading force – eventually numbering more than 400,000 soldiers – into Czechoslovakia to restore hardline Communist rule.[30]

The Soviet and allied East European troops who moved into Czechoslovakia and quickly established military control of the country in August and September 1968 did not encounter violent resistance at any stage. Non-violent resistance was widespread and vigorous, but in the face of overwhelming military power, the Czechoslovak authorities and the Czechoslovak public decided to eschew attempts at violent resistance. As a result, civilian casualties during the invasion and initial weeks of occupation of Czechoslovakia were very limited (though 104 people did die and 335 were seriously injured through accidents or when putting up non-violent resistance).[31]

Western governments and international legal experts accused the Soviet Union of having violated the UN Charter and other international agreements restricting the use of force, but they did not allege that Soviet troops had violated the Geneva Conventions. Even if such charges *had* been voiced, Soviet leaders staunchly rejected the notion that the entry of Soviet troops into Czechoslovakia was counter to international law. With the promulgation of the so-called Brezhnev Doctrine (a Western, not Soviet, term referring to a set of authoritative Soviet statements justifying the invasion), the Soviet Union embraced the notion that the "laws of class struggle" must always take legal precedence over "abstract concepts of sovereignty."[32] Elaborating on this notion, Soviet theorists began distinguishing between "bourgeois" and "class-based" versions of international law. They argued that the intervention of Soviet and East European troops into Czechoslovakia, far from transgressing the principles of respect for sovereignty and non-interference, had actually buttressed them by "defending Czechoslovakia's independence and sovereignty *as a socialist state*" against "the counterrevolutionary forces that would like to deprive it of this sovereignty."[33] The "bourgeois" concepts of independence and sovereignty, according to this argument, were invalid because they lacked "class content" and because the norms of international law were meaningful only within "the general context of class struggle."

The Brezhnev Doctrine focused on rationalizing the use of armed force (*jus ad bellum*) rather than the conduct of war itself (*jus in bello*) or of military occupation. Therefore, it did not refer specifically to the Geneva Conventions or make any mention of the basic issues covered by the Hague and Geneva Conventions. Nevertheless, the Brezhnev Doctrine had far-reaching implications for how Soviet leaders might construe their obligations under IHL documents in the future.

1.3.4 Sino-Soviet border conflicts, 1969

The Soviet Union and the PRC had been staunch allies in the 1950s under a bilateral treaty signed in early 1950, but by the end of the 1950s the two Communist

giants had split angrily apart. Tensions between them rapidly mounted in the 1960s. Although secret bilateral negotiations in 1964 made significant progress toward resolving the status of approximately 700 small islands on the Amur and Ussuri Rivers along the Sino–Soviet border, the talks reached an impasse after the Chinese insisted that the Soviet Union admit to having benefited from a series of "unequal treaties" imposed on China in the mid-nineteenth century by the Russian Empire.[34] After the Sino–Soviet negotiations broke off in July 1964, political and ideological hostility steadily increased, culminating in deadly military confrontations in 1969 involving some of the disputed islands.[35]

The border conflict that erupted between Chinese and Soviet garrisons on the island known as Damanskii to the Soviet side (and Zhenbao to the Chinese) in the Ussuri River in early March 1969 was preceded by several weeks of armed skirmishes that caused injuries to a few soldiers on both sides but no damage to the small number of civilians living nearby. The major battle that erupted on 2 March resulted in the deaths of some 50 Soviet soldiers, including the commander of the Soviet garrison.[36] Declassified documents from Moscow and Beijing make clear that PRC forces instigated these clashes at the behest of the chairman of the Chinese Communist Party (CCP), Mao Zedong, who had launched China's chaotically violent Cultural Revolution in 1966. In early 1969, Mao was seeking to generate perceptions of an exigent threat from the USSR that would help justify China's domestic upheavals and consolidate his hold on power.[37]

Daily reports from the Soviet General Staff's military intelligence directorate in February and March 1969 had kept Soviet political leaders and military commanders apprised of events in China and the provocations along the border.[38] Nonetheless, the scale of the Chinese attacks on 2 March caught Soviet policymakers off guard. In the immediate aftermath of the clashes, Soviet military intelligence reports warned about "the further deterioration of Soviet–Chinese relations" and the "rise of the most extreme elements" [in the PRC] who would "exploit the situation" to foment "shrill anti-Soviet hysteria" and provoke "further armed incidents along the border."[39]

Another round of deadly clashes on the island, involving heavy artillery, main battle tanks, and other armored combat vehicles, ensued in mid-March, causing many dozens of casualties. Reports to Moscow from Soviet intelligence sources indicated that "local residents" had been caught in the crossfire.[40] After these initial hostilities, Soviet officials alleged that Chinese soldiers were deliberately surrounding themselves with civilian farmers and livestock when advancing on Soviet positions – a charge that, if true, would have pointed to a flagrant violation of the Geneva Conventions. (Even though there is little evidence that Chinese troops were deliberately using such tactics, some civilians were in the immediate proximity and were apparently unable to leave the area before exchanges of gunfire broke out.) Low-level skirmishes continued throughout the spring and summer, and on 13 August a group of more than 300 heavily-armed Soviet soldiers confronted and destroyed a squadron of 30 Chinese troops in the Chinese border zone along China's Tielieketi region in Xinjiang.[41] At the time, Xinjiang was sparsely populated, but the intense fighting and risk of wider hostilities posed a constant threat to civilian settlements. Neither side, however, took any steps to prevent collateral damage from the conflict.

Tensions escalated in subsequent months, and Soviet officials began stoking fears in Beijing that the Soviet Union would launch a preventive nuclear strike against the PRC.[42] No convincing evidence has yet emerged that leaders of the CPSU were actually contemplating such a strike, but it is now clear that when Soviet officials at the time spoke privately with Western policymakers and journalists to warn them of the possibility, they did so in the hope that these comments and rumors would reach Mao and other key figures in Beijing.[43] Soviet leaders hoped that the Chinese would find the rumors credible enough that they would cease further military action.

The Soviet campaign of nuclear coercion had its intended effect. In late August 1969, amid rising fears, the Chinese authorities began evacuating civilians from Xinjiang and other border areas and ordered local CCP organizations and ordinary citizens to be ready for a major Soviet attack, whether nuclear or conventional.[44] Simultaneously, they turned to negotiations. On 11 September, Soviet Premier Aleksei Kosgyin and Chinese Premier Zhou Enlai held emergency talks at the Beijing airport that helped to defuse the prospect of all-out war but did not eliminate severe tensions and fears of renewed fighting.[45] No further clashes actually transpired, but all evidence suggests that concern about danger to civilians in the border regions played no role in the Soviet Union's (or China's) decision to refrain from further combat. At no point did either side make any effort to comply with the Geneva Conventions or other IHL norms.

1.3.5 The Soviet war in Afghanistan, 1979–1989

On 12 December 1979, the CPSU Politburo approved a decision to send tens of thousands of Soviet troops to prop up Afghanistan's Communist regime, which had been increasingly threatened by Islamic guerrillas throughout the country.[46] Two weeks later, a KGB special operations unit seized the presidential palace in Kabul, paving the way for some 80,000 Soviet soldiers to move en masse into Afghanistan from the ground and the air, initiating a protracted war.[47]

The 9 years of warfare that ensued, officially involving only a "Limited Contingent of Soviet Forces," were marked by unrestrained violence and destruction. Immense suffering was inflicted on Afghan civilians by both sides in the conflict, and at least 1.5 million were killed.[48] Soviet forces were responsible for the overwhelming share of the bloodshed and misery endured by the civilian population in Afghanistan. They also routinely mistreated and executed POWs, in clear violation of the Geneva Conventions. The Afghan guerrillas who fought Soviet troops were no less willing to commit atrocities during the war, and they also gravely mistreated Soviet POWs.

Western governments, non-governmental organizations (NGOs), UN special envoys, and international legal experts repeatedly accused the Soviet Union of gross violations of the Geneva Conventions and other IHL and international human rights agreements, but Soviet leaders dismissed these allegations and blocked efforts by NGOs, UN-sponsored commissions, and other international bodies to conduct more in-depth investigations.[49] At the UN and elsewhere, Soviet officials

aggressively defended the actions of Soviet troops and denied that mass abuses had occurred. Even during the Gorbachev era, the Soviet government did not formally respond to charges that Soviet troops in Afghanistan had been culpable of systematically violating norms of IHL.

1.4 Security policing in the USSR: a role for the Geneva Conventions?

Within the USSR, Soviet military and internal security forces were employed after World War II in at least one contingency that undoubtedly could have been regarded as an "armed conflict not of an international character" and thereby covered not only by Common Article 3 of the Geneva Conventions but also by Additional Protocol II (after 1977). The counterinsurgency operations conducted by Soviet state security and military forces against armed resistance groups in several border regions annexed by Stalin at the end of the Second World War – western Ukraine, western Belarus, the three Baltic states (Lithuania, Latvia, Estonia), and Moldova – from the mid-1940s through the mid-1950s were on a much larger scale than some internal conflicts later on in other parts of the world in which Common Article 3 and Additional Protocol II were deemed applicable. In all the new Soviet regions, particularly western Ukraine and Lithuania, Soviet troops resorted to systematic torture (especially prior to Stalin's death in March 1953), mass reprisals, and indiscriminate violence and destruction of villages and other residential areas.[50]

Far from trying to curb atrocities against civilians during the counterinsurgency campaigns, Soviet leaders demanded that state security forces clamp down even more harshly. At a meeting of Ukrainian party and security force officials in early 1945, one of Stalin's top aides, Nikita Khrushchev, called for a "merciless struggle" against the population in western Ukraine to consolidate Soviet rule:

> You need to find the relatives of those who are helping the [anti-Communist resistance] and arrest them… . The [local population] will never respect us if we fail to take harsh measures. We must arrest all the participants, even the most minor ones. Some must be tried, others simply hanged [without trial], and the rest deported. Only then will we be sure that everything is in order. And the [local] population will know: For every one of ours, we will take out a hundred of theirs. Right now, the reverse is true. We must make them fear our revenge … If the [guerrillas] kill one of ours, you must burn the entire village to the ground! You have not been using enough violence! If you take a village and [the guerrillas] kill two women there, you must annihilate the entire village! You are the armed [security] forces, and you must make your enemies fear you, and your friends respect you.[51]

The subsequent reign of terror in western Ukraine was so bloody and indiscriminate that it became counterproductive, making it extremely difficult to establish order in the newly acquired regions.

Although anti-Communist guerrilla groups in the western borderlands also showed complete disregard for IHL, Soviet military and security forces bore by far the greater share of responsibility for abuses and atrocities committed during the

conflicts. Tens of thousands of civilians (as well as thousands of insurgents) were killed, and vast numbers suffered injuries, torture, and other abuse. Not until the mid-1950s were the insurgent groups annihilated once and for all.

After Stalin's death, deployments of Soviet military and state security forces for domestic crackdowns were of a much smaller magnitude. Even though Soviet troops behaved brutally on some occasions – in Georgia in March 1956, Novocherkassk in June 1962, and Georgia in April 1989, among other instances – these abuses did not come within the purview of Common Article 3 of the conventions or Article 1 of Additional Protocol II, both of which specifically do "not apply to internal disturbances and tensions."[52] The largest number of casualties in a single case occurred during the Soviet Army's incursion into Azerbaijan in January 1990, when at least 140 civilians were killed and more than 720 were wounded.[53] Yet even that operation, which was intended to crush the Azerbaijani Popular Front, would almost certainly not have qualified as the sort of "non-international armed conflict" covered by Common Article 3 or by Additional Protocol II.

That said, if the Soviet Union had lasted for several more years (or longer), Common Article 3 and Additional Protocol II might eventually have become relevant. As concerns mounted in official circles in Moscow at the end of the 1980s and early 1990s that Soviet troops might soon have to be used against large-scale separatist movements (especially in the Caucasus) or other rebellious groups, the prospect of an internal armed conflict that would fall within the scope of Common Article 3 and Additional Protocol II seemed distinctly plausible.[54] Hence, Yazov's signature of Directive No. 75 was not an insignificant or purely symbolic act. The behind-the-scenes debate that preceded the directive indicated that Soviet military and security commanders were worried about "having [their] hands tied" during future outbreaks of domestic turmoil. That sentiment persisted after 1991 and shaped the outlooks of senior army officers in Russia.

1.5 The shift into the post-Soviet era

The Russian Federation and the 14 other former republics of the USSR inherited the Soviet Union's international obligations under the Geneva Conventions and Additional Protocols. The main guidelines on IHL compiled by the Russian Defense Ministry after 1991 affirm that

> the Russian Federation, as a legal successor to the Soviet Union, is a participant in nearly all protocols of international humanitarian law. Thus, the norms and principles of the law of armed conflicts are obligatory for all categories of service personnel to fulfill when undertaking combat operations and when carrying out peacekeeping missions. Consequently, every serviceman must know them.[55]

These guidelines are reinforced by the Russian Constitution and by various Russian laws. Paragraph 4 of Article 15 of the Russian Constitution states:

> The universally recognized norms of international law and the international treaties and agreements of the Russian Federation shall be a component part

> of [the country's] legal system. If an international treaty or agreement of the Russian Federation fixes rules other than those envisaged by [domestic] law, the rules of the international agreement shall be applied.[56]

In principle, this formulation gives supremacy to IHL obligations and establishes the Geneva Conventions and Additional Protocols as Russian law.

By the time the Russian Constitution was adopted in December 1993, the Russian government had taken significant steps toward integrating the Geneva Conventions and Additional Protocols into the new, post-Soviet polity. In 1992, the ICRC was allowed (indeed encouraged) to open a branch in Moscow, something that had never been permitted during the Soviet era. In the spring of 1993, the ICRC also opened a regional office in the North Caucasus, headquartered in Nal'chik (the capital of Kabardino-Balkaria), which during both rounds of warfare in Chechnya (1995–1996 and 1999–2009) was responsible for "running a major humanitarian operation comprising both protection and assistance programs for the vulnerable populations affected by the conflict in Chechnya" and for "promoting [compliance with] IHL."[57] This latter task proved impossible to achieve in the absence of cooperation from the Russian army.

1.6 Russia's wars in Chechnya

The legal steps adopted by the Russian government in 1992–1993 were important, but they had no effect on Russia's conduct in either of the wars it fought in Chechnya after the breakup of the Soviet Union – the first lasting from December 1994 to August 1996 and the second lasting from October 1999 through March 2009, when the Russian government officially declared an end to its "counterterrorist operation" (KTO) in Chechnya. At the start of the first war, the Russian authorities ordered the armed forces to "use all means at the state's disposal … to ensure state security, legality, civil rights and liberties, and the protection of public order; to combat crime; and to disarm all illegal armed formations" in Chechnya and adjacent areas of the North Caucasus.[58] But throughout both conflicts, the Russian government argued that the Chechens' guerrilla campaign was not a sustained insurgency and did not rise to the level of a "non-international armed conflict" covered by Common Article 3 and Additional Protocol II.[59] Official rejection of the Geneva Conventions' relevance was reflected in the conduct of the two wars. Russian federal forces perpetrated widespread atrocities against combatants and civilians alike.

1.6.1 Denying the Conventions' applicability

The Russian government's argument for the irrelevance of the Geneva Conventions came under legal challenge in 1995 from two groups of deputies in the Russian parliament who contended that the Russian government was violating its international legal obligations by failing to apply the Geneva Conventions to the situation in Chechnya. This was "the first time a national court [had] been called

upon to scrutinize compliance by a state's armed forces with international rules concerning the protection of civilians and the conduct of hostilities during an armed conflict."[60] On 31 July 1995 the Russian Constitutional Court issued a mixed ruling on the matter.[61] On the one hand, the court determined that the war came within the scope of Additional Protocol II and that Russian federal forces had been violating the terms of the protocol. On the other hand, the court stipulated that the Russian government and armed forces had not been obliged to comply with Additional Protocol II because the protocol had not yet been duly incorporated into the Russian legal system (an interpretation that many legal experts in Russia found dubious). Although the Russian government officially denied that IHL was applicable to the war in Chechnya, the ruling overall gave the government precisely what it wanted, namely, de facto authorization for federal forces in Chechnya to disregard the Geneva Conventions and other such documents.[62]

The Constitutional Court did not explain why it believed that the war fell within the scope of Additional Protocol II, nor did it explain why it did not invoke other IHL obligations that are self-executing and would not have to be implemented through legislation. Under Article 15 of the Russian Constitution, these obligations should have been binding on Russian federal forces, but the court made no mention of them. Nor did the court clarify the matter in subsequent years, allowing the impact of the July 1995 ruling to stand. Although the Russian Supreme Court issued a regulation in October 2003 calling on lower courts to apply principles of international law, the Supreme Court itself routinely ignored this regulation in subsequent cases brought before it, including those pertaining to abuses committed by federal forces in the North Caucasus.[63]

The Russian government, for its part, never deviated from the position it staked out in 1995 to the effect that counterinsurgency operations in Chechnya did not fall within the scope of the Geneva Conventions or Additional Protocols or other IHL agreements. Standard Russian textbooks on IHL and the laws of war, especially those used in military academies and schools, did not cover Chechnya, except to claim that the Geneva Conventions and other IHL documents did not pertain to Chechnya.[64] Russian military academies covered the Geneva Conventions and other IHL documents, but the curriculum on these topics specifically excluded any discussion of the "internal disturbances" in Chechnya. Instead, the IHL training was intended mainly for Russian commanders and troops assigned to international peacekeeping missions.[65] U.S. officers who worked with Russian peacekeeping units in the Balkans attested that the Russian forces were generally well-versed in the Geneva Conventions and equipped with copies of relevant IHL materials.[66]

The situation with Russian soldiers sent to Chechnya from 1994 through 2009 was entirely different. Because the Russian government's official position during both wars was that the fighting in Chechnya was not covered by IHL, troops from the Russian army and the Russian MVD who were deployed in Chechnya were not given any training in the Geneva Conventions and were regularly given assignments that contravened basic principles of IHL (and even Russian domestic law). Commanding officers from the Russian army who were stationed in Chechnya were generally aware of the Geneva Conventions, and some

commanders understood the provisions thoroughly, but none of them felt under any obligation to comply with the conventions or associated documents or to insist that their troops abide by Additional Protocol II. A colonel serving with the 42nd Motorized Rifle Division observed in July 2006 that "these sorts of international agreements [the Geneva Conventions] do not apply here, not at all. We are dealing with terrorists here. [Applying IHL] here is out of the question. This is a counter-terrorist operation."[67]

Troops from the Russian MVD – the agency that officially oversaw all operations in Chechnya from September 2003 to April 2009 – were given no training at all in the Geneva Conventions or other IHL documents. Neither the main academy of the MVD (*Moskovskaya Akademiya MVD*) in Moscow nor any of the ministry's regional schools and academies covered IHL, and the standard textbooks used at the MVD academies referred only to Russian domestic law, not to the Geneva Conventions or Additional Protocols. A whole chapter of the main textbook went carefully through the Federal Law on Combating Terrorism (passed originally in 1998 and periodically amended afterward), but it did not connect it in any way to IHL. When asked in late 2007 why the MVD had never offered any training in the Geneva Conventions to its soldiers before sending them to the North Caucasus, an MVD lieutenant–colonel who had been in Chechnya on multiple tours seemed puzzled by the question. "We are in charge of a counterterrorist operation in the region; this is not an international war." When he was then asked specifically about Common Article 3 and Additional Protocol II and whether the fighting in Chechnya at any point would have qualified as an "armed conflict not of an international character," he replied negatively: "This is not a civil war. It is not a civil war. In a civil war you have two competing centers of power. We are fighting isolated bands of terrorists, not a civil war."[68]

These frequent characterizations of the Chechen wars as "counterterrorist operations" outside the auspices of IHL rather than as "armed conflicts" were in line with official policy. In response to ICRC queries in late 1994 and early 1995, the Russian government formally notified the international body that it did "not regard the current operation as coming under the auspices" of IHL because it was "only a limited operation to cope with an internal disorder and to combat terrorists." That position remained unchanged throughout the first war, and essentially the same position was adopted at the start of the second war.[69] Russian officials did acknowledge in early 2000 that the "counterterrorist operation" in the second war had begun with a "military phase," but they expressly denied that this meant the operation should be governed by international humanitarian law. The Russian Defense Ministry, which was in charge of the "counterterrorist operation" during the first year-and-a-half (before yielding command to the Federal Security Service and later to the MVD), consistently stuck by its finding that the fighting in Chechnya was no more than an "internal disturbance" and was therefore not subject to any provisions of IHL.[70]

During both wars, Russian human rights activists and a few Russian international legal specialists disputed the Russian government's position. In June 2000, for example, a professor of law at the Russian Academy of Military Sciences, Captain Vladimir Galitskii, argued that "the events in Chechnya [during both wars] should

be classified as an internal armed conflict, in the course of which it is obligatory to adopt Article 3, common to all four Geneva Conventions from 12 August 1949, and Protocol II from 8 June 1977 in its entirety."[71] This view, however, gained no traction within the Russian government or military establishment. Galitskii complained that "unfortunately, many in Russian state, political, and military circles do not always correctly understand the essence of the laws of armed conflict." Whether because of a lack of "correct understanding" or for other reasons, the Russian government never embraced Galitskii's position and never accepted any obligation in the North Caucasus to comply with fundamental norms of IHL.

1.6.2 Consequences and lack of accountability

Throughout the two wars in Chechnya, atrocities were committed by both sides at the expense of civilians.[72] Russian federal troops engaged in systematic abuses of non-combatants, including torture, rape, forced disappearances, mass roundups (*zachistki*), extortion, brutal interrogations, and summary executions. Far from seeking to rectify these abuses, commanding officers frequently condoned them or at least turned a blind eye. The Chechen guerrillas, for their part, often used civilians as human shields and resorted to grisly revenge attacks against suspected collaborators. Both the Russian troops and the Chechen guerrillas also practiced kidnapping for ransom.

During the first Russian–Chechen war, the abuses committed by Russian forces were often ignored in Russia but occasionally did provoke a public outcry. Reports broadcast by the then-independent NTV station that were highly critical of official policy helped to focus public sentiment in Russia against the conflict. During the second war, President Vladimir Putin reimposed state control of television (not least NTV) and ensured that all coverage was compatible with official aims.[73] When Russian news programs during the second war referred to Chechnya, they dwelt solely on the invidious deeds of Chechen "bandits" and "terrorists." No atrocities committed by Russian federal forces were ever mentioned. Instead, television stations broadcast dramatic series featuring the heroic exploits of Russian troops in Chechnya and the reconstruction undertaken by pro-Kremlin Chechen groups. Although the Russian press was less subject to state interference, the large majority of Russian citizens received all or most of their information about Chechnya from television. Most of the time, the subject was kept off the air entirely.

Moreover, even print journalists in Russia who tried to cover the abuses committed by Russian troops in Chechnya came under great pressure from the federal government, which closed down several newspapers that it deemed "unacceptably hostile" for reporting on such abuses. The government also orchestrated the beating or intimidation of outspoken reporters who reported candidly on the situation in Chechnya. Among the victims were Andrei Babitskii and Anna Politkovskaya, who were assassinated in late 2006. Russian officials often physically prevented "undesirable" journalists (including Babitskii and Politkovskaya) from traveling to Chechnya. Even when the government did not restrict access, reporters were aware that a visit to Chechnya would place them in constant danger

from rebel forces and criminal gangs. As a result, newspaper coverage often relied solely on information provided by federal commanders, who never mentioned anything that would be construed as a possible violation of the Geneva Conventions. All of these factors enabled Russian officials to control public perceptions of the conflict.

Another reason for the lack of any accountability in Russia for the failure to comply with the Geneva Conventions was Putin's success in undermining opposition parties and political competition in Russia. During the first Russian–Chechen war, some of the strongest criticism of Russian atrocities and war crimes came from opposition party leaders in the Russian parliament and from Yeltsin's rivals in the 1996 presidential election. During the second war, by contrast, Putin brought the parliament firmly under his control and used his high popularity ratings and leverage with the media (especially television) to eviscerate the two parties that espoused Western-style liberal democracy. He also increasingly marginalized all other political organizations that could constrain his political power or hinder his ruthless prosecution of the war.

The result was that the continuing bloodshed in Chechnya almost never came onto the political agenda, not even during barrages of terrorist attacks in Moscow and other Russian cities outside the North Caucasus. Only one of Putin's rivals in the 2004 Russian presidential campaign, Ivan Rybkin, dared to raise the issue at all, and he was quickly forced to drop it after coming under vehement criticism from Putin's spokesmen and aides.[74] A few members of the Russian parliament (mostly from the two liberal parties, the Union of Right Forces and Yabloko) occasionally raised pointed questions about the conduct of the war and the abuses committed by Russian federal forces, but no parliamentary committee ever held hearings on the conflict. Nor was any parliamentary overseer or independent commission set up to examine how the war was fought.

In the absence of genuine political debate about the role of IHL in the Russian–Chechen war, a grassroots movement to hold the authorities responsible for violations of the Geneva Conventions was a non-starter. Some Russian and international NGOs, such as Memorial, Human Rights Watch, and Amnesty International, published many critical reports about the rampant torture, killing, and other abuses perpetrated by both sides in Chechnya, but these reports were consistently ignored by the Russian government, which felt under no obligation to punish war crimes and abuses committed during the second war. On the exceedingly rare occasions when Russian soldiers were prosecuted for having committed serious crimes in Chechnya (e.g., Colonel Yurii Budanov, who brutally tortured, raped, and murdered a Chechen woman to amuse himself after a wild night of drinking), they were charged solely under Russia's domestic law.[75] Despite the Russian Supreme Court's regulation of October 2003, not a single prosecution was brought that referred even in passing to the Geneva Conventions or other IHL documents.

Thus, during both conflicts in Chechnya, the Russian government made no effort to hold federal troops accountable for war crimes and other grave breaches of international humanitarian law.

1.6.3 IHL versus human rights law

The only partly successful means of establishing a degree of accountability for the abuses and bloodshed perpetrated by Russian federal forces in Chechnya – and later a modicum of accountability for the violent mayhem caused by Russian troops outside Russian territory (in Georgia, Crimea, and Ukraine's Donbas region) – came not through IHL but through human rights law, specifically the role of the European Court of Human Rights (ECtHR) in adjudging cases brought against the Russian government.[76] After Russia joined the European Council in 1996 and ratified the European Convention on Human Rights in May 1998, the ECtHR became an influential forum for applicants from Russia, especially from Chechnya, who had exhausted all attempts within the Russian judicial system to seek remedies for egregious abuses of human rights.

From 1998 until 2022, by far the largest number of cases accepted by the ECtHR pertained to Russia, and the large majority of those concerned the North Caucasus, including atrocities committed in Chechnya in wartime. During the quarter century of Russia's membership in the European Council, the ECtHR issued rulings in more than 400 cases that found the Russian federal government culpable of human rights violations in connection with the second war in Chechnya, including enforced disappearances, unlawful killing, property destruction, torture, and widespread illegal and inhuman detention.[77] Among those who won judgments from the ECtHR (in 2017) were several hundred survivors of the terrorist siege of the school in Beslan in September 2004 that resulted in the deaths of more than 330 people, mostly children.[78]

Over the years, the ECtHR determined that Russian military and security forces were responsible for a wide range of extrajudicial killings, torture, and forced disappearances – all at the behest of the Russian government or with its acquiescence. In numerous instances, the ECtHR also ruled that Russia, by withholding key documents and other material evidence, failed to live up to its obligation as a member of the European Council to "provide all necessary facilities" to the Court to assist consideration of a case.[79] Although these transgressions were deemed to be breaches of human rights law (specifically the European Convention on Human Rights) rather than of IHL, the line between the two was blurred here, as elsewhere. Most of the applications regarding abuses that occurred during the second war in Chechnya could just as easily have been processed under the Geneva Conventions. The cases adjudicated by the ECtHR represented only a minuscule percentage of the tens of thousands of applications from Russia, but the Court's frequent rulings in favor of the plaintiffs were acutely embarrassing for Russian officials.

Not surprisingly, senior figures around Putin repeatedly criticized the ECtHR and claimed that it was biased against Russia. They undercut the Court's impact by refusing to bring perpetrators to justice, by eschewing meaningful investigations of alleged abuses, and by declining to redress underlying problems. Their criticism of the ECtHR began long before 2014, and it escalated after Russia's occupation and annexation of Crimea sparked a surge of tensions with Western countries. In 2021 and early 2022, as Russia mobilized for its invasion of Ukraine, the

Russian government also began preparing to revoke its adherence to the European Convention on Human Rights, seeking to act before the Council of Europe would formally expel Russia.

On 15 March 2022, the day before the Council of Europe voted to expel Russia, the Russian government announced that it would be terminating its relationship with the ECtHR.[80] One of Putin's closest allies, Vyacheslav Volodin, the speaker of the Russian State Duma, justified the pullout by insisting that the ECtHR had "become an instrument of political battle against [Russia] in the hands of Western politicians" and had issued "decisions in direct contradiction to the Russian Constitution and our values and traditions."[81] Putin himself spoke scornfully about the Court, arguing that "the ECtHR's politicized decisions were absolutely unacceptable for Russia" and that "we are now a lot better off without this interference from the West."[82]

The cessation of Russia's status vis-à-vis the ECtHR did not formally take effect until mid-September 2022, but in practical terms the Russian authorities severed all ties with the Court as of March 2022, leaving in limbo some 17,450 pending applications.[83] This action deprived Russian citizens of the only meaningful option they could pursue if they suffered flagrant violations of human rights and were denied justice by Russia's own legal system. The ECtHR initially hoped to process some 12,000 of the pending applications from Russia on an expedited basis by extrapolating from judgments in past cases of a similar nature, but the Russian government torpedoed such efforts by blocking access to crucial evidence and witnesses.[84] The lack of an effective alternative to the ECtHR has made it even more likely that grave abuses of human rights in Russia (not to mention war crimes perpetrated by Russian forces abroad) will go unpunished.

1.7 IHL and Russia's incursions into neighboring countries in the 1990s

In various international agreements signed by the newly independent post-Soviet countries in December 1991, the Russian government under President Boris Yeltsin pledged to respect the borders that existed between them as of the end of 1991. Yeltsin and his aides reaffirmed those binding commitments in numerous other international legal documents they signed over the next decade. But in practice the Russian government repeatedly sent troops into neighboring countries to bolster a Russian sphere of influence in the former USSR, often in glaring disregard of IHL.[85]

Violations of international humanitarian norms occurred routinely amid the fluid circumstances accompanying the disintegration of the Soviet Union. The situation was especially chaotic in Soviet Georgia and other union-republics in which multiple regions and entities put forth divergent claims of sovereignty and independence in 1990 and 1991. Poorly disciplined militias and armed units seized weapons from unguarded or lightly guarded stockpiles and confronted each other and Georgian troops, perpetrating violence against militias and civilians alike.[86] Shortly after the USSR was formally dissolved, soldiers and former KGB officers in the newly independent Russian Federation began actively helping pro-Russian separatist forces

in two of Georgia's regions: South Ossetia along Georgia's northern border with Russia from early 1992 on, and Abkhazia along Georgia's northwestern border with Russia adjacent to the Black Sea in 1993. In both cases, Russian military intervention – backed by Yeltsin and also by his hardline opponents – enabled the pro-Russian forces to break away from the central Georgian government's control and to establish their own heavily militarized quasi-states.[87]

The fighting in these two regions of Georgia led to rampant ethnic cleansing and other serious abuses, which the Russian authorities often instigated or exacerbated.[88] The Russian government deployed "peacekeeping" forces in both South Ossetia and Abkhazia from the early 1990s on, but these deployments were intended not for "peacekeeping" but to prevent Georgia from regaining control of either region.[89] Moscow's approach to "peacekeeping" in the South Caucasus often entailed harsh measures against local residents who did not want to be uprooted and forced into exile. At no time during these operations did Russian soldiers comply with basic IHL.

The same pattern emerged with Russian policy toward the newly independent republic of Moldova. By the time the Soviet Union broke apart, fighting in Moldova between pro-Moscow Transnistrian separatist forces and the Moldovan government had been simmering for a year. When the warfare escalated in March 1992, Yeltsin relied on what had been the 14th Guards Army of the Soviet Armed Forces to intervene on behalf of pro-Kremlin fighters in Transnistria and establish them as a quasi-independent state. The war and Russia's intervention caused violent abuses and huge disruption for civilians who were driven out of their homes and forced to live outside their native areas. In subsequent years, the Moldovan government repeatedly demanded the withdrawal of Russian forces from Transnistria and the restoration of Chișinău's control over the territory, but neither Yeltsin nor his successor, Vladimir Putin, showed any interest in pulling Russian soldiers out of Moldova or in seeking accountability for grievous war crimes.[90]

The intervention of Russian forces in Georgia and Moldova was accompanied throughout the 1990s by large-scale Russian military and security operations in Tajikistan, a small Central Asian republic far away from Russia, where a destructive civil war erupted in the spring of 1992 and dragged on for five years, killing many tens of thousands. In this case, Russian forces were intervening on behalf of a pro-Moscow central government against a variety of armed opponents. In that sense, Tajikistan was the opposite of Georgia and Moldova, where Russian troops had provided support to separatist fighters against the existing central authorities. Neither the Tajik government nor its various opponents showed any concern about international humanitarian law, and Russian forces likewise made no effort to comply with IHL during their prolonged operations in Tajikistan. Because there was no legal basis for Russian intervention in Tajikistan, Russian military and security forces relied on structures and laws left from the Soviet era.[91]

Neither IHL nor human rights law played any role in Russia's activities in Tajikistan, which were mainly geared toward a quest for regional hegemony. Russian officials were aware of the human rights abuses and corruption that had prevailed in Tajikistan from the late 1980s on, but Yeltsin was willing to overlook

those shortcomings so long as Tajikistan's rulers, especially Emomali Rahmon, the Tajik politician who became the supreme leader of the country in November 1992 (initially as chair of the Tajik parliament and then as Tajik president), were willing to subordinate their country to Russia's control. Russia's 201st Motorized Rifle Division kept Rahmon in power and helped him finally bring an end to the civil war in June 1997.[92] Neither Rahmon nor anyone in Moscow seemed to care that Russian forces and Tajik fighters had routinely violated basic IHL norms throughout the civil war and after. Soldiers in Russia's 201st Rifle Division said in interviews in 1999 and 2013 that they had never received training in IHL.

The Russian government's repeated military incursions into other former Soviet republics in the 1990s provoked no significant Western response even when Russian forces committed clear violations of IHL. The lack of response suggested that Western countries were wont to view other former Soviet republics – what Russian officials called the "near abroad" – as a Russian sphere of influence. This pattern set the stage for the escalation of Russia's military activities vis-à-vis other former Soviet republics after Putin replaced Yeltsin on the final day of 1999.

1.8 IHL and Putin's external wars

In much the same way that Putin cracked down brutally in Chechnya, he repeatedly used the Russian army outside Russia's borders without regard for IHL. When Russia went to war against Georgia in August 2008, Putin was temporarily serving as prime minister to comply with constitutional limits on consecutive presidential terms, but he promptly took command of the Russian army and ordered Russian troops to push all Georgian forces out of South Ossetia and Abkhazia.[93] With that mission swiftly over, Russian troops swept into the rest of Georgia to impose a settlement that would deprive the Georgian government of any lingering presence in either of the border regions. More than 3,000 casualties, including 412 civilian deaths, ensued in the 5 days of combat, and tens of thousands of Georgians were permanently displaced.[94] At least 35,000 homes were destroyed by Russian troops and allied forces, mostly in indiscriminate raids.

Western governments largely acquiesced in the Russian army's rout of the Georgian military and took no steps to prevent the Kremlin from recognizing South Ossetia and Abkhazia as sovereign entities in the aftermath of the brief war. Nor did Western governments seek punishment of Russian forces that committed atrocities during and after the war. Emboldened by the lack of accountability for breaches of IHL, officials in Moscow declared that, from that point on, the two new quasi-states would be integral components of Russia's "sphere of privileged interests."[95] Even though only a few small countries joined Russia in recognizing South Ossetia and Abkhazia as independent states, the war against Georgia had lasting consequences. In addition to the bloodshed and forced displacement, roughly 20 percent of Georgia fell under Russian occupation. In all these respects, the war seemed to show that Kremlin policymakers could use large-scale military force against small states and violate the Geneva Convention with impunity.

Georgian officials filed a legal complaint against Russia with the European Court of Human Rights in August 2008 as the war was ending, but the case remained on hold for more than 12 years, in part because of wrangling over applicability and jurisdiction. The ECtHR Grand Chamber ultimately ruled in favor of Georgia in January 2021 – in a judgment that found Russia culpable of unlawful killing, torture, forced disappearances, destruction and looting of homes, inhuman and degrading treatment of detainees, and other egregious abuses – but the outcome underscored the drawbacks of relying on human rights law to assess responsibility for war crimes.[96] The ECtHR ruling applied only to abuses committed after the war rather than to wartime atrocities. Even though the judgment was a major setback for the Russian government, the ECtHR seemed to want to curtail the co-applicability of IHL and human rights law in future wars.[97]

The long series of Russian military interventions in other former Soviet republics took on a new edge in early 2014 when Putin responded to the Maidan revolution in Ukraine by ordering the occupation and annexation of Crimea, a peninsula in southern Ukraine on the Black Sea that had been part of Soviet Russia until 1954. For various reasons that were not convincingly explained at the time (or later), Soviet leaders decided in 1954 to transfer Crimea to Soviet Ukraine, and the peninsula was thus part of Ukraine when the Soviet Union disintegrated in late 1991.[98] In the final days of the USSR and in later years, Russian officials signed numerous binding agreements that committed them to respect Ukraine's territorial integrity and existing borders. These pledges, however, often seemed to have little connection to subsequent Russian policy. On many occasions after 1991, Russian officials cast doubt on the legitimacy of the transfer of Crimea to Ukraine and vowed to undo it. They expressed hope of resolving the matter peacefully, but they declined to rule out the use of force if needed to reestablish Russia's control.[99]

The status of Crimea was such an acute point of contention between Russia and Ukraine in the early 1990s that Yeltsin's government even began supporting a pro-Russian separatist movement on the peninsula under Yurii Meshkov. Not until mid-1994, after Leonid Kuchma was elected president of Ukraine on a platform of closer ties with Russia, did Yeltsin drop his support for Meshkov's "Rossiya" bloc in Crimea. Even after Russia and Ukraine signed landmark treaties in 1997 to resolve most aspects of their territorial disputes and other dividing points, some friction persisted over the status of Russia's Black Sea Fleet in Sevastopol. The salience of the issue diminished after the two countries signed a long-term extension of the 1997 lease in April 2010, but it came back to the fore after the Maidan upheavals of 2014 changed the calculus.[100]

The Maidan revolution itself had nothing to do with Crimea, at least initially. The chain of events that spawned the revolution began in November 2013 after Putin kept pressuring Ukrainian President Viktor Yanukovych to back away from a free trade and association agreement he had been planning to sign with the European Union. Yanukovych's decision to abandon the pact sparked mass protests on the Maidan, and these eventually led to his abrupt departure from Kyiv in late February 2014. Amid the turmoil that followed Yanukovych's ouster, Putin sent heavily armed "little green men" to Crimea to seize the peninsula and bring it under

Russian control – a mission they swiftly accomplished.[101] In mid-March 2014, at a lavish joint session of the Russian parliament, Putin proclaimed the annexation of Crimea, earning widespread praise in Russia for a move that bad been totally unexpected (and undebated) until it actually happened. Opinion polls indicated that large majorities in Russia strongly supported the takeover.[102]

Several weeks later, at Putin's behest, Russian soldiers and sympathetic Ukrainians instigated a conflict in the eastern Ukrainian provinces of Donets'k and Luhans'k, comprising the Donbas region. In this case, unlike in Crimea, Ukrainian troops fought against the Russian-backed "little green men" and limited the scope of the land the pro-Russian forces were able to occupy. The conflict involved fierce combat during the first year and then continued at a lower (though still deadly) level. Two Minsk peace accords signed by the Russian government in September 2014 and February 2015 to curb the fighting proved useless when Moscow declined to fulfill any of its obligations. During the 8 years from the spring of 2014 until Russian forces launched an all-out invasion of Ukraine in February 2022, more than 14,400 people were killed in the war that Putin had fomented in eastern Ukraine as a follow-up to his annexation of Crimea.[103]

Russian operations in Crimea and Donbas posed numerous problems for international humanitarian law, but in the absence of a global body that could adjudicate breaches of IHL, the Ukrainian government turned to the ECtHR in Strasbourg and the International Court of Justice (ICJ) in the Hague to seek redress for Russia's predatory actions in Crimea and Donbas. The Ukrainian authorities filed their initial claims in 2014 regarding human rights abuses in Russian-occupied Crimea and then brought subsequent claims to deal with the shootdown of the MH17 passenger airliner by pro-Russia fighters in Donbas in July 2014.[104] Because more than two-thirds of the passengers on board MH17 were from the Netherlands, the Dutch government also submitted a complaint to the ECtHR against Russia over the MH17 disaster. The cases dragged on inconclusively for many years and seemed at times to be on the verge of being rejected for technical reasons, but in 2021 and 2023 the ECtHR decided to accept the applications, with some exceptions.[105]

The rulings were a clear breakthrough for the Ukrainian and Dutch governments, but by the time they were handed down the likelihood of any cooperation from Russia had disappeared. In December 2015, the Russian parliament adopted a law at Putin's behest empowering the Russian Constitutional Court (RCC) to annul any judgment from the ECtHR or other international human rights body if the RCC deems the judgment to be at odds with the Russian Constitution.[106] The RCC's power to invalidate ECtHR rulings was further strengthened in November 2020 by another law adopted by the Russian parliament at Putin's behest.[107] Then, in 2022, as discussed above, the Russian government cut all its remaining ties to the ECtHR. Thus, the Ukrainian and Dutch cases at the ECtHR and elsewhere have had to proceed without any Russian participation and without any prospect that Russia will heed the final judgments of the Court.[108]

The Russian government's determination to evade international responsibility under both IHL and human rights law was fully evident even before Russian troops invaded Ukraine on 24 February 2022, but the invasion and the devastating war

have brought the whole issue to a head. Putin's contempt for Ukraine's post-1991 borders, and his willingness to discard all the binding commitments the Russian government had formally embraced in bilateral and multilateral agreements after 1991, were reflected in an article titled "On the Historical Unity of Russians and Ukrainians" that appeared in the Russian press under Putin's name in July 2021.[109] Using fanciful historical arguments, the article denied that Ukraine ever had any legitimate basis to exist as a sovereign state. Depicting Russians and Ukrainians as the same nation, the article emphasized that a Ukrainian state should not exist outside Russia. The implication was that Russia should extend its southwestern border to incorporate most or all of the territory of post-1991 Ukraine. The norms of IHL were of no relevance in Putin's thinking about the future of Ukraine.

Russia's invasion of Ukraine on 24 February 2022 and the brutal war that ensued have underscored what can happen when a large country adopts a militaristic course without any heed for international humanitarian law. In 2022, Putin had hoped to bring the whole of Ukraine's territory under Russian dominion within a few weeks. That effort failed disastrously, but the immense destruction and systematic atrocities caused by Russian forces have shown that the long record of Russia's disregard of IHL carries onerous costs. Putin stands indicted as a war criminal by the International Criminal Court, but responsibility for Russia's crimes against humanity extends to all government and judicial bodies in Russia that have encouraged (or at least not discouraged) the adoption of cruel, sadistic warfighting practices by the Russian armed forces.

1.9 Conclusions

Even the armies of liberal democratic countries – countries whose governments respect civil liberties in peacetime – will often find it hard to comply with international humanitarian law in wartime. Many obstacles to the implementation of IHL by democratic countries have been discussed at length over the past 25 years, especially in the wake of U.S.-led wars in Iraq and Afghanistan.[110] But if Western countries at times have fallen short of adhering to IHL, the difficulties of ensuring compliance by the Russian Federation are incomparably greater. Putin's 25-year reign as Russia's top leader has been marked by increasing ruthlessness and autocratic repression. Under Putin, the Russian government denies basic human rights to its citizens, and Russian security agencies routinely use harsh torture when cracking down. The severity of the coercive methods used by Russian state security personnel was underscored in March 2024 when four suspects were put on public display in a Moscow courtroom after having undergone mutilation and other savage abuse at the hands of the Russian authorities.[111] The whole purpose of bringing the gravely wounded men into court was to highlight the ferocity of Russia's security forces.

Far from stirring a public outcry, the security services' open reliance on gruesome torture seemed to enjoy popular backing.[112] High-ranking Russian officials lauded the torturers and declared that they should be awarded prestigious state medals for their "heroic" actions.[113] Even though Russia has long been a party to the

international Covenant against Torture and Other Cruel, Inhuman, or Degrading Treatment, and even though Russia's own constitution and laws bar the use of torture, neither the Russian government nor the Russian public seemed to believe that laws and binding international agreements should constrain the behavior of Russan security forces.

Mass repression in Russia affects not only civilians but also soldiers, including those who have been sent to fight against Ukraine. Throughout the war, Russian leaders have treated their own recruits as cannon fodder, expendable without any regret.[114] This ethos from on high cannot help but influence the attitudes and behavior of low-level "grunts." Far from being expected to treat the opposing side's prisoners of war and civilian population humanely, Russian military personnel operate within an incentive structure that rewards (or at least does not punish) extreme cruelty.

The brutality of the war Russia launched against Ukraine in February 2022 is a natural outgrowth of the historical record, including the pernicious legacy of the Soviet era with regard to IHL. As the main legal successor state to the USSR, the Russian Federation inherited the obligations the Soviet government had under the Geneva Conventions and other IHL documents. Yet, the Russian government under both Yeltsin and especially Putin was no more willing than the Soviet government to live up to those obligations. Russian leaders, like their Soviet predecessors, failed to "internalize" basic norms of IHL, and during the Putin era they never came under political pressure at home to uphold fundamental norms mandated by Russia's own laws.

Nor did Russian leaders encounter any sustained international pressure to comply with IHL. During both wars in Chechnya, the Russian government faced no international consequences when it gave Russian army units and security forces free rein to use mass killing, systematic torture, and other forms of extreme violence. Similarly, the atrocities perpetrated by Russian forces and their allies on occupied territory in Georgia, Moldova, and Ukraine incurred few if any penalties. The sanctions imposed after Russia's annexation of Crimea and instigation of warfare in eastern Ukraine in 2014 were far too modest and too easily circumventable to induce compliance with IHL and other international legal norms. Russia's military intervention in Syria starting in September 2015 included indiscriminate bombing of hospitals, schools, restaurants, markets, residential areas, refugee camps, and other "soft" targets in support of the Syrian government's mass slaughter of civilians, yet this campaign brought no serious international consequences for Russian leaders or for the Russian military units that abetted the killing.[115]

The lack (or near-lack) of adverse fallout for Russian officials and commanders in all these cases generated a "moral hazard." The concept of "moral hazard" derives originally from the insurance industry and is widely used in the social sciences.[116] As used here, it means the rewarding or encouragement of bad behavior. If the rulers of a large country (X) routinely commit atrocities and war crimes without suffering any punishment, they will get accustomed to behaving this way and will have little incentive to eschew further such abuses in the future. Even if the government of X has agreed in legally binding documents to uphold IHL, officials in

X will be far more likely to renege on those commitments if they have done so in the past with impunity.

That is precisely what happened with the Russian government and the atrocities it authorized (or at least condoned) both at home and abroad in the first three decades after the breakup of the Soviet Union. During Yeltsin's presidency and in the early years under Putin, Western governments rarely, if ever, took any action when the Russian government was linked with atrocities and war crimes. Russian leaders came to expect that they could engage in such behavior without facing meaningful consequences. When Western governments did finally begin expressing strong concern about the brutality of Russia's operations in neighboring countries in 2008 and 2014, the reaction in Moscow was harsh. After many years of disregarding IHL at home and abroad, Kremlin officials had no intention of suddenly being reined in and held accountable for their actions. Putin's shrill anti-Western rhetoric and his angry condemnations of Western policies reflected his deep-rooted belief that Western countries were trying to hold Russia to a standard unbecoming of its role as a "great power" free to act as it chose.

The moral hazard that emerged with Russia's disregard of IHL underscores a more general lesson regarding international humanitarian law. The norms are not self-enforcing. Because the international system has no supranational authority capable of holding great powers to account, norms of behavior depend on the willingness of individual states to enforce them. For many years, Western powers were unwilling to confront Russia over its disregard of IHL, and the result was that Kremlin leaders became accustomed to engaging in atrocities and war crimes with impunity. If external powers had acted much earlier (especially in the early 1990s, when leaders of the newly independent Russian Federation cared about the country's human rights reputation and were more susceptible to "shaming"), Russian behavior abroad might have changed and the rampant brutality of Russia's invasion of Ukraine in 2022 might have been avoided.

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Notes

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2 Historical Soviet and contemporary Russian criminal acts against Ukrainians under the UN Genocide Convention of 1948

A comparative analysis

Tomasz Lachowski

2.1 Introduction

Raphael Lemkin, a Polish lawyer of Jewish origin who introduced the concept of genocide into international law, believed that "the crime of crimes" was particularly likely to be committed under the conditions of totalitarian, imperial, or colonial power,[1] being the product of a long-lasting process of subordination of a given group rather than a single event. When writing the book *Axis Rule in Occupied Europe* (1944), in which he presented the definition of a new concept of genocide, Lemkin referred mainly to World War II and the crimes of Nazi Germany. Nevertheless, he perceived the Soviet Union (USSR) – in which the Russian Soviet Federative Socialist Republic played a prominent role – as the most serious threat to the existence of independent nations of Central and Eastern Europe.[2] In the eyes of Lemkin, the Kremlin's desire to implement the idea of *Homo Sovieticus* ("the New Soviet Man") meant an imminent attempt to destroy the separate nations living on the territory of the USSR and in its satellite states. This was to be achieved not only through physical or biological extermination, but also thanks to full political or cultural subordination. It followed that the crime of genocide could be analyzed as a means to uphold the Soviet/Russian empire in its "natural sphere of influence" claimed by Moscow.[3]

Today's Russia, leading an aggressive war against Ukraine since 2014 (which was transformed into a full-scale invasion on 24 February 2022), is trying to rehabilitate the legacy of the USSR on the legal, political, and even military level, with the new state ideology of *Russkiy Mir* ("the Russian World") becoming a continuation of the old doctrine of "the New Soviet Man." As a consequence, the current political system of the Russian Federation is consistently moving towards a totalitarian one, this in addition to imperial inclinations that manifest themselves in an attempt to bring Kyiv back under Moscow's influence.

Since the outbreak of the full-scale war in late February 2022, Russia's highest political leadership has been undermining the Ukrainian state's inherent right to sovereignty and further independent existence, citing among others the allegedly "artificial" character of the Ukrainian nation.[4] Such statements are being compounded by the crimes committed by the Russian troops on Ukrainian soil (like

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those witnessed in Bucha, Izyum, or Mariupol). This leads to a hypothesis that the ongoing crime of genocide against Ukrainians may be committed by the Russian Federation with the goal of restoring the Russian/Soviet empire. Since these activities form part of the Kremlin's systematic policy, they cannot be viewed as a separate event. The contemporary criminal actions, exactly as it used to be in the times of the USSR, include the attempts of the physical destruction of the Ukrainian nation that are accomplished by examples of the political and cultural genocide of Ukrainians, which may be interpreted as evidence of a special intent to commit the crime of genocide as stipulated in the UN Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.[5]

This chapter aims to demonstrate a historical continuation of the Kremlin's repressive policies towards the Ukrainian nation starting from the Soviet era, namely the Great Famine (Holodomor) of the 1930s, until today's aggressive war against Ukraine. The first part deals with the similarities between the totalitarian and imperial doctrines of *Homo Sovieticus* and *Russkiy Mir* and their practical implementation that provides an ideological and legal foundation for the crime of genocide. The second one presents the peculiar relation between the Kremlin and the crime of genocide under international law during the time of the USSR, which has visible implications for the current policy of Moscow in this regard. Eventually, the chapter analyzes the contemporary criminal actions of Russia's highest political and military leadership, as well as of Russian soldiers, in light of the Genocide Convention understood as a newest phase of the same pattern of abuses against the Ukrainian nation as observed in the history.

2.2 From *Homo Sovieticus* to *Russkiy Mir* – crimes of the Soviet Union and their rehabilitation in the Russian Federation

One of the main declared aims of the USSR was to create "the New Soviet Man" – irrespective of their national, ethnic, or cultural origin – living in a communist "paradise on Earth." This concept, initially developed by leading Soviet thinkers and party ideologues (such as Nikolai Bukharin or Leon Trotsky), was later fleshed out in the "bible of Stalinism," i.e., *History of the All-Union Communist Party (Bolsheviks): Short Course* of 1938. The idea that a man (an individual) should be fully subordinated to a state (a collective) was symbolically confirmed by Joseph Stalin, who erased his main political opponents (e.g., Bukharin) from the above-mentioned book, previously subjecting them to repression as part of the Great Purge of 1936–1938. Having been forced to leave the USSR in the mid-1970s, the philosopher Alexander Zinoviev coined the term *Homo Sovieticus* in his 1982 London-published novel. He wrote that as a result of the top-down centralized policy, "the New Soviet Man" became an intellectually enslaved opportunist with no space for independent thought or action – a cog in the totalitarian machinery run directly by the Kremlin.[6]

Acknowledging the research on totalitarianism carried out by such renowned scholars of the Cold War era as Carl J. Friedrich and Zbigniew Brzezinski, we can claim that the USSR fulfils the criteria to be considered a totalitarian regime – it

had an official state ideology, a massive monoparty system with a strong leader (dictator), state monopoly on means of coercion and political terror, no place for free communication and circulation of ideas among society and expansionist tendencies.[7] From the legal point of view, these indicators found particular expression in the Russian Soviet Federative Socialist Republic (RSFSR) Penal Codes of 1922 and 1926 (that entered into force on 1 January 1927), which served as a cornerstone for criminal codes of the other republics. This stemmed from the fact that in the USSR, the main source of sovereignty was the state itself (with its "Russian-centered" approach), not the nation or society, while criminal law was understood as one of the most important instruments of maintaining power in the Soviet Union. The RSFSR Penal Code of 1926 was based on the principles of collective responsibility and analogy, which at the time were considered the antithesis of modern criminal law.[8] Vague notions such as "revolutionary conscience," "socialist legal awareness," "enemies of the working class" – replaced with "enemies of the people" in 1934 – or "measures of social protection" (instead of "punitive measures"), all of which were incorporated in the RSFSR Penal Code of 1926, left room for potential abuse of power in the form of physical elimination of individuals (or even whole groups) who differed in opinion from the official state ideology (i.e., all people suspected of "counter-revolutionary activities").[9] With some subsequent amendments, the Penal Code of 1926 remained in force until 1958, when a fundamental reform was initiated with the aim to "liberalize" the Soviet criminal law. Needless to say, it was only possible after the deaths of Joseph Stalin in 1953 and Andrey Vyshinsky, the USSR State Prosecutor, in 1954. For instance, the new RSFSR Penal Code of 1960 replaced the principle of analogy with those of *nullum crimen, nulla poena sine lege*, and *lex retro non agit*. Nonetheless, the practice of the Soviet courts was affected by the reform only to a small extent.[10]

Moreover, the Soviet regime might be characterized as an imperial one. As Wiktor Sukiennicki duly noticed, the Soviet Constitution of 1936 ("Stalin Constitution") did not establish the borders of the Soviet Union and particular Soviet republics, thus "encouraging" other states to create in the future a "world Soviet socialist republic."[11] Soviet expansionism also resulted from the Kremlin's attitude to international law. One of the most prominent Soviet jurists, Fyodor Kozhevnikov,[12] wrote in his books *The Russian State and International Law (until the 20th Century)* of 1947 and *The Soviet State and International Law 1917–1947* of 1948 that the wars waged by the Russian Tsar Ivan the Terrible were "just wars," because the Tsar intended to bring "historical Ruthenian lands" under Moscow's rule.[13] Needless to say, this approach became almost a dogma during the existence of the Soviet Union, and there are many signs that nothing has changed.

The abovementioned features of the Soviet system – as was the case with other totalitarianisms – created an ideological and legal basis for the crimes of the Soviet regime, including the crime of genocide.[14] For Nikolai Ivanov, one of the key internal conditions that fostered Joseph Stalin's genocidal policy was the status of particular Soviet republics as the *de facto* "inner colonies" of the Kremlin.[15] Norman M. Naimark noticed Stalin's subjective approach to various national, ethnic, and political groups in the USSR, which the dictator blamed for failing

to complete subsequent stages of collectivization and industrialization and, as a result, dehumanized.[16] Joseph Stalin was in fact a crucial figure for the USSR's criminal record, since the vast majority of Soviet crimes were committed during the first phase of the introduction of the concept of *Homo Sovieticus*, which ended with his death in 1953. We can invoke such criminal endeavors of the USSR under Stalin's rule as the Great Famine (Holodomor) of 1932–1933, the so-called Polish Operation of 1937–1938 and the Great Purge of 1936–1938, as well as crimes committed during World War II (including the Katyń Massacre of 1940 and mass deportations of Crimean Tatars in 1944 and Balts after 1944) and in the postwar period as part of the Kremlin's fight against underground independence movements, especially in the Baltic states. It should be borne in mind, however, that the Gulag system functioned until 1987, and political repression was rampant until the dissolution of the Soviet Union in 1991.[17]

In the aftermath of the dissolution of the USSR, the Russian Federation failed to adopt a comprehensive strategy for reckoning with past evils – the few exceptions include the establishment of the Memorial society in 1987 (at the time of Mikhail Gorbachev's *glasnost* and *perestroika*) and the enactment of rehabilitation laws in 1991.[18] On the contrary, Russia moved towards the historical politics of rehabilitation of the USSR, in 1995 adopting the Law "On Perpetuating the Victory of the Soviet People in the Great Patriotic War of 1941–1945" (since then several times revised). This was to a large extent determined by numerous armed conflicts that broke out after 1991 on the peripheries of the former Soviet empire, among others in Moldova, Georgia, and Chechnya. The Kremlin decided to carry out military interventions, either to defend its position in the states that emerged on the ruins of the USSR, such as Moldova or Georgia, or to prevent the breakaway of an independent Chechen Republic of Ichkeria. This imperial approach, which resulted in the illegal establishment of the *de facto* regimes in Moldova ("Pridnestrovian Moldavian Republic") and Georgia ("Abkhazia" and "South Ossetia") at the beginning of the 1990s, was repeated after 2014 with regard to Ukraine, where two unlawful self-proclaimed entities – "Donetsk People's Republic" and "Luhansk People's Republic" – were created by Moscow. Needless to say, in all of these armed conflicts, Russia used the argument of a "just cause" of its fight against the alleged nationalists or chauvinists in Moldova, Georgia, and Ukraine who supposedly wanted to destroy "the common Soviet legacy," in fact, the conflicts were fueled by the growing Russian nationalism that is rooted in the concept of *Russkiy Mir*.[19]

The myth of the Great Patriotic War, considered to be at the core of the Russian politics of memory, was subsequently developed during Vladimir Putin's terms as Russia's head of state. Efforts were made to strengthen the messianic role of the USSR and the Russian Federation in their "eternal fight against Nazism," and to agree on a single interpretation of the history of World War II in the entire post-Soviet space. In the aftermath of Putin's speech on the 70th anniversary of the end of World War II,[20] one year after the first phase of the Russian aggression against Ukraine, the myth of the Great Patriotic War became in fact one of the pillars of

Russia's foreign policy, as well as an internal instrument of control over Russian society.

Like in the time of the USSR, the criminal law was used to suppress any criticism of the conduct of the Soviet Union during World War II. As a result of the amendments to the Criminal Code of the Russian Federation introduced in 2015 and 2021, questioning the judgment of the International Military Tribunal (IMT) in Nuremberg was penalized, this in order to petrify the understanding of the Great Patriotic War as a fight between "good" and "evil." The amendments to the constitution of the Russian Federation of 2020 confirmed the relevance of the myth of the Great Patriotic War; Article 67 states that the Russian Federation is a legal continuator of the Soviet Union, serving as an instrument of securing the historical-legal and symbolic identity of the Russian state irrespectively of its formal name.[21] Furthermore, shortly after the invasion against Ukraine, on 16 April 2022, President Putin signed the Law "On the introduction of amendments to the Code of the Russian Federation on Administrative Offenses" (the so-called "April 16 law") forbidding the public comparisons of the "goals, decisions, and actions" of the Soviet Union's political leadership with those of the Third Reich, alongside the denial of the "decisive role of the Soviet people in the defeat of Nazi Germany and the humanitarian mission of the USSR during the liberation of European countries."[22] The policy of rehabilitating Soviet crimes found poignant expression in the liquidation of the Memorial society on 28 February 2022, following the judgment of the Supreme Court of the Russian Federation. Under these provisions, Russia is constantly moving towards totalitarian rule. Undoubtedly, these laws also contributed to the propaganda effort to depict Russia's "special military operation" of 24 February 2022, supposedly aimed at "de-Nazification of Ukraine", as a "new chapter of the Great Patriotic War." Last but not least, after the amendments of 2020, Article 79 of the constitution of the Russian Federation allows the Constitutional Court to decide whether international obligations or judgments of various international bodies shall be enforced by the Russian authorities, provided that they are not held unconstitutional.

It has to be emphasized that the idea of *Homo Sovieticus* was being rehabilitated during the time of *Russkiy Mir* as Russia's main state ideology.[23] Therefore, the concept of "the Russian World" can be seen as a continuation of the historical idea of "the New Soviet Man,"[24] this despite their apparent differences.[25] The doctrine of *Russkiy Mir* is founded on Russian nationalism and chauvinism, as well as on the Orthodox faith under the administration of the Russian Orthodox Church with direct links to the Kremlin. The aim is to foster special ties between the Russian state and Russian-speaking people living in the former Soviet republics (or provinces in the Russian Tsardom). In fact, "the Russian World" serves as an ideological basis for Vladimir Putin's declared aim of restoring the Russian superpower in post-Soviet space,[26] in which the Kremlin-dependent Ukraine would play a crucial role (which, by the way, confirms the imperial character of the concept).[27] *Russkiy Mir* does not exclude the existence of various nationalities and ethnicities living in Russia and its "natural sphere of influence" as such – as long as they accept the dominant role of the Russian state, Russian language, and Russian culture.

2.3 The peculiar relation between the Kremlin and the crime of genocide

Raphael Lemkin defined the crime of genocide in the book *Axis Rule in Occupied Europe* published in 1944.[28] According to Lemkin, genocide was not limited solely to physical or biological extermination. The "coordinated plan of different actions" that he wrote about comprised various aspects of genocidal acts against a given national or ethnic group: their nature could be political, social, cultural, economic, biological, physical, religious, or even moral.[29] It seems that the Polish lawyer perceived genocide as a crime of an imperial-totalitarian character, because he identified two phases of the criminal actions that usually follow one another – "one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor."[30] In other words, there is a clear opposition between the powerful machine of a totalitarian state and a group destined for elimination, which has no chance to survive in a physical, political, or cultural sense.

In the aftermath of World War II, the concept of genocide was not covered by the jurisdiction of the Nuremberg-based IMT. It was only on 11 December 1946 that the UN General Assembly (UNGA) adopted Resolution 96 (I) that contained key phrases authored by the Polish lawyer: "genocide is a crime under international law," which can be committed against "racial, religious, political, and other groups." This non-binding resolution was worded in a universal and broad manner, but still in accordance with Lemkin's concept.[31] What is more, it served as a starting point for *travaux préparatoires* of a legally binding treaty on genocide, though eventually it was drastically changed by the negotiating parties.

Pursuant to Article II of the 1948 Convention, genocide consists of the subjective element (*mens rea*), i.e., a special intent of the perpetrator to destroy one of the four protected groups (national, ethnic, racial, or religious) as such, in whole or in part; and the objective element (*actus reus*), i.e., particular genocidal acts through which the perpetrator achieves their aims. These acts can be qualified either as physical genocide (paragraphs from (a) to (c) of the definition) or biological genocide (paragraphs (d) and (e)).

The definition of genocide adopted in the UN Convention of 1948 differed markedly not only from Lemkin's original concept, but also from the UNGA Resolution 96 (I) of 1946. Due to the position of Western powers (France, the Netherlands, but also the US), cultural genocide was dropped, although "forced transfer of children from one group to another" was initially viewed as an act of cultural genocide.[32] They feared that their colonial crimes against native peoples could be qualified as genocide. On the other hand, the Soviet Union worked successfully to have political groups removed from the definition. According to the Kremlin's narrative, all "tragedies" that happened in the USSR (in reality, Soviet crimes) were experienced by various political groups (such as "the kulaks") – not by national groups – and were "necessary" in the process of building communism.[33] Nevertheless, Moscow failed to establish an integral connection between the crime of genocide and the Nazi-Fascist ideology.

The UN Convention on Genocide entered into force on 12 January 1951 after ratification by 20 states. The Soviet Union signed the Convention on 16 December

1949 and ratified it on 3 May 1954. As a result, Raphael Lemkin could finally discuss various Soviet crimes under the notion of genocide in an open and public manner, which he had previously avoided for tactical reasons not to discourage the Kremlin from ratifying the Convention. In this context, Lemkin's speech titled *Soviet Genocide in Ukraine* – delivered in New York in 1953, on the 20th anniversary of the Great Famine – should be particularly emphasized.[34] "What I want to speak about is perhaps the classic example of Soviet genocide, its longest and broadest experiment in Russification – the destruction of the Ukrainian nation."[35]

Lemkin described the repressions against the Ukrainian nation in the 1920s and 1930s as a long-lasting process organized by the Soviet leaders "to produce the 'Soviet Man', the 'Soviet Nation'." The Polish lawyer distinguished four stages of the Soviet genocide of Ukrainians,[36] not limiting it only to the two tragic years of the Great Famine of 1932–1933. According to Lemkin, the first phase, which commenced in the 1920s, was a blow against the Ukrainian intellectuals – "the national brain" of an independent nation. The second stage was aimed against the "national soul," i.e., the Ukrainian Orthodox Autocephalous Church that was eventually liquidated by the Kremlin and the Russian Orthodox Church in the mid-1930s. The third phase was the organized starvation of peasants – "the body of the nation," which at the time of the Holodomor was the main carrier of Ukrainian national identity.[37] The last step was the settling of other nationalities, including ethnic Russians, primarily in the south and east of Ukraine, i.e., areas that suffered the most during the two years of the Great Famine. To a large extent, this scheme of crime, comprising different genocidal techniques, is repeated in today's aggressive war of Russia against Ukraine (analyzed below).

Lemkin drew his understanding of Soviet crimes not only from his own broad concept of genocide, but also (retrospectively) from the UN Convention of 1948. First of all, it was clear for Lemkin that the Kremlin's genocidal policy was aimed against Ukrainians as a "national group" (not as a political group, as Soviet propaganda claimed, especially concerning "the kulaks"). Moreover, it can be argued that Ukrainians were subjected to various acts falling under the 1948 Convention, in particular "killing members of the group," "causing serious bodily or mental harm to members of the group," as well as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." The most problematic part of the definition of genocide – the intent – can be reconstructed from instances of cultural and political genocide of Ukrainians that accompanied physical genocide as stipulated in the Convention ("the systematic destruction of the Ukrainian nation, in its progressive absorption within the new Soviet nation"[38]). The deliberate elimination of Ukrainian identity and its replacement with the imposed Soviet identity was presented by Lemkin as four stages of the crime of genocide, which clearly demonstrates that the lawyer perceived the Soviet genocide of Ukrainians as a long process constituting an example of an imperial-totalitarian crime.

Neither the Soviet Union nor the Russian Federation has recognized the Great Famine as genocide. On the contrary, Moscow uses threats against other states and international organizations to prevent such steps.[39] At the same time, the Kremlin

uses the figure of genocide as a political and quasi-legal argument in order to justify its own armed activities in "its sphere of influence," like in Georgia or recently in Ukraine.[40] Although in the order of 16 March 2022, the International Court of Justice (ICJ) pointed out that *prima facie* there was no evidence of any genocide being organized and perpetrated by the Ukrainian authorities against the residents of eastern Ukraine (to be clear – it is still not the final judgment),[41] this evaluation does not affect the Kremlin's conduct. The reason, as Timothy Snyder argues, is that the criminal decisions of today's Russian political and military leadership are rooted in history – among others, in the myth of the Great Patriotic War and the post-colonial perception of the former USSR republics, according to which an independent state is not a state, and a separate nation with its unique identity is not a nation.[42] As a result, the ultimate rejection of Russian/Soviet legacy by Russia's closest neighbors – as demonstrated by Ukrainians during the Revolution of Dignity of 2013–2014 and in subsequent years – is taken by the Kremlin to signify not only a "just punishment" for "their own past sins," but first and foremost a "moral necessity" to use force or commit the most heinous crimes, including the crime of genocide, like those witnessed in Ukraine, especially after 24 February 2022.

2.4 Contemporary Russian crimes in Ukraine in the light of the 1948 UN Convention on Genocide

Following the invasion launched by Russia on 24 February 2022[43] – in a legal sense understood as a new chapter of the ongoing aggression of the Russian Federation against Ukraine that started in late February 2014 with the occupation of Crimea[44] – many horrific atrocities that can be labeled as international crimes were committed.

It seems that the legacy of Raphael Lemkin and other researchers who perceive Soviet crimes as genocide of an imperial-totalitarian nature may contribute to the assessment of the contemporary Russian criminal endeavors as "the crime of crimes," especially with regard to one of the crucial *mens rea* elements – a special intent to destroy one of the protected groups as such. A proper identification of intent can help answer the key questions: what is the main purpose of the Kremlin's war against Ukraine – which is rooted not only in the present, but also in the past – and what do the Russians want to achieve by committing mass atrocities against the Ukrainian population?[45]

The denial of Ukraine's right to sovereignty and existence as an independent state, expressed in various statements of Vladimir Putin[46] and his closest collaborators (like Dmitry Medvedev[47]), has been repeatedly confirmed by official Moscow and its state broadcasters since the beginning of a full-scale aggressive war. They have often stated that Ukrainians are an "artificial nation," dehumanizing them as "Nazis," "drug addicts" (notably with regard to the Ukrainian authorities) or even "servants of Satan."[48] Therefore – in the eyes of Russian elites – the announced "de-Nazification" of Ukraine by means of a "special military operation" constitutes a rightful and justified "continuation of the Great Patriotic War" in order to "stop the alleged genocide committed by (Nazi) Ukrainians on the residents of Donbas." Russian propagandists claim that "history has proved it impossible

for Ukraine to exist as a nation-state, and any attempts to 'build' such a nation-state naturally lead to Nazism. Ukrainism is an artificial anti-Russian construct that has no civilizational substance of its own,"[49] calling even for the "burning" and "drowning" of Ukrainians, including the children, if they do not want to "accept" the Russian identity.[50] As Douglas Irvin-Erickson rightly notices, these words can be considered proof of a genocidal intent, since they "have coalesced around a plan to destroy Ukraine as a nation-state and begin a campaign of de-Nazification, which should be understood as a euphemism for de-Ukrainianization because elite narratives in Russia draw a direct line between being Ukrainian and being a Nazi."[51] While a special genocidal plan does not have to exist in order for the intent to be demonstrated (the plan is not an element of the crime, as follows from the jurisprudence of international criminal tribunals), its existence can be very useful to support such argumentation.[52] Putin's reasoning – which is an emanation of the Russian state policy – suggests that Ukrainians can function only within a broader "Great-Russian nation," since in his view (based on the concept of *Russkiy Mir*) Ukrainians and Russians constitute one people.[53]

Concerning the issue of past evils that was raised by Snyder, a physical replacement of Ukrainians by Russians is also taking place today, just as after the Great Famine.[54] Ukrainians are being murdered or deported to Russia (especially the Ukrainian children), while on the temporarily occupied territories we can observe an ongoing move of people from Russia to resettle the east and south of Ukraine. Cultural and political genocide in the form of an attempt to destroy every manifestation of Ukrainian-ness, like the Ukrainian Orthodox Autocephalous Church, national museums, libraries, monuments, and language (with the subsequent change of the educational program in schools under Russian occupation), can serve as another proof of a genocidal intent.[55] Furthermore, it can also be reconstructed from the outcomes of particular genocidal acts, such as the brutality of mass killings or forced transfer of Ukrainian children in order to re-educate them in the spirit of Russian anti-Ukrainian imperialism (*Russkiy Mir*).[56] The conclusion can be drawn that the Russian war against Ukraine is not just a military effort to conquer territory, but also an attempt to erase Ukrainians as an independent nation – just like it was during the time of the USSR.[57]

It follows that with regard to a protected group, which the perpetrator intends to destroy, it has to be argued that the Ukrainian national group fell victim to Russian criminal endeavors, including direct incitement to commit genocide.[58] First of all, it is an immediate consequence of the abovementioned Russian policy of "de-Nazification," which in fact means an attempt at "de-Ukrainization" of Ukraine. Secondly, especially in the occupied territories, Ukrainians are being slaughtered by Russians irrespectively of their ethnic origin (thus, ethnic Russians can also become victims of such criminal acts). For the perpetrators, the main criterion is Ukrainian citizenship (an objective factor), supported by the assessment of the role of particular victims in the Ukrainian society (a subjective factor). For instance, in March 2022 in occupied Bucha and surroundings, Russians were searching first and foremost for local community leaders placed on the proscription lists – politicians, activists, and military veterans.[59] Anyone who considers themselves

Ukrainian – other than belonging to the *Russkiy Mir* concept – may be targeted by the occupying power. It can be claimed, therefore, that the requirement of a special intent to destroy one of the groups protected under the Convention (the national group of Ukrainians) in whole or in part "as such" was met[60] (the International Criminal Tribunal for the former Yugoslavia, ICTY, used the phrase "to target the very existence of the group as such"[61]).

Undoubtedly, *mens rea* is strictly interrelated with acts punishable under the 1948 Convention – *actus reus*. With regard to the situation in Ukraine, several genocidal acts have been reported by the Ukrainian authorities, non-governmental organizations and journalists: killings (like in Bucha or Izyum); causing serious bodily or mental harm to members of the Ukrainian national group (for instance, by rape and other forms of sexual violence);[62] and the forcible transfer of children from the group of Ukrainians to the group of Russians.[63] In particular, the latter is a well-documented operation that is rooted in Russian national law; Russian authorities at all levels are involved in the process by, *inter alia*, organizing the system of re-education camps for Ukrainian children in the spirit of the *Russkiy Mir* ideology.[64] It seems that the warrant of arrest issued on 17 March 2023 by the International Criminal Court (ICC) among others for Vladimir Putin with regard to the deportation of Ukrainian children,[65] even though the practice is thus far qualified as a war crime (which, however, can be extended in the future), clearly shows that it is a structural solution approved by the highest political leadership of the Russian Federation.

The relevant proceedings concerning state responsibility and individual criminal accountability for committing, *inter alia*, the crime of genocide are still taking place (for instance, before the ICJ or the ICC). Nevertheless, at the academic level of analysis, we cannot rule out that the Russian Federation has already embarked on another stage of genocide against Ukrainians after the brutal Sovietization of Ukraine in the 1930s – back then in the name of the *Homo Sovieticus* ideology, and now in the name of *Russkiy Mir*.[66]

2.5 Conclusion

The crime of genocide rarely materializes in a single event, being rather a consequence of a long-lasting process resulting in the destruction of a given group by the perpetrators. Circumstances conducive to genocide include a totalitarian state with clear ideology and imperial tendencies. In such conditions, physical extermination or biological deformation of a nation – types of genocide stipulated in the Genocide Convention of 1948 – is usually supplemented with other means of subordination of victims to offenders; especially the instances of cultural and political genocide should be borne in mind here. In a legal sense, both of them can serve as proof of the perpetrator's intent to destroy one of the groups protected under the Convention.

The implementation of the concept of *Homo Sovieticus* by the USSR, especially during the rule of Joseph Stalin, was characterized by the combination of physical annihilation of different groups (not necessarily always by killing, as it

was demonstrated during the artificially organized Great Famine), eliticide, mass deportations and the assault on culture of various national and ethnic groups (through deep Russification/Sovietization). Following Lemkin and other researchers, it can be propounded that the Soviet authorities perceived genocide as a crucial means to uphold the Soviet empire.

The Russian Federation has never fully condemned the USSR as a criminal regime. On the contrary, a constant rehabilitation of the *ancien régime* is taking place on the legal, political, and even military level. Therefore, it can be argued that – in spite of apparent differences, which are purely theoretical – the idea of *Russkiy Mir* became a continuation of the *Homo Sovieticus* doctrine.

The ongoing Russian aggression against Ukraine – which is openly aimed at degrading the Ukrainian state to a mere province of "the Russian empire" and at destroying the independent Ukrainian nation – can be analyzed through the prism of the definition of genocide. In the eyes of the Kremlin, Ukrainians may survive in a physical, biological, but also political and cultural sense only after they fully subscribe to the idea of *Russkiy Mir*. In such circumstances, the crime of genocide – understood as a long-lasting process – became for the Kremlin a means to achieve its goal of restoration of the Russian/Soviet empire.

Notes

1 Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (University of Pennsylvania Press 2016), 26.
2 Piotr Madajczyk, *Krajobrazy biograficzne Rafała Lemkina* (Instytut Pileckiego 2023), 329–330.
3 Raphael Lemkin, "Soviet Genocide in Ukraine" in Roman Serbyn (eds.), Soviet Genocide in Ukraine. Article in 28 Languages (Maisternia Knyhy 2009), 31.
4 As the Russian President stated already in 2021: "[m]odern Ukraine is entirely the product of the Soviet era." Vladimir Putin, "On the Historical Unity of Russians and Ukrainians" (*Kremlin.ru*, 12 July 2021).
5 78 UNTS 277.
6 Like Hannah Arendt underlined: "Totalitarian movements are mass organizations of atomized, isolated individuals. (…) their most conspicuous external characteristic is their demand for total, unrestricted, unconditional, and unalterable loyalty of the individual member." Hannah Arendt, *The Origins of Totalitarianism* (7th printing Meridian Book 1962), 323.
7 Carl J Friedrich and Zbigniew Brzezinski, *Totalitarian Dictatorship and Autocracy* (2nd edn, Harvard University Press 1965), 22.
8 In the interwar period, the Soviet legal system was extensively analyzed by Polish lawyers and Sovietologists, such as Wiktor Sukiennicki, Wacław Makowski, Juliusz Makarewicz and Konstanty Grzybowski. Raphael Lemkin translated the RSFSR Penal Codes of 1922 and 1926 into Polish.
9 Harold J. Berman, "Principles of Soviet Criminal Law" (1947) 56 The Yale Law Journal 803.
10 Kazimierz Grzybowski, "Soviet Criminal Reform of 1958" (1960) 35 Indiana Law Journal 2, 141.

11 Wiktor Sukiennicki, *Ewolucja ustroju Związku Socjalistycznych Republik Radzieckich w świetle oficjalnych publikacji władzy radzieckiej*, vol. 1 (Instytut Naukowo-Badawczy Europy Wschodniej 1938), 166.
12 Interestingly, Fyodor Kozhevnikov was rather a representative of Russian nativism and Eurasianism than a clear communist ideology – what became one of the foundations of the contemporary "Russian World" concept.
13 Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press 2015), 52–55.
14 Compare Eryk Habowski, "The Terror of the Idea – the Idea of Terror. Totalitarianism's Faces Old and New (Digital)" in Eryk Habowski (ed.), *The Nature of Totalitarianisms* (Instytut Pileckiego 2023), 208.
15 Nikołaj Iwanow, *Zapomniane ludobójstwo. Polacy w państwie Stalina – "Operacja Polska" 1937–1938* (Wydawnictwo Znak 2014), 448–449.
16 Norman M. Naimark, *Stalin's Genocides* (Princeton University Press 2010), 132–135.
17 It is estimated that between 20 and 60 million people died at the hands of the Soviet officials. Stéphane Courtois, "The Crimes of Communism" in Karel Bartošek, Stéphane Courtois, Jean-Louis Margolin, Andrzej Paczkowski, Jean-Louis Panné and Nicolas Werth (eds.), *The Black Book of Communism: Crimes, Terror, Repression* (Harvard University Press 1999), 4.
18 Lavinia Stan, "Limited Reckoning in the Former Soviet Union: Some Possible Explanations" in Cynthia M Horne and Lavinia Stan (eds), *Transitional Justice and the Former Soviet Union. Reviewing the Past, Looking Toward the Future* (Cambridge University Press 2018), 19–44.
19 See more Pål Kolstø, *Strategic Uses of Nationalism and Ethnic Conflict. Interest and Identity in Russia and the Post-Soviet Space* (Edinburgh University Press 2022).
20 'Мы преклоняемся перед всеми, кто насмерть стоял за каждую улицу, каждый дом, каждый рубеж Отчизны' (*Kremlin.ru*, 9 May 2015).
21 Nonetheless, it has to be stated that Article 67[1] of the Russian Constitution uses alternately two terms – "legal successor" and "legal continuator," which cannot be seen as equal under international law. This evokes considerations among different legal scholars regarding the appropriate legal position of the Russian authorities with reference to the past of the Russian state, including the relation between the USSR and the Russian Federation, as well as between the RSFSR and the Russian Federation. Compare Jakub Sadowski, "Amendments of 2020 to the Russian Constitution as an Update to Its Symbolic and Identity Programme" (2021) 35 International Journal for the Semiotics of Law 2, 723, 730.
22 As Ilya Nuzov notices "Russia's April 16 Law was a purely political act meant to whitewash Soviet crimes and protect the unassailability of the Great Victory." Ilya Nuzov, "Legislating Propaganda. Russia's Memory Laws Justify Aggression Against Ukraine" (2022) 20 Journal of International Criminal Justice 4, 805, 815.
23 On the ideological foundations of the *Russkiy Mir* concept read Виктор Ерофеев, *Энциклопедия русской души* (Издательство Подкова 1999).
24 On a side note, it can be added that starting from the 1930s, Joseph Stalin reconciled communist ideology with the ideas of Russian nationalism. E Arfon Rees, "Stalin and Russian Nationalism" in Geoffrey Hosking and Robert Service (eds), *Russian Nationalism, Past and Present* (Palgrave Macmillan 1998), 77.
25 Symbolically, Vyacheslav Nikonov – who became the first head of the Russkiy Mir Foundation, established by the Russian President in 2007 – is a grandson of Vyacheslav Molotov, the Soviet foreign minister (1939–1949 and 1953–1956).

26 Vladimir Putin, "Speech [of Vladimir Putin] and the Following Discussion at the Munich Conference on Security Policy" (*Kremlin.ru*, 10 February 2007).
27 For a broader account see Taras Kuzio, *Putin's War Against Ukraine: Revolution, Nationalism and Crime* (University of Toronto 2017).
28 Raphael Lemkin worked on the new concept of genocide since the 1930s, when he proposed two new types of crimes: barbarity and vandalism, both aimed at the destruction of a given (racial, religious or social) collectivity in a physical, economic or cultural sense. See Rafał Lemkin, "Przestępstwa polegające na wywołaniu niebezpieczeństwa międzypaństwowego jako delicta iuris gentium" (2018) 1 Głos Prawa. Przegląd Prawniczy Allerhanda 1–2, 130.
29 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for World Peace 1944), 79.
30 Ibid., 79.
31 On 7 July 1946, the Supreme National Tribunal of Poland delivered a judgment in the case of Arthur Greiser, Gauleiter of the Warthegau, who was convicted for, inter alia, "general totalitarian genocidal attack on the rights of small and medium nations to exist, and to have an identity and culture of their own," thus, in Lemkin's totalitarian-imperial understanding of genocide, among others for the genocidal character of the assault on Polish culture and identity. See Mark A. Drumbl, " 'Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946" in Kevin Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013), 421.
32 William Schabas, *Genocide in International Law. The Crime of Crimes* (2nd edn, Cambridge University Press 2009), 201–202.
33 See more, Anton Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention* (University of Wisconsin Press 2017).
34 Roman Serbyn, "Lemkin on Genocide of Nations" (2009) 7 Journal of International Criminal Justice 123.
35 Cf. Lemkin (n 3), 31.
36 Ibid 32–35.
37 Ibid 33.
38 Ibid 35.
39 Anne Applebaum, *Czerwony głód* (transl. Barbara Gadomska and Wanda Gadomska, Wydawnictwo Agora 2018), 404.
40 Clifford J Levy, "How Russia Defines Genocide Down" (*New York Times*, 8 August 2009) www.nytimes.com/2009/08/09/weekinreview/09levy.html (access: 11 June 2023).
41 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (pending) ICJ Press release 2022/75 www.icj-cij.org/sites/default/files/case-related/182/182-20221216-PRE-01-00-EN.pdf (access: 11 June 2023).
42 Timothy Snyder, "Russia Intends to Commit Genocide in Ukraine, Six Ways to Prove It" (*European Pravda*, 23 October 2022) www.eurointegration.com.ua/eng/articles/2022/10/23/7149219/ (access: 11 June 2023).
43 The Russian conduct against Ukraine after 24 February 2022 was described as an act of aggression, *inter alia*, by the UNGA in the resolution A/ES-11/1 of 2 March 2022 adopted on the basis of *Uniting for Peace* formula.
44 See more Patrycja Grzebyk, "Escalation of the Conflict between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law" (2021) XLI Polish Yearbook of International Law 145.

45 Compare Martin Shaw, "Russia's Genocidal War in Ukraine: Radicalization and Social Destruction" (2023) Journal of Genocide Research, https://doi.org/10.1080/14623528.2023.2185372 (access: 11 June 2023).
46 Vladimir Putin, "Address by the President of the Russian Federation" (*Kremlin.ru*, 21 February 2022).
47 In April 2022, Dmitry Medvedev wrote on his blog on Telegram among others that "the very essence of Ukrainian-ness, fed by anti-Russian venom and lies about its identity, is one big sham," calling for a holistic "denazification" and "demilitarization" of Ukraine to "ensure peace for future generations of Ukrainians and build an open Eurasia – from Lisbon to Vladivostok." 'Дмитрий Медведев написал статью, разоблачающую "глубинное украинство"' (*Новые Известия*, 5 April 2022) https://newizv.ru/news/politics/05-04-2022/dmitriy-medvedev-napisal-statyu-razoblachayuschuyu-glubinnoe-ukrainstvo (access: 11 June 2023).
48 Katarzyna Chawryło, "Weapons of mass deception. Russian television propaganda in wartime" (OSW Commentary, 6 May 2022)
49 Тимофей Сергейцев, 'Что Россия должна сделать с Украиной' (*РИА Новости*, 3 April 2022) https://web.archive.org/web/20220403212023/https://ria.ru/20220403/ukraina-1781469605.html (access: 11 June 2023).
50 The author of these words addressed publicly in October 2022, the Russian broadcaster RT top-presenter, Anton Krasovsky, was suspended from work in the television. Moreover, the Russia's Investigative Committee started proceedings in his case, however, did not find that Krasovsky's statement infringed the Russian criminal law. On 17 February 2023 Krasovsky was sentenced *in absentia* by a court in Kyiv for incitement to the genocide of Ukrainians. See Evgeny Stupin, "Investigative Committee finds no crime in journalist Anton Krasovsky's call to 'drown' Ukrainian children" (*Meduza*, 17 December 2022) https://meduza.io/en/news/2022/12/17/investigative-committee-finds-no-crime-in-journalist-anton-krasovsky-s-call-to-drown-ukrainian-children (access: 11 June 2023).
51 Douglas Irvin-Erickson, "Is Russia Committing Genocide in Ukraine?" (*Opinio Juris,* 21 April 2022) https://opiniojuris.org/2022/04/21/is-russia-committing-genocide-in-ukraine/ (access: 11 June 2023).
52 As was observed by the ICTY in the cases of *Prosecutor v. Jelisić* (Judgment) IT-95-10-T (14 December 1999) and *Prosecutor v. Krstić* (Judgment) IT-98-33-T (2 August 2001), as well as by the ICTR e.g. in the case of *Prosecutor v. Kayishema et al.* (Judgment) ICTR-95-1 (21 May 1999). See also Schabas (n 33) 245–246.
53 Cf. Putin (n 4).
54 Cf. Snyder (n 42).
55 Cf. Shaw (n 45); compare *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) ICJ Reports 2007 para. 344.
56 Ian Garner, *Z Generation: Into the Heart of Russia's Fascist Youth* (C Hurst & Co Publishers Ltd 2023).
57 Kristina Hook, "Why Russia's War in Ukraine Is a Genocide" (*Foreign Affairs*, 28 July 2022).
58 The New Lines Institute and Raoul Wallenberg Centre, "An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent" (*New Lines Institute* 27 May 2022) https://newlinesinstitute.org/an-independent-legal-analysis-of-the-russian-federations-breaches-of-the-genocide-convention-in-ukraine-and-the-duty-to-prevent (access: 11 June 2023).

59 See "Crime Scene: Bucha. How Russian soldiers ran a 'cleansing' operation in the Ukrainian city" (3 November 2022) www.youtube.com/watch?v=WW8YYhUIK0s&t=730s (access: 11 June 2023).

60 Requirement set by the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro* (n 55) para. 187.

61 *Prosecutor v. Krstić* (n 52) para. 590.

62 See Kateryna Busol, "When the Head of State Makes Rape Jokes, His Troops Rape on the Ground: Conflict-Related Sexual Violence in Russia's Aggression against Ukraine" (2023) Journal of Genocide Research, https://doi.org/10.1080/14623528.2023.2292344.

63 Zmina, "Analytical Report: Deportation of Ukrainian citizens from the territory of active military operations or from the temporarily occupied territory of Ukraine to the territory of the Russian Federation and the Republic of Belarus" (*Zmiana,* 2023) https://zmina.ua/wp-content/uploads/sites/2/2023/01/deportation_eng.pdf (access: 11 June 2023).

64 Humanitarian Research Lab at Yale School of Public Health, A Conflict Observatory Report: Russia's systematic program for the re-education & adoption of Ukraine's children (*Conflict Observatory,* 14 February 2023) https://hub.conflictobservatory.org/portal/sharing/rest/content/items/97f919ccfe524d31a241b53ca44076b8/data (access: 11 June 2023).

65 "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova" (*ICC*, 17 March 2023) www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (access: 11 June 2023).

66 See Denys Azarov, Dmytro Koval, Gaiane Nuridzhanian, Volodymyr Venher, "Understanding Russia's Actions in Ukraine as the Crime of Genocide" (2023) *Journal of International Criminal Justice*, https://doi.org/10.1093/jicj/mqad018. However, it has to be emphasized that William Schabas does not assess Russia's criminal actions in Ukraine as genocide, since he believes it is still impossible to exclude other explanations of the Kremlin's crimes against Ukrainians than a genocidal intent to physically destroy the Ukrainian national group, even in part. Compare William Schabas, "Genocide and Ukraine: Do Words Mean What We Choose them to Mean?" (2022) 20 Journal of International Criminal Justice 4, 843.

3 The crime of genocide

Historical aspects, political discussions and memory laws in Ukraine

Yurii Kaparulin

3.1 Introduction

The history of every country has dark and tragic pages of the past. The scale and intensity of the mass violence that took place on the territories of modern Ukraine are striking example. These lands became the battlegrounds of two world wars, accompanied by ethnic cleansing, pogroms, deportations, and mass murders. The topic of the Stalinist regime and Nazi crimes stands apart. Finally, at the present stage, Ukraine has become the object of Russian aggression. After Ukraine gained its independence, an open discussion about the tragic events of the past, including the crime of genocide in the country's history, was launched. As a result, a system of memory laws condemning systemic acts of mass violence and genocide in the past was formed at the official state level. Among the central topics for discussion were the events of the Holodomor, the Great Terror, and the Holocaust. These laws aim to form their own inclusive and critical national picture of the past. In addition, from the perspective of transitional justice, they can be seen as a form of reconciliation of different narratives of the past within the country, as well as at least symbolic reparation for the crimes committed. At the same time, the process of incorporating international law into the current legislation of Ukraine was underway to prevent atrocities of this kind and establish responsibility for such actions in the future.

How is the invention of the crime of genocide related to the history of Ukraine? What are the peculiarities of the legal interpretation of the crime of genocide in modern Ukrainian legislation? What is the place of genocide in the system of memorial laws of Ukraine? How has the military aggression of the Russian Federation against Ukraine actualized the theme of genocide in the modern world? How did the Russian Federation instrumentalize the crime of genocide during the war against Ukraine? What do Ukraine's past and present genocidal experiences tell us from a global perspective? I will try to answer these questions in the present chapter.

3.2 Lemkin, genocide, and Ukrainian context

The concept of the crime of genocide, proposed by Raphael Lemkin, allows us to explain a significant part of acts of violence in Ukraine, trace the connections

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between past events and the nature of contemporary crimes, and consider the dynamics of the official policy of memory in the country. Thus, when we talk about the study of the crime of genocide in the history of Ukraine, we are in one way or another addressing various aspects of this topic – legal, historical, and political.

According to Douglas Irvin-Ericson, in 1933 Lemkin proposed a number of radical changes in the structure of international criminal law: "The rampant discrimination, the desecration of cultural diversity, the pogroms, the state terror, and the killing of people to destroy their group were to be outlawed as international crimes. In 1933, Lemkin called these crimes 'barbarism' and 'vandalism'."[1] In 1942, he called them "genocide."[2] As Lemkin himself noted:

> In the acts of barbarity, as well as in those of vandalism, the asocial and destructive spirit of the author is made evident. This spirit, by definition, is the opposite of the culture and progress of humanity. It throws the evolution of ideas back to the bleak period of the Middle Ages. Such acts shock the conscience of all humanity, while generating extreme anxiety about the future. For all these reasons, acts of vandalism and barbarity must be regarded as offenses against the law of nations.[3]

Lemkin's many years of work as a lawyer culminated in the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948, which entered into force on 12 January 1951.[4] However, from the very beginning, the adoption of the convention at the international level was a compromise. In particular, due to the influence of the Soviet delegation, political groups as potential victims of genocide were removed from the original text. Anton Weiss-Wendt noted that the Genocide Convention bears the stamp of Stalin. Earlier, he and his followers, including Molotov, had signed execution lists during the Great Terror, but 10 years later they were already signing international humanitarian conventions: "Under ideal circumstances, Stalin and the Soviet Union could no doubt be indicted for genocide."[5]

As a result, following World War II, the Nazi regime and its crimes were condemned and judged internationally, while the top leadership of the Soviet Union and the regime as a whole were not even formally accused. At the time, this was acceptable to representatives of the international community, but not to the inventor of the notion of genocide. He was probably aware of the threat that the Soviet Union continued to pose to Eastern Europe, and the Ukrainian case was indicative for him.

In September 1953, the Ukrainian community in New York City held a demonstration dedicated to the anniversary of the "Great Ukrainian Famine" – the Holodomor (literally "death inflicted by starvation"), which was also aimed at condemning the crimes of the communist regime. As Roman Serbyn noted: "Raphael Lemkin spoke to the audience of several thousand people. He named the intentional murder of millions of Ukrainians by famine, as well as extermination of Ukrainian intelligentsia (intellectuals) and Church, a classic example of Soviet genocide […]."[6] According to the researcher, this speech laid a long-term methodological basis for

the study of the Holodomor. Thus, after World War II, Lemkin actualized the study of Soviet genocidal policy against Ukraine in a historical context. However, it is also important that he viewed the genocide in Ukraine as an exemplary, but not the only, example of Soviet genocide.

Interest in Lemkin's ideas and the concept of genocide has experienced ups and downs. His contemporaries also focused on more global international criminal law issues, including the problem of aerial bombardment of civilians and civilian objects as massive acts of human rights violations. According to Dirk Moses: "From the 1920s to the 1940s, international lawyers were debating civilian destruction in broad terms in relation to aerial warfare and blockades. Lemkin ignored these discussions in fixating on ethnic categories."[7]

In any case, Lemkin's ideas greatly influenced the understanding of the nature of mass violence in the 20th century. While analyzing Lemkin's unpublished work on "Thoughts on Nazi Genocide,"[8] Dan Stone focuses on Lemkin's description of phenomena that are relevant today. For example, he mentions "political religion," a term that has been used after the end of the Cold War to explain the appeal of both fascism and communism. Dan Stone says that Lemkin intended to suggest that what motivated followers of these ideologies was less to do with rational choice and more to do with a kind of need for community and devotion in a modernized world in which "traditional" forms of affiliation had broken down: "We find a leader, bewitched by his own twisted conviction and enormous power to bewitch others. We find a small clique of followers, imbued by the same fanatical spirit and willing to execute his orders. We also find a large mass of people who follow blindly or remain indifferent, except for a few who go into exile or underground."[9] We can say that this scheme is also characteristic of contemporary Russian "*ruscism*" as a state ideology.

Thus, during the 20th century, many events of mass violence took place on the territory of Ukraine, most of which occurred during the period of Soviet rule and Nazi occupation: Jewish pogroms, soviet collectivization, the Holodomor of 1932–1933, the Great Terror, the Holocaust, the Roma genocide, deportations, and ethnic cleansing during World War II, and so on. Raphael Lemkin was the first to speak about Ukraine's genocidal experience, but he was unable to develop this topic during his lifetime. In Ukraine, the study of this topic became possible only after the collapse of the Soviet Union and the attainment of independence.[10] Studying genocide and mass violence remains important for the formation of a critical vision of the past in the public consciousness, which Yaroslav Hrytsak referred to as the process of "overcoming the past."[11]

3.3 The crime of genocide in Ukrainian law after independence

For the past 30 years, Ukraine has been in a state of overcoming the influence of the Soviet totalitarian past, during which massive gross human rights violations and crimes took place. In particular, over the past decades, attempts have been made at the legislative level to incorporate the norms of international law on the crime of genocide into national legislation.

On 1 September 2001, the Criminal Code of Ukraine came into force, replacing the Criminal Code of the Ukrainian Soviet Socialist Republic of 1960. The new code included Article 442, which defines the crime of genocide and the relevant liability, repeating almost identically the provisions of the Convention with the exception of the concept of "mental harm," which has not yet been clearly defined in Ukrainian legislation:

> Genocide, that is, an act intentionally committed with the intent to destroy in whole or in part any national, ethnic, racial or religious group by taking the lives of members of such group or causing them grievous bodily harm, creating for the group living conditions calculated to bring about its physical destruction in whole or in part, reducing or preventing childbearing in such group or by forcibly transferring children from one group to another shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment.[12]

Subsequent normative acts were related to the desire to rethink the events of the past Soviet era as acts of genocide. Such decisions are formalized in special laws and individual resolutions of the Verkhovna Rada of Ukraine (VRU), the Cabinet of Ministers of Ukraine, and decrees of the President of Ukraine. For example, on 8 October 2004, in preparation for the International Day of Commemoration of the Roma Genocide, the 60th anniversary of the mass killing on the territory of Ukraine, the VRU adopted a resolution "On the commemoration of the International Day of the Roma Holocaust."[13] In this case, the term "Holocaust" was used in a broad sense, as a crime committed by the Nazis against various categories of victims, in contrast to the term "Shoah," denoting the exclusive Jewish experience during World War II. The date for the memorial day was set at the internationally accepted date of 2 August the day when in 1944, the Nazis massacred Roma in the Auschwitz-Birkenau death camp.

In 2006, the Law of Ukraine about the Holodomor of 1932–1933 in Ukraine was passed. Article 1 defines the Holodomor of 1932–1933 in Ukraine as the genocide of the Ukrainian people.[14] This law was one of the results of the political activity of President of Ukraine Viktor Yushchenko, which helped to draw attention to the recognition of the Holodomor as genocide abroad. Prior to that, the Holodomor was officially recognized by seven countries (Estonia, Australia, Canada, Hungary, the Vatican City State, Lithuania, and Georgia). However, Ukraine specifically has created a basic memorial law on the Holodomor.

Paragraph 2 of the Decree of the VRU of 5 July 2011, was established "to commemorate Holocaust Memorial Day on January 27 every year."[15] This important step demonstrated the tendency of the state and Ukrainian society to understand the Holocaust as a tragedy that occurred on the territory of Ukraine and to take responsibility for the memory of Ukrainian and European Jewish victims of the Holocaust. This act became important for the formation of the current official policy of memory in Ukraine, according to which we should study all tragedies that happened on the territory of Ukraine, including crimes against ethnic minorities. It's important in light of the formation of Ukrainians as a modern political nation.

At the same time, it was a necessary step for the further process of Ukraine's European integration.

Thus, during the first decades after the independence of Ukraine, we see that the recognition of genocides formed a peculiar hierarchy of legislation – from special laws to individual clauses of resolutions of the VRU.[16] These were mostly memory laws.

3.4 New lawmaking and debates around genocide after 2014

On 30 November 2013, the events of the Revolution of Dignity began in Ukraine. The main reason for this was the development of a protest movement against the policies of President Viktor Yanukovych, who had drastically changed his policy concerning the integration of Ukraine with the European Union. Attempts to suppress the protest movement by force ended with the fall of his authority. At the same time, this led to the weakening of Russian influence in Ukraine and pushed the Russian Federation to launch direct aggression against Ukraine.

In February–March 2014, Russian troops occupied and annexed the Autonomous Republic of Crimea. On 15 April 2014, the VRU adopted a law defining the Autonomous Republic of Crimea and the city of Sevastopol as "territories under temporary occupation."[17] The aggression continued with the invasion of Donetsk and Luhansk regions in eastern Ukraine. This stage of the war lasted for 8 years until the full-scale invasion of Ukraine by Russian troops on 24 February 2022.

From the very beginning of the aggression in 2014, the crime of genocide began to appear in the rhetoric of the Russian Federation, which resorted to manipulation aimed at justifying the act of aggression by protecting the Russian-speaking population of Ukraine and the "people of Donbas."[18] Attempts to stop Russia's aggression within the framework of the Normandy format group (representatives of Ukraine, Russia, Germany, and France) in 2014–2021 proved ineffective. The next day after the regular meeting of the negotiators on 9 December 2019, in Paris, Russian President Vladimir Putin said in a press interview: "The Ukrainian side is constantly asking the question: give us the opportunity to close the border with troops. Well, I can imagine what will happen next – there will be Srebrenica."[19] Thus, he resorted to another manipulation by comparing the events in eastern Ukraine to the act of genocide that took place in 1995 in Bosnia and Herzegovina. Thus, for years, Russia has resorted to instrumentalizing current international law and the crime of genocide, in particular, to justify its criminal actions in Ukraine.

After the outbreak of Russian aggression in 2014, the Ukrainian legislature adopted a number of regulations that condemned the genocide in a historical context, while also giving impetus to the current political debate.

In 2015, the VRU passed a resolution on the recognition of the genocide of the Crimean Tatar people.[20] It was a new step to rethink the national history of Ukraine, which was caused by the annexation of Crimea by the Russian Federation and the beginning of the military conflict in eastern Ukraine. The resolution demonstrated a further trend away from an ethnocentric view of Ukrainian history and respect for the rights of ethnic minorities. This decision

received solid support from officials in Ukraine and abroad and from many people who supported singer Jamala during her performance and victory at the Eurovision Song Contest in 2016 with the song "1944." The song was dedicated to the memory of the victims of the deportation of Crimean Tatars organized by the Soviet authorities in 1944. In 2021, the Verkhovna Rada adopted the Law of Ukraine on Indigenous Peoples of Ukraine. Article 1, paragraph 2 of the law states that "The indigenous peoples of Ukraine, which were formed on the territory of the Crimean peninsula, are the Crimean Tatars, Karaites, and Krymchaks."[21] All of these legislative initiatives, in addition to their direct purpose of supplementing and ensuring the rights of ethnic minorities in Ukraine, have become an important signal from the authorities to representatives of these minorities in Crimea that the state does not plan to give in and will fight for the liberation of the territories occupied by Russia.

The Law of Ukraine on the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols became both a memory and a sanctioning law. In particular, its provisions amended Article 436 of the Criminal Code of Ukraine, which provides for a penalty of up to 5 years' imprisonment for:

> Production, distribution, and public use of symbols of the communist, national socialist (Nazi) totalitarian regimes, including in the form of souvenirs, public performance of the anthems of the USSR, the Ukrainian SSR (Ukrainian SSR), other union and autonomous Soviet republics or their fragments throughout Ukraine […].

The memorial significance of the law is enshrined in Article 5, which states that:

> The state shall investigate crimes of genocide, crimes against humanity and humanity, war crimes committed in Ukraine by representatives of the communist and/or national socialist (Nazi) totalitarian regimes, and shall take measures aimed at eliminating the consequences of such crimes and restoring historical justice […].[22]

On 19 February 2016, the Verkhovna Rada registered a draft law on amendments to certain legislative acts of Ukraine (regarding criminal liability for denial of the Holodomor, Holocaust, genocide of the Crimean Tatar people), which was supposed to criminalize the denial of genocides, but after several years of consideration, the draft was withdrawn on 29 August 2019, due to the recognition of the provisions as unjustified and such that may violate basic human rights principles.[23]

In 2017, at the session of the VRU, a draft law was registered on amendments to some legislative acts of Ukraine (concerning criminal liability for denial of the Holodomor as a genocide of the Ukrainian people).[24] The content of the bill led to a discussion about the admissibility of such sanctions, and in 2019 the draft

was withdrawn. In the context of the Russian war in Ukraine, the bill could have meant criticizing the official Russian position that denies the genocidal nature of the Holodomor, but it caused a debate within the country, in particular, around the fact that certain provisions of the law contradict the principle of academic freedom. Therefore, this and other similar initiatives were not adopted and implemented.[25] As the recent events in Bosnia and Herzegovina have shown, ill-conceived memory laws can lead to an escalation of the "war of memories" and the intensification of hate speech rather than reconciliation. Therefore, every initiative of the Ukrainian parliament should be balanced.[26]

On 3 June 2021, at the first reading of the VRU, the Draft Law on Preventing and Combating Anti-Semitism in Ukraine was passed. Article 2 states that denial of the persecution and mass murder of Jews during World War II (the Holocaust) can be considered an expression of anti-Semitism.[27] This law became important in the context of Ukraine's European integration path, where the memory of the Holocaust has become one of the foundations of European identity. In addition, it had an important symbolic meaning on the eve of the 80th anniversary of the tragic events of the Holocaust on the territory of Ukraine. On this occasion, in early October 2021, the leaders of Israel and Germany arrived in Kyiv to participate in a joint commemorative event at Babyn Yar. This place has become symbolic in the context of the history of the Holocaust not only in Ukraine but throughout the former Soviet Union as the site of the largest mass murder of Jews and other victims of the Nazis in the occupied Soviet territories. However, open discussion and commemoration of the Holocaust became possible only after Ukraine gained independence and the abolition of Soviet censorship.

Once the President signs Law No. 5110, which amends Article 161 of the Criminal Code of Ukraine to criminalize anti-Semitism, *anti-Semitism will be punishable by a fine of 200 to 500 tax-free minimum incomes (UAH 3,400 to 8,500) or imprisonment for up to 5 years, with or without deprivation of the right to hold certain positions or engage in certain activities for up to 3 years*.[28]

Thus, until 2022, the topic of genocide in Ukrainian legislation was mainly aimed at condemning the crimes of the past and forming an appropriate policy of memory in the state. At the same time, the first attempts to instrumentalize the crime of genocide during the Russian Federation's aggression against Ukraine should be noted.

3.5 Shifting the focus after 24 February 2022

From the very beginning, the full-scale invasion of Ukraine by the Russian Federation was accompanied by massive destruction of civilian objects and violence against civilians. This instantly attracted the attention of researchers, including international law experts, who tried to provide their own qualifications for the events and to plan the way to investigate and convict the crimes. Some questions arose: what are we dealing with here? Are these war crimes, crimes against humanity, or is there a special intent that allows us to talk about genocide

against the Ukrainian people? How do we investigate, prosecute, and organize justice?

As Alexander Etkind noted:

> Russian actions in Ukrainian cities and villages included mass murders and deportations combined with intentional destruction of their cultural sites (monuments, museums, theatres, and so on), educational facilities, and history textbooks. This is exactly what Lemkin in 1933 called barbarity and vandalism, and renamed this combination into genocide in 1944.[29]

The researcher noted that the debate on genocide in light of the current events of Russian aggression was raised at the highest political level by the leaders of major countries, including the presidents of the Russian Federation, Ukraine, France, and the United States. Thus, at the initial stage, the political aspect dominated over the functionality of international laws.

Dominique Arel and Jesse Driscoll noted that Russian aggression was not provoked. The claim that the population of eastern Ukraine needed "protection from genocide" turned out to be completely fabricated. The researchers note that after the outbreak of violence in 2014–2015, the number of civilian casualties remained low until the full-scale invasion:

> The full strategy was unveiled in the morning of February 24 [2022]. Putin announced a 'military operation for the protection of Donbas,' allegedly because the Ukrainian army was attacking civilians and conducting 'genocide' […]. Both were phenomenal lies.[30]

Russia's full-scale invasion of Ukraine on 24 February began not with the condemnation of genocide, but with the instrumentalization of this crime to justify the aggression, which was an unprecedented act in the international practice. According to the Kremlin's official reports, the invasion was aimed at preventing the genocide of Donbas residents. On 26 February 2022, Ukraine filed in the Registry of the International Court of Justice an "Application instituting proceedings against the Russian Federation concerning a dispute relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide."[31] In an order on 16 March 2022, the court called among others for a ruling that "The Russian Federation shall immediately suspend the military operations that it began on February 24, 2022 in the territory of Ukraine."[32] Thus, Ukrainian lawyers managed to draw the attention of the global community and international justice to the attempt to instrumentalize the crime of genocide by the Russian Federation to justify aggression against Ukraine. The discussion initiated then continues to this day within the framework of the court's work. Public sitting in the case of Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening), were held in September 2023. The case is ongoing.[33]

As a result of the full-scale invasion, massive crimes against civilians were committed, accompanied by the destruction of infrastructure of both large cities and smaller settlements. In the first weeks of the war, it became apparent that all this violence could not be explained by the accompanying risks that coincide with any hostilities. The torture and murder of people who actively or passively resisted the Russian military, together with the destruction of schools, universities, museums, libraries, theaters, and other cultural sites that had no military significance, gave reason to talk about the special intent of such actions.[34] On 14 April 2022, referring to the Convention on the Prevention and Punishment of the Crime of Genocide, customary international law and taking into account the provisions of the Rome Statute of the International Criminal Court, the VRU decided to approve the Declaration of the Verkhovna Rada of Ukraine "On the Genocide Commitment by the Russian Federation in Ukraine."[35] In particular, this decision actualized the topic of ratification of the Rome Statute by Ukraine, to which it became a signatory in 2000. Ratification would allow for a more effective investigation of war crimes, crimes against humanity and genocide within Ukraine. Representatives of Ukraine could take up a seat in the Assembly of States Parties to the International Criminal Court. Also, ratification could strengthen Ukraine's position on the ICC and its members, increase Ukraine's credibility as a signatory, and allow for the ratification of the amendments on the crime of aggression. The main argument against the ratification of the Rome Statute in Ukraine is that after such a step, the International Criminal Court would potentially begin investigating alleged crimes of the Ukrainian army, as it would be almost impossible to prosecute the Russians. However, this opinion was criticized by Ukrainian lawyers and human rights activists as the ICC already has jurisdiction over Ukrainians.[36]

In the Explanatory Note, considerable attention was paid to the characteristics of the policy of the Russian Federation towards Ukraine in recent years, which contributed to the rooting of hate speech against Ukrainians and led to an aggressive war. The continuity of this policy to the tragic events of the Soviet period of Ukraine's history, in particular, the times of Stalin and his genocidal policy, was noted.

An important aspect was to note the prospects for which the investigation of the crimes of the Russian Federation in Ukraine is not limited only to the investigation of the crime of genocide. Also, the Prosecutor General's Office, the Ministry of Foreign Affairs of Ukraine, and the Ministry of Justice of Ukraine were instructed to take measures to properly document the facts of crimes against humanity, war crimes, and other serious crimes on the territory of Ukraine. This will allow for a more flexible policy in investigations initiated in Ukraine and abroad.

On 7 February 2023, the Draft Law on the Creation of the National Memorial Complex of Genocide in Ukraine, War Crimes, and other serious crimes committed by the criminal regime of the Russian Federation on the territory of Ukraine was submitted to the Parliament of Ukraine for consideration.[37] This was the first step that was taken regarding the future commemoration of war victims.

The special attention of legislators was drawn to the plight of Ukrainians who are in the territories controlled by Russia. The Draft Resolution on the Statement

of the Verkhovna Rada of Ukraine on the Genocide of the Ukrainian People by the Russian Federation and Systematic Discrimination of Ukrainians in Russia and in the Territories of Ukraine temporarily occupied by Russia was devoted to this.[38] But there was no further movement after the draft resolution was received by the VRU on 19 January 2023.

On 22 November 2022, the VRU approved a Resolution on the Address to the parliaments of the world countries regarding the recognition of the Holodomor of 1932–1933 as genocide of the Ukrainian people.[39] This document contributed to attracting attention to the topic of crimes committed by the Kremlin on the territories of Ukraine.[40] As a result, a number of new countries (Czech Republic, Brazil, Ireland, Moldova, Romania, Germany, Bulgaria, Belgium, Slovenia, Great Britain, Iceland, France, Luxembourg, Croatia, and Slovakia) recognized the Holodomor as genocide at the state level.

In order to understand the nature of the anti-democratic regime of modern Russia and its aggression against Ukraine, knowledge of modern politics alone is not enough. This can only be done by understanding the historical context. That is why explanations of events by historians became extremely important. Moreover, Putin and his closest entourage quite freely manipulate history, which was put at the service of Russian propaganda to influence both its own population and people abroad.

Timothy Snyder in his "9 Theses on Putin's Fascism for 9 May" tried to deconstruct the Russian narrative of the genocidal war in Ukraine in relation to the history of the Second World War:

> Russian propaganda about 1945 and 2022 is summarized in the popular slogan: 'We can repeat!'… The whole idea of repetition involves choosing a particular point in the past, idealizing it, ignoring all the context and everything that followed, and then imagining that it can be relieved . Whoever performs this exercise eliminates any sense of responsibility: we were right back then, therefore we are right now, and we will always be right — no matter what we do. And so fascism's 'redemptive excess' of 'patriotic arbitrariness' is attained.[41]

However, comparing Russia's war against Ukraine with the Second World War sometimes draws too many parallels that could harm the process of holding Russia accountable in the future. That is why it has become extremely important to call the crimes of Russia today and here, its regime by its name. That is why, on 2 May 2023, the VRU adopted the Resolution "On the Statement of the Verkhovna Rada of Ukraine 'On the use of the ideology of *ruscism* by the political regime of the Russian Federation, condemning the foundations and practices of *ruscism* as totalitarian and misanthropic.'"[42] According to the Press Service of the Apparatus of the VRU,

> the Draft Resolution is aimed at the adoption of the Statement of the Verkhovna Rada of Ukraine, which will allow to determine the forms of aggression of the Russian Federation and will encourage the countries of the world to condemn

> its policy, which leads to the commission of war crimes and the genocide of the Ukrainian people.[43]

Thus, *ruscism* was defined as the state ideology of the Russian Federation. Prior to this, the phenomenon of *ruscism* has been studied by researchers for several years and has gone from a meme to a well-founded and legally established term. Ukrainian researcher Larisa Yakubova characterized *ruscism* as

> the highest stage of the 'Russian world.' Ruscism is a historically new phenomenon – a delayed/mutant fascist/Nazi syndrome on the Russian ethno-political soil. It is the mutant nature of the post-Soviet organism of the Russian Federation that makes direct analogies with Nazism or fascism impossible, as is generally stated in the mass discourse.[44]

On 22 May 2023, members of the NATO Parliamentary Assembly stated that they were "Determined to hold accountable the Russian regime, its co-aggressors in the Belarusian regime and all other perpetrators, including for the crime of aggression, war crimes, crimes against humanity and possible acts of genocide committed in Ukraine."[45] The text does not provide a detailed definition of *ruscism*, but calls it part of Russian ideology and practice in the context of aggression against Ukraine. Thus, a detailed interpretation and inclusion of the concept of *ruscism* in other language dictionaries is a pressing issue.

Currently, both Ukrainian and foreign lawyers are dealing with the qualification of the crime of genocide in Ukraine. On 14 April 2023, in Vilnius, members of the joint investigative team for the investigation of serious international crimes in Ukraine (JIT) signed an agreement to investigate not only war crimes but also the crime of genocide. Prosecutor General of Ukraine Andriy Kostin noted in his report that

> Since the beginning of the full-scale invasion, we have seen a system in the war crimes of the Russian Federation. Currently, in our investigations, we are checking two main aspects: whether individual war crimes have signs of genocide and whether the revealed patterns indicate a planned policy of genocide.[46]

Thus, it is very important to investigate not only specific crimes, but also pre-war rhetoric, official statements, and other sources, where the roots of the modern Kremlin's genocidal policy should be sought.

British lawyer Wayne Jordash, analyzing the genocidal nature of Russian violence in Ukraine, noted that after the Russian command and Russian troops encountered Ukrainian resistance and learned about the origin or existence of the genocidal campaign, they may have developed a specific intent to commit physical genocide in addition to the existing intent to commit cultural genocide: "Under such conditions, they will be responsible for war crimes and crimes against humanity, which constitute cultural genocide and genocide covered by the Convention on the Prevention of the Crime of Genocide."[47] We can agree with this, because the

tendency to commit conventional genocide can be traced from the Kremlin's public speeches, texts, and statements before a full-scale invasion. One of the most eloquent sources for study and analysis, and at the same time evidence, is Putin's article "On the historical unity of Russians and Ukrainians," which contains an actual denial of the right of Ukrainians to their own national identity and state independence:

> […] I said that Russians and Ukrainians are one people, a single unit […] I have spoken about it many times, this is my belief […] I am sure that the true sovereignty of Ukraine is possible only in partnership with Russia […]. Together we have always been and will be immeasurably stronger and more successful. After all, we are one people.[48]

In connection with the subsequent full-scale aggression and numerous murders of representatives of the civilian population, deportations and transfer of Ukrainian children to Russian families for upbringing, we can talk about various ways of committing genocide against the Ukrainian people.[49] In order to draw attention to this problem, the VRU adopted a number of resolutions to address the UN Human Rights Committee, the UN Committee on the Rights of the Child, the International Court of Justice, the UN High Commissioner for Refugees,[50] as well as parliaments and governments of foreign countries, international organizations and their inter-parliamentary assemblies[51] to condemn the crimes of forced deportation of Ukrainian children committed by the Russian Federation and the Republic of Belarus and to demand the return of such children to their parents or legal representatives. Today, these cases are carefully studied by investigators in Ukraine and abroad, and their qualifications should become a task for a special international court. In particular, ICC judges issued arrest warrants against President of the Russian Federation Vladimir Putin and Commissioner for Children's Rights in the Office of the President of the Russian Federation Maria Lvova-Belova.[52]

In addition to the purely Ukrainian context of the investigation of the crime of genocide, the deputies of the VRU considered and approved a number of resolutions recognizing Russia's policy towards the peoples of the North Caucasus as acts of genocide. On 24 June 2022, the VRU registered a draft resolution on the recognition of the genocide of the Circassian (Adyghe) people during the Russian–Caucasian war.[53] On 18 October 2022, the Draft Resolution on the Statement of the VRU on the Recognition of the Chechen Republic of Ichkeria as Temporarily Occupied by the Russian Federation and Condemnation of the Genocide of the Chechen People was signed.[54] Also, on 11 May 2023, the Draft Resolution on the Recognition of the Genocide of the Circassian People Committed by the Russian Empire was registered.[55] These legislative initiatives are important, as the events in the North Caucasus have shown how Russia conquered and brutally suppressed the efforts of the peoples of the Caucasus to gain their own sovereignty from the 19th to 21st century. The same Russian policy continues to threaten modern Ukraine and other neighboring countries.

3.6 Conclusion

In 1949, the Ukrainian Soviet Socialist Republic, as a UN member state, supported the adoption of the Genocide Convention. However, this did not lead to a review and condemnation of all crimes of the communist and national socialist regimes in the country, as its international position provided only for formal representation of the state as an independent entity and full control by Moscow. This process became possible only after Ukraine gained independence when mass violence and the genocidal experience of Ukrainians became available for free discussion. Genocide as a crime and its precedents in Ukrainian history were enshrined in sanctions legislation and a number of memory laws.

The Holodomor, the Great Terror, the Holocaust, and the Genocide of the Crimean Tatar people were the central themes of the memory laws around which the legislative work was conducted. In general, these initiatives were based on the idea of historical justice in relation to crimes that were not timely condemned. At the same time, individual legislative acts may differ in their content and goals. For example, the official condemnation of the Holocaust is one of the important conditions on Ukraine's path to European integration, and initiatives to protect the Crimean Tatar population of Ukraine have actually become one of the responses to the aggression of the Russian Federation and the attempted annexation of Crimea. However, this should not mean that these topics depend only on the political situation. It is also about the request of Ukrainian society for a critical revision of history, which plays an important role in the modern formation of Ukrainians as a political nation in which there should be no place for other people's tragedies. Accordingly, it is important to study all manifestations of mass violence, including the crime of genocide, which was experienced not only by Ukrainians but also by representatives of ethnic minorities. One of the next steps in assessing Ukraine's genocidal experience should be to agree on common themes with neighboring countries. For example, Ukraine and Poland still do not have a consistent view of the Volyn Massacre of 1943 (in the Polish version, the Wołyń Massacre) that took place on the territory of Ukraine. The official discourse of Ukraine is dominated by the version of mutual violence as a "tragic event," while in Poland these events were labeled genocide committed by Ukrainian nationalists and their supporters at the legislative level.

Russia's full-scale invasion of Ukraine on 24 February 2022, was a new milestone in the study of Ukraine's experience of international crimes, including the crime of genocide. The legislative initiatives of the Verkhovna Rada of Ukraine have launched investigations and political debates at home and abroad about the Russian genocide in Ukraine. These debates are accompanied by a journey into the past to understand the nature of Russia's contemporary genocidal violence against Ukrainians. The impunity of the Soviet leadership gave rise to the confidence of the modern leadership of the Russian Federation that a world in which real politics remains a powerful tool will come to terms with aggression against Ukraine and annexation of its territories. However, it is obvious that such a solution would open up opportunities for

new global conflicts and ambitions to redistribute the world and disrupt the already shaky peace that was established after World War II.

Thus, Ukraine continues to develop a legal framework that seeks to condemn genocide and other international crimes in a historical context and to investigate and prevent the future recurrence of these crimes.

This chapter is only an attempt to organize the understanding of genocide in the history and present of Ukraine at the official state level. In particular, it reflects the legal framework that serves as a tool for qualifying and preventing crime. This process is not complete and continues today. Critical reflection on the tragic events of the past plays an important role in shaping Ukraine's legal and democratic system. Similar processes are taking place in other democratic countries, while anti-democratic regimes tend to conceal and deny genocidal and other international crimes.

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4 In the span of a hybrid war

Engaging post-truth in shadowing Russian war crimes

Kseniya Yurtayeva

4.1 Introduction

The thesis that we live in a post-truth era where personal and collective beliefs predominate over reality is no longer perceived as unique. The concept of post-truth is recognized, studied, and even used by specialists in different spheres: modern philosophy, political science, social psychology, communications, and journalism. Legal science strongly associated with ideals of justice, rule of law and general aspiration for prospective development of mankind has been standing aside from the post-truth narratives, but today slides towards alarming exposure to this controversial concept. Post-truth, having already "turned the political world upside down,"[1] similarly attempts to corrode the essence of law and turn it into "non-law."

The Russian Federation in its undeclared war against Ukraine is believed to have opened the age of the hybrid war.[2] The Russian military commanders explicitly associate a new type of warfare with the use of political, diplomatic, economic, and other non-military measures in combination with the use of military forces for achieving political goals.[3] In this respect, it can be observed that Russia has not only introduced novel tactics to kinetic and virtual battlefields, but also explicitly strives to change legal models of qualification for the committed war crimes. The present chapter aims to examine contemporary tactics engaged by the Russian Federation for shadowing war crimes committed against Ukraine in the light of the post-truth concept, and to study their impact on the criminal justice system.

4.2 Antagonistic interrelation between post-truth and law

Post-truth is a relatively new concept, and its implication in the sphere of law is not yet fully understood. In the legal domain, there are only a few examples of engaging post-truth concepts in analyzing particular social phenomena. For instance, Oleksii Lytvynov and Yurii Orlov apply post-modern and post-truth reasoning in analyzing the essence of contemporary criminality.[4] Vyacheslav Tulyakov uses the post-truth concept to determine the nature of criminal proceedings carried out in the temporarily occupied territories of Ukraine under the law of the Russian Federation and non-recognized Donetsk and Lugansk People's Republics. Tulyakov introduced the term "criminal non-law" as a phenomenon explaining this illegal rationale.[5]

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Other Ukrainian researchers examine post-truth in the context of development of information society (Natalia Sanotska)[6] and journalist truth in Russia-Ukraine hybrid war (Vasyl Lyzanchuk).[7] In Western democracies, who initially introduced a post-truth notion, post-truth is presented as an idea inconsistent with transnational justice (Nanci Adler et al.)[8] and historical memory (Janna Thompson, Klaus Neumann).[9] The last two concepts are associated with social and legal response to massive serious human rights violations in the post-conflict zones. With regards to the latter, post-truth argumentation as a means of Russia–Ukraine hybrid war requires particular attention.

The term post-truth is believed to be coined in 1992 by the Serbian–American playwright Steve Tesich in his essay *A Government of Lies* published in "The Nation" magazine. Concentrating on the US government's untruthfulness on the issue of Iran-Contra and Iraq War I, Tesich draws a straightforward conclusion that although "we have acquired a spiritual mechanism that can denude truth of any significance … In a very fundamental way we, as a free people, have freely decided that we want to live in some post-truth world."[10] A somewhat similar concept referred to as "doublethink" was described by George Orwell in his landmark book *Nineteen Eighty-Four* published in 1949. Doublethink, invoked by political clout and propaganda, facilitated the population of the fictional state of Oceania to simultaneously accept two mutually contradictory beliefs as correct, in this way self-modulating and controlling personal mental rational and mindset.[11] The most famous examples of doublethink used throughout *Nineteen Eighty-Four* include the slogans: "War is Peace, Freedom is Slavery, Ignorance is Strength."[12]

The term "post-truth" came into the public focus in 2016, when the Oxford Dictionaries declared it their international word of the year. "Post-truth" was defined as "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief."[13] Editors admitted that the spike in usage of this term by around 2,000% was closely connected to the EU referendum in the United Kingdom and to the presidential election in the United States in 2016.[14] Both political events generated significant public controversy and debate.

Today, post-truth is not the only original notion reflecting non-objective perception of reality. In 2005, a famous American comedian, writer, political commentator, and television host Stephen Colbert introduced another recent neologism "truthiness" (or "veritasiness"), which wittily indicates the state of persuasion by whether something *feels* true, even if it is not necessarily backed up by the facts. One more closely related Colbertism is "wikiality" – a statement considered to be true because the majority of people agree on it, rather than because of established facts.[15]

Complexity in assessing credible facts brings to mind another recent post-truth trend dubbed "alternative facts." Alternative facts are generally associated with false statements, which aim to substitute reality. The latter emerged just after President Donald Trump's election. On 22 January 2017, during the broadcast of the NBC's television Sunday morning talk show *Meet the Press*, Kellyanne Conway, the advisor to the President Donald Trump, used the term "alternative facts" to

label a factually incorrect statement previously made by her colleague, the new White House press secretary Sean Spicer, who had falsely claimed Trump's presidential inauguration to be the largest one in history.[16] Using the euphemism "alternative facts," Conway sought to shadow Spicer's purely untruthful and delusional statement, and create alternative reality appealing to Trump's proponents. The term caught on widely with critics of the Trump administration, and today represents negative values of post-truth society. Therefore, the emerging post-truth terminology reflects peculiarities of contemporary mass consciousness, which does not necessarily rely on objective facts with regards to the experience of social reality, but instead replicates current popular moods and aspirations.

The Oxford Dictionaries define post-truth as a situation creating the state of distortion in the public perception of certain facts, but do not specify either the nature, or the origin of the underlying circumstances. This definition represents a pure statement lacking phenomenological analysis and thus contributing to uncertainty over its contextual interpretation. Analysis of modern scholarly views can decrease this ambiguity. In this regard, it is essential to define whether post-truth should be analyzed in relation to a specific governing agent (influencer) and particular objectives pursued, if at all.

Some researchers describe post-truth as a circumstance designed to undermine public tranquility as a whole.[17] Other scholars explicitly indicate the presence of underlying objective or implicit goal behind post-truth narratives. For example, Lee C. McIntyre speculates that post-truth amounts to a form of ideological supremacy, whereby its practitioners are trying to compel someone to believe in something, whether there is good evidence for it or not.[18] Meanwhile, it is important to emphasize that post-truth is not just a lie per se – it is a creation of a situation where truth becomes ostracized and no longer possible. Differentiating post-truth from other forms of social untruthfulness and manipulation, Vittorio Bufacchi points to another important feature of the former: the advocates of post-truth (post-truthers) feel threatened by truth and try to subvert and delegitimize it in order to disarm the threat which truth poses to them.[19] In other words, truth and post-truth are not just opposing notions such as truth and lie; post-truth has a strongly antagonistic character, striving to compromise and erode the opposite concept.

Despite minor differences in details, researchers agree that in most instances post-truth situations are not accidental. Post-truth arises from targeted activities aimed at modifying public perception of certain facts and is designed to gain concrete advantages or accomplish specific goals. The ultimate objective of post-truth is to make truth and true facts absolutely impossible, to erode perception of reality among vast populations, and to provide a basis for ill-intentioned manipulations of public sentiment.

While analyzing the relationship between post-truth and law, it is important to emphasize that law emerged as an instrument for exercising justice and public order within society. In democratic states, law is strongly associated with the promotion of such values as truth and social justice. It is quite revealing that in the Ukrainian language words denoting the notions of "law" (**прав**о), "truth" (**прав**да), "rightful" (**прав**ий, **прав**ильний), "justice" (с**прав**едливість) and even the state

of things reflecting the reality (нас**прав**ді) are of the same semantic sequence and all of them have a common root. In this regard, it is essential to differentiate law as a set of regulations representing ideals of the rule of law and social justice and a statute as a legislative document establishing related legal norms. The latter, when not reflecting the principles of humanism, democracy, justice, and equality, can be recognized as unlawful or contradicting the essence of law as a yardstick of fairness. Official interpretation of legal norms must be conducted by the court or other authorized body and is not subject to arbitrary treatment.

The proof of the facts in the judiciary also must meet legally defined standards. In criminal cases, the standard of proof is established at the highest level – beyond reasonable doubt. Subjective statements can be taken into account to support the indictment, but by no means should they influence the assessment of the objective facts. Misinterpreting or concealing facts and providing them with false evaluation corrodes the idea of justice and undermines the law. Therefore, law in contemporary democratic states is largely accepted as an embodiment of the truth. In this context the truth is an ultimate value. It does not have dimensions; it represents objective facts that cannot be privatized.

4.3 Russian war crimes in Ukraine in shadow of post-truth narratives

The full-scale invasion of Ukraine carried out by the Russian Federation has raised a number of legal issues concerning evaluation of war crimes committed in the territory of Ukraine. Significantly, the aggressor-state officially labeled that purely offensive armed attack against Ukraine a "special operation," denying its illegitimate character and portraying it as defensive action directed against far-right nationalists and neo-Nazis in Ukraine. As an extension of the act of aggression, Russian troops committed a number of war crimes against Ukrainian people in the course of a full-scale armed invasion. These include intentional and indiscriminate attacks against civilian objects,[20] causing intentional damage to cultural heritage,[21] inflicting long-term severe damage to the environment, which was clearly excessive in relation to the concrete and direct overall military advantage anticipated,[22] pillage,[23] violence against civilian population who are not taking direct part in hostilities,[24] etc. The evidence of mass atrocities is being gathered and documented by the Office of the Prosecutor General of Ukraine, special forensics and investigative team of the International Criminal Court, as well as by a number of non-governmental organizations and social initiative movements. As of June 2023, the Office of the Prosecutor General of Ukraine has registered more than 90,000 war crimes committed in the territory of Ukraine, including the crime of aggression.[25] The main case of aggression by the Russian Federation against Ukraine involves 669 suspects, including Russian ministers, deputies, the military command, officials, heads of law enforcement agencies, war instigators, and Kremlin propagandists, whose names are listed on the official website of the Prosecutor General of Ukraine.[26]

Most of the hostilities committed in the territory of Ukraine are being either ignored or rejected by military commanders and high-ranking officials of the

Russian Federation.[27] At the same time, the Russian authorities have not denied committing certain war crimes – in fact, they have publicized and presented them as notable accomplishments. For example, in September 2022 local occupying powers of the Russian Federation were filming and posting forceful expulsion of "unreliable" Ukrainian citizen from the territory of Zaporizhzhia region, the place of their habitual residence.[28] The head of State administration of Zaporizhzhia region Yevgenii Balitskii in his video interview said, that these measures were taken without court proceedings according to the decree of the occupying administration and he considers such measures very humane.[29] Despite their alleged humanitarian character, such actions clearly violate the norms of international law, namely Article 8 (2) (a) (vii) of the ICC Statute.[30] The war crime of unlawful deportation and transfer consists of forced displacement of persons by expulsion from the area in which they are lawfully present or other coercive acts, without grounds permitted under international law. As noted in The Prosecutor v. Radovan Karadžić,

> the term "forced" may include physical force, as well as the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or the act of taking advantage of a coercive environment. The forced character of the displacement is determined by the absence of genuine choice by the victim in his or her displacement.[31]

International humanitarian law establishes limited grounds for the expulsion of civilians from the area in which they are lawfully present. According to Article 49 of the Fourth Geneva Convention and Article 17 of its Protocol II, a total or partial evacuation of the population is allowed "if the security of the population or imperative military reasons so demand."[32] Article 49 of the Fourth Geneva Convention, however, specifies that "persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."[33] What follows is that civilian population can be temporarily evacuated only for their security or for imperative military reasons, which clearly is not present in the case. Therefore, a forceful expulsion of the civilians who disagree with the Russian politics from the temporarily occupied territories amounts to a war crime.

Another notable example of the Russian war crimes is a forcible relocation of the Ukrainian population to the territory of the Russian Federation. In July 2022, the number of forcefully relocated Ukrainian civilians reached 1.6 million, including over 260,000 children.[34] In mid-August 2022, Russian officials reported that over 3.4 million Ukrainians had entered the Russian Federation from Ukraine, including 555,000 children.[35] Due to the ongoing armed conflict and occupation of several regions of Ukraine, it was impossible for the Ukrainian government and international community to collect the relevant data directly. This indicates another immediate problem faced by the Ukrainian law enforcement starting from 2014 – the latency of crimes committed on the temporarily occupied territories. Unfortunately, in 2022 inaccuracy in official crime statistics previously referred to Luhansk and Donetsk regions and the Crimea Republic was replenished by Kherson and Zaporizhzhia regions. During the first months

of the Russian full-scale invasion to Ukraine Ombudsman of Ukraine Lyudmyla Denisova (2018–2022) relied in her official addresses on the figures publicly posted by the officials of the Russian Federation.[36] Therefore, the exact numbers of kidnapped adults and children remains unclear, growing evidence suggests these are large numbers.

It is worth noting that 2,000 of the forcibly deported children are orphans and children without parental supervision. Russian officials claim that these children do not have parents or guardians to look after them, or that they cannot be reached. Ukrainian government acknowledged to the UN representatives that most children of the state "are not orphans, have no serious illness or disease and are in an institution because their families are in difficult circumstances."[37] Ignoring the fact that most of the abducted children have relatives in their homeland, the Russian Federation initiated a massive adoption campaign just a few weeks after the full-scale invasion of Ukraine. The President of the Russian Federation Vladimir Putin declared the lack of legal basis for such proceeding "bureaucratic wrangling" that must be removed under emergency circumstances.[38] Putin's personal acknowledgement and support of such criminal policies were presented in his official briefing with Lvova-Belova to the Russian "First Channel" on 9 March 2022.[39] Following this narration, in May 2022 the President Putin signed a decree simplifying procedure of acquiring Russian Federation citizenship for Ukrainian orphans and children left without parental care,[40] which subsequently opened a back-door for their fast-tracking adoption by the Russian citizens. Besides an official campaign encouraging adoption of the children from the occupied regions of Ukraine, in the fall of 2022 the Russian blogosphere began circulating a multi-part propagandist documentary series *Childhood: Recovery* featuring "happy and peaceful life" of several Ukrainian children from Donbas after being adopted into Russian families.[41]

As part of the adoption procedures, Russian officials change names and personal information of the children from the occupied regions of Ukraine, which makes it almost impossible to find and return them to Ukraine, whilst many of them still have relatives in their homeland. By the end of 2022, Ukrainian human rights activists recorded at least 400 illegal adoptions of Ukrainian kidnapped children.[42] The most glaring case of such adoption was performed by high-ranking Russian official Maria Lvova-Belova, the Presidential Commissioner for Children's Rights in the Russian Federation. She and her husband, a priest of the Russian Orthodox Church, have five biological and 16 adopted children, and the couple adopted a 16-year-old boy from Mariupol. It is worth noting that many Ukrainian children were specifically placed in religious families,[43] which, under the circumstances, does not merely indicate a virtue, but rather a better tool for expediated transitioning of the abducted Ukrainian children to the alien environment. The Head of the Chechen Republic Ramzan Kadyrov additionally stated he is working with Russian Federation Commissioner for Children's Rights Maria Lvova-Belova to bring "difficult teenagers" from various Russian regions and occupied Donetsk and Luhansk Oblasts to Chechnya to engage in "preventative work" and "military-patriotic education."[44] All this proves premeditation of adoption policies of the

Russian Federation and their focus on changing cultural identity of the abducted Ukrainian children.

The policies of the Russian Federation facilitating adoption of the children abducted from the territory of Ukraine at the wartime are totally incompatible intercountry adoption standards and norms of international humanitarian law. According to Article 50 of the Fourth Geneva Convention, the Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage.[45] In the cases of humanitarian emergency children separated from their parents cannot be assumed to be orphans and every opportunity should be provided for family reunification. Furthermore, international experts emphasize that adoption should never occur during or immediately after emergencies, since it is near impossible to ensure that the standards and safeguards of the convention are respected. This increases the risk of child abduction, sale or trafficking, and illegal adoptions.[46] The Russian policies in relation to the children abducted from the territory of Ukraine also do not adhere to procedural requirements of intercountry adoption. Under the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions, such procedures take place within close cooperation between the state of the origin of the child and the receiving state, if the competent authorities of the state of origin have established that the child is adoptable and only if a suitable family cannot be found in the child's state of origin (Preamble and Article 4 of the Convention).[47] It is important to emphasize that official address of the Ukrainian Government to the international community regarding inadmissibility of illegal transfer of the Ukrainian children to the Russian families[48] was totally ignored by the Russian Federation. Nevertheless, the Ukrainian government managed to return 128 forcefully deported children to Ukraine through governmental and humanitarian channels by February 2023.[49] Meanwhile, according to the Ministry of Reintegration of the Temporally Occupied Territories of Ukraine, 4,396 abducted Ukrainian children continue to be illegally kept in Russia by April 2023.[50]

Based on the above, the actions of the President of the Russian Federation legalizing de facto abduction of Ukrainian children as presented in the President's decree "on humanitarian grounds" grossly violate core international principles. Moreover, regardless of the fact if abducted Ukrainian children had parents, their premediated transfer to another cultural environment is a marker of genocide and an attempt to erase the very identity of the Ukrainian nation. Relevant thesis was spread and supported by Vladimir Putin[51] and other high-ranking Russian officials just before and after the beginning of the large-scale invasion. In this regard, arrest warrants issued against Putin and Lvova-Belova on 17 March 2023, by the International Criminal Court[52] look grounded and more than timely.

Meanwhile, seeking to create additional obstacles to the international prosecution of the war crimes committed against Ukrainian people, on 20 June 2023, the Parliament of the Russian Federation procured a motion to establish "a commission for investigating the crimes of the Kiev regime against minors." The Deputy Chairman of the State Duma of the Russian Federation Anna Kuznetsova in her address to the Russian deputies defined a strategic objective of such parliamentary

action as "creating one more defence line for our truth, our children and our future."[53] This political motion illustrates Russia's further step towards complete separation from universal humanitarian values, as well as privatizing the truth and – literally and figuratively – the children from the Ukrainian territories occupied by the Russian Federation.

One more instance that is less publicly articulated by the Russian authorities, but not less striking, is exportation of cultural property from temporarily occupied territories of Ukraine. Journalists from both sides of the conflict reported seizure of museum exhibits and their subsequent exportation (in Russian media – evacuation) to the territory of the Russian Federation. For example, Scythian gold from the Melitopol museum of Local History,[54] paintings of Kuindzhi and Aivazovsky from the Mariupol Art Museum.[55] Similar instances were recorded in the Kherson region during the period of Russian occupation.[56] At the same time, Russian propagandists continue to promote a slogan of liberating the Ukrainian cultural heritage. The illegal character of the exportation of the Ukrainian cultural property can be proved by the targeted arrests and interrogations of museum staff by occupying military administrations and by the forceful character of the confiscation.[57] In October 2022, a representative of Russian occupying authorities in Kherson Kirill Stremousov stated that when the fighting stops, the historical monuments that have been seized from Kherson by the Russian Federation will be returned.[58] Meanwhile, he did not specify if the historical heritage will be returned to Kherson that has been liberated by the Ukrainian army in November 2022.

Transferring the most valuable pieces of cultural property from Ukraine to consistently predominating Moscow museums was a widespread practice during the Soviet times. Today it is coming back, but with the difference that it is directed at Ukraine as an independent state and constitutes violation of Article 1 of the Protocol for the Protection of Cultural Property in the Event of Armed Conflict.[59] In a broad sense, such practices of the occupying power can be viewed in the light of cultural genocide, as defined in 1946 by Raphael Lemkin.[60]

4.4 Post-truth as a hybrid war tactic

All cited atrocities contain apparently contradictory common features: they are demonstrative by their character, contain direct appeal to supreme spiritual values, and at the same time tend to substitute existing legal concepts of criminal liability. Despite virtual obscureness of the overall situation, the Russian Federation publicly exhibits atrocities committed against Ukraine, while arrogantly denying moral and legal liability for the committed war crimes. Such a tactic approach used by the Russian Federation is not accidental and is a part of brutal hybrid war against Ukraine.

By comparison with preexisting compound methods of warfare, hybrid war introduced complexity, fusion, synergy, and simultaneity of the full range of methods and modes of conflict at strategic, operational, and tactical levels, blended into the same battlespace.[61] Despite the fact that hybrid war is originally a Western concept,[62] its core ideas are replicated in the current military doctrine of the

Russian Federation. According to the Chief of the General Staff of the Russian Federation (and from January 2023, also the Commander of the combined forces group in Ukraine) Valery Gerasimov, in new types of conflicts, the ratio between non-military and military measures is envisaged as 4:1. Gerasimov also suggests that in modern warfare information space will be used as a full-fledged weapon on an equal basis with physical environments.[63] Therefore, today's superiority on the battlefield is closely linked with competition in non-military spheres.

Unfortunately, today the legal sphere has been overwhelmingly dragged into the Russia–Ukraine hybrid confrontation. Russian authorities take a proactive and frequently well-considered approach, aimed at creating obstacles for international prosecution of war crimes committed against Ukrainian people. Specific post-truth tactics engaged by the Russian Federation include public presentation of the objective facts accompanied by their deliberately distorted legal justification, robust informational propaganda supporting illegal actions of the public authorities, dehumanization and putting forward unjustified accusations against the adversary, as well as introducing permissible grounds for the committed atrocities. The main objective of the perverted advertisement of Russia's own illegal conduct lies in creating a guise of legitimacy and humanism in the eyes of the vast audiences, nullifying the gravity of the war crimes and ultimately removing the very idea of imposing justice from the agenda. In combination with other leverages (economic, diplomatic, social, cultural, etc.) the post-truth tactics depicted above are becoming a powerful tool in hybrid modes of warfare. Therefore, engaging a post-truth approach in the legal and informational spheres not only leads to obscuring the real-world picture or merely shaping public opinion, but also threatens to eventually corrode the public domain and unbiased criminal justice system.

In a broader perspective, the post-truth situation subsequently leads to a post-factual one, where objective facts are not relevant anymore and are substituted by comforting lies – non-truth and non-law. Hannah Arendt believed that emancipation of thought from experience and reality is an indispensable feature of totalitarian movements' propaganda.[64] One of Arendt's main legacies is the concept of "banality of evil."[65] As summarized by Jack Maden, "evil is perpetuated when immoral principles become normalized over time by unthinking people"[66] thereby making them a functioning component of totalitarian evil policies. According to Arendt, the ideologies have no power to transform reality, but by using specific methods they can achieve emancipation of thought from experience.[67] At present, post-truth can treat to one of the reinvented tactics of the commenced hybrid war against Ukraine. Post-truth reinforced by contemporary mass media, which often substitute reality for vast audiences, becomes a shortcut to multiplication of a banal evil. Promotion of post-truth narratives effect mass consciousness inspiring the Russian soldiers to commit further war crimes and the general public to tolerate or even support criminal policies of the Russian Federation.

On the other hand, engaging post-truth narratives as a part of hybrid warfare is also targeted at subversion of historical truth and modifying collective memory. For instance, Russian post-truth narratives manifest in denying Ukrainian people their historical past and presenting Ukraine (or as Russian authorities dub

Ukraine "Malorossia" – literally, "little Russia") as a creation and a lifetime colony of the Russian state. Meanwhile, the lessons of the past prove that subversion of historical truth can also be projected onto the legal domain. A similar upshot was described by Marko Milanovic as a negative legacy of the International Criminal Tribunal for the former Yugoslavia, where some of the prosecuted former Yugoslavian authorities with the passage of the time ironically gained greater popularity in the minds and hearts of their compatriots.[68] Milanovic emphasizes that "the factual accounts these tribunals produce – about the guilt of specific individuals for specific crimes, but also about the systemic nature and causes of these crimes – at least at some point need to be accepted by their local audiences." He concludes that crimes need to be believed to be remedied,[69] therefore highlighting the need for creating a better nexus between official assessment of grave violations of international humanitarian law and public perception of the relevant developments. In light of the above, it is important to stress that at the time of globalized information society, the practice of ignoring public perception and attitudes towards ongoing violations of international humanitarian law by local and international audiences can lead to undermining future decisions of international judicial bodies and, consequently, diminishing their role and significance. Therefore, consistent policy on substantiating historical and factual truth among vast populations is in direct line with the quest for criminal justice in the modern post-truth world.

4.5 Conclusion

Post-truth narratives used by the Russian Federation to shadow the war crimes committed in Ukraine in combination with other hybrid war tactics create a serious impediment for an international criminal justice system and for ascertaining historical truth. Besides giving rise to alternative factuality, denial of justice deprives the victims of war crimes of adequate legal protection and desired catharsis. For these reasons, complex post-truth challenges likewise require complex solutions. They must be based not merely on military and law-enforcement measures, but should be also supplemented by the promotion of true humanitarian values and comprehensive informational support based on a well-established factual background. The most urgent steps in this direction are as follows: pursuing credible documentation and international investigation of the Russian war crimes committed in Ukraine as well as the crime of genocide against Ukrainian nation; establishing international tribunal for investigating Russian crime of aggression against Ukraine; implementing persistent information policies unshadowing Russian war crimes committed in Ukraine and engaging all available informational instruments aimed at reaching vast audiences; exposing Russian propaganda and misinformation; keeping international and public focus on resolving the current international crisis, ending the war in Ukraine and restoring Ukrainian independence throughout its entire internationally recognized territory; implementing consistent policy for preserving memory and the historical truth about Russia–Ukraine war; further promotion of democracy and sustainable development of civil society.

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5 A Nuremberg for Communism?

Unified Germany, international law, and the idea of a tribunal for Stalinist/Soviet crimes

Annette Weinke

5.1 "Putin's war" and counterfactual history

At the end of 2022, the German Historical Museum in Berlin opened its doors for a new exhibition. "Roads not taken. Or: things could have happened differently" attracted large crowds with a general interest in the twists and turns of modern German history.[1] Conceived as an experiment in speculative thinking, historian Dan Diner and his co-curators played with the idea that, starting from the early 19th century, the German nation could have taken a different path and that its actual historical record often hinged on the contingencies of crossroad moments. In a certain way, "what-if" storytelling has always been an important stimulus of historical imagination, which inspired amateur and professional history writing alike. As cultural historian Catharine Gallagher has demonstrated in her excellent *tour de force* on the subject, the use of counterfactualism in historical thought originated in theological and metaphysical debates of the late 18th century and were later appropriated by the Prussian military theorist Carl von Clausewitz for the practical purpose of perfecting the art of warfare.[2]

Whereas in the Age of Enlightenment it had been "fashionable to think of history as the work of God's providence", historians and philosophers of history continued to argue about determinism, causality, and contingency under the modernizing influences of scientism and positivism.[3] A growing fascination for the idea of human agency, the socio-psychological impacts of man-made catastrophes, as well as the emergence in the 1970s of a culture of legal reasoning over the long-term consequences of historical wrongs, seem to have been factors which fostered the on-going popularity of counterfactual speculation in the 20th and 21st century: what would have happened if the first bourgeois revolution of February 1917 had been successful in pacifying the war-tired Russian population? How would the course of German history have changed had Adolf Hitler been killed during his attempted coup of November 1923? How would the revolution of 1989 have ended had the East German party functionary Günther Schabowski not stumbled over the innocent question of an Italian journalist? These were some of the narratives which became focal points of popular historical imagination that thrived especially after the end of the Cold War.

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Since 24 February 2022, the most recent dramatic turning point in European history, another set of hypothetical and contrastive questions has gained currency in international forums.[4] Some prominent members of the former Soviet opposition who quickly emerged as commentators of "Putin's war" raised the question of whether the trajectory of post-Soviet Russia might have been different if in 1991 a Nuremberg-style court had been erected. Would the creation of an international criminal court for the historical injustices of Communism have prevented the recurrence of Russian imperialism, militarism and chauvinism, thereby breaking destructive path dependencies in Russian, Soviet, and post-Soviet history?[5] Would the attempt to investigate and adjudicate at least the most heinous Stalinist crimes have made the Russian population more immune against Putin's blunt history propaganda and his glorification of the so-called "Great Patriotic War" (1941–1945)? Could such a trial against former Soviet leaders have induced a certain degree of critical awareness and empathy for the many victims of Soviet repression?

As often in the genre of speculative public history, raising the question often means knowing the answer. After the full-fledged Russian invasion, the prominent human rights activist, Likud politician, and former Israeli vice premier Natan Sharansky advanced the thesis that by not staging a criminal trial against selected politicians and state functionaries of the former Soviet Union, the international community had missed a unique historical chance. A Jewish-Soviet citizen, born 1948 in the city of Stalino (now Donetsk) in the Ukrainian Soviet Socialist Republic, Sharansky had been a close ally of Andrej Sakharov, speaker of the Moscow Helsinki group and representative of the Soviet *refuseniks*. He was convicted of high treason and spent 9 years in the notorious camp Perm 36 before being released in a US-Soviet prisoner exchange in 1986. After his emigration to Israel he became the founder of the Yisrael BaAliyah party and later joined the Barak government as minister without portfolio. In a guest commentary for *The Washington Post*, published two-and-a-half months after the Russian invasion and on the 77th anniversary of the Soviet victory over Nazi Germany, he claimed:

> Because Russia never had its own version of Nuremberg, [its] history was never officially corrected. Only a few years after the fall of the Iron Curtain, public opinion turned nostalgic for Stalinism. Whereas in Germany it was unthinkable after World War II to declare a longing for the days of Hitler, in post-Soviet Russia, parties that explicitly invoked Stalin could still garner millions of votes. The Russian people remained trapped in a fake reality because they continued to believe in a fake history.[6]

As Sharansky correctly stressed in his article, the idea of staging a "Nuremberg for Communism" was indeed far from new in 2022, though it had never broadly resonated in the circles of Western media, political think tanks, and Eastern European history experts. One of the authoritative voices who first came up with the proposal was Vladimir Bukovsky, another prominent Soviet ex-dissident and former Gulag inmate who had been expelled to Great Britain via Switzerland in the mid-1970s. Already in 1991, shortly after the implosion of the Soviet Union, Bukovsky had

returned to Moscow where he immediately became immersed in the constitutional struggles between the Yeltsin government and Russia's Communist party. In his role as witness for the Yeltsin government, Bukovsky secretly photocopied large numbers of documents from the party archive, which he later smuggled out of the country. While working for the democratization of Russian politics and society, he publicly called for the creation of a tribunal similar to the Nuremberg blueprint.

In an article, which had originally appeared in 2013 in the online journal "*Echo of Moscow*" and was later included in the English version of his monograph "*Judgement in Moscow*," Bukovsky reiterated his opinion that Germany's transformation to a democratic country had only been possible due to the successful proceedings before the International Military Tribunal (IMT) of 1945/1946:

> The healing of West Germany became possible thanks to the Nuremberg trial. Only by covering and condemning all the crimes of the Nazi regime could the country move forward. Poland needed almost 20 years before its own experience made it realize the same. Kampuchea required more than twenty years, but, in the end, it had to put the leaders of the Khmer Rouge on trial. By not deciding, at the right moment, to put the Soviet regime on trial, Russia has paid more heavily than any other "post-Communist" country. I would like to believe, this time, that we shall not repeat that mistake. It is beyond doubt that the Kremlin mafia will strive, at any cost, to avoid such a trial [… .] A dispassionate investigation and a fair trial are necessary. Granting such figures [as Putin, AW] immunity will be to leave them forever with a presumption of innocence. There will be a change of leaders, certain cosmetic reforms, but no change of regime. Once again, the criminal gang from the Lubyanka will evade responsibility and remain in power, stealing this new revolution from under our noses – they are conmen and crooks when all is said and done.[7]

Similar to developments in post-Soviet Russia, the political and academic elites of unified Germany engaged in a controversial and heated debate about the pros and cons of a "decommunization by legal means" and a "Nuremberg for Communism".[8] While the idea of a permanent international criminal court had lost backing during the Cold War and decolonization, the caesura of "1989" soon led German politicians and legal experts to lobby for the project in the German parliament and on the level of the United Nations (UN). International criminal law (ICL) was still in its infancy when the German Democratic Republic (GDR) came down during the peaceful revolutions of 1989. Against this backdrop, Germany's judicial reckoning with the Communist past, which began before the Unification Treaty came into effect in October 1990, was conducted before domestic courts on the basis of the traditional German national penal code.[9] And as had been the case with the adjudication of the much more violent Nazi criminality, court cases against the East German party and state functionaries mostly ended with mixed results. At a time when post-unified Germany had just started to reinvent itself as a global actor on the contested policy fields of reparation, restitution, public truth-telling, and international

criminal justice, these relatively meagre results of Germany's domestic experiment with post-Communist transitional justice effectively dampened the appetite for a Nuremberg-style trial of Communism.

In retrospect, Germany's difficult experiences with its second *Vergangenheitsbewältigung* (coping with the past) might explain why the country remained skeptical towards the idea of international investigations of Communist state criminality (committed largely beyond German territory) or to permanently integrate the issue into its national musealization strategies. Whereas the big trials against Nazi perpetrators today constitute a central aspect of Germany's vibrant public memory culture, as evidenced by numerous exhibitions, books, and film productions, the trials against former high-rank representatives of the SED dictatorship, border guards, and Western collaborators of the East German state security service have been mostly forgotten. This paradoxical development forms the starting point of the following essay. It advances the thesis that Germany's astonishing self-transformation into a leading international force for accountability and against impunity was accompanied by a restrained stance towards the idea of an international trial of Stalinist and Communist state criminality. In spite of the country's long anti-Communist tradition, this negative attitude even seemed to have hardened during the 1990s.

5.2 Postcolonial, Cold War, and cosmopolitan: the three varieties of (West) Germany's policies of international criminal justice

More than 20 years ago, Frédéric Mégret sketched out the contours of the emerging research field of international criminal justice. Summing up a few publications, which interpreted the implementation of an International Criminal Court in The Hague as the result of an almost natural liberal drive towards global justice,[10] the Canadian international law expert sharply criticized that most recent works seem to evade the crucial question why states make the decision to support international tribunals. By not grappling with this conundrum, scholars would simply ignore that these institutions might end up turning against those states, which had created them in the first place.[11] In his historical overview on West Germany's twisted politics of international criminal justice, German journalist and legal scholar Ronen Steinke adopted this approach by asking for the driving forces behind Germany's transformation from a staunch adversary to an emphatic supporter of international criminal law (ICL). Steinke's inquiry concludes with the insight that Germany's stance towards Nuremberg and ICL decisively softened up when its Eastern rival ceased to exist and when former GDR human rights activists started to call for an official trial program with regard to Communist state criminality. Torn between soft "cosmopolitan ideals" and hard "national interests," the proceedings against former GDR functionaries served as a springboard, which enabled the country to take its first cautious steps on the international stage of human rights and transitional justice.[12] More specifically, it was the difficulties in dealing with GDR criminality on a domestic plane, which motivated the Federal Republic's political and legal elites to overcome their former rigid understanding of *nulla poena sine lege*

and to discard their deep-seated historical skepticism towards a certain brand of Anglo-American (legal) interventionism.

Unlike their ideological rival in East Berlin, who out of political, diplomatic, and cultural considerations incorporated Nuremberg core crimes into national law already in the late 1960s, democratically elected governments in Bonn preferred to keep their distance towards all unpopular legacies of the allied occupation period. In their latently hostile stance, politicians were backed by conservative experts of international law, not a few of them trenchant critics of Western international law with a biographical background in the intellectual struggles over the Versailles Treaty and a candor for Nazi Großraum theories.[13] Shortly after the Second World War, when their previous engagement with National Socialist law temporarily became a professional burden, members of the West German legal community focused on the alleged imperializing tendencies of international criminal law. Not only did they reject the Nuremberg project as "victor's justice," but they also accused the Western powers of imposing on Germany a legal policy of civilizational superiority.[14]

In the Cold War era, with the subsequent foundation of two antagonistic states and the resurrection of a (limited) legal sovereignty, West German positions towards Nuremberg became more flexible and its critique more nuanced. On the one hand, the Federal Republic would follow the prevalent West European trend of reversing the results of post-war anti-fascist retribution policies. By abandoning the criminal investigations, overturning or not recognizing the verdicts, and releasing Nuremberg convicts, it embarked on a course, which could be described as another "bourgeois recasting" of Western Europe in the name of a conservative notion of "Christian–Jewish reconciliation."[15] Consequently, allied law was repealed, while West Germany ratified in 1952 the European Human Rights Convention with the caveat that it did not need to recognize the ECHR's citation of the Nuremberg principles.[16]

On the other hand, however, West German policies of international criminal law became embedded in what Sebastian Gehrig has pointedly characterized as the "Cold War legal entanglements" between the two Germanies.[17] Against this backdrop, the FRG, a non-UN member until 1973, paradoxically became one of the first states who in 1953 – on the General Secretary's invitation – joined the 1948 United Nations Genocide Convention (CPPCG). Although most international law experts had declared the project dead at that time, the Adenauer government expected important moral gains on the international trading floor with little fear that there would ever be any associated liability.[18] In spite of the fact that both its creator Raphael Lemkin as well as the German expellee associations had been lobbying relentlessly for the ratification, the Genocide paragraph was never applied to Nazi criminality nor was it used for adjudicating Communist state crimes.[19]

In the 1960s, the GDR used its new-won credibility within the UN to launch a public relations battle against the "neo-fascist" and "neo-imperialist" FRG.[20] Given the fact that majorities in the UN had shifted towards the Global South, it was especially the symbolic policy fields of human rights and international criminal justice where these tactics were relatively successful. In its attempt to set itself

up as a global guardian of Nuremberg and promoter of ICL, the GDR effectively took advantage of the fact that the Bonn government struggled with the statute of limitations on homicides regarding Nazi criminality. This was a direct consequence of its on-going refusal to implement international legal norms into its national penal code, which had caused considerable international indignation and a stiff critique by the World Jewish Congress (WJC).[21] Following the case of Poland, the GDR not only backed the initiative for a Convention on the Non-Application of Statutes of Limitations to War Crimes and Crimes against Humanity, adopted by the UN on 26 November 1968, but also became actively engaged in the Bangladeshi and Kampuchean atrocity investigations of 1973 and 1979.[22]

Given its strong anti-Communist tradition, it may surprise that it was not the GDR but the Federal Republic that struggled most in finding an adequate response to the mass violence of the Communist Pol Pot government. Between 1975 and 1979, the Khmer Rouge installed a brutal and irredentist regime that pursued a form of genocidal policy against the country's Vietnamese residents. At the same time, the leadership in Phnom Penh aimed at the final elimination of city dwellers, workers, and shopkeepers, which it denounced as "old things" and obstacles to a classless society.[23] Before December 1978, when a group of discontent Khmer Rouge leaders backed by Vietnam and the Soviet Union invaded Cambodia to stop the carnage, between one to two million people had fallen victim to the regime's mass killings and self-inflicted hunger catastrophes.

The massive atrocities committed against the Cambodian civilian population soon provoked analogies with the Nazi genocide of European Jewry. In West Germany, these comparisons occurred even before the US mini-series *Holocaust*, broadcasted in January 1979, sensitized West Germans for the harrowing dimensions of the event.[24] In September 1976, about one year after the adoption of the Helsinki Final Act, the head of the Foreign Office's Department of International Law compared the reports from the Cambodian "killing fields" with the testimonies given in the Frankfurt Auschwitz trial and the industrial mass murder of the Jews. Because the Khmer Rouge had turned the country into a "giant concentration camp," a diplomatic recognition of the regime would be irreconcilable with the SPD/FDP coalition's objective to pursue a consistent and indiscriminate human rights policy, the top diplomat stated.[25]

Only 2 years later, in the fall of 1979, the Federal Republic did what the West German Foreign Office had characterized as counterintuitive. At the UN Assembly Session of 21 September 1979, West Germany's UN ambassador Rüdiger Freiherr von Wechmar voted with a majority of its Western partners and recognized the Khmer Rouge as Cambodia's legitimate representative in the UN. Although the Federal Republic had not followed the example of other NATO members like Denmark, Italy, Japan, and Great Britain who all maintained diplomatic relations with the Pol Pot regime, the country nonetheless adopted the cynical Cold War logic of its partners.[26] Against this backdrop, West Germany not only ignored its former position not "to clap for mass murderers,"[27] but also neglected the opinion of Walther Marschall von Bieberstein, the former ambassador in Phnom Penh, who, due to his first-hand insights into the scope and quality of the atrocities committed,

had conceded that the invasion of the Communist Vietnamese Socialist Republic comprised "some elements of a humanitarian intervention."[28] Instead of instigating an international inquiry of the responsibilities of the mass murder or filing charges at the International Court of Justice in The Hague, the Bonn government reiterated its position in a UN second vote, which took place one year later.[29]

Confronted with numerous protests of the opposition and civil society, Chancellor Helmut Schmidt (SPD) and Foreign Minister Hans Dietrich Genscher from the Liberal Party (FDP) repeatedly stressed that the human rights violations in Southeast Asia, though morally repulsive, did not concern West Germany's "vital interests."[30] Genscher, who successfully covered up his former NSDAP party membership until 1994,[31] did not play down the regime's systematic mass crimes against civilians. Rather, he countered critics like the Social Democratic Justice Minister Hans-Joachim Vogel by relativizing the veracity of the numerous media reports and personal testimonies, calling eyewitness reports from Cambodian refugees as "not free of contradictions."[32] From Genscher's perspective, it was more important that the Federal Republic – who had entered the UN in 1973 – had stood firm in defending Western security interests by condemning the Vietnamese invasion as an illegal act of aggression. By contrast, preventing or punishing genocide was clearly not a priority of West Germany's foreign policy course, despite the GDR's absentia trial of Pol Pot and Ieng Sary and the country's problems with its own genocidal past. In the end, it took more than three decades until a combination of geopolitical shifts and continuous public pressure eventually caused the Federal Republic to revise its former attitude. When in 2004 the Cambodian Parliament voted for the creation of an Extraordinary Chamber for the adjudication of Khmer Rouge mass crimes, Germany became one of the most important financiers of the hybrid court.[33]

All in all, it seemed to have been a mixture of old deep-seated aversions against the humiliating effects of Nuremberg and the typical dynamics of the West-East conflict during the 1970s and 1980s, which prevented the FRG from taking a more favorable stance towards international criminal law. This hostile mood became again relevant in 1988 when the UN's International Law Commission (ILC) presented its Draft Code of Crimes against the Peace and Security of Mankind. Together with its Western partners, United States, Great Britain, and Israel, West Germany's representative voted against the commission's continuation of its work on the Draft Code. At a time when the emergence of a so-called "Third World UN" had led most Western states to take a skeptical stance towards the UN's international legal and human rights policies, the Federal Republic could afford to hide behind its Western allies and could avoid expressing its reservations more openly.

In 1988, officials of the FRG's Foreign Office – since the FDP's spectacular change of sides in 1982 again headed by Genscher – had still publicly warned against applying the principle of universal jurisdiction. The justification advanced at the time was that this would make it possible for "States to impose their views on other States by means of criminal prosecutions."[34] Three years later, however, the Cold War had ended, and this reasoning no longer seemed to be in sync with Germany's main political partners. Following reports that the Iraqi dictator had massacred Kurds in the northern part of the country, the United States and Great

Britain called for the creation of an international "war crimes tribunal" to punish the Iraqi government's human rights violations against ethnic and religious minorities.[35] In April 1991, German Foreign Minister and Vice Chancellor Genscher submitted several statements to the UN Security Council in which he characterized Hussein's actions against the Kurds as attempted "genocide."[36] Moreover, he instigated the Chair of the Council of EU Foreign Ministers to write to Javier Pérez de Cuéllar, calling on the UN Secretary General to initiate studies on the establishment of such a court. In the parliamentary debate of 17 April 1991, Genscher's party colleague Cornelia Schmalz-Jacobsen praised the Foreign Minister for his resolve in advancing the issue of a Nuremberg-style ad hoc court against Hussein and justified this with the on-going genocide on Iraqi soil:

> The awful extent of the genocide committed against the Kurds cries for condemnation and punishment. The analogy with the Nuremberg Trials is compelling. Hussein has to be brought before an international court. This is why the Free Democrats greatly appreciate that the twelve EU Foreign Ministers want to hold Hussein personally accountable for committing the crime of genocide. We as Free Democrats, I may say this here, are thankful and proud that the initiative of our Foreign Minister Genscher has been rapidly adopted on the European level.[37]

5.3 Dealing with the Communist past: a continuation of West Germany's Sonderweg with state criminality?

The 1991 Bundestag debate over the Iraq war did not lead to an abrupt change or complete U-turn in Germany's ambiguous attitude vis-à-vis international criminal law. Rather it marked one of the historical junctures, which paved the way for its later engagement for the establishment of a permanent international criminal court (ICC).[38] In hindsight, the international humanitarian crisis emerging from large numbers of Kurdish refugees fleeing to Western Europe seemed to have been one of the triggers that caused the Federal Republic's first realignment with Nuremberg core norms. But this gradual adaptation process on the international level did not mean that all old orthodoxies would be suddenly disbanded. Rather than using the special historical moment of "1989" to reverse the bogged pre-1989 course in its domestic jurisdiction, the German judiciary would stubbornly continue to adjudicate Nazi and now also Communist state crimes on the basis of the national penal code.

A first wave of criminal prosecutions against the Communist party and state officials had already begun in the final months of the GDR. After the unification treaty of October 1990 this project was expanded greatly. It is estimated that authorities initiated about 75,000 investigations. Of these, however, only about one thousand cases actually went to court. The structural conditions of the prosecutions caused major headaches for the Western trained jurists because the unification treaty required equal application of both GDR and FRG law in investigations of GDR era crimes. One year after its beginning, the criminal processing of Communist

injustice was in danger of falling apart. Prosecutors in Berlin had suffered a serious setback in their effort to try Erich Honecker, former General Secretary, for his responsibility for the border shootings. Moreover, it became obvious that due to the difficult legal environment many GDR system crimes would remain unpunishable, aside from a few so-called "excess" crimes.[39]

Against this backdrop and with the delay of almost one year, a controversy about purpose and direction of the on-going trials evolved in which former GDR dissidents took the lead. In September 1991, Wolfgang Ullmann from the party Alliance 90/The Greens called for a radical change of course. The theologist was convinced that judicial processing of Communist injustice had run into difficulties because it was pursued as a national project, without connections to international norms and laws. His article "Trial of the King or Nuremberg Trial" made the proposal to delegate the whole endeavor to an international legal authority, to a tribunal along the lines of Nuremberg that could deal with "state criminality" rather than "government criminality." Because the extent of lawlessness under real existing socialism was so profound, continuing the current prosecutions within the national framework would only increase the embarrassments for the judiciary:

> Where the destruction of law has reached the level of state criminality, national courts are no longer sufficient to rebuild the destroyed law. An international effort is required to create a new forum, before which the affected can appear and expect a verdict that upholds human rights. I do not believe that the existing internal courts are up to the task.[40]

While Christian Democratic politician Wolfgang Schäuble reacted to Ullmann's intervention by conceding that the *Rechtsstaat* might indeed be unable to cope with systemic state crime,[41] other representatives of the FRG's political class took a more reluctant stance. In December 1991, Federal President Richard von Weizsäcker, also a liberal Christian Democrat, expressed his deep skepticism and dismissed the establishment of an international tribunal for GDR criminality as unworthy of serious consideration.[42] In this position, Weizsäcker was seconded by left-liberal opinion leaders. Robert Leicht of the Hamburg weekly *Die Zeit* felt that already the word "tribunal" would provoke unappetizing associations with "real-socialist peoples' justice."[43] It must be left open whether Weizsäcker and *Die Zeit* were aware that 40 years earlier they had belonged to the most vehement critics of Nuremberg. In the community of German international lawyers Ullmann's ideas received only lukewarm responses. The only exception was Otto Trifterer, a former student of Hans-Heinrich Jescheck and since 1978 professor of international criminal law at Salzburg University.[44] As one of the few leading ICL experts outside the Anglophone world, he argued that especially the border shootings could qualify as a "special form" of crimes against humanity under international law principles.[45] But Trifterer's plea for an internationalization of the on-going investigations did not fall on more fertile ground than Ullmann's earlier proposition.

At the end of the 1990s, Germany belonged to the few countries worldwide, which had undergone the painful process of judicial coping with a dictatorial

past even twice. From 1945 onwards, both East and West Germany had conducted thousands of court cases against suspects of Nazi criminality. In the Federal Republic, these coping strategies gained new momentum in the late 1950s when it became apparent that many of the crimes related to the Holocaust on Eastern European territories had still not been prosecuted. After the end of the Cold War, the country would then become one of the pioneers and leading forces of legal decommunization by pursuing a comprehensive program, which comprised criminal proceedings, political disqualifications as well as parliamentary inquiries. It was due to these undisputable theoretical and practical experiences that unified Germany was often ironized as "world champion" of a processing of the past.

While at a first, superficial glance the Federal Republic's long-term experiences with judicial coping processes made it look like an excellent candidate to promote a "Nuremberg for Communism" as part of a larger post-Cold War project of accountability, judicial fact-finding and political-legal reorientation, there were other factors, which prevented it from taking a more active stance. Apart from geopolitical and economic considerations, the publication of the "Black Book of Communism," first published in German in 1998,[46] seemed to have been an event, which further undermined the political will to deal more effectively with the impunity problem lingering in post-Soviet Russia and other countries of the former East bloc. Conceived as a monumental collection of facts, which theoretically could have served as evidentiary fundament of an indictment, the volume of almost a thousand pages shed new light on the manifold manifestations of Communist rule in its different geographical and temporal contexts. In his introductory chapter with the programmatic title "Crimes of Communism," French historian Stéphane Courtois blamed – a rather unspecified – form of 20th century Communist rule for more than a hundred million deaths worldwide, which he juxtaposed to 25 million victims of Nazism. Moreover, he described Stalinism as an epoch that needed to be investigated for its numerous violations of Nuremberg core crimes and genocide.[47]

Although the "Black Book" became an international bestseller, its reception in the academic world was generally mixed. Even a benevolent critic like the Polish historian and Holocaust survivor Waclaw Dlugoborski questioned the book's numerical approach and its lax dealing with inflated victims' numbers based on outdated estimates of the Cold War era.[48] Among German scholars of 20th century history, reactions were mostly negative. One of the harshest condemnations came from the renowned historian Hans Mommsen, a leading specialist on National Socialism who was married to the Austrian Sovietologist Margareta Reindl-Mommsen. Aroused about what he considered as an especially blunt attempt to equate Nazism and Stalinism, Mommsen flatly rejected the publication as a piece of tendentious history in the vein of Daniel Goldhagen's "Willing Executioners."[49]

Mommsen's reaction was insofar symptomatic for German perspectives on the "Black Book," as the discussion mostly followed the lines of the 1986 West German *Historikerstreit* (historians' dispute) by centering on the comparability of the two totalitarian systems.[50] Whereas in the French context the authors' demand for a Nuremberg-style reckoning with Stalinist and Soviet criminality sounded

fully plausible at a time when France had just revised its national genocide paragraph by expanding it to political and social groups,[51] it had the opposite effects in Germany. By putting themselves into the role of judges of a complex phenomenon like Communism, the authors had not only impaired their credibility as historians, but also alienated left-liberal supporters of transitional justice. Moreover, their use of a vernacular legal language, manifest in a trope like "class genocide," evoked the revisionism of the German historian Ernst Nolte and smacked of relativizing the Holocaust. While the difficult investigations of GDR injustice had already caused considerable disillusionment in the first half of the 1990s, it was the controversial debate on the "Black Book," which, at the end of the decade and the election of a SPD/Green coalition, further eroded the chances that unified Germany would seriously consider or back the vision of a "Nuremberg for Communism."

5.4 Conclusion

From today's vantage point, the 1990s were a high time for international criminal law. Propelled by the lobbyism of states and transnational human rights organizations, the project surged and became an important identity marker for many countries around the globe. The Berlin Republic was one of the mid-size powers, which actively contributed to this process. By supporting the revival of a Nuremberg-style tribunal for international core crimes, it positioned itself as the vanguard of the new anti-impunity and accountability movement. This was an astonishing turn-around given the fact that West Germany, due to its antagonism with the GDR, had been one of the most vehement and persistent critics of Nuremberg before 1989.

In the perception and self-perception of German political and legal elites, this engagement was a direct consequence of the fall of the Wall and the subsequent task to cope with Communist state crimes. The narrative that Germany's repositioning on the field of international criminal justice was a reaction to its (mostly) negative experiences with trials against high rank GDR functionaries was advanced by several members of the government and the administration. Klaus Kinkel, who had replaced Genscher as Foreign Minister in 1992, was among those who made this causal nexus. Already during his first days in office, he stated that by furthering the cause of international criminal law Germany had drawn its lessons from its difficult experiences with domestic trials. What Kinkel did not mention, however, was that during the Cold War it had been his own FDP party which had most vehemently rejected the Nuremberg principles.

But Germany's policies of international criminal justice did not unfold in such a teleological way. It was not planned consistently and nor can it be described as a rational learning process. Contrary to the official account, Germany's commitment to the creation of ad hoc tribunals in the cases of Iraq and the former Yugoslavia was probably not so much motivated by the anti-impunity enthusiasm after the end of the Cold War, but more by the necessity to compensate for its lack of military engagement and the hastened acknowledgement of Croatian independence. Another important impulse was to contain the massive refugee crisis, which

threatened to undermine the already fragile societal fabric of reunified Germany in the early 1990s.

Conversely, this meant that domestic prosecutions of GDR crimes in reunified Germany completely lacked the utopian and cosmopolitan visions of international criminal justice projects during the 1990s. Instead, the project was conceived in a narrow and almost parochial manner and without any reflection on its transnational repercussions. Thus, the idea, advanced by some Eastern European voices, that by accomplishing the task in a relatively efficient manner the country had also acquired a political and moral responsibility to support a larger and multinational "Nuremberg for Communism" never found much resonance among Germany's political and legal elites.

Notes

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2 Catherine Gallagher, *Telling Like it Wasn't: The Counterfactual Imagination in History and Fiction* (Chicago 2018), 5.
3 Ibid., 4; Jeremy D. Popkin, *From Herodotus to H-Net. The Story of Historiography* (OUP 2016).
4 Tuomas Forsberg/Heikki Patomäki, *Debating the War in Ukraine. Counterfactual Histories and Future Possibilities* (Routledge 2023).
5 On the long-term effects of path dependencies in the Russian (neo-)imperial thinking see Martin Schulze-Wessel, *Fluch des Imperiums. Die Ukraine, Polen und der Irrweg in der russischen Geschichte* (C.H. Beck 2023).
6 Natan Sharansky, "Now we see, with Putin, why Nuremberg-style Soviet trials were needed" *Washington Post* (9 May 2022); see also Natan Sharansky, *The case for democracy: the power of freedom to overcome terror and democracy* (PublicAffairs 2004).
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12 Ronen Steinke, The Politics of International Criminal Justice: German Perspectives from Nuremberg to the Hague (Hart Publishing 2012); central primary sources of Steinke's

investigation were interviews with leading German international lawyers like Claus Kreß, Hans-Peter Kaul, Kai Ambos and Christian Tomuschat.

13 Wilhelm Grewe/Otto Küster, Nürnberg als Rechtsfrage (Ernst Klett 1947); idem, Rückblick auf Nürnberg, in: Kay Hailbronner, *Staat und Völkerrechtsordnung. Festschrift für Karl Doehring*, Berlin 1989, 229–250.

14 Daniel Stahl, Entschließungen deutscher Völkerrechtler, in: Quellen zur Geschichte der Menschenrechte, ed. by Arbeitskreis Menschenrechte im 20. Jahrhundert, Mai 2015, www.geschichte-menschenrechte.de/schluesseltexte/entschliessungen-deutscher-voelkerrechtler (accessed: 15 July 2023).

15 Charles S. Maier, *Recasting Bourgeois Europe: Stabilization in France, Germany, and Italy in the Decade after World War I* (PUP 2015); Martin Conway, *Western Europe's Democratic Age, 1945-1968* (PUP 2020).

16 Weinke, Law, History, and Justice, 106; on the FRG's reservation, Claus Kreß states: "The Foreign Relations Committee of the German Parliament explained this reservation by reference to the abuses that Germany experienced with the abolition of the *nullum crimen* principle by the Nazis. This reasoning, however, not only ignored the narrow scope of the Nuremberg qualification, but it also conceals the fact the background of the reservation was not so much about the Nazi experience but the controversy over Nuremberg; Kreß, Versailles – Nuremberg – The Hague," in: *The International Lawyer* 40 (2006), no. 1, 15–39, 21.

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18 Weinke, Law, History, and Justice, 110.

19 Former section 220a of the Criminal Code was transferred to section 6 of the new Code of Crimes against International Law; Claus Kreß, § 220a/§ 6 VStGB, in: Münchener Kommentar zum Strafgesetzbuch, ed. by Wolfgang Joecks and Klaus Miebach (C.H. Beck 2003).

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26 Ibid., 19.

27 Quoted from Port, Never Again, 115.

28 Quoted from Szatkowski, Sihanouk, 5.

29 Port, Never Again, 121.

30 Quoted from Port, Never Again, 117.
31 http://ausstellung.geschichte-innenministerien.de/biografien/hans-dietrich-genscher/ (accessed: 25 July 2023).
32 Quoted from Szatkowski, Sihanouk, 5.
33 www.unakrt-online.org/finances%20 (accessed: 25 July 2023).
34 Quoted from Steinke, Politics, 59.
35 William Schabas, *The UN International Criminal Tribunals. The Former Yugoslavia, Rwanda, and Sierra Leone* (CUP 2012), 12.
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6 Putin's youth and the TikTok war

Creating the militarized self in Russian adolescents

Ian Garner

The amount of draft-age Russians fleeing their country instead of enlisting to fight against Ukraine seems to suggest that young Russians are opposed to today's war.[1] Despite opinion polls showing majority support for the war in every demographic,[2] many Western commenters have assumed that young Russians are oppositional or apolitical. In this reading, Russia's young are destined to embrace a cosmopolitan vision of Western modernity and thus repudiate Putinist militarism through a "generational confrontation".[3]

In this chapter, this narrative is challenged by a critical discourse analysis of TikTok channels promoting the Youth Army, a state-run paramilitary organization for Russian children. On TikTok, the state uses popular culture to construct a "militainment" language of teen self-transformation encouraging subjects to transform themselves within a racial, gender, and age-based hierarchy that privileges militarism.[4] Young Russians are thus encouraged to imagine themselves as "ordinary" and even global teens while learning the language and behaviors of a militarized political culture. As the war on Ukraine has raged, young members of the Youth Army TikTok community have publicly expressed solidarity with one another and with the war effort. Such communities thus may strengthen support for the war among Russia's youngest subjects.

6.1 Historical and political context

Since 2012, the Russian state has pursued a policy that portrays Russia as a "fortress" under constant attack and in need of patriotic defenders.[5] The state has introduced new schoolbooks and courses, recruited celebrities and influencers, and promoted television shows and movies that disseminate pro-military, patriotic messaging with the intention of inculcating this worldview in children.[6]

However, the most significant creation of the last decade is the Youth Army – *Yunarmiya* – founded in 2016 by Defence Minister Sergey Shoygu. Participants aged 6–18 can join a Youth Army "unit" in their school, community centre, or other local venue. "Young soldiers" attend parades, camps, and sporting competitions, assist veterans, and learn to use guns and other military equipment. Recently, activities such as collecting aid for "evacuated" children and meeting Wagner and Ukraine "veterans" have become common.[7]

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As of 2023, the group claims thousands of "units" and 1.3 million members – a figure that grew by over 300,000 between February and December 2022.[8] The Youth Army has become an inescapable part of both childhood and the military apparatus in Russia.

Like previous Putin-era youth groups – the poorly organized and ultimately abortive Walking Together (*Idushchie vmeste*) and Ours (*Nashi*) – the group focuses on four principal goals that disseminate the state's vision of threatened Russian patriotic identity:

1 "Spiritual and moral development": inculcating "kindness" and "a love for the Motherland";
2 "Social development": taking "responsibility for one's actions" and other "values that characterize a true citizen";
3 "Physical development and sport": "boost[ing] health" and "team spirit";
4 "Intellectual development": the "ability to analyze historical phenomena" and "prepar[ing] young men for service in the Armed Forces."[9]

The group is thus a *militarizing* project: it introduces the military into all aspects of childhood through physical and psychological preparation revolving around Putinist cornerstones such as the Cult of the Great Patriotic War.[10] However, as Cynthia Enloe notes, militarization "creeps into ordinary daily routines; it threads its way amid memos, laundry, lovemaking, and the clinking of frosted beer glasses."[11] Militarization thus allows the state to exert power onto and within its subjects' quotidian life in ways that may not appear obvious.[12] This study explores how the group seeks to "creep into" and militarize a part of everyday life: social media accounts on young Russians' favourite platform, TikTok.

Despite the group's increasing prominence, and the raft of available research material on earlier Putinist youth groups and on youth culture and education of the "patriotic shift" era,[13] the Youth Army remains understudied.

Since early 2020, the group has adopted more and more digital engagement strategies.[14] Many Youth Army units host pages on VK, the Russian-owned social media platform. A smartphone app was launched in late 2021 to allow potential recruits to join up using their devices and to interact with one another in "secure" forums.[15] Users are even able to follow celebrity influencers who promote the Youth Army on social media.[16] These moves suggest a concerted attempt to reach young Russians through their devices; that is, to reach children (a)synchronously and thus to skirt moderating influences such as families.

The most notable of the digitization tactics has been the use of TikTok, which is today the most popular social media network among young Russians.[17] TikTok users post short video clips – content centers on dance trends, ironic "lip syncs" to excerpts from songs and movies, and teen diary-like confessions – and browse a custom-generated feed.[18] TikTok's algorithm drives users down "self-selecting" feeds whose content is dictated by users' subconscious preferences.[19] TikTok appears to be participatory and to reject hierarchy, yet it forces users into a walled garden in which access to outside information is limited and communities are self-constitutive.

On TikTok, Youth Army content abounds. "Young soldiers" in uniform perform group activities, dances and memes, and discuss their experiences as members of the group. Many of these videos have been produced by the Youth Army's central administration, regional "headquarters," or local "units." A critical discourse analysis of one hundred TikTok videos shared by four official channels reveals how the state's gendered, age, and military hierarchies are perpetuated, how the discourse community – one based around set patterns of interaction that demarcate group membership[20] – promotes military skills and historical memory, and how teen users have interacted with authority and with each other on the platform in the lead-up to and wake of 24 February 2022.

6.2 Methodology

Four TikTok accounts were selected for analysis, accounting for factors, including size, region, and time of activity:

1 @yun_army is run by the Youth Army's central administration in Moscow and thus the group's "official" account. It counts 149,000 subscribers as of June 2023; its videos have garnered 2.2 million likes since the account was started in April 2021. The group took a break from posting between May 2022 and May 2023.
2 @unarmia_nso is the Novosibirsk region's official account. The group counts 133,000 followers and has accrued 660,000 likes and 10,500,000 video views, but it ceased posting in March 2022.
3 @yunarmia.moscow is the Moscow region's official account. It counts just 1,200 followers and ceased posting as war broke out in Ukraine. Nonetheless, it was selected as an example of how smaller groups have imitated the central groups' production and dissemination of discursive material.
4 @unarmia_tsiv is run by a single "unit" in the town of Tsivilsk in Chuvashiya. Founded in April 2023, its following is small – 4,200 as of time of writing this chapter. However, its videos reach on average 155% of the account's subscriber count, suggesting a disproportionately wide reach and influence. As the @yun_army account has recommenced posting, new accounts like @unarmia_tsiv are springing up and enjoying viral success.

The last 25 videos posted by each account were analyzed using critical discourse analysis (CDA), which is a means to explore how discourses "construct, maintain, and legitimize social inequalities," focusing on the inequality between the state and its subjects.[21] Scholars of CDA contend that language – even seemingly "neutral" expressions – construct and perpetuate power.[22] CDA is thus useful for understanding the interaction of power and ideology in subtly sustaining boundaries between the civilian/military, male/female, and older/younger – and thus inserting these traditional aspects of militarization into everyday life.[23]

Expressions, symbols, movements, montages, and written and spoken language were logged. Particular attention was paid to the ways in which military and non-military themes, age, and gender-based hierarchies, and Russian/non-Russian cultural realia were conveyed (see summary in Table 6.1). User comments – account

Table 6.1 Summary of themes and discourses in Youth Army TikTok groups

	Total number of posts	*Topics and themes*		
		"Entertainment" content	*Meme content*	*Military content*
For example…		Videos chiefly about entertainment content, e.g., dances, memes, holiday celebrations	Explicit references to or recreations of memes either Russian or non-Russian	Military training, marching, parading, or the depiction of military techniques
Acct 1 (@yun_army)	25	10	7	13
Acct 2 (@unarmia_nso)	25	9	7	13
Acct 3 (@unarmia_tsiv)	25	3	15	4
Acct 4 (@yunarmia.moscow)	25	9	3	12
TOTAL	100	48	32	42

	Depiction of people		
	Child-led	*Adult-led*	*Gender balance: male-led*
For example…	Led by children as presenters, principal dancers, or majority attendees	Led by adults as presenters, etc.	Subjects majority male-presenting
Acct 1 (@yun_army)	17	4	6
Acct 2 (@unarmia_nso)	7	10	14
Acct 3 (@unarmia_tsiv)	24	1	1
Acct 4 (@yunarmia.moscow)	25	0	8
TOTAL	73	15	29

Recruitment content	*Violent content*	*Memory sites and symbols*	*Rituals*	*Sporting competition*
Explicit appeal to join the Youth Army	Physical fighting, shooting, punching, kicking, etc.	For example, war memorial, World War 2-era flags and medals, Moscow's Cathedral of the Armed Forces, etc.	For example, induction ceremonies, Victory Day parades, etc.	Sporting competition, contest, or prowess
6	3	8	8	2
1	7	1	3	4
5	3	7	6	4
3	5	11	11	3
15	18	27	28	13

Gender balance: female-led	*Traditional gender roles*	*Influencers and celebrities*	*Authority figures*	*Ethnic minorities*
Subjects majority female-presenting	Depiction of, e.g., women subordinated to men, engaging in traditionally feminine behavior, and vice versa)	Appearance of a recognizable influencer or celebrity	Appearance of senior officers, generals, politician, etc.	Depiction of 1+ non-white ethnic minority
10	12	8	4	2
6	12	1	11	0
21	14	0	4	0
10	11	2	7	0
47	49	11	26	2

(*Continued*)

Table 6.1 (Continued)

	Visual, textual, and audial language	
	Youth Army branding	*Self-realization language*
For example…	Depiction of Youth Army uniform, flags, banners, logos, etc.	Language referring to becoming or to transforming the self
Acct 1 (@yun_army)	24	7
Acct 2 (@unarmia_nso)	21	12
Acct 3 (@unarmia_tsiv)	23	11
Acct 4 (@yunarmia.moscow)	23	12
TOTAL	91	42

holders on TikTok are not able to limit, moderate, or delete users' responses to their videos – were then logged to explore how subjects interacted with content as the war against Ukraine unfolded.

6.3 Results

A minority of videos studied showed explicitly militaristic content like fighting or military history. In total, 27% of videos depicted memory sites or rituals. These videos were almost all clustered around Victory Day in 2022 and 2023, when three of the four accounts under analysis posted several videos about the Second World War. The exception was @unarmia_nso, which only posted a single video displaying any signs of a heroized military past. While the War is important to Putinist politics, to the politics of childhood, and to changes in education policy, it is not prominent on the Youth Army TikTok space. Moreover, while many videos depicted Youth Army members parading and training, only 18% of the videos depicted any elements of real fighting. Only two videos, both shared by @yun_army, showed active troops in Ukraine. TikTok is not a site for account holders to openly discuss the war.

Military activities were instead turned into meme-like "militainment" content: militarization was spread through informal audial and visual cues. This material comprised playful dance routines, twists on memes, and stories about the fun of joining the Youth Army. Indeed, the *idea* of the army was ever-present, even if that of killing was not: almost every video, for example, featured some aspect of Youth Army branded clothes or logos.

"Teen" language	*Prompts for participation*	*Background music: non-Russian*	*Background music: Russian*
Internet-style language used by teens: emojis, concatenations, informal address (*ty* vs. *vy*), etc.	Account holder encouraged users to participate by commenting, sharing, recreating memes, etc.	Any music explicitly produced by non-Russian sources, even if not labelled as such	Any music explicitly produced by Russian sources, even if not labelled as such: hip hop, *popsa*, Soviet era, patriotic rock (e.g. Lyube, Shaman)
17	10	11	7
12	0	13	5
20	10	7	19
9	6	11	11
58	26	42	42

Although Russian state organizations have often been associated with stilted, bureaucratic language, the Youth Army TikTok discursive space appears to be dominated by teens spontaneously speaking in their visual and linguistic vernacular. Indeed, children led 73% of the videos studied and often appeared to have produced the content. @unarmia_tsiv's first six videos appear to be spontaneously created by teens: a trio of girls dance to popular Russian, French, and American hip hop tracks, sometimes in uniform, sometimes in civilian clothes.[24] This is not the vision of shiny boots, ironed uniforms, and ordered rows seen on the Youth Army's traditional promo material. The impression of spontaneity was recreated in larger channels' more polished videos, which often included "behind the scenes," blooper, and similar footage. Even organized events such as summer camps and festivals were thus reframed as spontaneous expressions of teen discourse. The Youth Army TikTok space gives the appearance of being one in which support for the state's military project arises organically.

Meanwhile, account holders littered their captions and video subtitles with informal language that suggests that they are *part of* and not *above* the teens they address. In 58% of posts, the account holder deployed language associated with informal internet culture: typos, concatenations, informal address (the informal you, *ty*, rather than the formal, *vy*), emojis, etc. "*We* try to enjoy the simple things," announces one voice-over as a group in uniform run across a beach waving national flags. Even when official leaders speak, they did so from the perspective of a teen addressing another teen. For example, in one video published by @yun_army, the athlete, influencer, and nominal leader of the Youth Army Nikita Nagornyy announces a campaign to send packages to troops serving in Donbas: "We're

starting a new campaign; if *you* want to join, *you* can participate."[25] Using the informal *ty – you* – and phrasing the statement as an *option* rather than an *instruction* to participate creates the sense of a shared enterprise between leaders and the led. Dressed in comfy, branded hoody and sweatpants, Nagornyy mingles with a crowd of teens: he is of them, not above them.

That veneer of flattened hierarchy was central in the material studied. Comment threads bridged an implicit divide between account holders (i.e., the state's proxy), those appearing in videos, and online audiences. @yun_army often responded to questions and prompts left by users in comments. Several commenters, for instance, complained that upbeat, Western music did not fit a video of a military parade. The following report set the video to a new soundtrack – a cover of a patriotic rock song by Russian group Lyube – and joked, "[cry laugh emoji] If it doesn't fit 1000% percent I'll delete it! [embarrassed monkey emoji]"

Other accounts imitated this approach, yet often in response to questions that had not been posed. @yunarmia.moscow, for example, captioned one video of a military parade with "You asked to see the honour guard!", even though no such request had been made in any comment thread. The account holders, who occupy a position of power through control of their feed, can frame the discursive community within TikTok as a shared enterprise even when it is not.

The elision of the divide between state and subject creates a shared space in which the idea of the Youth Army itself functions as a discursive bonding agent. The glue holding that bond is the fetishization of the Youth Army's red and white uniform and eagle logo, which appeared in 91% of videos studied. The Putin regime has long used marketing and branding techniques to appeal to and create unity between young Russians;[26] now, in the apparently non-hierarchical TikTok space, the impetus for this branding appears to come from ordinary teens. For example, in one video published by @unarmia_tsiv, a teen presenter comments on a fellow "young soldier's" uniform as if presenting a fashion revue, introducing the "summer collection."[27] The Youth Army's visual identity is thus equated with an aspirational semiotic space (the fashion world). Other videos feature lingering, softly lit shots of kit. The uniform itself becomes a fetishized object of desire in the same way any other item might on TikTok: the "creeping" militarization of youth is achieved through the language of consumer desire.[28]

However, such fetishization extends from the external into the recreation of the psyche and the self. Frequently, joining the Youth Army was presented as a way to become more popular and romantically successful. For example, in one @unarmia_nso video, a dejected teen boy sits in civilian clothes behind a surtitle: "Her: don't write me." A second surtitle appears: "Then: 16 missed calls." Finally, the same boy reappears in uniform, dancing before a Youth Army banner, with a third surtitle: "soz [sic] was busy."[29] He appears to have transformed from a position of powerlessness to one of power thanks to his symbolically merging with the Youth Army.[30] By donning the uniform of the Youth Army, teens engage in self-realization: developing an understanding of "who they are" and "what they want" then *attaining* those things.[31]

Such self-realization narratives were the most popular materials studied. @yun_army's biggest hit, which received 111,700 likes and almost 700,000 views, was even covered by traditional media networks.[32] In the clip, published the day after Victory Day 2023, a male, uniformed soldier seems to return from Ukraine and appears at a holiday parade. He hands flowers to a Youth Army girl then proposes. The assembled crowd, made up of both Youth Army members and serving soldiers, watch on and applaud as the girl accepts. A large "Z" banner is visible in the background. Despite these hints at the ongoing war in Ukraine – then into its 15th month – and the national disappointment at the slew of 9 May parades cancelled for security reasons,[33] this clip suggests that militarism and membership in the Youth Army allow the teen girl to attain dreams of internet stardom, romantic success, and group popularity.

Dozens more videos displayed these sorts of transformations and becomings. The ideal subject is in this discursive community one whose inner longings are transformed and made real under the aegis of the Youth Army, which – in this discursive community at least – is seemingly directed by and expressive of teenagers' will and social norms. Children are encouraged through "neutral" discursive models to shed their old identity and engage in a constant process of *becoming*.

Nonetheless, the goal of that *becoming* is ordered according to strict, traditional hierarchies of race, age, and gender reinforced through "neutral" cues. For example, while female-presenting subjects were in the majority in 47% of the videos, their role was to play out traditional gendered roles: they danced, engaged in creative acts, gathered humanitarian aid for the Ukraine front and for "orphans" from Donbas, and presented videos; males led parades, engaging in military training, inducted new recruits into the Youth Army, and delivered tutorials. Indeed, of the 26 authority figures represented – generals, politicians, etc. – not a single one was female-presenting. Similar traditional roles were observed when it came to presenting ethnic minorities, who were almost totally absent from and never took the leading role in the material studied, reiterating the official policy that ethnic Russians are the leaders in a multinational nation.[34] Russian youth's militarized self-realization dreams are, in this community, not as limitless as first impressions suggest.

6.4 Explicit talk of the war

February 2022 heralded a shift in dissemination tactics as posting was interrupted – nonetheless, and despite a lack of clarity about how to discuss the war with teen users, channel subscribers made use of "their" space on TikTok to express solidarity with each other and the war effort. Two of the four accounts – @unarmia_nso and @yunarmia.moscow – ceased posting immediately; @unarmia_nso's last post, a reshare of a campaign video to help children from Donbas, came on 4 March 2022. Several other large accounts also ceased posting or deleted their feeds, electing to switch to domestic platforms such as VK. @yun_army continued posting until May 2022 before taking a year-long break. In this interregnum, it continued posting similar videos on its VK and Telegram feeds. Meanwhile, @

unarmia_tsiv only began its regular posting, which continues at the time of writing in July 2023, in April 2023. Despite bans and censorship of foreign-owned social media networks, the arrival of new official accounts and the return of @yun_army to the platform suggest that TikTok will remain a feature of the Youth Army landscape.

The following brief analysis of the @yun_army and @unarmia_tsiv's content relating to the "special military operation" suggests that discussion of the war by account holders – and thus its incorporation into the state's overall militarization project – is more likely to take the form of seemingly "neutral" discursive moves than overt displays of active support for or engagement in a genocidal war. However, feed subscribers used the norms of the discursive community described above to hijack comment sections for discussion of the ongoing war.

For example, @yun_army's first video after 24 February marks the start of "Graffiti of Goodness," a "Youth Army campaign for the children of the Donbass [sic]."[35] In this video, teen Youth Army volunteers in uniform oversee young children spray painting colorful pictures of smiling cartoon characters. A painted St. George Ribbon, associated with Russia's "Great Patriotic War" memory and a frequent feature in propaganda about the current war, then briefly appears. The "special military operation" is never mentioned, but uniformed "young soldiers" participate in the recreation of discursive norms that reinforce militarism in the present. In turn, even younger children appear happy thanks to their militarized, Russian elders' guidance.

In a follow-up video, the effect is strengthened. In a "behind the scenes" setting, a Russian Youth Army teen girl interviews a young girl who explains that "I was three when I left the DNR [so-called Donetsk People's Republic] but I have friends here."[36] The choice of "but" as conjunction creates a binary contrast between a Russia that is safe, ordered, and welcoming, and a Ukraine that is by implication the inverse.

Similar videos have in recent months perpetuated that message around the Russia–Ukraine relationship. Youth Army members collect toys and aid to send to frontline troops and "Russians" – in reality, Ukrainian citizens – in Ukraine. One Youth Army girl writes a letter and announces that "I wish you [our soldiers] health, strength, and bravery": the Russian *bravery – muzhestvo* – implies *manliness* through its root, *muzh* (in the archaic form, "man"). A male peer explains that "I'm writing [my letter] about how I want every one of our soldiers to come back alive." A third declares that "I took part [in the campaign] so our soldiers know that we love and support them."[37] In a later video, soldiers at the front receive packages and express their thanks.[38] However, the words "war," "special military operation," and "Ukraine" are not mentioned by any of the four accounts studied. The war exists only in implied form, relying on the audience's knowledge to read and respond to the subtext of sign and symbol.

Indeed, the explicit language of war did feed into users' self-produced texts in comments left on videos published since February 2022. On the launch of @yun_army's "Graffiti of Goodness" campaign, one apparently Ukrainian user interjected, "Are the people in Ukraine getting killed also part of the Relay of

Goodness?" Four commenters – each of whom on their own TikTok feeds express membership in the Youth Army either in text or by wearing some part of the group's uniform – responded by attacking the poster: "Hahahaha"; "uh dude i [sic] guess there's something wrong with you"; "yes!!"; "Crimea's ours."[39] Again, the language of teen informality and internet culture, the rejection of the other, and the creation of a binary in which "ours" and "us" is opposed to "yours" and "you" dominates. A discursive conflict – informed by the norms of the discursive community – is thus reiterated by teens themselves. In a performative sense, language may preface physical conflict.

On occasion, however, conflict was displaced by in-group peacemaking as Youth Army members offered each other support. In a video about an exhibition dedicated to the Afghan War, released in late February 2022, a series of commenters posted anxious messages: "My brother's in the war [crying face emoji]"; "I hope they come back." Other users responded with reassurances: "he'll come back, 100%"[40] However, at other times, tangential discussion of the war was far more violent. When @unarmia_tsiv posted a fashion show-style revue of female uniforms in May 2023, users responded: "On to Bakhmut!"; "Flush out the *khokhols* [racially derogatory term for Ukrainians]!". Of the hundreds of comments left on the feeds, not a single Youth Army (or cadets, armed forces, etc.) member expressed opposition to the war on Ukraine.

Across the videos posted during the wartime period, these phenomena were reiterated. The Youth Army TikTok feeds provided the space for a discursive community to engage in, perpetuate, and disseminate militarized behavior in a space that offers opportunities for belonging and self-transformation even during the "special military operation" that analysts imply has been all but completely rejected by Russia's younger generations.

6.5 Conclusion

In the discursive community studied, the bearer of power – the Youth Army – perpetuates the state's militarizing goals through branding, collectivity, and fun. Content related to the Youth Army's four goals: teens were depicted engaging in acts of "kindness" (Goal 1). They displayed leadership and other desirable "values" (Goal 2). "Team spirit" (Goal 3) was clear in choreographed dance routines and "behind the scenes" videos. Teens' "intellectual development" (Goal 4) was oriented less to historical education than to preparation for roles in the Armed Forces. Comment threads relating to Russia's war against Ukraine suggest that these goals had been to some extent absorbed by teens. They supported each other, expressed gratitude toward and solidarity with the Armed Forces, and deployed racist language to welcome attacks on Ukraine.

Meanwhile, the use of teen-oriented pop culture language realia did not signify a permissive attitude. Rather, these signs and symbols were deployed to reinforce social hierarchies and to exclude those outside the group. While the Youth Army was presented as a space for belonging, fun, and self-realization – that is, a part of the state's broader "militainment" culture – the group's TikTok feeds enact

a militarization that, to use Enloe's term, "creeps" into its members' subjective experiences.

Totalitarian subjects have always absorbed the language and behaviors of the state.[41] However, as society digitalizes, future work must ask why, in an era of abundant information, today's users choose to subscribe to particular Youth Army TikTok feeds and why opponents do not voice their opinions on this unmoderated, anonymous platform. Likewise, the CDA approach could be applied to VK, YouTube Shorts, and cognate social media platforms. Nonetheless, as a Russian state under pressure due to the costs of its war in Ukraine seeks new ways to bolster morale, it may apply the tactics its Youth Army groups have used on TikTok to other social platforms. Children and teens may then prove to be willing recipients of and participants in the state's militarization project – despite the military failures evidence in Ukraine.

Notes

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2 'Konflikt s Ukrainoi: otsenki maia 2023 goda' (*Levada Centre*, 1 June 2023) www.levada.ru/2023/06/01/konflikt-s-ukrainoj-otsenki-maya-2023-goda/ accessed 4 July 2023. Other polls have found similar, e.g., 'A Year of the War. Did Russians Change Their Mind?' (Open Minds Institute 2023) www.openmindsinstitute.org/reports/a-year-of-the-war-did-russians-change-their-mind (accessed: 4 July 2023).

3 SN Eisenstadt, 'Modernization and Changing Conceptions of Youth and Generations' (1995) XXV Prospects. For more on Russia's challenge to modernity, see Aleksandr Etkind, *Russia Against Modernity* (Polity 2023).

4 On "militainment," see Elizaveta Gaufman, "The Militainment of World War II Memory in Post-Soviet Russia," *War and Remembrance* (Brill Schöningh 2023) https://brill.com/display/book/9783657790920/BP000010.xml (accessed: 4 July 2023).

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Part II

Crimes in the Ukraine War and their documentation

7 Russia's war crimes in Ukraine as a tool of war

Agnieszka Bieńczyk-Missala

The primary goal of this chapter is to provide a comprehensive overview of the scale and repercussions of the war crimes and violations of international humanitarian law (IHL) and international human rights law committed by Russia in Ukraine since 24 February 2022.[1] However, it should be made clear that violations of law that took place before this date are also relevant.

The war in Ukraine continues, and the full extent of Russian war crimes is still unknown. However, the commitment of Ukrainian authorities, cooperating states, international organizations, and local groups to document violations of international humanitarian law, international human rights law, and international criminal law is worthy of appreciation. This war is likely to be one of the most thoroughly documented in modern history, thanks to the collective efforts of various entities. Noteworthy contributors to this documentation process include the UN Human Rights Council's Independent Commission of Inquiry,[2] the UN Human Rights Monitoring Mission in Ukraine (HRMMU),[3] the Organization for Security and Cooperation in Europe (OSCE), which invoked the Moscow mechanism and established the mission of experts,[4] the Council of Europe's Institutions, the European Union mechanisms, International Criminal Court and International Court of Justice. Additionally, national prosecutors' offices, joint international investigative teams, and both international and local NGOs are actively working on collecting millions of records to document these crimes.

Both parties to the conflict, Russia and Ukraine, are bound by numerous IHL treaties, which apply during international armed conflicts, such as the IV and IX Hague Conventions of 1907, as well as the four Geneva Conventions of 1949 and Additional Protocol (I) of 1977.[5] Moreover, Russia, being a permanent member of the United Nations Security Council, it bears a distinctive responsibility for upholding international peace and security. This obligation is of paramount significance, particularly from the perspective of all protected groups, whose well-being and protection are deemed imperative. Since 1999, the Security Council has consistently incorporated the issue of protecting civilians into its agenda. It confirmed key principles, which should be respected by parties to the conflict: prohibition of armed attacks without distinction and direct attacks against civilian targets, the principle of proportionality and taking precautions to protect civilians and civilian

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objects from the negative effects of military action, and ensuring humanitarian access to those in need.[6] It is important to note that both parties to the conflict are obliged to comply with the standards of international humanitarian law regardless of whether the state is the aggressor or the victim of a breach of ius contra bellum.

Independent organizations confirmed in their reports that Russia committed "numerous violations of international humanitarian law and violations of international human rights law, in addition to a wide range of war crimes."[7] They found "credible evidence to argue that some of these violations could amount to war crimes and crimes against humanity,"[8] or "may contain elements of the crime against humanity,"[9] and also concluded that "evidence points to a major war crime and a crime against humanity committed by the Russian forces."[10]

Fewer sources deal with crimes committed by Ukraine. UN missions and NGOs stated in their reports the positioning of military assets in close proximity to civilian objects and highlighted instances of torture, mistreatment, and executions of prisoners of war by the Ukrainian army.[11] It is not always possible to determine which actions may be qualified as war crimes without information from the armed forces. While it is easier to admit a war crime against persons in the power of the party to the conflict, it is more complicated to establish the fact of a crime in relation to the conduct of hostilities. This necessitates comprehensive examination and analysis of multiple factors, notably encompassing the nature and status of the targeted entity and military intentions of those using lethal power.

The afore-mentioned limitations ought not to impede an examination of states' approaches to and application of the international humanitarian law of armed conflicts. The data concerning Russia's engagement provides an adequate foundation to assert that Russia consistently and purposefully subjects civilians and prisoners of war to severe physical and psychological distress. The aim of the chapter is to examine to what extent Russia employs war crimes as tools of warfare.

7.1 War crimes and conduct of hostilities

While in the first days of the war Russian attacks were focused on military targets, over time, especially given the failure of the so-called Kiev offensive, they were carried out with increasing momentum and became more severe for the civilian population. The greater the scale of the attacks, the more likely it becomes that the military actions were conducted in violation of international humanitarian law. They were an instrument for terrorizing the population and pressuring Ukrainians to weaken morale. The Prosecutor General's Office of Ukraine claimed that 3,881 civilian objects had been destroyed by 30 March 2022 alone.[12] Many Ukrainian towns were almost completely destroyed, including Mariupol, Volnovakha, Rubizhne, Popasna, Lyman, Severodonetsk, and Bakhmut.[13] Such civilian buildings as houses, apartment buildings, shopping centers, educational institutions, and television towers were the objects of attacks. The scale of destruction that affected educational facilities can be considered gigantic. On 26 March 2022, Ukraine's General Prosecutor reported that 570 educational institutions and 40 children's institutions were damaged. On the same day, only one day, the UN mission verified attacks

on 35 educational facilities, including three universities, eight kindergartens, 23 schools, and one scientific institution.[14]

Also affected by the attacks were facilities that have special status under international humanitarian law, including buildings and transportation facilities of a medical and cultural nature, as well as facilities that contain so-called "dangerous forces," the destruction of which could have a great impact on civilians and the environment.

In the first month of the aggression alone, the UN Human Rights Monitoring Mission in Ukraine (HRMMU) present on the ground verified 74 incidents in which medical facilities were damaged.[15] The World Health Organization has verified 715 attacks on hospitals and health facilities in Ukraine until December 2022.[16] The Russian party systematically destroyed health care facilities, in many cases in targeted attacks,[17] making it difficult to treat not only civilians, but also wounded soldiers. The attacks also caused losses among medical personnel, which, given the increase in health needs, further complicated the situation.

Among the most notable incidents were Russia's bombing of Mariupol's hospital on 9 March and the Drama Theater on 16 March 2022. Civilians were hiding in the latter, and huge "children" signs were placed next to the building, visible from a height. However, it neither stopped the aggressor nor prompted measures to protect civilians, some 300 of whom were killed.[18] In both cases, Russia accused Ukraine of misusing the facilities in an effort to justify dropping the bombs. It claimed that members of the Azov battalion were sheltering in the hospital, issued a warning of the planned attack, and patients were evacuated, but the OSCE mission that thoroughly investigated the incident concluded in a report that the attack was deliberate and carried out in violation of the law. A similar conclusion was issued in the case of the attack on the theater in Mariupol.[19]

International missions were critical of the so-called "double-strike" attacks, already known from the war in Syria. In this case, two consecutive attacks were carried out, with the second taking place after medical staff members arrived in the area, as if the wounded and medical aid were to be the immediate target.[20]

The OSCE mission also reported on the "depressing" scale of the destruction of cultural sites. It did not confirm Russian allegations that they were being used by Ukraine for military purposes to justify offensive actions.[21] The shelling included significant monuments where hundreds of civilians had sought refuge, such as the Svyatoshirsk monastery. By June 2023, the Ukrainian side had verified 553 partially or completely damaged cultural sites.[22]

Russia's actions regarding facilities containing dangerous forces that could pose an extraordinary threat to civilians were observed with particular concern. Since the outset of the war, the focal concern revolved around nuclear power plants, the destruction or malfunctioning of which could entail significant repercussions for the civilian populace. Until June 2023, direct attacks on the power plants had not occurred.

However, in the case of the former Chernobyl nuclear power plant, occupied by Russian troops on 24 February 2022, there was an increase in radioactive dust, which may have resulted in higher radiation levels, including from digging trenches

in the contaminated Red Forest. Russian troops left Chernobyl, but took control of other power plants, including the largest Zaporizhzhya Nuclear Power Plant in Enerhodar, which was eventually shut down. Fighting over the plant sparked a fire that damaged parts of the plant. According to the UN, Russian armed forces placed military equipment in and around the facility and carried out attacks from there.[23] In addition, in the spring of 2023, the Ukrainian side raised alarms about the mined area of the nuclear power plant's cooling tank, which was confirmed by representatives of the International Atomic Energy Agency.[24]

A catastrophic example of the destruction of a facility containing dangerous forces was the Novaya Kakhovka dam and hydroelectric plant on 6 June 2023. Both the Russian and Ukrainian sides levied accusations against each other regarding this incident. The Ukrainians called it an "ecocide"[25] or "the use of weapons of mass destruction."[26] Tens of thousands of people and some 80 villages were in danger. The majority of the flooded area was situated within Russian-controlled territory. Ukraine accused Russia of neglecting to assist in the evacuation of the population and provide humanitarian aid. Furthermore, the Russian party declined aid offered by the UN, thereby denying access to the occupied territories.

There were problems with access to drinking water and the threat of epidemics in many localities. Mines and explosives installed in eastern Ukraine moved along with the water. Agricultural land was washed away, causing irreparable damage to local agriculture and fisheries. The UN Deputy Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Martin Griffiths described the dam's destruction as the most significant incident of damage to civilian infrastructure since the beginning of the war.[27] The Prosecutor General's Office of Ukraine estimated that some 40,000 people may have been affected by the flooding.[28] The exact number of casualties is not known, probably dozens in the Ukrainian-controlled area and several hundred on the left bank of the Dnieper River occupied by Russia, especially in the towns of Oleshki and Hola Prystan.[29]

As of 10 October 2022, the energy infrastructure constituted a significant target of attacks, directly impacting civilian populations. In times of war, it can be a legitimate target for attacks, but since power plants and tractions are dual-purpose facilities, used by both the military and the civilian population, parties to the conflict should plan military actions with extreme caution and respect the principle of proportionality. Their scale and the difficult winter conditions in which Russia carried out these attacks make one assume that the aim was not only to weaken the Ukrainian state, but also to put pressure on the population.

As early as mid-December 2022, the UN reported that Russia had destroyed 50% of Ukraine's energy infrastructure, exposing millions of people to disease and death in the face of plummeting temperatures.[30] A detailed analysis of the effects of the attacks on Ukraine's energy infrastructure was conducted by the United Nations Development Program (UNDP) and the World Bank. It found that the deprivation of access to electricity or a significant reduction in its availability affected more than 12 million people and negatively impacted water supplies, heating systems, and public services. The losses were estimated at more than $10 billion.[31] The Commission of Inquiry established by the UN

Human Rights Council found the attacks on energy infrastructure to be disproportionate, widespread, and systematic.[32]

In densely urbanized areas, the weapons used play a large role in the situation of the civilian population. The highest civilian death toll in modern armed conflicts is from aerial bombardment; nevertheless, in the case of Ukraine, the highest number of people have been killed by explosive weapons, especially from artillery shelling.[33]

Humanitarian organizations have criticized Russia mainly for the use of incendiary weapons (including thermobaric bombs and phosphorus shells) in urban settings, which have caused difficult-to-control fires, as well as cluster munitions, which are characterized by a large area of effect; moreover, the components from which they are built are sometimes defective and behave like anti-personnel mines when they come into contact with the ground. Human Rights Watch reported hundreds of such attacks in at least 24 regions of Ukraine, killing at least 689 people between February and June 2022.[34] Russia is not a party to the Convention on Cluster Munitions of 2008 that explicitly prohibits or restricts the use of such weapons, which does not mean that it has carried out attacks in compliance with rules under IHL. International law prohibits the use of weapons, projectiles and materials that can cause unnecessary suffering and bring extensive, long-term, serious environmental damage.[35]

It is a widely accepted premise that parties engaged in conflicts are obliged to employ the most precise and discriminate weaponry available to ensure adherence to the principles of distinction and proportionality in their attacks.[36] Meanwhile, the Russian party has repeatedly threatened to use nuclear weapons, the use of which would be a clear violation of the principles of international humanitarian law of armed conflict and an extremely inhumane means of waging war.[37]

The UN fact-finding mission and non-governmental organizations also pointed to the widespread use of anti-personnel mines by both sides of the conflict, including high-powered anti-personnel mines (PFM), which were allegedly used in populated areas and led to serious civilian casualties.[38] Russian troops left mines especially in areas from which they were retreating. Cases were reported of mines being attached to dead bodies.[39] It is worth noting that Ukraine, unlike Russia, is a party to the 1997 Ottawa Convention on the prohibition of the use, stockpiling, production, and transfer of anti-personnel mines and their destruction.

7.2 Treatment of prisoners of war

At the end of February 2022, both parties to the war said they would grant detained members of the opposing armed forces the status of prisoners of war and allow access for delegations from the International Committee of the Red Cross, which has a mandate to monitor the situation of the prisoners and provide them with assistance, including facilitating contact with their families. Despite this, for many months the ICRC's work was hampered, and parties to the conflict tended to treat detainees as criminals, disregarding their obligations under the third Geneva Convention for the Protection of Prisoners of War.[40]

The international investigative missions did not have full access to the places where Ukrainian prisoners of war were held. Nonetheless, they established, including on the basis of interviews with those released, that they had been inhumanely treated, tortured, and in some cases arbitrarily killed. There were also cases of castration.[41] These allegations were confirmed by the UN Office of the High Commissioner for Human Rights (OHCHR) in the fall of 2022, among others. Beatings, electric shocks, sham executions, and being forced to stay in uncomfortable positions were used, and captives were notoriously deprived of personal belongings. The places of confinement often did not meet the criteria for a prisoner of war camp.[42]

The most tragic incident occurred on 29 July 2022, when, according to the UN mission HIMMRU, dozens of Ukrainian prisoners of war were killed and more than 100 wounded in Olenivka detention center. Soldiers who surrendered to the Russian side after the fall of Mariupol were held there. Russia accused the Ukrainian side of a deliberate rocket attack, while the results of CNN's journalistic investigation pointed to a probable fire. It ruled out the use of a Himars missile suggested by Russia.[43] A fact-finding mission to investigate it was, moreover, appointed by the UN Secretary-General, but was not granted access to the site. Difficulties in fulfilling its mandate were also signaled by the ICRC.

Since the beginning of the war in 2022, both Russian and Ukrainian authorities have also published photos and personal data of captured prisoners of war, thus exposing them to so-called public curiosity, which is explicitly prohibited by the Third Geneva Convention in Art. 13. Ukraine created the controversial "Ищи своих" ("find your own") portal to make it easier for Russians to learn the fate of their loved ones.[44] It also engaged prisoners of war for press conferences.

There were several exchanges of POWs. Over time, the ICRC gained more and more access to the detainees. From February 2022 to June 2023, it visited a total of more than 1,500 POWs in Ukraine and Russia. The ICRC's Central Search Agency, which collects information on prisoners of war, provided news of the missing to more than 5,500 families.[45]

7.3 The situation of the civilian population in the occupied territory

Documenting Russian policy in areas effectively controlled by Russian troops was hampered by independent organizations' limited access to them. As an occupying power, Russia had the responsibility to respect human rights, as well as to restore order and relative stability, enabling the population to return to peaceful daily life. It was responsible for providing food and medicine and allowing humanitarian access.[46] It should also refrain from making changes in the political and economic system, education, as well as in the status of the occupied territory. The so-called referendums held on 23–27 September 2022, in the occupied areas of the Donetsk, Luhansk, Kherson, and Zaporizhia regions on their annexation to the Russian Federation were unquestionable violations of international law, as was the issuance of Russian passports to residents.

International organizations that reached out to victims and witnesses of the Russian army's practices and documented crimes in the territories reclaimed by Ukraine found cases of intentional killings, unlawful detention, torture, rape, and looting.

These mostly took place during house searches, when attempts were made to identify, among others, supporters of the Ukrainian armed forces and citizens loyal to Ukraine. Special detention centers (so-called "filtration camps") were also set up for verification purposes, where torture and degrading and inhumane treatment were used. The UN Commission of Inquiry, as well as UN Special Rapporteur on Torture Alice Jill Edwards, found that torture of civilians as well as prisoners of war was systematic and widespread, and may have constituted a crime against humanity. Detainees testified about beatings, electrocution, suffocation with cables and plastic bags, rape, and exposure to cold.[47]

Relatives were not informed of where the detainees were being held, and detention deadlines and procedures were not followed. Most of the detainees were men who were judged to be loyal to the Ukrainian state and potentially able to influence the local community, including officials, journalists, activists, teachers, and humanitarian workers. They were accused of collaborating with the Ukrainian armed forces, and those with overtly pro-Ukrainian views, which could be evidenced by having relatives in the army or certain tattoos, met with particular hostility. In all places of confinement that the UN mission checked, conditions were found to be inhumane. The cells were overcrowded, and detainees had to sleep on the floor. Women were not always separated from men. The lack of electricity, heating, ventilation, and toilets was also noted.

The UN mission confirmed mass executions in 17 towns in the Chernihiv, Kharkiv, Kyiv, and Sumy regions, with the highest number in the Kyiv region, including the towns of Bucha and Irpin, including, for example, the execution of 65 men, two women and a 14-year-old boy in the same action.[48] It also documented instances of direct attacks on civilians who were trying to evacuate or carrying out ordinary daily activities.[49]

Since the commencement of the war, the forced deportation of civilians, particularly children, has elicited significant consternation and condemnation. This concern is well-founded, supported by extensive documentation attesting to the gravity and impact of such actions on affected individuals. Such practices violate human rights instruments, international humanitarian law, and international criminal law. These actions are coordinated at the central level by Russian officials and openly communicated to the Russian public. The International Criminal Court in The Hague has issued an arrest warrant against both President Vladimir Putin and the Plenipotentiary to the President of the Russian Federation for Children's Rights Maria Lvova-Belova, considering them principal suspects in the alleged case of forced transfers and deportations of Ukrainian children to Russia. The decision was backed by compelling arguments, notably the existence of a centrally organized system utilized for adopting and re-educating children, along with the clear and direct involvement of both Putin and Lvova-Belova in this particular practice.[50]

A few months after the annexation of certain territories, in his New Year's speech[51] President Putin expressed appreciation for the dedication of Maria Lvova-Belova and extended gratitude to Russian citizens for facilitating the movement of children from the newly acquired regions to Russia for vacation purposes. Additionally, he mandated the prompt identification and support of minors residing in these territories who were bereft of parental care, all in compliance with the prevailing laws of the Russian Federation. These pronouncements, along with televised reports showcasing the children being "rescued," served as a means to legitimize the costly war and concurrently to address the demographic challenge arising from the steadily diminishing birth and fertility rates.

Vladimir Putin has tried to make the legal requirements as simple as possible. On 12 March 2022, Decree No. 349 was enacted, meticulously outlining the regions where the children were to be deported. Then, some steps were taken to legalize their stay. On 30 May, President Putin signed a decree on a simplified procedure for obtaining Russian citizenship. Procedures for adoption and transfer of children to foster families were agreed upon. Adults who adopted children had even the right to change their names.[52]

Initially, the children were sent to transit accommodation points in the border towns of the Kursk, Voronezh, Belgorod, and Rostov regions, but also in occupied Crimea, and were then distributed to their destination facilities.[53] Moreover, collective centers, under the supervision of local authorities and activists, were established across Russia, serving as venues for pro-Russian re-education initiatives targeting minors. The primary objective of these programs was to effectuate shifts in the worldview of the minors involved, occasionally even seeking to alter their identity. In some cases, they were involved in military training.

The procedure mainly affected children who had lost their parents to warfare or had temporarily lost contact with them, were in social and medical care facilities or camps. Parents and guardians were often not informed of the children's situation, were hindered from contacting them or burdened with arranging the child's return. Organizations that have investigated the deportation process have found that the deportations were not justified on medical or security grounds. The exact scale of the deportations is not known.[54] According to Children of War, by 26 July 2024, more than 19,546 children had been deported and less than 400 had returned.[55]

7.4 War crimes and their instrumentalization

The acknowledgment of sexual violence as a weapon of war and a tactic of warfare was underscored by the United Nations Security Council Resolution 1820 in 2008. This resolution recognized that sexual violence serves as a means to humiliate and terrorize populations, manipulate public opinion, and advance the objectives of armed conflict. In extreme scenarios, such as the genocide witnessed in Rwanda, sexual violence has been employed as a tool to execute genocidal intentions.[56] This can also be applied to other criminal practices, such as killings, torture or looting, which historically have found acquiescence by participants in wars.

The primary objective of international law was to curtail and prevent such practices, with a particular emphasis on safeguarding the rights and well-being of individuals and civilian populations. Nevertheless, it is disheartening to observe that in numerous instances, inflicting immense suffering upon civilian populations and causing the destruction of critical assets vital for their survival is perceived as a strategy for furthering the objectives of warfare.

The war in Ukraine represents another instance, following the models observed in Chechen and Syrian wars, where Russia has employed criminal acts as a tool to advance its strategic objectives. In this context, the civilian population is not regarded as a protected group, but rather perceived as an adversary to be subjected to punishment, humiliation, subjugation, and killings. This assertion is substantiated by numerous factors.

Russia escalated its use of destructive attacks resulting in significant harm to civilian infrastructure after the initial phase of the war, which had primarily targeted military objectives. Russia had no reluctance to bring about the complete destruction of some civilian settlements. Furthermore, the civilian population in Ukrainian cities was subjected to punitive measures as a response to successful actions by Ukrainian forces, such as the damage inflicted on the Crimean bridge in October 2022 or the attack on Russian soldiers in Makeevka during the night of 31 December 2022, and 1 January 2023. The aggressor's policies and actions were targeted, by depriving the civilian population of grain and destroying assets for their survival, such as crops and farmland. Unfortunately, medical staff confirmed the lack of respect for the emblem of the red cross. There were attacks against medical and humanitarian personnel and medical facilities, as well as incidents of shelling of humanitarian corridors. 1/3 of the population suffered as a result of disproportionate, widespread, and systematic attacks against energy infrastructure cumulated deliberately over the winter period. Ukrainians faced problems with access to water, heating systems, and public services.[57]

In addition to the aforementioned actions, Russia has demonstrated a willingness to employ nuclear weapons as a means of coercion, which has grave implications for all protected groups. Such threats of nuclear use exacerbate the precariousness of the situation and pose an existential threat to the safety and well-being of civilians, including women, children, and other vulnerable groups. The potential consequences of nuclear warfare extend beyond physical harm and casualties, encompassing far-reaching socio-economic, environmental, and psychological repercussions that could profoundly affect all individuals, including those in protected categories. The mere existence of such threats heightens apprehensions and deepens the sense of insecurity experienced by civilian populations in the conflict zone, highlighting the urgent need for effective measures to de-escalate tensions and safeguard human rights and humanitarian norms.

In the end it is crucial to look at registered war crime incidents and civilian casualties. The Ukrainian Prosecutor's Office has already registered nearly 126,000 cases of potential crimes that are subject to further investigation, demonstrating the magnitude of the challenge facing Ukraine.[58] The war is still ongoing, and it will be many years before the extent of the violations and crimes committed is fully investigated. There is a lack of reliable data on the most significant cases, such as the number of civilian

casualties. The UN Human Rights Monitoring Mission in Ukraine (HRMMU) has verified that conflict-related violence in the period 24 February 2022–24 February 2024 killed more than 10,000 civilians and injured nearly 20,000. The numbers are likely significantly higher. It does not have data from many places where intense hostilities have continued, such as Mariupol, Lysychansk, Popasny, and Severodonetsk.[59] The Ukrainian NGO Center for Human Rights ZMINA reported, based on Ukrainian police statistics, that 16,502 people were killed in 2022 alone, 21 mass graves were discovered and 1,000 bodies were exhumed.[60] Ukrainian officials, on the other hand, estimated the number of civilian casualties at tens of thousands.[61]

Historically, the international community has displayed a tendency to overlook Russian atrocities perpetrated in Chechnya and Syria, as well as past crimes committed by the Soviet Union. This leniency has contributed to the establishment of a culture of impunity in Russia, fostering a belief that violations of international humanitarian law and war crimes can be utilized as tools to undermine the morale of adversarial states' population and the state potential. Russia's overt disregard for international norms, including those outlined in international humanitarian and human rights law, presents a formidable challenge to the global legal order.

Nevertheless, recent endeavors to meticulously document, secure, and analyze evidence of these crimes have been unprecedented in scope and intensity. These efforts significantly enhance the prospects for holding the perpetrators accountable and delivering justice for the victims. The accumulation of substantial evidence strengthens the basis for pursuing legal action against those responsible, potentially deterring future crimes and reinforcing the importance of upholding international legal standards. By undertaking such resolute actions, the international community signals its commitment to safeguarding the principles of justice, accountability, and human rights in the face of flagrant violations committed by state actors.

Notes

1 The article is funded by the National Science Centre in Poland under the project no. 2020/39/B/HS5/00782.

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8 Digital evidence in investigations concerning Russian crimes in Ukraine

Hanna Kuczyńska

8.1 Introduction

Documentation of crimes committed during the aggression against Ukraine is in large part done in the digital environment. Digital evidence plays an important role, which cannot be overlooked by both national and international investigation authorities. The use of digital evidence allows for the documentation of a wide array of crimes, where numerous potential perpetrators are involved on various levels of hierarchy.[1] Using digital evidence makes it easier – and sometimes only in this case it is possible – to determine the widespread character of the attack and its systematic design that are necessary to establish that core crimes were committed, when the on-the-ground evidence is not sufficient for this purpose.

In this chapter, the role of digital evidence in investigations into core crimes committed in Ukraine will be discussed. In the first part, the analysis will relate to the role of open-source evidence and digital databanks of information regarding crimes committed in Ukraine created by both governmental and non-governmental organizations. The most influential databanks will be presented, along with their role, their achievements and their way of operating. The circumstances may change, the NGOs may disappear, they may change their mode of functioning, they may cease their activity, or the data from open sources may be removed – it is all the more important to capture such activities on an ongoing basis and to gather all the existing forms of collecting digital information, not only for academic purposes, but also for use by procedural authorities that may search for evidence concerning specific cases.

The second part of the paper will deal with how to use digital materials as evidence in criminal investigation – taking into consideration that large amounts of online-stored information and data can become evidence in a procedural meaning only after being admitted into a criminal trial. In this regard, it will be necessary to present problems concerning the procedural perspective: the need to introduce mechanisms of verification and management of digital evidence and to design new rules of their admissibility. The paper will present possible solutions to these problems, e.g., by identifying verification tools that could be used by investigators, such as satellite imagery that can be employed to verify the locations of where videos and photographs were taken in a process known as geolocating. It will also

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be discussed how the use of digital evidence leads to the need for standardization and management of data before they can be presented in the courtroom. It is clear that at present the character of digital evidence requires tech expertise from all the people taking part in an investigation. The question for the prosecuting authorities is how to harness this digital environment to the needs of criminal trial; the question for trial judges – how to assess and on what rules to admit evidence found in this particular environment.[2]

8.2 Gathering information about evidence

There are various types of digital evidence, but since a comprehensive and all-encompassing analysis is beyond the scope of this paper, two types will be discussed in greater detail: open-source evidence and evidence stemming from digital databanks. Digital evidence acquired from open sources has a growing significance.[3] The analysis of Internet sources shows that digital audio and video-recordings, CCTV footage, hacked RF military communication, aerial and satellite imagery, as well as drone footage, can be easily acquired from a digital environment. Large amounts of information about crimes committed in Ukraine are publicly available – or may be generated by an "open-source research"; everybody can get access to these sources and share them with national authorities or analyze such material in order to prepare a report on a particular event. Within the frame of open sources, a specific role is played by social media[4] (Facebook, Snapchat, TikTok, YouTube), which offer a special type of open-source evidence defined as user-generated content, where videos and images of human rights violations are captured by eyewitnesses on the ground and shared online. As a result, social media platforms become "accidental archives"[5]; the information posted to social media may include critical data for proving the elements of crimes – and in some cases may be the only documentation of such events. As regards the conflict in Ukraine, the amount of conflict-related information that is publicly available online is ever-growing: Ukrainian and Russian civilians on both sides of the war are posting photographs and videos of convoys, equipment, and themselves on the Internet.[6] Depending on the conflict, different open media can play the most significant role: in the case of the conflict in Syria, YouTube and Facebook were mostly used for this kind of publication, but in Ukraine Tik-Tok and Telegram are used more often.[7] Later, these images can be confirmed and verified (also corroborated) by various techniques, using digital tools such as satellite imagery in order to verify the locations of where videos and photographs were taken in a process known as geolocating.

Another type of evidence of growing significance are digital databanks that collect information concerning specific conflicts and events of core crimes. Such digital tools are provided by state governmental authorities,[8] the ICC[9] and NGOs.[10] The first group – designed by state authorities or the ICC – are platforms designed to help identify persons who may have information or evidence relevant to criminal investigations concerning core crimes committed during the conflict in Ukraine. They offer a special tool to provide, store, and share information about potential

witnesses; when the incident took place; where the incident took place – automatically specifying an address or coordinates and allowing to define the precise location or indicate it on the map; enemy personal data: documents, passports, callsigns, aliases, identification marks. The questionnaires also allow for uploading of video and photo materials. As will be shown below, sometimes the role of databanks intersects with the functioning of open-source evidence.

Firstly, there are governmental initiatives that use databanks to communicate with citizens. The most influential and effective government-designed databank devoted to documenting crimes committed in Ukraine is the initiative of the Ukrainian Office of the Prosecutor General, which, together with other Ukrainian and international partners, has created a digital form to document war crimes and crimes against humanity committed by the Russian military in Ukraine.[11] It has received more than 100,000 submissions of detailed evidence from citizens (by September 2023). In addition, the Ukrainian government launched a digital tool for documenting crimes committed by the Russians known as the "e-Voroh" (e-Enemy) chatbot. It was created to help the Ukrainian Army locate the occupation forces (it has been used by more than 200,000 Ukrainians – only by 18 April 2022). This chatbot consists of specific digital tools the government has set up to crowdsource and corroborate evidence of alleged war crimes. It allows citizens to document damage to their homes and use facial-recognition software to identify Russian military officials in photos, as well as offers digital tools to guide users through the process of geo-tagging and time-stamping their footage in hopes that it may help the authorities to hold the perpetrators responsible. All data is fed into one centralized database of the office of Ukraine's Prosecutor General.[12] Mykhailo Fedorov, Ukraine's Minister of Digital Transformation, told the "Time" reporter:

> A few weeks into the war, a column of Russian armored vehicles with missile launchers rumbled through a neighborhood near Kherson, in southern Ukraine. As it rolled past an intersection, staff at Ukraine's digital ministry back in Kyiv watched as the "e-Enemy" chatbot, which is monitored 24/7, lit up with dozens of reports from residents' windows block by block.[13]

Even if such information was intended to be used for strategic purposes, it can just as well be used as evidence in a criminal trial.

Also the OTP of the ICC has a databank that allows it to fill in the details relevant to investigation into crimes in the scope of jurisdiction of the ICC. As explained on the platform, information shared by informants is first analyzed, and then an investigator may contact this specific person to ask more questions or to agree on a method of gathering information that would be useful to OTP investigations.

Secondly, there are also various NGOs who either create databanks storing hundreds of thousands of photos and videos from the war in Ukraine or manage open-source evidence. There are various types of such databases; they can be divided into four groups. The first group of such NGOs limits itself to gathering and storing information without any further activities. The second group takes up the task of gathering and fact-checking information, verifying the data sources;

the third – gathering, fact-checking information, verifying the data sources and preparing reports on certain topics or events of war crimes or other core crimes. Finally, the last type of NGOs fulfills all of the above tasks but is also able to conduct on-site verification, where digital data can be fact-checked on the ground. Most of the data – acquired, processed, and publicly presented – can be easily accessed online (with the exception, of course, of the data that uncover the identity of concrete witnesses, and such data are kept on secure servers and not made public). Such NGO-led investigations became a *signus temporis* of this war. Below, some of the most influential NGOs will be presented, along with their mode of operating in the time of war in Ukraine.

The Conflict Observatory (functioning with the support of the Bureau of Conflict and Stabilization Operations, United States Department of State) is a US hub site created in order to capture, analyze, and make openly available the details of Russia-perpetrated war crimes and atrocities in Ukraine. It is a digital tool that analyzes and preserves publicly and commercially accessible information, including satellite imagery and information shared *via* social media, for use in ongoing and future accountability mechanisms under appropriate jurisdictions. The results of performed and completed research are published on the site of this organization.

Just to mention some of the research presented in this web site, there is a report on evidence of widespread and systematic bombardment of Ukrainian healthcare facilities (dating from 17 May 2022), in which 22 healthcare facilities in Ukraine that sustained damage from apparent Russia-aligned bombardment between 24 February and 29 March 2022 have been identified. The inflicted damage was verified through cross-corroboration of very high-resolution satellite imagery and open-source information. In the report on Ukraine's crop storage infrastructure (from 15 September 2022) it was found that one out of every six (15.73%) Ukrainian crop storage facilities has been damaged, destroyed, or controlled by Russia and its aligned forces. The report on mass graves at Pishchanske Cemetery in Izyum (from 20 September 2022) established that satellite and open-source data showed new earth disturbances covering 55,000 square meters of land in and around the Pishchanske Cemetery between 6 April and 1 July 2022, which were consistent with reported burial operations occurring at the time. Two vehicles consistent with military excavators were also observed at the site on 20 June via satellite imagery, matching excavators seen in Russia-aligned media photos of body disposal near Izyum. The report also confirmed that Russia controlled the area during the period under investigation, and significant military activity was observed. The next report concerns a timeline of Mariupol's destruction (published on 15 November 2022). Based on moderate-resolution PlanetScape imagery collected from 24 February 2022 to 1 October 2022 and a PlanetScape AI imagery algorithm analyzed by imagery analysts, it was found that 2,664 structures sustained significant damage in the city.[14] Another structural analysis of damages suffered by civilian infrastructure was presented in the report from 13 December 2022: "Kyiv falling into darkness." With the use of digital instruments, this research measured that there has been a significant decrease in nighttime light production and stability in Kyiv following a wave of missile and drone strikes on the city and other areas of Ukraine

starting on 10 October 2022 and continuing through four additional significant aerial bombardment events that have struck Ukrainian energy infrastructure. Using digital tools of verification of satellite images, the experts proved that since these attacks, the average light production for the city of Kyiv has dropped by 26% compared to the two preceding months. On 9 June 2023 the Conflict Observatory published a report: "Rapid Assessment: Impact of the Kakhovka Hydroelectric Station Destruction," explaining that the catastrophic failure of the Kakhovka Hydroelectric Station Dam on 6 June 2023 has flooded an estimated 520 square kilometers of southern Ukraine, including all or part of 51 towns and villages. The sources used included commercially available, very high resolution (VHR) satellite imagery as well as synthetic aperture radar (SAR) data provided by ICEYE to outline polygons covering the pre- and post-flood extents of the Dnipro River below (south of) the dam, the areas of which were then compared.

A detailed report on each of the topics was prepared and published online. An analysis of these reports shows that they are based on various sources and databases: both scientific (like NASA sources and the PlanetScape Ai imagery algorithm, but also on correlations between precise satellite images), social media (Twitter) and other reports presented by NGOs (Amnesty International[15]). Specialists in a given area have then analyzed and compiled data stemming from these different sources, presenting reports and data pertaining to a specific crime of international law. It is possible to follow the links provided in the reports and establish the relevance and credibility of these sources. It is also possible to determine who prepared the cited reports and data and what methodology was used.

Another organization managing digital evidence, which prepares reports using information accessible online that is later verified during an investigation, is a Netherlands-based investigative journalism group called Bellingcat that specializes in fact-checking and open-source intelligence. Among others, it has published interactive maps of destroyed civilian targets and has worked on authenticating potential documentation of war crimes. It not only finds and saves images and information accessible online, but also verifies them and identifies the source – as in most cases videos and photos are not posted by the person who took them but reposted many times. They also use digital tools of verification that are accessible online: mapping tools and satellite imagery.[16] One example of how the data are verified and published online is a journalist-led investigation into geolocation of a photo of a Russian Missile Programming Team,[17] where a group photograph of the missile guidance team who were purported to be behind programming many of the cruise missiles that have hit Ukraine led to establishing the exact location of the facility where it was taken (although it operates under strict security regulations). During the course of the investigation, the journalists analyzed the names of engineers they had identified as working for the GVC in leaked Russian databases, information about addresses used to register cars or sign up to online delivery apps (some had registered addresses at the missile facility), pictures from a Russian state television documentary, other photographs published online from earlier periods of time, as well as user-uploaded photos. They used the big-picture details analysis (where details inform us where to look in the first place – in this case, what does

the building look like from the street or from satellite images taken at an angle) and the micro-details analysis (a positive identification of the site once there is a potential match, such as cracks in the floor, paint patterns on the building's columns, the design of a no smoking sign). Finally, they used geolocation techniques to confirm conclusively where the image was taken. All the collected and verified data can be later used by investigative authorities when pointing to the direct and indirect perpetrators of crimes inflicted by the missiles.

The second example of the Bellingcat activities is the investigation into Russia's missile attack on the shopping mall in Kremenchuk from 27 June, in which Russian claims were refuted by verified and verifiable digital evidence (the Ukraine's air force command said that the shopping mall was hit by Russian X-22 missiles fired from Tu-22M3 bombers that flew from Shaykovka airfield in Russia's Kaluga region, whereas the Russians claimed that their air force carried out a "high precision air attack at hangars where armament and munitions were stored delivered by the US and European countries at the Kremenchuk road machinery plant, which is a few hundred meters north of the Amstor shopping mall" and, moreover, that the shopping mall was non-functioning and caught fire as a result of the strikes on nearby targets).[18] When analyzing this case, the journalists used politicians' accounts on Twitter, personal accounts on Twitter with video footage, satellite imagery (the Sentinel-2 L1C satellites – confirmed by data from another satellite system, Planet satellite imagery) and CCTV (city cameras) footage. These methods proved effective, as illustrated by the fact that the CCTV video footage appeared to show a missile land directly on the building of the shopping mall and even recorded the missile used to hit the shopping mall – a freeze-frame image appears to provide a view of the type of missile used (combined with the geolocation of the CCTV). The acquired data were also confirmed in other sources: videos posted to Facebook by the locals, which showed a huge crater at the site of the strike. In this research, each source was linked to a specific digital tool of data verification. In the same report, using the same sources (such as Twitter and Facebook accounts of the mall customers at the time of the attack, satellite imagery showing the number of cars in the parking lot), experts proved beyond doubt that the shopping mall was in use at the time of attack. This report may have even a bigger impact, as it was translated and published in Russian.

Another database collecting digital information about cases of core crimes is "Dattalion," which is a "witnesses' database" – it is the largest free, independent, open-source database of Ukraine war photos and videos. It mostly serves to compile footage from across Ukrainian and Russian-occupied territories, as well as eyewitness accounts of Russian aggression, war crimes, and acts of genocide in Ukraine. This database is stored on Google drive and can be accessed by anyone. It contains mostly short notes, accompanied by photos downloaded by eyewitnesses from specific locations and dates.

The most technically advanced database is EyeWitness to Atrocities, which provides not only storage, but also verification of authenticity and management of the digital data conducted by an algorithm.[19] This application is used (among others) in Ukraine to capture potential evidence of crimes in a verifiable format to

be submitted in future criminal investigations. Data about crimes (photos/videos/audio) can be downloaded in the "eyeWitness to Atrocities" application available in the Google Play Store. It contains reliable metadata: the application automatically stamps the footage with unmodifiable location, date, and time. The founders of this organization observed that in the context of deep fakes and misinformation, one of the many challenges that journalists face when uncovering and reporting international atrocity crimes is capturing photographic proof in a way that both the public and courts will trust their authenticity.[20] Since photos captured with standard phone cameras are difficult to verify and cannot be used as evidence at all or only if the photographer testifies in court (when speaking of common law courts), the images captured with the application are embedded with the location, date, and time they were captured, and can be easily verified for both advocacy and journalistic reporting.

Since February 2022, EyeWitness has received more than 580,000 photos, videos, and audio recordings relating to the war in Ukraine[21] from the users of the application. Besides analyzing and cataloguing materials of evidentiary value, EyeWitness has submitted 10 dossiers relating specific events of Russian crimes to relevant accountability mechanisms, including a legal report exposing damages inflicted in the Chernihiv Oblast.[22] The report includes 2,000 images related to the destruction of this city; basing themselves on footage captured with the application, the EyeWitness team supplemented them with open-source information, summarizing selected incidents that resulted in damage or destruction of residential areas, educational facilities, cultural heritage sites, and commercial properties in the Chernihiv Oblast.

Another organization that is actively collecting digital evidence accessible online is Mnemonic, which has already archived over 300,000 records from social media documenting alleged war crimes in Ukraine (in the so-called Ukrainian Archive). This NGO took into consideration the fact that social media are not stable sources of information – data can be deleted at any time, both by the users and by the platform algorithms in takedown procedures[23] – for example, perpetrators close their accounts or governments ask social media companies to close certain accounts or to censor certain content.[24] Moreover, social media companies' terms, conditions, and community guidelines prohibit certain categories of social media content: for example, propaganda from internationally recognized terrorist groups or material that sexually exploits children. Such content is being removed, though it should serve as evidence in core crimes trials.[25] Therefore, the aim of this organization is to create a digital memory of the crime of aggression, human rights violations, and war crimes committed in Ukraine by all parties to the conflict. One of the investigations conducted by this organization concerned attacks on public infrastructure in Zhytomyr (published on 3 November 2022).[26] This investigation examined open-source evidence pertaining to alleged attacks affecting critical public infrastructure, including medical facilities, in Zhytomyr Oblast in March 2022. The Ukrainian Archive verified these incidents by cross-referencing a combination of open-source visual content and public information. Specific methodologies included open-source investigation,

online reporting, geolocation (analyzing video footage from YouTube verified by the use of satellite imagery and Google Street View) and chronolocation (examining the earliest upload times for available open-source information, identifying reports, and claims about the attack timing and verifying them by conducting a shadow analysis of footage documenting the attack). Damages were estimated with the use of satellite images showing an approximate measurement between given locations.

A dossier compiled by the Starling Lab, an academic research center co-founded by Stanford University's Department of Electrical Engineering and the USC Shoah Foundation, used a blockchain technology to prevent tampering with collected information concerning war crimes committed by Russia in its invasion of Ukraine. The experts in this case put the evidence in the blockchain, which is a distributed ledger where multiple copies are kept and verified.[27] As a result, a cryptographic dossier has been submitted to the ICC. The dossier focused on crimes against children, specifically the destruction of five schools in Kharkiv, Ukraine from 2 to 16 March 2022. Photos and videos from social media and messaging platforms showed destroyed classrooms and buildings in a civilian area, including kindergartens and playgrounds. This organization produced an "unbroken chain of evidence" on the decentralized web – the dossier is registered and preserved across seven protocols.[28]

There are also Polish initiatives aimed at collecting information regarding evidence of core crimes and storing the information on victims of these crimes with the use of digital technology. The Lemkin Center (Raphael Lemkin Center for Documenting Russian Crimes in Ukraine) is collecting digitally preserved statements of victims and witnesses, acquired personally, in on-the-ground encounters, and then digitalized in a special database, where the personal data of witnesses are kept secure.[29] Each witness gives their statement about a certain event that can be considered a crime with the precise location and date. Such information about potential witnesses can then be used by the Polish National Public Prosecutor's Office, which conducts investigation into crimes committed during the conflict in Ukraine.[30]

Such a database has also been created by Project Sunflowers, which is an international initiative with a seat in Warsaw. The database addresses the need to collect information about evidence and victims of crimes committed in Ukraine that can be used in future criminal proceedings against those responsible for such crimes. The information about core crimes committed during the aggression against Ukraine is stored in a secure digital database created especially for this purpose and containing voluntary testimonies from potential witnesses and victims. The Project was designed to be complementary to the activities of state authorities or any international courts established to prosecute and adjudicate war crimes, crimes against humanity, genocide, aggression, or other serious human rights violations connected to the recent Russian invasion of Ukraine.[31]

All the data gathered digitally by the above presented organizations are catalogued and preserved, in some cases after their verification and analysis, for accountability and justice mechanisms. An analysis of the methods of verification

of the data collected by the above-described organizations allows us to determine the specific tools used by digital investigators. After an initial online search for photo and video footage, they use digital tools in order to verify and analyze these data, including geo- and chronolocation techniques (confirming where and when a video or photo was taken); when possible – cross-checking the material with satellite imagery, ground-level photography, and other publicly available information, i.e., checking details such as landscape elements, trees, buildings, and streets in the images to see whether they match with street views or other photos from a known location; pattern and shadow analysis – in order to see if the images match the conditions that prevailed when the photo or video was supposedly taken; satellite imagery and other sensors such as Radar and LiDAR – in order to look for tell-tale signs of attacks like destroyed buildings, craters, debris, troop, or weapon movements, although a bird's eye view is also important to cross-check and verify potential targets and understand the dynamics of attacks; verifying which weapons were used (e.g., by studying the shape of a crater left by a missile, watching footage of air strikes or examining photos of weapons remnants, as well as by analyzing weapons trade data to understand ownerships of these weapons); interviewing eyewitnesses to attacks and collecting testimonies that might corroborate the digital evidence.

Organizations extensively document individual attacks, but they also work in a big picture way, looking for broad patterns of violations and building a detailed timeline of events. These documentation efforts are also useful in compiling databanks of reliable evidence that could later be used to hold perpetrators of human rights violations to account. It is important to remember that the databanks and reports analyzed above do not contain evidence in a procedural sense – they are just sources of information that can later be requested, analyzed, and used by procedural authorities. The question for the authorities is how to use such digital resources.

8.3 Assessing admissibility of evidence

Investigative authorities can access (or request) all the above-mentioned databanks. There is certainly an abundance of information. The only problem that they have to solve is how to deal with digitally stored information: both from open sources and contained in various databanks. There is a need to verify the authenticity and evidential value of such digital data before they can be used as evidence in trial. Verification should become an obligatory stage of criminal investigation through which the accuracy of the source and validity of a piece of evidence is established (geolocation, chronolocation). Procedural authorities – both national and international – should develop a method of dealing with such data, based on specific rules of admissibility of digital evidence. Since every legal system has its own rules of admissibility of evidence, it would be impossible to discuss them all in the present paper. Nevertheless, there are certain common problems that need to be addressed by every legal system when it comes to digital evidence from online sources.

The first problem related to using open-source evidence and databanks is verification of the method of preservation of digital data: digital preservation is an important aspect to ensure authenticity and credibility.[32] It is necessary to guarantee the integrity of the evidentiary material and preserve the history of its transmission through continuous instrumental control during data retrieval. Moreover, any action taken on electronic evidence must be documented so that an independent third party can repeat the action and obtain a similar result.[33] Certainly, the basic prerequisite for credibility of data is to ensure that evidence presented in court is the same as when it was processed during the investigation. This factor should also be assessed by the court – either by making each person who has handled the evidence to testify or by expert opinion. The handlers of digital evidence should ensure that the integrity of digital evidence has been preserved because any errors in the process may lead the court to deny credibility to such evidence.

The second stage of verification should be identification of the source. There are several software products that help to obtain information about the owner of the domain (site), their IP address and the location of the server with the site (hosting or colocation); there are also free services on the Internet that can be used to get information about the resources of the network (sites).[34]

Next, as the third stage of processing digital evidence, the verification of authenticity of digital data should be conducted, including with the use of digital tools such as geolocation and chronolocation. Firstly, this can be done by internal investigators checking the data from available sources and links. National investigators can use the same digital techniques and skills as employed by the journalists and NGO volunteers who work with publicly available verification tools accessible on the Internet. There are also several applications that are available online for free, which can serve this purpose: *TinEye,* allowing for patterns' recognition and using a reverse image search engine; *SunCalc*, which shows sun movement and sunlight phases at any time and location; *InVID*, a project for video verification, which is able to discover and label fake materials, edited photos or deep fakes; *FotoForensic*, which provides tools and training for digital picture analysis, including error-level analysis, metadata, and tutorials.[35] Secondly, it is also possible to call authors of reports as witnesses in order to verify the reliability of data. The third option is to conduct an external verification analysis and call an expert in open sources (an IT specialist) to present a forensic analysis pertaining to the credibility of the sources. What follows is that such experts, either internal or external, possessing certain skills in digital investigations, should be trained and be ready to be called by the authorities. Another question would be, what role should the defense play in the process of undermining a prosecution case prepared on the basis of such digital expertise? This, however, goes beyond the scope of the present study.

It is also possible to have the information authenticated by its providers. The authors of the footage or users can themselves ensure the evidentiary value of digital evidence (*a priori*). The authors can use the *EyeWitness* application linking the photos and videos with metadata. Even if authentication of digital data has been conducted by the provider of the data, it is reasonable to claim that the procedural

authorities should also carry out verification, checking the data with the help of experts or internal investigators.

8.4 Standardization and management of digital evidence

Conducting investigation into crimes under international law requires a standardized methodology for gathering and assessing evidence. There is too much data and too many unknown factors to proceed without any standards. A formal methodology for open-source investigations is provided by the Berkeley Protocol on Digital Open Source Investigations. This document presents a set of common professional standards for incorporating open-source methods into investigations of alleged violations of international criminal law, as well as offers guidance on methodologies and procedures for gathering, analyzing, and preserving digital information in a professional, legal, and ethical manner.[36] Instead of focusing on specific types of digital evidence, it presents the underlying principles and methodologies that can be consistently applied, even as the technology itself changes, thus providing a potential foundation for the desired procedural rules of conduct for national investigative authorities.

There is also a need to manage such an abundance of information. The key question is how to link data to specific events, locations, and dates. Currently, some NGO databanks allow for management of data, e.g., the EyeWitness to Atrocities. Other NGOs assign data to specific events using geolocation and chronolocation techniques (e.g., Amnesty International). There have been attempts to transfer this task to algorithms and allow big data analysis to come into play. Also, perhaps it is worthwhile to consider whether social media platforms or electronic media should be obliged to use algorithms for mass detection and sorting of data in order to create a database and preserve data for use as evidence in criminal trials[37]; maybe there can even be legal compulsion for the media to construct and organize such archives. In such a case, there would be an obligatory additional phase of verification that would comprise checking the source code and the algorithm's functioning, as well as obligatory court control of the proper working of the algorithm. It seems that algorithms are best designed to deal with such amounts of data. Perhaps it is the next step in the development of investigations on core crimes – to transfer certain tasks to artificial intelligence, creating a sort of "AI investigation." It is not entirely unthinkable: the Office of the ICC Prosecutor has recently (on 9 March 2013) announced that it is committed

> to introduce new advanced technological tools in order to enrich, filter, and analyze such material. This will include the introduction of artificial intelligence and machine learning tools that will significantly enhance the ability of OTP investigators to review audio and video evidence.[38]

This statement may mark the beginning of a new era in investigating core crimes, not only those committed in Ukraine. It seems that the use of digital evidence in such investigations is taking an entirely novel direction. The next stage of

documenting core crimes may be founded on designing an AI search engine that would scour open sources for publicly available data related to concrete criminal acts, based on the specific parameters of the inquiry.

8.5 Conclusions

In every case of core crimes, every national procedural authority – both investigators and judges – should "consider ways to build its cyber forensics capacity."[39] First, investigators should acquire new skills pertaining to searching for and verifying digital evidence. Certainly, a coherent method should also be adopted – besides personal skills, and thus model digital investigation rules should be adopted. There is no doubt that digital evidence requires an additional stage of verification and standardization before presentation in court. As the Berkley Protocol states: "The methods of evidence collection will affect the weight judges give to the evidence"; "In an era marked by the proliferation of digital information, including both misinformation and disinformation, it is crucial that investigators be able to determine whether open-source information is authentic and establish or disprove its veracity with sufficient accuracy."[40] Verification of digital evidence should be construed as one of the principles of evidentiary law – in the frames of the so-called "procedural rules"[41] and not "power-based rules" or "rights-based rules" – where "procedural rules" are the ones that govern the techniques the investigating authorities are obliged to use in order to ensure legality and thus admissibility of evidence.

Secondly, at the stage of criminal trial, every piece of information should be assessed by the court in terms of its reliability, relevance, and probative value – before it can be admitted as evidence. This stage is *a priori* assessment of admissibility of evidence. Then digital evidence needs to be evaluated as regards its relevance for the determination of legal and/or factual conclusions, as part of a holistic (*a posteriori*) stage of assessment of evidence, during which gaps in evidence should also be detected.[42] Thus, the rules for admissibility of digital evidence in core crimes trials need to be established. It should be underlined that proper administration of criminal justice (both national and international) requires digital evidence in all cases to be collected, analyzed, presented, and assessed in a forensically and legally adequate manner, as only a coherent method ensures its necessary quality as evidence.[43]

Every national investigator must be aware of the opportunities and challenges of dealing with digital evidence, specifically coming from open sources. With proper management they can become a decisive tool of preparing a case for the court. However, the text shows how many questions arise from the use of digital evidence and digital tools of analysis in a criminal trial. The conflict in Ukraine is just one of the examples of digital documentation of crimes committed during a war – such digital evidence may be used by each prosecutorial agency in regard to any other conflict, and not only by national prosecutors. With the arrest warrants issued by the ICC against Russian officials, the above-mentioned digital evidence may (and should) be used by the ICC. There have been examples of the ICC cases where the

Court admitted digital evidence from open sources and based its decision on such evidence.[44] However, even if digital evidence has been widely presented by the prosecution before the ICC, no rules have been adopted by the Trial Chamber as to their credibility and admissibility. It rather pointed to the need to use the holistic assessment of such evidence, based on their relevance for the case and thus balancing their credibility versus their significance. Although no procedural rules were established it could have been noticed that admitting digital evidence into criminal trial into core crimes became crucial and indispensable.

Notes

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2 All links cited in the text were active when accessed on 12 June 2023.
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13 Vera Bergengruen "How Ukraine Is Crowdsourcing Digital Evidence of War Crimes" (*Time*, 18 April 2022) https://time.com/6166781/ukraine-crowdsourcing-war-crimes/>.
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9 Ethical and methodological challenges of documenting the war

Recording testimonies of Ukrainian witnesses after 24 February 2022[1]

Anna Wylegała

9.1 Introduction

In the very first days of the Russian invasion, the Lviv Center for Urban History, a Ukrainian institution active in the field of public history,[2] came up with a project aimed at documenting the Ukrainian experience of everyday life during the war. At that time, the center's building served as a temporary shelter for internally displaced persons who had arrived in Lviv after fleeing from the eastern regions of Ukraine that were at greater risk of being affected by hostilities. Its staff on 24-hour duty soon realized that some of their guests felt a strong need to talk about their ordeal. This is how the idea of documenting the war experience in its immediate aftermath was born. At the same time, it soon became clear that the wave of refugees from eastern and central Ukraine would not stop in Lviv but rather spread first to Poland and then to other countries. This gave rise to the idea of carrying out documentation not only in Lviv, but also in all other places where Ukrainian refugees ended up. The Institute of Philosophy and Sociology of the Polish Academy of Sciences in Warsaw (hereafter: IFiS PAN), as well as representatives of academic institutions from Germany (University of Hagen), Luxembourg (University of Luxembourg), and the United Kingdom (University of St Andrews) were invited to participate in the project. The teams in each country worked at different speeds and adapted some aspects to local specifics, but the basic methodological and ethical assumptions were developed jointly, based on solutions reached by research teams working in various crisis situations.[3] The Polish team carried out the project from March 2022 to August 2023, collecting 210 audio interviews, amounting to a total of more than 600 hours of recordings.

The purpose of this text, which was written when the principal data collection phase of the Polish part of the project had already been completed, is to present the methodology and ethical assumptions, with an emphasis on the challenges that had to be met. The need to approach these issues very carefully was evident from the outset. We intended to interview people who had just left their country fleeing war, who may have experienced violence and lost their loved ones, and who were struggling to adapt to completely new conditions on the ground. These were to be interviews related to an ongoing armed conflict, conducted with people whose country and loved ones could still be in danger, even if these people were now

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relatively safe themselves. Moreover, these were to be interviews with interviewees of a (usually) different nationality than that of the researchers, with citizens of a different country. The project was therefore reviewed by the Ethics Committee at IFiS PAN and the Ethical Board at the University of Luxembourg. The initial arrangements were modified to include most of the recommendations made by the ethics committees, though some changes were introduced throughout the project due to the dynamic nature of the work. In qualitative social research, this procedure is referred to as the mechanism of informal ethics, i.e., the ongoing development of ethical solutions that emerge during fieldwork and cannot be decided upon on the basis of general codes or even guidelines adopted specifically for a particular study at the beginning of the project.[4]

9.2 The research tool and sampling

The primary tool for data collection in the project was narrative interview conducted on the basis of pre-determined interview guidelines that served as a starting point for the conversation with the witness (we provisionally referred to these guidelines as the questionnaire). Our interviews, although recorded according to the questionnaire, which brings them closer to the sociological in-depth interview, allowed the participants to talk about their experience. This represented a change in the conceptualization of roles: from researcher–interviewee to narrator–listener.[5] The questionnaire, which was developed in March 2022, was consulted with psychotherapists. Part one of the questionnaire was common to the Ukrainian and foreign teams and concerned the experience from the early days of the Russian invasion on Ukrainian territory; then, the foreign teams proceeded with part two, which was about leaving Ukraine and living in exile.

The questionnaire focused on everyday life and how it changed as a result of the Russian aggression rather than on emotions. This did not mean that we did not talk about emotions at all, as these naturally came up during the conversation, but that we asked about what happened rather than how the witness felt in a particular situation. One of the most important assumptions was that we did not start the meeting by asking about the beginning of the Russian aggression. We also did not cut the time the narrators spent talking about what they did for a living until the war/their departure from Ukraine. In line with the assumptions of the biographical method,[6] we explored the problem in the context of the person's entire biography, because this allowed us to better understand the meaning that the narrators attributed to their experience. For example, one of our interviewees, born in 1941 and originally from Kyiv, devoted much of his story to his experiences during World War II and Stalinism; when the researcher asked him how he remembered the beginning of the war, he retorted by asking which war she meant. Another interviewee, when recounting the story of her family, remarked that when she had to leave her hometown of Chernihiv, located in northern Ukraine, she knew what to take and what not to take with her, as her grandmother had previously told her about her experience of displacement during World War II.

After the opening question, we moved on to the period that immediately preceded the Russian invasion: we asked about preparations, awareness, rumors, the information sphere, whether the interviewees had anticipated or sensed the scale of the coming aggression and whether they had made any preparations (for example, larger food purchases). The next set of topics covered the first day of the aggression, 24 February 2022, the initial reactions and how the narrators found out about what had just happened. The following questions were about changes in the organization of daily life: work, education, the possibility of buying specific goods and services, hygiene, access to healthcare, access to information, and the phenomenon of volunteering. As for those who stayed in the occupied territories, we asked about contact with Russian soldiers and the attitudes of the local population.

The second part of the questionnaire contained a series of questions about the circumstances surrounding the decision to leave, the packing process, the route traveled, the way of crossing the border, the initial reception on the Polish side. Then we asked our interviewees about how they arranged their lives in Poland, starting from the first day, whether they received any assistance, and if so, whether it came from the state or private persons. The questionnaire also included questions about livelihood adaptation, place of residence, entering the labor market, sending children to Polish schools and social contacts with Polish people, as well as staying in touch with the relatives who remained in Ukraine.

While the initial question about biography and life before the war performed the opening function in the interview, the final question about future plans (insofar as these were possible at that stage) performed the closing function of the narrative. At the very end of the interview, we also asked if the interviewee wanted to add anything else that the researcher had not asked about. This question sometimes produced unexpected results. Two interesting and rather surprising themes that came up in response to this question were gratitude towards Poland and Polish people and hatred towards the Russians. The former initially aroused our suspicions – we surmised that this could have been a narrative intended to please the Polish researcher. However, it turned out that this theme appeared quite as often in the conversations recorded by refugee-researchers. The open display of hatred towards Russia and the Russians, in turn, was at least at the beginning a source of some discomfort for us as researchers, because the interviewees quite often expected us to share this hatred.

All the interviewees familiarized themselves with the questionnaire in advance, which influenced the course of the interviews. They could decide which questions they wanted to answer and also talk about issues that were not included in the questionnaire. As a result, many interviewees came to their interviews with a pre-prepared story, which virtually required no questions, apart from requests to clarify or specify factual details.

We carefully selected people for interviews within the project. We only wanted to talk to adults who declared a good mental state and expressed a clear willingness to participate in the project. Due to the potential for retraumatization, we excluded the possibility of persuading or enticing people to talk. Also, for this reason, the researchers did not record people who were dependent on them in any

way (e.g., those they had previously helped after their arrival in Poland or those they employed). Financial or personal dependence could create a risk that the interviewee would agree to participate in the study due to the influence of others or the desire to maintain a good relationship. Another rule was to talk only to people whose livelihoods were relatively stable (they were assured of housing, their legal situation was settled, their basic material needs were met) and their stay in Poland lasted at least 4 weeks. We did not offer any remuneration, other material benefits or assistance for participation in the study. All these criteria were designed to minimize the participation of people who were in an extremely temporary situation or had an open mental crisis.

Some of these initial criteria were modified as the project proceeded. One of them was the requirement to talk only to people whose livelihoods were already stable. In the spring of 2022, we thought that one of the indicators of such stabilization would be that the interviewee had a residence that was not strictly transitory. In the first weeks after the escalation of Russian aggression, massive numbers of such transit sites sprang up in Poland: exhibition venues, sports halls, and leisure centers were transformed into refugee shelters. Initially, we did not want to record interviews either there or in rooms temporarily provided to refugees by Polish families. However, we decided to change our approach. Many of these facilities (hotels, hostels with individual units) are still in operation today, but their housing conditions have been arranged to ensure that the occupants have privacy and independence. Meanwhile, in some Polish families, hosting refugees has taken the form of stable co-living.

The issue of the interviewees' good mental state remained a non-negotiable criterion. As our team members were not qualified to assess the emotional state of the interviewees with the use of professional tools, we relied on self-declarations from the narrators. We took the final decision after an initial interview or informal meeting. An additional criterion was residence in Poland for at least 4 weeks, which was intended to exclude people who would develop PTSD (post-traumatic stress disorder) in clinical form following the interview. The research practice showed that those who expressed their willingness to take part in the study indeed displayed no signs of a bad emotional state, but a few situations demonstrated that it was not always possible to avoid this. In mid-June 2022, one researcher recorded an interview with a middle-aged interviewee who had arrived in Poland from Mariupol 2 months earlier. The interviewee learned about the project from her sister, who had previously participated in an interview, and she expressed her willingness to talk. During the interview, however, she started to behave in a way that suggested a dissociative state typical of PTSD. The researcher suggested stopping the interview, but the interviewee insisted on telling her story to the end. This situation confirms that the risk to interviewees remains a real threat despite all the efforts to reduce it.

Most interviewees in the project were recruited through the so-called snowballing effect: each successive interviewee referred us to other potential participants. Although at the start of the project we thought that it would be most ethical to recruit interviewees through social media and other information channels, which at the recruitment stage do not involve personal contact and give interviewees the

opportunity to respond to the project announcement or not, this method of recruitment proved ineffective. Establishing a connection in such a project required a high degree of trust and personal contact was indispensable. Recruitment through social networks and advertisements brought more success only a year after the start of the Russian aggression: it appears that this was related to a significant stabilization of the refugee population in Poland.

9.3 The team and its preparation

The research tool was designed merely as the starting point for the conversation: in some interviews certain questions were not asked at all, while others featured questions that were impossible to anticipate at the stage of designing the questionnaire. In addition, from the very beginning, the project assumed a high degree of the researchers' independence. This meant that the team members reached out to potential interviewees on their own and organized the research process. For this reason, from the outset our team sought to bring in people who already had experience in recording qualitative interviews: oral history, biographical, narrative. It was obvious to us that a project with such a difficult topic was not a good time to train inexperienced people, even if they were most eager to cooperate.

The second important criterion was language skills. Fluency in at least one of the two languages spoken by our interviewees, Russian or Ukrainian, was a prerequisite. For this reason, several researchers from the older generation, who had overestimated their language skills, quickly gave up recording the interviews. Our team included one researcher from Ukraine, who had already worked in Poland before the war, and two female researchers who were refugees themselves. In particular, the presence of female refugees-researchers in the team opened many doors and facilitated contacts with potential interviewees. We did not involve any volunteers in the project: since it was not quantitative, we were not looking to maximize the number of accounts recorded, but rather to control the substantive preparation of the researchers and ensure the high quality of their work. Moreover, we concluded that recording this kind of interview is a hard, emotionally and intellectually demanding work, and as such should be paid for, especially when the researcher was herself a refugee.

The interview recording team in Poland was interdisciplinary and consisted of mostly female sociologists, historians, anthropologists, and oral history practitioners, which helped to maximize the use of various methodological and theoretical perspectives. Although it was not our intention, the final composition of the 12-member team, which took permanent shape in the autumn of 2022, included only two men. In practice, this meant that women's accounts were recorded primarily by women in this project.

All those who recorded the interviews received training on the research process and record-keeping, with particular emphasis on methodological and ethical issues. Initially, during the team-formation phase, these trainings were collective, but over time we provided individual training to researchers who were joining the team. In addition, the team met online every fortnight, which, especially at the beginning,

resulted from the need to modify various methodological assumptions. Psychological support was provided to the team throughout the project. As Agnieszka Golczyńska-Grondas and Katarzyna Waniek rightly point out, while the need to care for the psychological well-being of interviewees is obvious in qualitative research, it has only recently been emphasized that the researcher is also a "feeling person" who may experience negative emotions as a result of their participation in the research.[7] When the research deals with difficult topics, it can be assumed with a high degree of certainty that the researchers will experience emotional discomfort originating from various issues and expressed in different ways.[8]

Initially, we assumed that this support would take the form of individual consultations with a psychologist working with the team, but eventually we opted for the formula of supervision. This meant involving an outsider to run the team's regular meetings (previous training sessions had been run by the project's management and external experts), someone with experience in recording interviews during armed conflict, but not involved in our project. As Golczyńska-Grondas and Waniek write, supervision, understood as a forum in which a group of people reflectively analyze their professional work,

> is of particular importance [...] in all the fields where professionals work with <<bearers of suffering>> and wherever the specific nature of working with people [...] entails the risk of misunderstanding, failure, unpredictability and, consequently, a huge emotional burden, including secondary post-traumatic stress syndrome.[9]

In our case, the change in the nature of the team's meetings coincided with the emergence of the first highly stressful and problematic situations in the research practice. The formula of supervision creates a space to talk about such issues, and its role is twofold: to provide comfort and a support group for the researchers, which allows them to continue working effectively; and to address ethical issues, by which it acts as a mechanism of informal ethics.

Another important function of supervision is the improvement of methodological skills. Although at this stage our meetings were no longer designed as training sessions, discussing each case meant that not only the person directly affected by the situation stood to benefit. We learned from each other and, by exploring the strategies adopted by individual researchers, we were better prepared for problem situations in our own research practice.

9.4 The interview situation and preparation for the interview

All the criteria for those involved in the study were intended to minimize the negative emotional effects of participating in the interview. In the next section of this text, I will outline the remaining methodological and ethical principles that guided us in this project, starting with the interview situation itself.

We wanted to ensure maximum comfort and safety on different levels for all those who decided to participate. This included providing the interviewees with

as much information as possible about the very idea of the project, its objectives, the process of conducting the interview, its content, and subsequent use of the recording. Most of the interviews were preceded by an informal meeting to convey this information to the interviewee. At a minimum, the interviewee received by e-mail a leaflet about the project and the bodies involved in its implementation, as well as the address of the website where our goals and methodology were described in detail in Polish, Ukrainian, and English, and a short list of questions (the interview scenario). These materials also specified the ways in which the recorded account could be used, giving the interviewee a chance to think about which options for recording, archiving, and sharing her account she wanted to agree to.

The interviews were recorded in audio format only, without video recording, and only on-site. The audio format provided the necessary intimacy for the conversation and was easier and safer for those interviewees who chose to completely or partially anonymize their interviews. In turn, the decision to conduct the interviews only on-site was dictated by our concern for the emotional safety of both the interviewees and the interviewers. After consulting with psychotherapists, we concluded that remotely recorded interviews would make it impossible to build adequate trust, but above all would not allow for a response in case the interviewee suffered an emotional crisis.

The interviews were recorded in the language chosen by the interviewee. Both the questionnaire and all the other documents and information about the project were prepared in Russian and Ukrainian. We did not want to impose the language of the interview in any way, much less to suggest that Ukrainian was the "official" language of the project, given that publicly available data show that the majority of those living in the areas where the refugees came from speak Russian on a daily basis. To this end, for example, the researchers who spoke only Ukrainian (and did not actively use Russian) contacted people solely from western and central Ukraine, so as not to impose, even through the first contact, the language that would later be used in the interview. However, things took a different turn than expected.

Although the vast majority of our interviewees came from eastern and southern Ukraine, out of the 210 accounts collected, only 73 were interviews conducted in Russian. It is therefore highly likely that during a large number of interviews conducted in Ukrainian, the interviewees consciously decided to speak in the language they did not use on a daily basis. The researchers were quite often aware of this, having witnessed the interviewees' interactions with their family members. It also happened that while the actual interview was recorded in Ukrainian, all the informal communication before and after the recording took place in Russian. Another example is that some of our interlocutors unintentionally switched from one language to the other: for example, one of the interviewees (born in 1955, from Mariupol) started speaking in Ukrainian, switched to Russian in the middle of the interview and then used surzhyk in the last part of the recording, which lasted several hours.[10] This was most often registered only when reading the transcripts – the narrators spoke different languages during the conversation, sometimes mixing them within a single comment. It appears that conducting an

interview in the official language of the narrator's country, especially when they were fully aware that the material would be archived, also became a moral/identity choice. One of the narrators, a 30-year-old from Dnipro, firmly refused when the researcher suggested that she switched to Russian, thinking that this would make it easier for her – she explained that after the outbreak of the war she no longer wanted to speak that language.

We wanted to talk to the interviewees in their comfortable places. Although at the beginning of the project we assumed that the interviewees would feel most secure in their homes, as the documentation work progressed it became clear that this intuition was not always accurate. While some interviewees did invite us into their homes, for others it was the least comfortable option. This was because the housing conditions of a large number of Ukrainian female refugees are more than modest: these women often share a small apartment with a large, sometimes multi-generational family, and sometimes also with another Ukrainian family. In this situation, a better option was to meet at the researcher's place of residence or to find another safe place that gave the interviewees a sense of intimacy and also served as "neutral ground." Local activity centers, rooms in academic institutions and even presbyteries proved useful for this purpose. Since we collected sensitive data, we did not conduct recordings in public places such as cafes.

Initially, we also placed great emphasis on ensuring that the interviews were not recorded in the presence of third persons. We assumed that roommates, hosts, co-workers, children, or anyone who could influence the narrator's frame of mind and her story should not be there. However, the practice turned out to be quite different in this aspect as well. In some cases the interviewee would take someone with her to the meeting at the agreed place – her husband, son, or friend. This gave her a sense of security. Two of the few couples we recorded did not agree to be interviewed separately. Sometimes the interviewees insisted on being interviewed at their place of residence, even though it did not guarantee privacy. During one interview, which was recorded in a small studio, the researcher only realized after a snack break that the interviewee had told her teenage son to lock himself in the bathroom with headphones on his ears for the duration of the interview.

Finally, we mostly interviewed mothers caring for young children: research with such interviewees always has its peculiarities, especially during long encounters such as narrative interviews.[11] On a number of occasions, we recorded interviews in the presence of infants and school or preschool children; in the case of the latter, the narrators sometimes asked them to put on headphones/watch a cartoon in a distant part of the room when they were talking about issues that a child should not overhear, such as sexual violence. In other cases, we heard the explanation that "the children have lived through all this anyway, so there is no reason why they should not hear about it."

9.5 Caring for the interviewees and data security

Caring for the interviewees meant that during the interviews we needed to provide them with as much emotional comfort as possible when talking about war, violence,

suffering, and loss. Our researchers prepared for the interviews: they knew what was happening in the interviewee's region of origin, they were attentive, ready to listen, and empathetic. As noted earlier, they followed the difficult emotions of the interviewees, but did not delve deeper into the themes that could trigger them. Since collecting evidence of Russian crimes was not the aim of our project, we also did not ask about the details of violent acts if our interviewees did not choose to raise this issue themselves. Nevertheless, the topic quite often came up spontaneously. As Agnieszka Golczyńska-Grondas and Marek Grondas point out,[12] participation in any scientific study cannot replace interventionist psychological support, let alone systemic therapy, but a skillfully conducted interview can be therapeutic.

Since even the most skillfully conducted interview can make the interviewee feel psychological discomfort, we always offered psychological support after the interview ended: the contact details of a Ukrainian- and Russian-speaking psychologist were listed on the copy of the recording consent form that we gave to the interviewees. The researcher mentioned this possibility while stressing that such contact did not have to be made through us and that the psychologist was committed to confidentiality. Once again, however, the research practice showed that what seems appropriate in theory does not always work in practice: our interviewees did not use this form of support.

This situation was very surprising and forced us to ask the question whether the psychological support offered was unnecessary or whether the interviewees did not use it for other reasons. We would like to think that the interviewees did not need psychological support, because the sampling used ensured that we were not talking to participants who were in a weak emotional state and not ready to be interviewed, and that the methodology we had developed meant that the interview itself was not a difficult experience. However, two issues lead us to believe that this was not the only explanation. Firstly, the use of psychological assistance is much more associated with mental illness in Ukraine than in Poland and therefore less socially acceptable.[13] This was seen in the irate and outraged reactions of some interviewees to information about possible psychological support ("I am not insane," "I am still coping on my own"). The interviewees did not deny the actual possibility of experiencing problematic emotional states, but they disagreed with defining them as (potentially) requiring professional support.

Secondly, our temporary cooperation with a person who recorded the interviews and at the same time worked at a therapeutic clinic that offered free psychological assistance to refugees from Ukraine sheds some light on the reasonableness of offering psychological assistance. The interviewees of this researcher, like all the others, did not contact the psychologist listed in the recording consent form, but some of them returned to this researcher after some time to ask if she could provide them with support as a psychotherapist. This was not possible due to the inadmissibility of combining the professional roles of researcher and therapist in a relationship with one person, but it refuted the hypothesis that the people interviewed did not need psychological support. Therefore, it appears that a professional psychologist who was unknown to the interviewee simply did not inspire trust, but we were unable to find a more optimal solution.

In addition, the interviewers contacted their interlocutors some time after the interview to ask about their well-being. Sometimes this was a one-off contact, and sometimes it was repeated, depending on the needs and resources of both sides. Apart from the possibility to check on the interviewee immediately after the interview, maintaining contact for some time had one more function: it gave the interviewee a chance to distance herself from the interview situation and to reconsider the consents given to the researcher. This brings us back to the issue of agency: the process of working with the informants did not end when the consent to be interviewed was signed; it could be modified or even withdrawn at any time. Therefore, making contact again was also the time to revisit the issue of archiving and recording: did the interviewees feel comfortable with their stories? Or did they want to remove some parts after reconsidering it? We assume that such changes are possible at any time.

Our interviewees were granted agency to decide what to speak about and how the testimony would be used. They were in complete control of the terms on which they would give us their testimony. They had a choice of three privacy options: to participate in the study with the use of their name and surname; with the use of pseudonymization of their name and surname, but without pseudonymization of other personal data (e.g., the name of their city, street, workplace, names of other people mentioned in the interview); and with full pseudonymization of all personal data. In addition, the interviewees could specify the purposes for making their account available (scientific, exhibition, educational, artistic), as well as the final place of archiving, and also add specific wishes regarding the way the recording should be used (e.g., to withhold the material for a certain period of time or to request the anonymisation of individual passages).

In practice, this means, for example, that a given account can be made available under name and surname in Poland, but only for academic purposes, and with partial pseudonymization for artistic purposes, while in Ukraine (where the entire collection will be transferred after the end of the war) it is possible only with full pseudonymization and only for educational purposes. Although our interviewees declared that they appreciated such a wide range of possibilities, in practice most of them (about three in four) did not ask for any form of anonymization, which in our opinion shows that their motivations included the desire to be heard by the widest possible audience, the wish to "report their story to the world." This fits very strongly with the basic idea of oral history as such, that is, to give voice to people who would otherwise not be heard.

Another ethical dimension of the project concerns security of the collected data. It encompassed a range of activities at the stages of data collection, processing, and archiving, as well as plans for subsequent sharing. In the project, we collected not only ordinary personal data, which should be protected in and of itself, but also sensitive data, concerning health, political views, and ethnic background. Most importantly, however, we collected data on the ongoing armed conflict, including violence, also sexual violence, the situation in the occupied territories and the actions of the Ukrainian military. Although our informants were staying in Poland, some of their relatives remained in Ukraine, including in the occupied territories,

which meant that any unauthorized use of such data would expose them to danger. The husbands of some of our informants were fighting on the front lines and these women often requested us to remove from their accounts the information they provided on the location of troops.

Data security also applies to unexpected and incidental disclosure, that is, such data as appeared in the narrative accidentally, with the narrator sometimes being unaware that she disclosed them. In relation to such data, we applied the procedure of double-checking the intentionality of communicating with them. This meant that after the interview was over, the researcher returned to these fragments and ascertained whether the interviewee wanted them to remain part of the interview, while also reminding her that they could be pseudonymized.

Data security also includes a number of very practical rules for the day-to-day handling of data. All the team members signed a confidentiality clause. Recordings were kept on private storage media only for as long as necessary. Personal data (the names and contact details of the interviewees and copies of project documentation) were kept in a different location from the recordings. We also made backup copies of the entire collection.

From the outset, the project was documentary rather than research-oriented, which meant that we were collecting valuable sources in order to make the collection available to interested researchers at some point. However, while at the start of the project we thought that the war would soon be over and that it would be possible to open the collection quickly, it became clear over time that this would not happen and that the conditions for sharing the data would have to be given much more attention than we had assumed, since it would have to be done amidst the ongoing conflict. For this reason, we only made the collection available three times during the period of collecting data, despite receiving multiple requests. Ten anonymized interviews were provided as source material to enhance the permanent exhibition on Russia's aggression against Ukraine at the House of European History. Similar samples were made available to a Ukrainian director who was preparing a play on the Ukrainian refugee experience in Poland and to colleagues from our institute who were launching a research project on Ukrainian refugee children in Polish schools and used our data to prepare their research tools.

The entire collection, together with the interviews recorded by the teams from Ukraine and Luxembourg, will be made available in an open-source software database, which is being developed at the time of writing under a grant from the National Science Centre that our team received for the years 2024–2026. This database will provide secure access to material of different status for various types of users at selected sites in Poland, Ukraine, and Luxembourg.

9.6 Conclusion

The methodological and ethical assumptions adopted by our team had a direct bearing on the nature of the collection obtained. A different team recording interviews according to different principles would probably have obtained completely different results. In the conclusion to this text, therefore, let me briefly

characterize our collection, show its limitations and potential, and offer some reflections to the reader.

Our collection of interviews broadly corresponds to the general structure of the Ukrainian refugee population in Poland in terms of gender, education, and place of residence before the war. We collected accounts primarily from young and middle-aged women, most of them with children, with higher education, who came from central, eastern, and southern Ukraine. The majority of our interviewees described themselves as Ukrainian, though a few gave their nationality as Russian, Tatar, or Chechen; most identified their mother tongue as Ukrainian but spoke Russian on a daily basis until the outbreak of the war. The majority of our interviewees were living in a big city in Poland at the time when the interviews were recorded (mostly in Warsaw, Krakow, Poznan, the Tri-City, and Lodz), although we have also recorded several dozen accounts in smaller urban centers and in the countryside. We have obtained a dozen or so testimonies each from people who fled from Mariupol, Kherson, Kyiv, Kharkiv, Chernihiv, and Dnipro.

This particular sampling and strict adherence to ethical principles obviously means that our project did not reach certain categories of people or record certain types of experiences. The collection does not include accounts of those who could not find their place in Poland at all, who lived in temporary centers for a few months and then returned to Ukraine, or those who were in Poland for a very short time and then either returned to Ukraine or left for another country. We also did not record accounts of people in emotional crisis. Given the fact that we recruited interviewees by the snowball method and through personal contacts, the collection includes a strong representation of people linked to the academic community. The Polish team did not record many accounts from the occupied areas that were liberated, because we conducted interviews only in person, we did not assign the recording of interviews to researchers whom we could not provide with training, and we did not organize trips to Ukraine for security reasons. We do not have any recording that would describe the mass murders in Bucha, although we have an interview with a person who managed to flee Bucha beforehand. Such accounts are in the collection that has been assembled by our partner team from Lviv.

Paradoxically, the potential for the use of the collection we have amassed also stems from the way in which it was created. The open nature of the interviews means that the approximately 600 hours of recordings we collected in Poland constitute extensive qualitative material that can be used by researchers, educators, and artists alike. In turn, the joint development of methodological and ethical principles as well as close cooperation across several different countries have produced data sets that can be collated and analyzed comparatively.

The execution of this type of project, which deals with an ongoing armed conflict and is based on interviews with a highly volatile population, also shows that it is impossible to plan many things in such a research process. Even when utmost care is taken, methodological and ethical assumptions necessarily undergo modifications. This makes it all the more important that such projects are carried out by experienced research teams with the necessary substantive and institutional support. In the spring of 2022, both in the Polish and Ukrainian scientific

community, many were saying that a crisis situation leaves no room for documenting and researching the fate of victims, because this is the time for humanitarian aid and psychological support.[14] When designing and developing this project, we took the view that documentation obviously cannot be a substitute for meeting the basic needs of interviewees, but it can follow right behind. If implemented responsibly, it performs important functions both in relation to the group studied and more broadly to society (here: both Polish and Ukrainian). The implementation of this project over the past several months has confirmed our intuition at the time.

Notes

1 This text is based on research conducted as part of the project "24.02.2022, 5 am: Testimonies from the War," implemented by the Institute of Philosophy and Sociology of the Polish Academy of Sciences in partnership with the Mieroszewski Centre and the Polish Oral History Association, with funding from the Foundation for Polish Science.

2 The center has for years been involved in projects to document current events in Ukraine – for example, the 2014 Maidan protests and the war in the Donbas, which has been ongoing since the same year, as well as the experience of the pandemic; see www.lvivcenter.org/updates/body-and-city/ and www.lvivcenter.org/en/academic-en/research/voices-of-resistance-and-hope/ (accessed: 12 December 2023).

3 See, e.g., Mark R. Cave, Stephen Sloan, *Listening on the Edge: Oral History in the Aftermath of a Crisis* (Oxford University Press 2014); Stephen Sloan, "Oral History and Hurricane Katrina: Reflections on Shouts and Silences" (2008) 35, *The Oral History Review* 2, 176–186.

4 See Adrianna Surmiak, *Etyka badań jakościowych w praktyce* (Scholar 2022), 49; Guillemin Marilys, Gilliam Lynn, "Ethics, Reflexivity, and 'Ethically Important Moments' in Research" (2004) 10 *Qualitative Inquiry* 2, 261–280.

5 D. Jean Clandinin, F. Michael Connelly, *Narrative inquiry: Experience and story in qualitative research* (Jossey-Bass 2000).

6 Polish sociologist Florian Znaniecki is considered to be the author of this concept. For its description, see, e.g., Kaja Kaźmierska, *The Generational Experience of the Shoah Survivors* (Academic Studies Press 2012).

7 Agnieszka Golczyńska-Grondas, Katarzyna Waniek, "Superwizja w jakościowych badaniach społecznych. O radzeniu sobie z trudnymi emocjami badających i badanych" (2022) XVIII Przegląd Socjologii Jakościowej 4, 6–33.

8 Jakub Gałęziowski, "When A Historian Meets Vulnerability. Methodological and Ethical Aspects of Research on Sensitive Topics and with People Affected by Difficult Experiences" (2020) X Rocznik Antropologii Historii, 13, 169–189; Wiktoria Kudela-Świątek, "Siła emocji w badaniach terenowych" (2020) 13 Rocznik Antropologii Historii, 7–17.

9 Golczyńska-Grondas and Waniek, 8.

10 On the complex language situation in Ukraine see, e.g., Volodymyr Kulyk, "Language Attitudes in Independent Ukraine: Differentiation and Evolution" (2017–2018) 35 Harvard Ukrainian Studies1, 265–292.

11 See Leahy Carla Pascoe, "Selection and Sampling Methodologies in Oral Histories of Mothering, Parenting and Family" (2019) 47 *Oral History* 1, 105–116.

12 Agnieszka Golczyńska-Grondas, Marek Grondas, "Biographical research and treatment. Some remarks on therapeutic aspects of sociological biographical interviews" (2013) IX *Przegląd Socjologii Jakościowej*, 4, 28–49.
13 Quirke Eleanor, Klymchuk Vitalii, Suvalo Orest, Bakolis Joannis, Thornicroft Graham, "Mental health stigma in Ukraine: cross-sectional survey" (2021) 8 *Glob. Ment. Health* (Camb) 11.
14 See, e.g., a certain perspective on these attitudes Gelinada Grinchenko, "Oral History of War: Issues and Cautions Regarding This Research Method" (*Heinrich Böll Stiftung*, 26 August 2022), https://ua.boell.org/en/2022/08/26/oral-history-war-issues-and-cautions-regarding-research-method. (accessed: 5 August 2023).

10 The Center for Civil Liberties

Chronicler of crimes committed after Russia's invasion of Ukraine

Roman Nekoliak

10.1 Introduction

On 23 May 2022, a court in Kyiv sentenced Vadim Shishimarin, a Russian soldier, for killing Oleksandr Shelipov, an unarmed Ukrainian civilian.[1] The trial of Shishimarin was the first prosecution of a war crime committed after the 2022 Russian invasion of Ukraine.[2] The success of this trial brought, among other things, justice for Kateryna, Oleksandr's wife. The victims in this case are no longer mere numbers; the perpetrator has been held accountable for his act. The trial also sets a precedent, which can deter other violations of international humanitarian law (IHL).

Since the Russian full-scale invasion of Ukraine on 24 February 2022, Russia has committed numerous war crimes and other violations of IHL, population displacement, and caused massive loss of life. The list of Russia's reported violations includes arbitrary detentions and arrests, extrajudicial executions, enforced disappearances of civilians with the complicity of representatives of military administrations, beatings and torture, rape, deportation and forced mobilization, indiscriminate attacks, and attacks deliberately targeting civilians and civilian infrastructure.[3]

Ukraine's civil society organizations have joined national resistance and defense efforts, expanding on their traditional advocacy and watchdog roles. In this regard, the Center for Civil Liberties (CCL) has had a crucial role in gathering records of war crimes after Russia's latest invasion, building on its experience documenting war crimes and torture since the start of the War in Donbas in 2014. This chapter considers the Civil Society Organization's (CSO) work in general and the CCL's involvement in particular, exploring methodologies and initiatives to end Russia's impunity and ensure justice for all victims of Russia's crimes.

10.2 Evolution of the Center for Civil Liberties

The Center for Civil Liberties is a Ukrainian human rights organization founded in 2007 by Oleksandra Matviichuk, a human rights lawyer. For 15 years, the CCL has been working to protect human rights and promote democracy in Ukraine.[4] The CCL has witnessed the most momentous events in Ukraine's contemporary history, including the turbulent events of the Euromaidan protests

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(2014), the annexation of Crimea (2014), the War in Donbas (2014–2022), and the ongoing full-scale Russian invasion. In 2022, the CCL was awarded the Nobel Peace Prize, and its role in documenting war crimes and human rights abuses was recognized.[5]

The CCL began documenting war crimes independently starting in 2014 with the War in Donbas. The organization has also been actively working towards the release of Ukrainian political prisoners and civilian hostages illegally detained in Russia and in temporarily occupied Crimea.[6] The CCL conducted extensive public campaigns to engage the European community and help release them. The campaigns included #saveOlegSentsov, which eventually led to the release of Crimean filmmaker and activist Oleg Sentsov in a prisoner swap, and the #PrisonersVoice project, which contributed to numerous releases.[7] From February 2022, the CCL has focused its efforts on documenting war crimes and other human rights violations in pursuit of justice and accountability. Since 2022, as a member of the joint undertaking "Tribunal for Putin" (T4P), the organization has documented more than 40,000 cases of war crimes and human rights violations up to June 2023.[8]

In addition, the CCL continues to work on fighting impunity, promoting the international criminal justice system and IHL compliance, implementing legal mechanisms for prosecuting Russian war crimes committed in Ukraine, advocating for the ratification of the Rome Statute by Ukraine, promoting the interests of Ukraine abroad and in international organizations, and informing on war crimes committed by the Russian forces in Ukraine. Moreover, the CCL is working on the creation of a Special Tribunal to prosecute the crime of aggression against Ukraine committed by the Russian Federation since the International Criminal Court (ICC) has no jurisdiction on this crime with regard to Russia.[9]

In its work, the CCL has partnered with various international human rights groups, including the International Federation for Human Rights (FIDH), the Public International Law & Policy Group (PILPG), the Global Accountability Network, the Civic Solidarity Platform, Parliamentarians for Global Action, and the Coalition for the International Criminal Court.

Together with other CSOs, the CCL set up the "Tribunal for Putin" (T4P) initiative in pursuit of justice and accountability. The initiative was launched to document atrocity crimes under the Rome Statute of the ICC, which include war crimes, crimes against humanity and genocide in the context of the Russian armed aggression against Ukraine.

The initiative is working at the international level using existing mechanisms in the UN, the Council of Europe, the OSCE (including Moscow Mechanism), the EU, and the ICC to avert further crimes and bring perpetrators to justice. The participants of the initiative cover all regions in Ukraine that have been impacted by Russian aggression. The documentation methodology used constructs a daily chronological reproduction of the atrocity crimes committed by Russian forces since 24 February 2022. Currently, this is the only initiative with a network based on regional and local organizations. Each local CSO is responsible for a

specific area of Ukraine, where it has been working for years before the start of Russia's full-scale aggression. As of June 2023, the database of the T4P initiative contains more than 40,000 instances of war crimes.[10] The initiative advocates for parties in a conflict to comply and respect IHL rules. The CCL's work to educate the public on IHL rules is based on the idea that a sound acquaintance with the law is essential for effective application and, consequently, for the protection of the victims of armed conflicts. The CCL works toward compliance with the Geneva Conventions and their Additional Protocols by strengthening the international criminal justice system.[11]

The large number of crimes already documented and Russia's continued use of "war crimes as a weapon"[12] have made it obvious that the Ukrainian judicial system will not be able to handle the enormous scope of work, which includes investigating and prosecuting each crime. It is therefore important to find ways to increase the capability of the national judicial system to deliver justice to all the victims of this war.

Moreover, this documentation work helps to highlight issues that need to be addressed immediately to prevent further mass human rights violations and war crimes. This is best illustrated by the work done on the forcible transfer and mass deportation of hundreds of thousands of Ukrainians to the territory of the Russian Federation and the denationalization and forced adoptions of children. On 17 March 2023, the ICC issued arrest warrants for President Vladimir Putin and Russia's Commissioner for Children's Rights Maria Alekseyevna Lvova-Belova, for "responsibility for the war crime of unlawful deportation of population and that of unlawful transfer of population from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children."[13]

For the first time since its establishment, the ICC has issued an arrest warrant for the president of a permanent member of the UN Security Council. This holds tremendous significance for Ukraine as it marks a substantial victory for international justice and the global efforts to combat impunity. The warrant is conclusive, and the cited crimes are not bound by any statute of limitations. As a result, this warrant instills further hope that the culprits will be prosecuted and brought to justice for their actions.

In April 2022, the CCL and the Ukrainian Bar Association submitted to the OSCE ODIHR a joint information package on Russia's war crimes in Ukraine under the OSCE Moscow Mechanism.[14]

Our information package to the OSCE contains evidence on premeditated killings, torture or inhuman treatment; premeditated attacks on civilian objects: cities, villages, houses or buildings, deliberate strikes on houses intended for religious, educational, artistic, scientific or charitable purposes, historical monuments, hospitals and places of concentration of the sick and wounded; coercion of the citizens of the opposite side to take part in military actions against their own country, intentionally committing acts that expose the civilian population to starvation, as a means of waging war by depriving it of its necessities for survival, including deliberately obstructing assistance as established in the Geneva Conventions in

Donetsk, Dnipropetrovsk, Zaporizhia, Kyiv, Luhansk, Sumy, Kharkiv, Kherson, Chernihiv regions.

Moreover, the CCL has provided recommendations regarding the next Moscow Mechanism Reports on the state of human and civil rights in the context of the Russian war on Ukraine.[15]

CCL emphasizes that the goal must be to change the existing framework in a way that rapporteurs would have sufficient time, provisions and qualified specialists for full-fledged monitoring in the framework of the armed conflict in Ukraine. The operational work of the Moscow Mechanism concerning the situation in Ukraine should also serve as a blueprint for working with other countries, such as Belarus.

Even though the Moscow Mechanism does not investigate crimes, future reports should offer clearer conclusions contributing towards ensuring accountability for the crimes committed in Ukraine.

It is our strong belief that the CCL documentation work as well as the efforts of other NGOs and journalists have helped to highlight issues that need to be addressed immediately to prevent further mass human rights violations – such as the forced relocation of hundreds of thousands of Ukrainian citizens, including children, to the territory of the Russian Federation – and spark response from international community.

Center for Civil Liberties and its partners under The Tribunal for Putin (T4P) global initiative value integrity in their work therefore they do not ignore any violations attributable to the Ukrainian side. If such cases fall into CCL's attention they are being thoroughly documented.

Considering the importance of the provisions of IHL, Ukraine requires compliance with the rules of war in its force. Thus, in 2017, the Ministry of Defense of Ukraine approved an order on the procedure for implementing the norms of international humanitarian law in the Armed Forces of Ukraine. Therefore, Ukraine fully fulfills the requirements of IHL, especially in such sensitive issues as prisoners of war and respect to dead, wounded, and horse de combat.

Combat Statutes of the Armed Forces of Ukraine, require that the rules of war, especially for the protection of the civilian population, must be taken into account at the stage of combat planning.

As we have repeatedly noted, respect for and adherence to IHL is a reflection of the army's discipline and professionalism, morality, and humanity. The Ukrainian army's aims to build itself to a NATO standard. Through the active support of national international lawyers, civil society and international organizations Ukrainian military receives up-to-date IHL training.[16]

Compared to the Russian side, the Government of Ukraine is transparent and open to this issue. Illustrated by providing OHCHR[17] with full and confidential access to POWs in official places of internment. Moreover, UAF understands that appropriate treatment of the dead is a fundamental human need for the bereaved.

Despite all the legitimate concerns and shortcomings, the Ukrainian government shows a clear intention to be a rule-of-law state, to uphold IHL standards,

effectively protect POWs and ensure timely and effective investigations into all allegations of IHL and human rights violations by Ukrainian forces.

10.3 Closing the accountability gap

The CCL pursues justice with the aim of ending the impunity of the Russian Federation and deterring future atrocity crimes and other violations of IHL. The Ukrainian state investigative and judicial bodies have already set the justice process in motion. However, the Ukrainian judicial system does not have the resources to work on all these cases, especially given the scale of Russian war crimes. It is therefore important to find ways to increase the capability of the Ukrainian judicial system to respond to appeals for justice from all of the victims of this war by involving international organizations and the national judicial systems of other countries. The ICC may end up prosecuting several cases, but those will most likely be very limited in number. Ukraine will have to handle all the other cases. Instruments should be found or created to help engage international elements in national investigations and administration of justice, for example, under the model of a hybrid international tribunal or by implementing the principle of universal jurisdiction.

The CCL advocates for the implementation of the principle of universal jurisdiction to allow national justice systems in other countries to prosecute perpetrators of international crimes regardless of the nationalities of the perpetrator and victim and of the country where the crimes were committed.[18] A recent example of successful use of this principle are the trials of ISIS soldiers of German descent for international crimes against Yazidi women in Syria and Iraq.[19] A German court has also successfully prosecuted Syrian intelligence officer Anwar Raslan for crimes against humanity by applying this principle.[20] The German judiciary has done great work in bringing justice for the victims. According to Oleksandra Matviichuk, the universal jurisdiction principle and international cooperation in justice accountability field is essential since

> there are thousands of cases. Several of them could be prosecuted by the ICC but far from all. Others will be left to the Ukrainian national jurisdiction but it will not be able to handle this enormous scope of work. New instruments should be found or created, for example under the model of a hybrid international tribunal.[21]

A significant goal for the CCL is the ratification of the Rome Statute. Ukraine signed the Rome Statute in 2000 but has not yet ratified it, citing the need for constitutional amendments to be able to do so. Ukraine has made two declarations under Article 12(3) of the Rome Statute, giving the ICC jurisdiction over alleged crimes committed on Ukrainian territory from February 2014 onward.[22]

The civil society has been calling on Ukraine to formally join the ICC for many years.[23] The constitutional provisions cited as reasons for non-ratification of the

Rome Statute concern the principle of complementarity, the irrelevance of official capacity, the transfer of Ukrainian citizens to the ICC, and the enforcement of sentences in third States.

The Constitutional Court of Ukraine in 2001 ruled that full ratification of the Statute would contradict the Constitution of Ukraine, in particular, some provisions of Chapter VIII "Justice." Thus, Art. 124 of this Section provides for the possibility of administering justice only by the courts of Ukraine and excludes the delegation of this function to other structures, such as the ICC. However, this obstacle was removed in June 2019, when amendments to Article 124 of Section VIII of the Constitution came into force. The article was supplemented with part 6, which states that: "Ukraine shall recognize the jurisdiction of the International Criminal Court under the conditions set forth in the Rome Statute of the International Criminal Court." The amendment recognizing the ICC entered into force on 1 July 2019. Since then, Ukraine can ratify the Rome Statute.

Ukraine's hesitance to ratify the Rome Statute can be attributed to the politicization of the issue by certain domestic actors, a misguided understanding of the operation of the principle of complementarity, and a misinterpretation of the ICC's functions. It may also be tied to a lack of political will.[24] Should Ukraine become a fully fledged member state to the Rome Statute, it would have to begin making contributions to the ICC's budget.[25] Some argue that for a nation that is currently suffering from an aggression of the Russian Federation, incurring such added expenses may appear to be less than ideal.[26] With the ICC already having jurisdiction to investigate and prosecute alleged international crimes that have been or are being perpetrated on its territory, vis-à-vis Ukraine's Article 12(3) declarations, it is still important to stress that Rome Statute ratification will bring other practical benefits for Ukraine. The Statute preamble emphasizes that the States Parties established the ICC to fight against impunity for the most serious international crimes. By ratifying the Statue Ukraine will demonstrate its readiness to fight impunity in other regions of the world.[27]

10.4 Documentation of Russian war crimes in Ukraine

There are various initiatives documenting Russian war crimes in Ukraine in pursuit of accountability and justice, adherence to the rule of law, establishment of the truth, preservation of historical memory, and future transitional justice.

Collecting and preserving information about Russian crimes can then allow national and international courts and other authorities to bring prosecutions, as well as provide a solid base of testimonies and evidence even before international investigators arrive on the ground.

Firstly, Ukrainian state investigative bodies, the Security Service of Ukraine, the General Prosecutor's Office, and the National Police are carrying out their respective functions to document, investigate, and prosecute. Secondly, the international and intergovernmental organizations are involved via the ICC, the UN, the OSCE and, to a lesser extent, the Council of Europe.[28] Thirdly, Ukrainian

and international CSOs are actively complementing, assisting in, and – in certain instances – leading documentation efforts.

Two Ukrainian CSO communities are documenting Russian war crimes in Ukraine: T4P[29] led by the Center for Civil Liberties[30] and Coalition 5 AM[31] led by ZMINA.[32]

The main international organizations pursuing accountability for core international crimes committed in Ukraine include Amnesty International, Bellingcat and the Global Legal Action Network (GLAN), Global Rights Compliance, Coalition for the International Criminal Court (CICC), European Center for Constitutional and Human Rights (ECCHR), Global Rights Compliance (GRC), Mnemonic – Ukrainian Archive, Open Society Justice Initiative (OSJI), Redress, and TRIAL International.

The work of these organizations has led to the publication of several reports, including the OSCE Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity,[33] the GAN UTF White Paper,[34] which covers war crimes and crimes against humanity committed by the Russian Federation, the UN Human Rights Monitoring Mission in Ukraine (HRMMU) report,[35] Human Rights Watch,[36] and Amnesty International.[37]

In the investigation and documentation of war crimes and crimes against humanity, it is also very important to preserve the agency of Ukrainian actors involved in these processes. Ukrainian civil society who already have years of experience in documenting war crimes on the territory of their country are utilized in investigation efforts undertaken at the international level. That is why the CCL, individually and together with other NGOs, on various occasions submitted its findings to various international organizations.[38]

These and any subsequent reports contribute towards ensuring accountability for the crimes committed in Ukraine. Such reporting was intended to assist investigations if a state decided to use a universal jurisdiction mechanism, or to be taken into consideration within the framework of other investigative mechanisms that had already been or would be launched within other international organizations (e.g., the COI launched by the UNHRC).

Documenting human rights violations is a critical process that involves collecting, analyzing, and preserving information and evidence related to the abuses committed. It plays a crucial role in shedding light on violations, holding perpetrators accountable, and seeking justice for the victims. However, the process of documentation is not without its challenges.

Human rights documentation follows established standards and guidelines to ensure consistency and credibility. The Istanbul Protocol,[39] for example, provides guidelines for documenting cases of torture, while the Minnesota Protocol[40] offers guidance for investigating unlawful killings. These frameworks help standardize the documentation process and provide specific instructions for documenting different types of human rights violations. Civil society documentation efforts may benefit from being aware of and utilizing national and international standards such as the ICC Guidelines[41] and the Berkeley Protocol.[42] The awareness and application

of these guidelines can enhance the quality, credibility, and utility of documentation efforts. Documentation of war crimes and other violations of international law require adherence to strict guidelines. In 2022, the European Union Agency for Criminal Justice Cooperation (Eurojust) and the Office of the Prosecutor of the ICC published practical guidelines for CSOs,[43] responding to requests for clearer guidance on effective documentation approaches. This approach aims to ensure the safety and well-being of persons providing testimonies as well as to avoid compromising their willingness to contribute to the accountability process. Therefore, the ICC's guidelines focus on approaching vulnerable persons, taking a person's account/photographs/videos, dealing with documents/digital information/physical items, storing/safeguarding/analysing collected information.

When conducting interviews with victims and witnesses, a trauma-informed and sensitive approach is essential. Interviewers need to create a safe and supportive environment that allows survivors to share their experiences without retraumatization. Employing empathetic listening skills, using appropriate interview techniques, and ensuring informed consent are crucial aspects of conducting interviews.

CSOs undertake the crucial task of collecting testimonies, gathering information, and documenting crimes under highly challenging circumstances. In this process, they face several main risks that need to be addressed.

Firstly, there is the concern for physical security. CSOs must meticulously identify threat actors and assess their capacity to cause harm to those involved in the documentation process, including witnesses, victims, researchers, and others.[44]

Secondly, cybersecurity becomes a significant aspect to consider. To minimize the risk of the disclosure of activities and the identities of those involved, CSOs should employ secure communication tools and encrypted storage methods for the gathered data.

One of the primary challenges in human rights documentation is gaining access to areas where violations occur. Conflict zones, authoritarian regimes, and regions with restricted access create significant hurdles for researchers, activists, and human rights defenders. The limited access to these areas can hinder the collection of accurate and comprehensive information, making it essential to find alternative methods to gain insights.

Engaging in documentation efforts often exposes human rights defenders and researchers to safety and security risks. The process of collecting evidence in volatile or hostile environments can subject them to threats, intimidation, or physical harm. Consequently, ensuring the safety of those involved becomes paramount, and careful planning, risk assessments (including specific risk assessment when considering whether to engage with a person they suspect of having committed a crime),[45] and security measures are necessary to protect their well-being.

As a general principle, the CCL conducts a risk assessment and only intervenes if the site is safe and free from danger for the team, others present or involved and for the information itself. It is extremely important, to the best of one's knowledge, to consider potential hazards such as fire, mines, bombs, the presence of

perpetrators, the need for specialized equipment, and the risk of possible accidental destruction/damage of relevant objects or sources of information.[46]

In addition, there are challenges related to methodology and approach to collecting evidence. The ICC's guidelines set forth general standards and more specific approaches, as elaborated below.

The main *general standard* is the "do no harm" principle that underscores the responsibility of professionals to prioritize the well-being and safety of individuals involved in their work and research. "Informed consent" is another crucial aspect, emphasizing the necessity of obtaining explicit and voluntary consent from witnesses, ensuring they are fully aware of the purpose, risks, and benefits of their involvement.[47] Furthermore, upholding "objectivity, impartiality, and independence" is essential to maintain the integrity of one's work and avoid bias or conflicts of interest. Complementing this, "accountability and legality" emphasize the need to act within the boundaries of the law.[48] Lastly, "professionalism and respect" set the tone for interactions and engagements in any professional context.

Gathering testimonies soon after a violation has occurred is an essential part of any human rights investigation. However, interviewing a person who has been, or is still, suffering from trauma may have an impact on both the interviewee and the interviewer as on the testimony itself. When dealing with criminal investigations, vulnerable persons are often involved. In general, these are well-identified groups such as children, the elderly, victims of sexual or physical violence, people with limited abilities or those who have been deeply psychologically traumatized.[49]

In such situations, trauma-informed techniques can be used to help create an environment that allows the interviewee to share their account while minimizing the potential for re-traumatization and vicarious trauma. Adopting a trauma-informed approach entails comprehending the effects of trauma on memory and being mindful of its influence. Additionally, it involves considering the cultural context as a crucial factor in how individuals interpret and cope with traumatic incidents.[50] Based on the principles of "do no harm" and "informed consent", CSOs must adopt a victim-centered approach to gathering evidence. This means ensuring that the person is mentally and physically able to talk to the interviewer by conducting a vulnerability assessment. If this assessment concludes that documentation is harmful, the CSO is responsible for terminating or postponing it.

During the interview or testimony, it is important to remain vigilant for any signs of trauma. If necessary, it is encouraged to be accompanied by health professionals and to refer victims to such structures. Follow-up meetings may also be appropriate, depending on the situation.[51]

Digital information, often containing photos, videos, documents, records, official reports, should be kept confidential and preserved in a manner that prevents their contents from being unduly disseminated. All of the principles described above, especially regarding cybersecurity, apply to the collection and preservation of digital information. It is important to not alter the documents received, as it can discredit them from a legal point of view.

The other field manual that the CCL's researchers use daily is the PILPG Handbook on Civil Society Documentation of Serious Human Rights Violations,[52] which provides guidelines and practices for CSOs and individuals. The purpose of the handbook is to enable civil society actors to collect and manage information on human rights situations while adhering to ethical principles and documentation guidelines. The PILPG Handbook distinguishes itself from other manuals that mainly target human rights mandated actors or focus on specific crimes by providing guidance to non-professionals involved in documentation processes.

10.5 The CCL's methodology of data collection and description

The CCL conducts its documenting work based on commonly established policies and practices provided by the ICC, EUROJUST, PILPG and others, as well as NGO practices specializing in transitional justice, such as Swisspeace's Dealing with the Past training course, HURIDOCS, the Berkeley Protocol and others.

The CCL's documentation process begins with open-source intelligence (OSINT), followed by investigative missions on the ground and verification of the reliability of information collected, checks, and due diligence. The CCL teams travel to specific locations, collect all the information, analyze it, identify the patterns, and forward the gathered data to the relevant organizations. Each case is linked to the applicable article in the Rome Statute of the ICC. The information is primarily collected from open sources, such as media reports and social media groups, as well as eyewitness accounts from liberated territories. Not all war damages are considered war crimes, such as unintentional destruction resulting from a battle. The team needs to confirm that the crime actually happened, but not before the war, and the circumstances of the event must be thoroughly examined.

The CCL has trained and established a team of professionals in charge of interviewing people, gathering information from witnesses, and collecting visual data. In cases when something significant is reported, the team goes directly to that location. The documentation of a war crime is a very detailed process; it includes searching for connections between cases, perpetrator tracking, and determining the sequence of events. This allows the CCL to establish a complete picture of the event and identify the individual(s) responsible for a crime.

First of all, we work in the interests of justice. The CCL cooperates with national investigative authorities and international courts, primarily the International Criminal Court and the European Court for Human Rights (whose jurisdiction covered the Russian Federation until 16 September 2022).

With the witness' consent, the information received is used to apply to national and international investigative bodies, as well as international organizations for them to include such information in their periodic reports, in particular to the UN Committee against Torture, the UN Independent International Commission of Inquiry on Ukraine, the UN Human Rights Monitoring Mission in Ukraine, the ICC, etc. to document and further investigate war crimes committed in Ukraine and bring the perpetrators to justice.

The CCL has been working with the ICC for 8 years and intends to continue this cooperation after the ICC opens its full-fledged investigation. In 2014, the ICC initiated a "preliminary examination" into the situation in Ukraine. However, it was on 28 February 2022, following the Russian invasion that the ICC's Chief Prosecutor Karim Khan announced his intention to proceed with a full investigation. Remarkably, 43 ICC member countries referred the case to the prosecutor, showcasing unprecedented international support for the ICC's pursuit of justice in Ukraine. This referral is a strong indication of the global community's commitment to the ICC's core objective: ensuring accountability for crimes falling within its jurisdiction. The collaboration and backing of States Parties and the international community as a whole are indispensable in addressing the challenges inherent in conducting these investigations effectively.[53]

However, due to its policy, the ICC will be limited to some selected particular cases and top officials. This means that all the other array of international crimes and war perpetrators will remain the responsibility of national investigative agencies and courts. Secondly, the war has an informational dimension, so information about the crimes committed is of great public interest to both Ukraine and the world. To this end, the CCL cooperates with the institutional and convention bodies of the Council of Europe, country and thematic mandates at the UN system, the ODIHR, and other OSCE bodies, diplomatic corps and politicians, international human rights organizations, and networks as well as with foreign and national media.

Thirdly, sooner or later, this war will end, and historians will need to restore a complete and honest picture of what happened. Therefore, even if some testimonies and materials will have no legal value to serve as evidence, they will still be important for the work of national archives, researchers, museum exhibitions, works of art, and so on.

10.6 Conclusion

Since the start of the Russian invasion, there has been vast participation in evidence-collection efforts by the Ukrainian government, civil society, and international organizations. Several states have opened their own investigations into war crimes in Ukraine under universal jurisdiction, and others have indicated their intent to do so. A lot of civilians have gotten involved in evidence collection as well, through various war crime reporting apps, online portals, and social media.

The Ukrainian judiciary began prosecuting Russian soldiers in domestic courts for war crimes early on in the conflict. The first conviction was in May 2022, less than 100 days into the war. Finally, the ICC opened its investigation into the situation in Ukraine in early 2022. About a year later, in March 2023, the Office of the Prosecutor announced the indictments of Vladimir Putin and Maria Alekseyevna Lvova-Belova for alleged war crimes.

Based on the CCL's field mission experience in the Kyiv region we have determined several key steps that CSOs should take to improve their human rights documentation efforts and ensure the safety and well-being of all involved.

Firstly, there should be an emphasis on training staff members to develop a genuine trust-based relationship with victims and witnesses. CSOs should assess and update their technical tools to ensure that they facilitate the collection of information with the explicit consent of victims or witnesses. CSOs should also establish secure measures for storing and protecting information to maintain confidentiality. This approach ensures that the information collected is accurate and comprehensive.

Secondly, CSOs involved in similar work should enhance collaboration. This can be achieved through sharing best practices, exchanging information, and coordinating efforts to provide comprehensive support to victims or witnesses. Collaboration can also help in addressing challenges collectively and maximizing the impact of their work. CSOs should strengthen collaboration with law enforcement agencies to ensure effective cooperation in cases of serious human rights violations. This can involve sharing relevant information, supporting investigations, and advocating for the rights and protection of victims or witnesses. Building trust and establishing clear communication channels between CSOs and law enforcement is crucial for successful collaboration.

Thirdly, CSOs should prioritize the well-being and care of their staff and volunteers. This includes providing support mechanisms, such as counseling services and debriefing sessions, to help them cope with the emotional challenges they may face in their work. CSOs should also ensure that staff and volunteers have access to training and resources to enhance their knowledge and skills in dealing with sensitive situations.

These suggestions aim to improve the CSO practice by emphasizing the importance of consent, confidentiality, collaboration, and the well-being of both the victims or witnesses and the CSO staff and volunteers. Fight for justice and accountability requires the continuous efforts and actions of state, individuals, and communities who work towards promoting justice, equality, and human rights. The struggle for justice is ongoing and it is our collective responsibility to actively work towards creating a more just and safe world.

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> The States Parties to this Statute […] Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, […] Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, Resolved to guarantee lasting respect for and the enforcement of international justice, Have agreed as follows: […] An International Criminal Court ("the Court") is hereby established.

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11 Witnesses to the war

The Raphael Lemkin Center for Documenting Russian Crimes in Ukraine as a case study[1]

Aleksandra Konopka and Krystian Wiciarz

11.1 Introduction

In response to Russia's full-scale invasion of Ukraine in February 2022, the Pilecki Institute established the Raphael Lemkin Center for Documenting Russian Crimes in Ukraine (the Lemkin Center). Its name is associated with a long-term project conducted by the Institute from 2018 to 2024 and funded by the Polish Ministry of Education and Science, which was dedicated to "The Contribution of Polish Legal and Scientific Thought to the Shaping of the Concept of Genocide. Raphael Lemkin and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Polish Experience of Occupation by National Socialist Germany." Raphael Lemkin is one of two prominent figures of Polish descent (along with Hersch Lauterpacht) who significantly influenced the development of international criminal law and who, by virtue of having studied in Ukraine (Lviv), can be said to link the history of Poland and Ukraine.

The need to create such an institution was prompted by the expected influx of refugees from Ukraine. According to the UN Refugee Agency,

> an estimated 5.1 million people have been driven from their homes and are internally displaced, and more than 6.2 million people have crossed into neighboring countries in the region including Poland, Hungary, Moldova and other countries globally. Poland has welcomed the greatest number of Ukrainian refugees, hosting nearly 60 percent of all refugees from Ukraine.[2]

There were two reasons for gathering testimonies: first, it was anticipated that obtaining such accounts within Ukraine itself would become increasingly difficult; second, there was the risk that Ukrainian citizens will leave for different countries and losing contact.

The Lemkin Center was tasked with collecting witness testimonies of the victims of Russian aggression with the primary objective of preserving the memory of and commemorating these events. Since the gathering of testimonies has been completed, two core activities of the Center are building an online repository (with

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questionnaires, photographs, videos and audio recordings) and the dissemination of knowledge.

Materials collected by the Lemkin Center are anonymized, cataloged, and analyzed to finally become available to researchers, journalists, and all those interested in the subject.[3] The effort draws upon the experience gained from the creation by the Pilecki Institute of the "Chronicles of Terror" online database, which is one of the largest collections of civilian accounts from occupied Europe.[4] It consists of depositions given before the Main Commission for the Investigation of German Crimes in Poland, established in Poland in March 1945,[5] as well as of accounts from Poles who left the Soviet Union as members of the Anders' Army.[6] As a result, the Pilecki Institute Archives hold testimonies of Polish citizens who, during World War II, experienced suffering at the hands of two totalitarian regimes: the German and the Soviet. These testimonies contain personal experiences of thousands of victims of crimes, their families, relatives, and communities. The data collected by the Main Commission for the Investigation of German Crimes in Poland deal with the horrors of the German occupation, including the Wola Massacre, the pacification of Polish villages, and the workings of concentration and extermination camps. The accounts of Poles who left the Soviet Union with the Anders' Army, deposited in the Hoover Institution Archives, tell of the occupation of Poland's Eastern Borderlands, deportations and the Gulag. Children's essays from the state archives present the war from the perspective of the youngest and most victimized witnesses. Materials from the Katyn Museum include letters from future victims of the crime, which they sent to their families from Soviet captivity. These statements offer insights into the experiences of Polish citizens who endured hardships under the German and Soviet totalitarian regimes during World War II.

It is not a coincidence that the "Chronicles of Terror" database, which was already operational, was chosen for publishing the testimonies of Ukrainians who experienced suffering as a result of Russia's full-scale aggression from 2022.

The chapter aims to show the role of the Lemkin Center in preserving the victims' memories and experiences on Ukrainian territory, as well as to outline the Lemkin Center's methodology for acquiring the testimonies and the current cataloging and translation processes. Problems and challenges that occurred during both phases (i.e., collection and post-processing of testimonies) will also be described. The chapter concludes with the analysis of the acquired material, with a particular focus on statistical data obtained from 843 written testimonies and 646 video interviews.[7]

11.2 The idea and goals of the Lemkin Center

The Lemkin Center was established on 26 February 2022 – two days after Russia's full-scale invasion of Ukraine – on the basis of an internal order issued by the Director of the Pilecki Institute. This document specifies the tasks of the Lemkin Center as collecting and compiling testimonies of victims and witnesses of crimes committed in connection with the Russian invasion of Ukraine, including in particular collecting eyewitness testimonies from Ukrainian civilians and soldiers

and documenting Russia's military actions on Ukrainian territory.[8] Initially, there was a permanent team of nine members, which was assisted by more than 100 volunteers (on a rotating basis). Currently – in December 2023 – there are only a few volunteers who help to collect testimonies, as the collecting effort has been reduced and replaced with the preparation of reports based upon the collected data.[9]

The Lemkin Center has strategic partnerships with several institutions. Among its Polish partners are Fundacja Ośrodka Karta (the Karta Center Foundation), Ośrodek Studiów Wschodnich (the Center for Eastern Studies), and Centrum Mieroszewskiego (the Mieroszewski Center).[10] In Ukraine, the center collaborates with the World War II Museum in Kyiv, the Holodomor Museum in Kyiv, as well as the administrations of the cities of Mariupol, Trostyanets, and Kharkiv. These partnerships are integral to the Center's mission and activities.

It is worth mentioning that an ongoing scholarly and legal debate surrounds the issue of accountability for, as well as the nature and classification of the crimes committed by the Soviet and later Russian state. For instance, there are debates about the genocidal character of many crimes from the Soviet era, such as the dekulakization campaign of the 1920s and 1930s, the Holodomor in Ukraine, and the Great Terror (or Great Purge) conducted by the NKVD in the years 1937–1938 under strict supervision of Stalin.[11] Among numerous mass atrocities of the Stalin era are the deportation of the Chechens and Ingush (Ardakhar Genocide) and the Katyń massacre against Poles.[12] Putin's Russia is following this tradition, as evidenced by a long list of crimes committed in Chechnya, Georgia, Syria, and now Ukraine. Many historians explain that the history of violence and terror is deeply rooted in Russian culture and society.[13] They point to numerous examples of crimes and mass atrocities dating back to earlier eras, extending beyond the reign of Catherine the Great. The perpetrators of many of these crimes were never brought to justice, and it is therefore crucial to ensure – as it was with the crimes mentioned above – that the stories and experiences of Ukrainians are thoroughly documented and thus saved from oblivion, and that the memory about the victims and crimes is preserved. According to the staff, in doing so the Lemkin Center draws on the experience and methods of the earlier mentioned "Chronicles of Terror" archival project. Such activities are of paramount importance, as there have been numerous cases of history rewriting and constructing false historical narratives – not only in Russia, but also in many other states where atrocities were committed.[14] Among the more extreme examples of crimes perpetrated during the ongoing conflict in Ukraine is the deportation of children from Ukrainian territory, followed by subsequent indoctrination, adoption, and violent integration into Russian families and neighborhoods, denationalization, etc. Such memorialization efforts are undertaken by other institutions and organizations in Poland and across the world.[15]

One of the crucial motivations behind establishing a body dedicated to preserving history for future generations was the concern over Russia's genocidal narrative. Genocidal intentions were clearly present in President Vladimir Putin's article from 12 July 2021, entitled "On the historical unity of Russians and Ukrainians," as well as in his speech that started the war.[16] In the article, referring to their shared

history of the Rus, President Putin suggested that Russians and Ukrainians were one people – a single whole, which means that, as it were, he deprived Ukrainians of their nationality.[17]

A year later, the narrative promulgated by President Putin had completely changed, as exemplified by his speech on the morning of 24 February 2022, though it still revealed genocidal intentions. According to Gregory Stanton, the first stage of genocide is classification.[18] This means dividing people into "us" and "them" based on ethnicity, race, religion, or nationality. In his speech, President Putin repeatedly referred to Russians as "us," reserving the term "them" for Ukrainians and, more broadly, the West.[19] His appeals raised concerns among scholars, legal experts, and researchers from many institutions, including the Pilecki Institute.

Another reason for establishing the Lemkin Center was the successful precedent of testimonies given before the Main Commission for the Investigation of German Crimes in Poland in the years 1945–1984. The Commission, which was subordinated to the Ministry of Justice, conducted investigations into numerous war crimes committed by the Germans in Poland during World War II, such as the atrocities perpetrated in concentration camps and ghettos, mass executions, and deportations.[20] As mentioned earlier, the Lemkin Center is not a legal entity and as such does not have the authority to conduct investigations; it aims to collect testimonies solely for memorialization and archival purposes. Nevertheless, the past success and the valuable role of such activities in holding perpetrators accountable for crimes committed during World War II served as an inspiration to create an archive to ensure historical memory will be preserved and passed on to future generations.[21] Other initiatives such as The Reckoning Project were created for similar reasons.[22]

The importance of the issues addressed by the Lemkin Center and other such institutions has been confirmed by the current developments, including the issuance by the International Criminal Court of arrest warrants for Russian Federation President Vladimir Putin and Russian Ombudswoman for Children's Rights Maria Lvova-Belova.[23] These warrants were issued on 17 March 2023, following applications submitted by the Prosecution on 22 February 2023. Putin and Lvova-Belova are allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.[24] The arrest warrant hampered President Putin from traveling abroad, for instance, to the BRICS summit in August this year. The execution of the warrants will depend on international cooperation, and that is why the statements made by state leaders after the arrest warrants were issued are extremely important. There is a growing tendency to seek accountability for crimes committed in Ukraine. The proposals include the establishment of an ad hoc international tribunal through a UN General Assembly resolution, as the Security Council's involvement is blocked by Russia's veto power. Alternatively, a "hybrid" court integrated into the Ukrainian justice system is considered, which would involve international judges and foreign funding to ensure impartiality and effectiveness.[25] The European Union is among those who support the initiative to

create a special tribunal to fill in any prosecution gaps not covered by the ICC. The support was expressed in March 2023.

The many imperfections of the international system that make it difficult to punish international crimes mean that bodies such as the Lemkin Center are a very important element in preserving the memory of the victims and perpetrators.

11.3 Gathering testimonies (forms, methodology, processing)

In contrast to historical evidence from World War II, the materials gathered by the Lemkin Center shed light on contemporary atrocities and pose a threat to wrongdoers in the present day. Consequently, witnesses often find themselves in a vulnerable position, facing potential persecution during the investigative and judicial phases aimed at establishing the culpability of criminals across various court levels. Furthermore, the Center gathers testimonies from individuals who have fled the occupied territories, while their family members and associates, who also feature prominently in these testimonies, remain under occupation. Given these circumstances, the paramount focus of any institution like the Lemkin Center must revolve around safeguarding the well-being and security of witnesses. According to the Lemkin Center, the methodology for acquiring, preserving, and processing evidence was designed with this primary objective in mind, and the Center adheres to specific guidelines when collecting testimonies, ensuring a careful and secure process:

1 Safety: testimonies are collected in a safe and voluntary manner. Trained staff or volunteers accompany witnesses during the process to minimize the risk of retraumatization.
2 Confidentiality: questionnaires are only collected during personal meetings and are not shared with external parties. This safeguards the privacy and confidentiality of the witnesses.
3 No oath: testimonies are obtained without requiring an oath.
4 Diverse questionnaires: the questionnaires contain more than 43 diverse questions that cover various types of crimes. This diversity allows for greater accuracy and relevance in the testimonies collected.
5 Verification: testimonies are carefully verified to maintain accuracy and truthfulness. The verification helps prevent errors or confusion, especially given the challenging experiences of the witnesses.

The Lemkin Center is gathering testimonies in three forms: paper questionnaires, video/audio interviews, and online interviews. All the interviews are conducted following the approved questionnaire, which was developed with the help of historians, psychologists, and experts on international law. The questionnaire comprises three distinct sections: the initial segment solicits personal information, the central part is dedicated to inquiries pertaining to the witnesses' wartime experiences, and the concluding segment seeks their consent for the utilization

of their responses within the framework of the Institute's activities, adhering to the General Data Protection Regulation (GDPR). According to the instructions produced by the Center and interviews conducted with its head and the Ukrainian staff responsible for the collecting process, the primary objective is to ascertain the scope and severity of potential violations. Witnesses are systematically queried regarding the following key aspects: the destruction of civilian facilities and monuments; the unlawful appropriation of cultural and private property; civilian casualties (both fatalities and injuries); sexual violence and torture; forced deportations; mass atrocities. It should be emphasized that hostilities must be conducted in accordance with the Geneva Conventions of 1949 and their Additional Protocol I of 1977 and other rules of humanitarian law as specified among others in the Hague Convention.[26]

The fundamental method involves the completion of paper questionnaires available in four languages: Ukrainian, Russian, English, and Polish. The process of filling out these questionnaires is conducted in the presence of either the Lemkin Center staff or dedicated volunteers. These handwritten accounts are gathered primarily from refugees residing in Poland. The second category of testimonies comprises video interviews conducted by a team operating in Ukraine, particularly in proximity to the frontline and within formerly occupied territories. The Lemkin Center correspondent engages directly with local residents and mayors in these regions, generating valuable video interviews destined for inclusion in the Pilecki Institute's archives. The video interviews are tailored for witnesses who are willing to provide their accounts on camera, and these interviews adhere to the same structured questionnaires employed in other forms of testimonial documentation. Despite the potential utility of collecting handwritten questionnaires in Ukraine, the Lemkin Center discarded this approach due to the formidable challenges associated with safeguarding the security of paper questionnaires and the sensitive personal data contained therein amidst the backdrop of ongoing military operations.

The third and final group of materials collected by the Lemkin Center encompasses a diverse array of resources. These include recordings of online interviews, audio and video interviews recorded in Poland, supplementary photographs, and videos. Online interviews are carried out by the Lemkin Center staff, connecting with witnesses situated both in Ukraine and abroad. Frequently, these contacts are established through referrals from other witnesses or through connections within the team members' personal networks. Typically, these interviews encompass a video recording of the online conversation. However, in certain instances, they may involve voice-only recordings, depending on the preferences and circumstances of the witnesses being interviewed.

The process of gathering testimonies has undergone an evolution, mirroring the changing dynamics of war and migration. Initially, the predominant and most prolific method involved the collection of written questionnaires, particularly during the peak of migrant traffic along the Ukrainian–Polish border in February 2022. As the number of refugees arriving from war zones began

to stabilize around September 2022, there was a notable increase in witness interviews conducted online. While the quantity of recorded online interviews may be lower when compared to written questionnaires, these interviews often yield more valuable content for the archive. This is due to the fact that they typically contain more comprehensive and detailed information, with interviews frequently extending over several hours, allowing witnesses to provide in-depth accounts of their experiences. One of the significant methods of testimony collection involves video recordings made by the correspondents in Ukraine. Processing of the testimonies includes four stages: registration, anonymization, digitalization, and translation. First, the testimonies are registered in the Lemkin Center database. Second, they are anonymized and uploaded to an electronic archive. To significantly enhance the accessibility of the archive for a broad and diverse audience of researchers, the anonymized testimonies are then transcribed. Providing only the scans of the handwritten originals would inadvertently exclude researchers who are not proficient in Slavic languages, particularly Ukrainian or Russian, as well as reading the Cyrillic cursive at an advanced level. Furthermore, it would render automated searches impossible, limiting the archive's usability for scholars and investigators seeking specific information. Having transcribed the testimony, a Lemkin Center employee prepares a short description of the case. The last step is translation into Polish and English.

All testimonies are pinpointed on an interactive map accessible within the Lemkin Center's archive. This map serves as a navigational tool for cases of crimes committed in Ukraine. Additionally, the archive is organized into catalogs, each focusing on a different form of crimes. There are 39 types of crimes in total, including the destruction of civilian infrastructure, robbery, arrest, execution, and more. These catalogs, along with the map and concise descriptions of the testimonies, are publicly available on the website of the Pilecki Institute Archives under the "Chronicles of Terror" tab.[27]

Article 5 of the Statute of the International Criminal Court underscores that genocide, crimes against humanity, crimes of aggression, and war crimes represent the gravest international offenses within the purview of the Court's jurisdiction.[28] War crimes occupy a prominent place among the testimonies collected by the Lemkin Center. The Rome Statute precisely defines war crimes as follows:

- grave breaches of the Geneva Conventions of 12 August 1949
- serious violations of article 3 common to the four Geneva Conventions of 12 August 1949
- other serious violations of the laws and customs applicable in armed conflicts.[29]

It is noteworthy that many of the specific acts identified in the Rome Statute as war crimes find concrete documentation in the testimonies collected by the Lemkin Center, which underscores the importance of this work in the pursuit of justice and accountability. Most of these relate to the following.

- The destruction of civilian infrastructure (Art. 8(2)(b)(ii) of the Rome Statute) – more than 62% of testimonies;
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (Art. 8(2)(a)(iv) of the Rome Statute) – 55% of testimonies;
- Willful killing (Art. 8(2)(a)(i) of the Rome Statute) – 54% of testimonies;
- Unlawful deportation or transfer or unlawful confinement (Art. 8(2)(a)(vii) of the Rome Statute) – 41% of testimonies.[30]

Most of the incidents documented in the testimonies bear all the hallmarks of war crimes, although some of them also exhibit elements indicative of crimes against humanity and, in some instances, even the crime of genocide. Crimes against humanity are acts committed as part of a widespread or systematic deliberate assault on civilians. According to the Rome Statute, an "attack directed against any civilian population" involves a pattern of behavior marked by multiple acts against such population, carried out in accordance with or in furtherance of a State or organizational policy to execute such an attack.[31]

The testimonies collected by the Lemkin Center contain information regarding a spectrum of crimes that have the attributes outlined in Article 7 of the Rome Statute concerning crimes against humanity, encompassing acts such as murder, persecution, imprisonment, torture, deportation, and rape.[32] It is imperative to acknowledge that the data presented in these testimonies may not invariably serve as authoritative evidence, particularly with regard to highly sensitive crimes, such as sexual offenses. Nonetheless, they represent a vital resource for capturing essential insights into potential crimes against humanity, significantly contributing to the documentation and comprehension of these events.

The Lemkin Center's collection of testimonies also touches upon the crime of genocide, as elements of this crime are evident in some of the witness statements. As mentioned above, the genocidal narrative in speeches of representatives of the Russian Federation served as a significant motivation for establishing the Lemkin Center. Consequently, it is essential to analyze the testimonies from the perspective of potential genocide, given the profound gravity and far-reaching implications of this crime. As defined by the Rome Statute, genocide encompasses various acts, such as killing members of a group, inflicting severe bodily or mental harm upon members of the group, deliberately creating conditions intended to result in the physical destruction of the group, imposing measures to prevent births within the group, and forcibly transferring children from the group to another group.[33] To establish responsibility for genocidal acts, it is imperative to demonstrate that any of the aforementioned acts were carried out with the specific intent to annihilate, in whole or in part, a national, ethnic, racial, or religious group. Therefore, in order to attribute responsibility for the crime of genocide, it becomes paramount to prove that Russian nationals acted with the intent to destroy Ukrainians, either wholly or in part. According to the testimonies collected thus far by the Lemkin Center, the following acts can be considered as bearing the hallmarks of genocide: executions by shooting (20%), the persecution of Ukrainian identity and

efforts at Russification (11%), the use of civilians as living shields (36%), instances of sexual abuse (1%), and the deportation of children as well as their transfer to Russian families – although it is worth noting that such cases have not yet been documented in the testimonies collected.[34]

11.4 Data derived from witness testimonies

The geography of the testimonies reflects the varying intensity of the hostilities across different regions, as well as access to the witnesses fleeing the occupied territories as shown in Figure 11.1.

Analyzing the testimonies, the staff of the Lemkin Center could not help but notice trends regarding the conduct of Russian troops. Initially, they endeavored to correlate variations in behavior with specific categories of crimes. Ultimately, they discovered that there are at least three distinct approaches to the war, and these differences can be attributed more to the actions of the military itself rather than the geographical region (see Figure 11.2).

Through a regimen of interviewing sessions, the Lemkin Center staff observed the multiple waves of evacuation through Poland and identified both commonalities and distinctions in the behavior of perpetrators across various regions and time periods of the conflict. The first phase was from February to early March 2022, when the borders were crossed by people who had not seen hostilities. The second phase lasted from the beginning of March to May, when a lot of eyewitnesses to the events came from Ukraine to Poland, and the last phase commenced in June, bringing a marked decrease in new arrivals. They documented a range of occurrences, including pseudo-referendums, the commencement of the 2022/2023 school year in occupied territories, the persecution of volunteers, the shooting of evacuation convoys, partisan activities in regions such as Kherson, Kyiv, Kharkiv, and Mariupol, the imprisonment and capture of civilians, instances of torture.

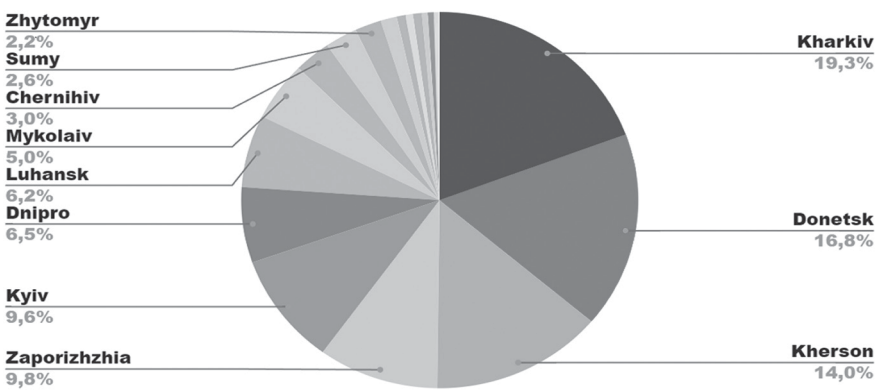

Figure 11.1 Distribution of witnesses by the region. Created by the Lemkin Center.

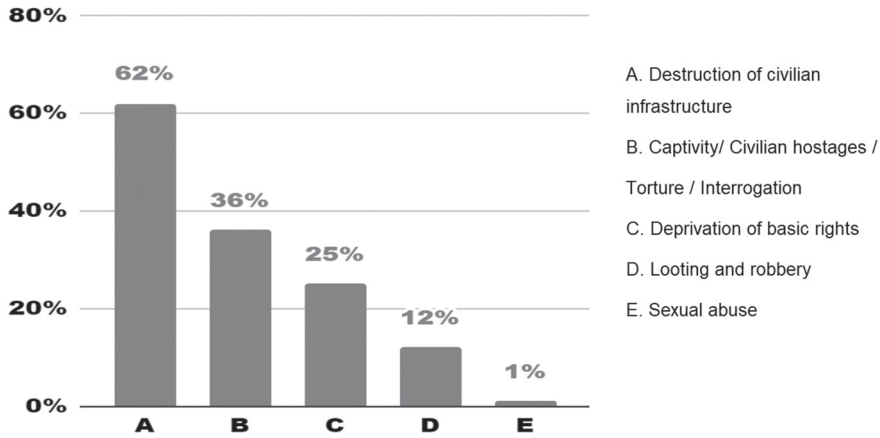

Figure 11.2 Some types of crimes recorded. Created by the Lemkin Center.

Key similarities in the behavior of perpetrators across all regions encompassed: jealousy toward the quality of life in Ukraine, the disregard for basic hygiene, a penchant for disorder, intense propaganda efforts in times of limited communication, coercion of teachers into propagandistic activities, and a profound aversion to the Ukrainian language and culture. These shared behavioral traits offer valuable insights into the multifaceted dynamics of the conflict and its impact on various regions and communities.

11.5 Challenges and obstacles encountered by the Lemkin Center during the acquisition phase

It is important to note that the challenges encountered by the Warsaw group of the Lemkin Center must be distinguished from the difficulties experienced by people working in Ukraine. The work of the latter requires daily exposure to life-threatening risks and obstacles. The scale of these risks is difficult to estimate, given the unpredictable and dangerous nature of such endeavors. These circumstances underscore the dedication of those engaged in this mission to collect testimonies and document the realities of the ongoing war.

The challenges encountered in organizing the activities of the Warsaw team can be categorized into three primary groups: logistical difficulties, psychological challenges, and obstacles inherent in the interview process; all of them need to be addressed in order to effectively carry out the mission of the Lemkin Center. At the outset, one of the primary difficulties was the establishment of a network of cooperative refugee centers where the staff could reach eyewitnesses. Moreover, finding safe and trust-inducing spaces for communication within these centers was not always feasible. In the early stages, the Lemkin Center's volunteer

team worked at railway stations and suburban centers, often in adverse weather conditions and amid the presence of common cold and other infectious diseases. As time passed, the Lemkin Center managed to develop a network of contacts within the refugee housing providers and learned how to create more comfortable settings for conversations with eyewitnesses. The search for witnesses was also impacted by shifts in evacuation routes, with many refugees traveling directly to Western European countries without stopping in Poland. Consequently, some refugee centers reduced their capacity or closed down. In response, the Lemkin Center staff adapted by seeking witnesses through their database contacts, their personal networks, and by conducting remote interview sessions.

In the initial stages, the Lemkin Center primarily encountered individuals who had swiftly evacuated their families from the war-torn regions. These individuals had limited exposure to hostilities and had not experienced personal losses or witnessed significant crimes. As the war persisted, a shift occurred, with more traumatized individuals seeking assistance. These were people who had lost their homes and families, witnessed deaths on the streets of their towns, and arrived with a strong desire to share their stories and grief with the world. Over time, however, many of these individuals began to adapt to their new circumstances, and their willingness to cooperate and testify diminished. Presently, the Lemkin Center engages more with witnesses who survived occupation, endured massive shelling, and experienced widespread destruction. These individuals carry deep trauma that has gone unprocessed for an extended period. Furthermore, there are witnesses who fled the occupation and underwent the intimidating filtration process by Russian forces. They often require more time to gather the courage to testify, along with assurances that their friends and relatives in occupied territories will remain safe. In the first year of the full-scale invasion, people were eager to testify right after the presentation of the Lemkin Center initiative, driven by an understanding of the importance of documenting crimes for themselves, history, and the future. However, now the team spends 20–30 minutes explaining their work and its significance to encourage each witness to come forward and share their experiences. During the work of the Lemkin Center, three types of difficulties can be distinguished:

1 Difficulty in expressing in writing: older individuals and those who have experienced trauma may struggle to articulate their thoughts in writing, necessitating the involvement of the Lemkin Center volunteers or employees to transcribe their spoken words. This extends the process of working with one witness from 2–4 to 3–6 hours and can be emotionally taxing for both the witness and the interviewer.
2 Technical issues during remote interviews: technical problems like internet interruptions, power outages, sudden air-raid alarms or shelling can disrupt remote interviews with witnesses in Ukraine, requiring rescheduling to give the witness the opportunity to hide in the bomb shelter.
3 Emotional recollections: some witnesses may agree to testify but encounter painful emotional memories that prompt them to pause. In such cases, the

Lemkin Center staff offer psychological support and, when appropriate, resume the interview at a later time.

Addressing these three categories of difficulties is crucial to maintain the effectiveness and well-being of the Warsaw team as they continue their important work of documenting the realities of the conflict.

The primary focus of this chapter centers on the preservation phase of the Lemkin Center's work, encompassing the search for witnesses, evidence collection, processing, and the establishment of an archive. However, it is equally essential to shed light on its activities aimed at disseminating the information gathered by the Center, which was one of the main goals for which it was established.

One notable aspect of the Lemkin Center's collections is that the evidence is not covered by judicial secrecy. As a result, data from these testimonies, once processed and anonymized, can be immediately put to use. This facilitates effective communication with media representatives and enables the creation of projects that showcase individual testimonies of war. Such projects aim to engage audiences on an emotional level by fostering understanding and empathy and encouraging the public opinion to remain invested in the ongoing challenges of the conflict. One of the projects carried out by the Lemkin Center was entitled "War and Memory." It consisted of performative readings, with the participation of actors, of carefully selected testimonies collected by the Lemkin Center. The project was inaugurated in Warsaw and then presented at a series of screenings in the National Museum of Ukrainian History in Kyiv and the Lesia Ukrainka Theater in Lviv, providing – in the authors' intention – emotional narratives of war and resilience through live performances. Another project, "The Liberated," was a theater production inspired by a curatorial selection of testimonies collected by the Lemkin Center. It was organized in Warsaw on the 83rd anniversary of the USSR's invasion of Poland. It was an attempt to bring to life through performance the experiences of those affected by the conflict and liberation. Another form of artistic communication about the ongoing conflict in Ukraine was the multimedia installation "Shards of Unjudged Crimes," created by the Pilecki Institute in Warsaw from materials collected by the Lemkin Center in Ukraine and Poland. It sheds light on the untold stories of unpunished crimes. After its debut in Berlin in February 2023, followed by a presentation in Warsaw in May 2023, the installation was ready to travel to various locations in Europe. The authors of the installation stress that its aim is to show this powerful testimony to the resilience of those affected by war and to prompt reflection and dialog on the impact of war and human rights violations. The Pilecki Institute also conceived and produced the documentary film "HerSons" featuring the testimonies of four people from Kherson (and their families) who were forcibly taken from their hometown, deported initially to Crimea and then imprisoned in Moscow's notorious Lefortovo detention center. Through their stories, the film reveals the complex mechanisms of human rights violations by the Russian Federation, from unjustified detention to torture and, tragically, the ultimate destruction of lives.

By these activities, the Lemkin Center tries to reach a wide and diverse audience. Of course in theory, such artistic endeavors not only raise awareness, but also provoke contemplation and reflection among audiences, fostering a deeper understanding of human sacrifices and the importance of bearing witness to historical injustice. In practice, we do not know if those projects had any influence on the public narrative, because the center has not provided any data which could show if such strategies were successful, especially when compared to other forms of public communication. In this respect, further assessment is needed as soon as any data will be publicly available.

It is also worth mentioning that in 2023, the Pilecki Institute in Berlin became an important venue for discussion of Russian crimes in Ukraine, thereby advancing the goals of the Lemkin Center. The Institute sought to initiate such a debate in Germany and internationally by combining various methods of reflection, intervention, and mobilization: speeches at demonstrations, aid and collection activities for Ukraine, artistic activities, think-tank meetings, testimony gathering, conferences and academic speeches. These activities were inaugurated with a conference on Russian crimes in Ukraine organized by the Center for Totalitarian Studies of the Pilecki Institute in Warsaw together with the Berlin branch of the Institute and in cooperation with a German think-tank Zentrum Liberale Moderne on 1–3 February 2023 at the Institute's offices in Pariser Platz. This publication is the outcome of the conference, which was titled "Russia's War of Aggression Against Ukraine. Challenges of Prosecuting and Documenting War Crimes." After Russia's full-scale aggression against Ukraine, a program called "Will UA" ("Will" means freedom in Ukrainian) was developed at the Pilecki Institute in Berlin. This program included the 23 February 2023 performance "23.02 – 20.23". The event was designed to highlight the historical continuity of repression and the struggle for freedom. Testimonies of survivors of the terror in 2022, 2014, and 1944 emphasized the importance of justice and the need to listen to the voices of survivors. The event was organized by the Pilecki Institute in cooperation with Boell Stiftung and Zentrum Liberale Moderne. The Pilecki Institute in Berlin also hosted several German film premieres in 2023, including expert discussions on topics such as the fate of Mariupol or aid to Ukraine. In May (27–28 May 2023), a two-day workshop on OSINT (Open-Source Intelligence) called "OSINT Saves Ukraine" was held at the Pilecki Institute in Berlin. The workshop focused on the use of various tools to gather and verify information from publicly available sources. The event was aimed at journalists, researchers, human rights defenders, and international organizations involved in understanding and reporting on Russian aggression against Ukraine. In June 2023, a lecture "Unveiling the Dark Chapters: Soviet Crimes against Ukraine" by Professor Yurii Shapoval was organized. The lecture provided insight into Soviet crimes committed against Ukraine in the past century and gave the necessary context for understanding the current crimes committed after 2014 and 2022. It is also worth mentioning that after Russia's full-scale aggression against Ukraine in February 2022, the Pilecki Institute in Berlin became a meeting place for Ukrainian diaspora organizations. In particular, the Vitsche

organization became its partner, as well as the Plast scout organization and the Ukrainian church, which organized gatherings at the Pilecki offices. The Pilecki Institute in Berlin also became a co-organizer of demonstrations aimed at mobilizing German society and public opinion in support of Ukraine.

11.6 Conclusions

The activities of all organizations such as the Lemkin Center serve to build memory in the event of unaccounted crimes and attempts to fabricate false historical narratives and rewrite history. The Lemkin Center contributes to the memorialization efforts concerning Russia's mass atrocities and the war by creating a database of testimonies and crimes committed, as well as by organizing events, exhibitions, and conferences based on the collected stories. Such activities fundamentally involve the cultivation of collective memory through a personal connection with the voices of affected individuals and communities. They help to remember facts and events and to empathize with the human stories behind them, fostering a deeper and more enduring understanding of the profound impact of war on individuals and communities. In doing so, they help to ensure that the lessons of the past are not only documented, but also etched into our collective consciousness.

The Center benefits from the experience and expertise of the Pilecki Institute and its Department of Archives, which has previously created the "Chronicles of Terror" database of testimonies from World War II. This helped the Lemkin Center to employ proven tools and methodologies, resulting in a comprehensive and cohesive archive devoted to contemporary testimonies of conflict. While there are other institutions and projects involved in the collection of testimonies from Ukraine, such as The Reckoning Project and the Center for Civil Liberties, the Lemkin Center distinguishes itself by not aiming to gather evidence for future legal proceedings. Instead, it prioritizes the broader utilization of these testimonies for research and various other purposes. Consequently, the Lemkin Center can play a vital role in the documentation, research, and understanding of the ongoing conflict and its impact, as long as it will manage to spread its reports and other achievements to a wider public in Poland, Ukraine, the EU, and other countries, as well as build a solid network of cooperation and support. Understandably, a full assessment of both the value of the database being built and the effectiveness of the activities undertaken by the Center is still pending and will need further attention in the future.

Notes

1 The text was written with the help from the Lemkin Center staff members: Jarosław Bittel, Jakub Kiersikowski, and Kateryna Leontyeva, who provided the necessary statistical data and information about the Lemkin Center's activities and with the help of Mateusz Fałkowski, from the Pilecki Institute in Berlin staff.

2 "Ukraine Refugee Crisis: Aid, Statistics and News | USA for UNHCR" (*USA for UNHCR. The Un Refugee Agency*) www.unrefugees.org/emergencies/ukraine/ (accessed: 13 December 2023).
3 According to the head of the Lemkin Center, it will happen no sooner than in the fall of 2024. The current data is being validated and three major reports are being prepared.
4 "Lemkin Center Collection" (Chronicles of terror), www.zapisyterroru.pl/dlibra (accessed: 13 December 2023).
5 In 1990, its competences were extended to Soviet crimes and other crimes constituting war crimes or crimes against humanity. On 19 January 1999, on the basis of the Act of 18 December 1998, the Institute of National Remembrance (IPN) put it into liquidation. It was replaced with the Main Commission for the Prosecution of Crimes Against the Polish Nation, operating within the IPN.
6 The Anders' Army was created by the Polish-Soviet agreement of 30 July 1941, and the military agreement of 14 August 1941. This agreement announced the creation in the Soviet Union of an army consisting of 30 thousand Polish citizens, operationally subordinate to the command of the Soviet Union, whereas organizationally and personally – to the Polish Supreme Command of the Armed Forces. General Anders was appointed commander, "Anders Army" (Polin- Museum of the History and Polish Jews) https://sztetl.org.pl/en/glossary/anders-army (accessed: 13 December 2023).
7 Data from the Lemkin Center, Pilecki Institute, as of 27 December 2023.
8 Decision No. 10 of 31 March 2022, of the Director of the Pilecki Institute on the appointment of a permanent team of the Lemkin Center.
9 In an interview with the authors in early December 2023, Jarosław Bittel, the current head of the Lemkin Center, stated that the Center had already prepared one report, and that in 2024 it would be working on at least two more.
10 The Karta Center Foundation – an NGO, which discovers, preserves, and disseminates history as seen from the perspective of the individual, as well as supports Ukraine; the Center for Eastern Studies – a Polish legal entity engaged in the preparation of analyses, expert opinions and forecast studies, as well as in compiling and making available to the public authorities information on significant events and political, social and economic processes in the international environment of Poland; the Mieroszewski Center – a Polish legal entity whose mission is to initiate, support and carry out activities addressed to the peoples of Eastern Europe, especially Ukrainians, Belarusians, Georgians and Moldovans, in order to strengthen the independence of their countries, this in light of Russian attempts to revise the borders and rebuild regional hegemony, and to support processes that will contribute to the construction of mature democracies, bring them closer to Euro-Atlantic structures and deepen ties with Poland. "Centrum Dokumentowania Zbrodni Rosyjskich w Ukrainie im. Rafała Lemkina" https://instytutpileckiego.pl/pl/instytut/aktualności/centrum-dokumentowania-zbrodni-rosyjskich-w-ukrainie-im (accessed: 13 December 2023).
11 Robert Conquest*, The Great Terror: Stalin's Purge of the Thirties* (first published 1968, reprint by Oxford University Press 2008).
12 Norman Naimark, *Stalin's Genocides* (Princeton University Press 2010); Patrycja Grzebyk, *The Communist Crimes. Individual and State Responsibility* (Wydawnictwo Instytutu Wymiaru Sprawiedliwości 2022); Tomasz Lachowski, "From Homo Sovieticus to Russkiy Mir. The Kremlin's Genocidal Policy Against the Ukrainian Nation in the Light of International Law and the Thought of Raphael Lemkin" (2022) Perspectives on the 20th Century 7.

13 Evgenii Anisimov, "Progress through violence from Peter the Great to Lenin and Stalin" (1990) 17 Russian History 4; Norman Naimark, *Stalin's Genocides* (Princeton University Press 2010); Svetlana Stephenson, "State, society and violence in Russia: towards a new research agenda" (2019) *A Research Agenda for Global Crime* (2019, 122–132); Joshua Sanborn, "The Genesis of Russian Warlordism: Violence and Governance during the First World War and the Civil War" (2010) 19 *Contemporary European History* 3, 195–213); Maria Mälksoo, "The Postcolonial Moment in Russia's War Against Ukraine" (2023) 25 *Journal of Genocide Research'* 3–4; Irina du Quenoy, Dmitry Dubrovskiy. "Violence and the Defense of 'Traditional Values' in the Russian Federation" (2018) *Religion and Violence in Russia* (2018), 93–116.

14 See for instance: Joseph Zajda, Rea Zajda, "The Politics of Rewriting History: New History Textbooks and Curriculum Materials in Russia" (2003) *International Review of Education* 49, 363–384; Roger Marwick, *Rewriting History in Soviet Russia: The Politics of Revisionist Historiography 1956–1974* (Palgrave Macmillan 2001); David Brandenberger "Promotion of a Usable Past: Official Efforts to Rewrite Russo-Soviet History, 2000–2014" in Vladimir Tismaneanu and Bogdan C. Iacob (eds.), *Remembrance, History, and Justice: Coming to Terms with Traumatic Pasts in Democratic Societies* (Central European University 2015), 191–212; Maria Kurbak, " 'Living the last chapter of History': Anxiety as a force for rewriting history textbooks in Putin's Russia and before" (2023) 2 Memory, Mind and Media 4; "Rosyjska wojna dezinformacyjna przeciwko Polsce, Raport Centrum Analiz Propagandy i Dezinformacji, Fundacja im. K. Pułaskiego" (Fundacja im. K. Pułaskiego 2017).

15 In the Ukrainian case see for instance: "Our Mission" (The Reckoning Project) www.thereckoningproject.com/stories (accessed: 13 December 2023). One of the aims of The Reckoning Project is: "Beyond the scope of using testimonies to ensure justice, The Reckoning Project wants to ensure that the experiences of Ukrainian victims are not forgotten. Multimedia projects, including digital storytelling, are being used to illustrate the experiences of the Ukrainian people and to memorialize our findings."

16 Vladimir Putin, "On the Historical Unity of Russians and Ukrainians" http://en.kremlin.ru/events/president/news/6618 (accessed: 13 December 2023).

17 Ibid.

18 Gregory Stanton, "The ten stages of genocide," (*Genocide Watch*, 2016), www.genocide-watch.com/genocide/tenstagesofgenocide.html (accessed: 13 December 2023).

19 "Full text of Vladimir Putin's speech announcing 'special military operation' in Ukraine," https://theprint.in/world/full-text-of-vladimir-putins-speech-announcing-special-military-operation-in-ukraine/845714/ (accessed: 13 December 2023).

20 Łukasz Jasiński, *Sprawiedliwość i polityka. Działalność Głównej Komisji Badania Zbrodni Niemieckich/Hitlerowskich w Polsce 1945-1989*, (Instytut Studiów Politycznych PAN 2018).

21 See more, Patrycja Grzebyk et al., *Polski dorobek w zakresie międzynarodowego prawa karnego w latach 1918-2018* (Wydawnictwo Instytutu Wymiaru Sprawiedliwości 2023).

22 See note 16.

23 "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova" (*International Criminal Court*, 17 March 2023) www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed: 13 December 2023).

24 Ibid.

25 Michel Duclos, "A Special Tribunal for the Russian Crime of Aggression in Ukraine" (*Institut Montaigne,* 31 January 2023) www.institutmontaigne.org/en/expressions/special-tribunal-russian-crime-aggression-ukraine (accessed: 13 December 2023).
26 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention (1954) http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed: 13 December 2023).
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28 Rome Statute of the International Criminal Court http://legal.un.org/icc/statute/romefra.htm, (accessed: 13 December 2023).
29 Ibid.
30 Statistics by the Lemkin Center in July 2023, current data available on website: "Lemkin Center Collection," (*Chronicles of Terror),*www.zapisyterroru.pl/dlibra/collpubs?startstr=_all&dirids=67&action=SimpleSearchAction&collType=type&ipp=20&p=0&type=-6 (accessed: 15 November 2023).
31 Rome Statute of the International Criminal Court (1998), Art. 7 http://legal.un.org/icc/statute/romefra.htm (accessed: 15 December 2023).
32 The full list of acts considered crimes against humanity is given in Article 7 of the Rome Statute.
33 "Application of the Convention on the Prevention and Punishment of the Crime of Genocide," Art. II.
34 Statistics by the Lemkin Center in July 2023, current data available on website: www.zapisyterroru.pl/dlibra/collpubs?startstr=_all&dirids=67&action=SimpleSearchAction&collType=type&ipp=20&p=0&type=-6 (accessed: 13 December 2023).

12 Precedent for Ukraine

Experiences of the UNWCC of documenting war crimes

Dan Plesch, Jacob Thaler, and Dominika Uczkiewicz

12.1 Introduction

Russia's war of aggression against Ukraine has started a complex process of accountability-seeking efforts. The president of the EU's Agency for Criminal Justice Cooperation (Eurojust) Ladislav Hamran stated:

> In the past, it was sometimes difficult to find a state which was ready to allocate financial and human resources to start war crime investigations. Today the problem is exactly different. We may actually have more actors involved than we can manage.[1]

The quest for accountability focuses on the effective prosecution of core international crimes confronting practical challenges of documenting crimes committed in Ukraine. The willingness of national and international authorities to hold perpetrators, low- and high-ranking, to account is but one prerequisite for international justice to be served; another is the ability of those seeking accountability to navigate evolving information, actors, and interests. The delivery of justice is a collective undertaking that requires an infrastructure harmonizing accountability efforts, while preserving operational flexibility of formally independent actors.

Such a "common, yet differentiable"-approach to the pre-trial preparatory stage of accountability rests on two principles: complementarity and inclusiveness. We understand complementarity as a form of cooperative justice that sees domestic jurisdictions investigating alleged crimes in coordination and cooperation with international agencies.[2] Inclusiveness refers to the operation of a system of participation that resists the marginalization of actors.

The contemporary legal response to the Ukraine war marks a turning point in the multinational fight against impunity. And yet, it is not without historical precedent. As we argue in this chapter, the 1943–1948 United Nations War Crimes Commission (UNWCC),[3] exemplifies what multiple actors are striving to create today. As noted by Diane Marie Amann, the UNWCC represents a useful model for today's accountability efforts, that could be reinforced by "setting up a clearinghouse for gathering, cataloging, and preserving evidence, with an aim to eventual prosecutions in multiple national, regional, and international systems."[4]

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This chapter surveys efforts to create judicial responses to the attack on Ukraine and to document crimes following Russian aggression, details the work in the 1940s through the UNWCC that has relevance today, and concludes with suggestions to increase the effectiveness of contemporary efforts.

12.2 Ongoing accountability efforts in the context of the Ukraine war

This section details the most relevant accountability efforts taking place at the European, international and national level.

In March 2022, Lithuania, Poland, and Ukraine, later joined by Estonia, Latvia, Slovakia, and Romania, constituted an EU Joint Investigation Team (JIT) on alleged core international crimes committed in Ukraine.[5] A JIT is a legal agreement under EU law to facilitate judicial cooperation among member states, operationally, analytically, legally, and financially supported by Eurojust.[6] Through a JIT, national authorities can directly exchange information and evidence and cooperate in real time. Soon after its establishment, the Office of the Prosecutor of the International Criminal Court joined the JIT, in a move unprecedented in the Court's history and intended to "conduct rapid and real time coordination and cooperation with the JIT partner countries."[7] The inclusion of the ICC prosecutor in the JIT allows the ICC and the JIT member countries "to engage in direct and interactive dialogues on information and evidence sharing."[8] The JIT also signed a memorandum of understanding with the US in order to formalize and facilitate coordination on their respective investigations and prosecutions.[9]

Responding to the need for a central, secure repository of evidence,[10] Eurojust established the Core International Crimes Evidence Database (CICED).[11] CICED stores evidence on core international crimes from national judicial proceedings in a central database to allow for the early identification of parallel national investigations and thus avoid inefficiencies and enhance the effectiveness of national and international investigations.[12] Eurojust also hosts the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA). The ICPA is the EU's response to the ICC's lack of jurisdiction for the crime of aggression in the case of the Ukraine war.[13] It is mandated to facilitate collaboration between national prosecutors and agree on a common investigative and prosecutorial strategy. Notably, the ICC's Office of the Prosecutor participates in the ICPA, and evidence collected by the ICPA could be used by the ICC to investigate crimes that fall within its jurisdiction.[14]

The ICC's Office of the Prosecutor itself opened an investigation into the Situation in Ukraine following referrals from 39 State Parties to the Rome Statute.[15] In May 2022, the Office dispatched a team of 42 investigators, forensic experts, and support personnel to Ukraine to advance their own investigations and support Ukrainian national authorities.[16] The ICC Prosecutor engages with Ukraine's national investigation teams to map activities and strengthen coordination.

In addition to the EU and the ICC, several international organizations, notably the United Nations and the Organisation for Security and Cooperation in Europe (OSCE) have also actively been seeking accountability for Russian actions in

Ukraine. The Independent International Commission of Inquiry on Ukraine of the UN Human Rights Council has conducted more than 600 interviews, including with witnesses and victims of alleged violations and abuses, inspected sites of destruction and graves, places of detention and torture, as well as weapon remnants.[17] In addition, the UN Human Rights Monitoring Mission in Ukraine, deployed since 2014, has focused on documenting violations of international human rights law and international humanitarian law committed by all parties to the conflict.[18]

The OSCE's Office for Democratic Institutions and Human Rights (ODIHR) established two fact-finding missions, the Ukraine Monitoring Initiative and a Mission of Experts under the OSCE's Moscow Mechanism. The latter consisted of three experts named by Ukraine. The Mission's mandate was to establish the facts and circumstances surrounding possible violations and abuses of international human rights law and international humanitarian law and to collect, consolidate, and analyze information on possible core international crimes with a view to presenting it to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, jurisdiction.[19] Similarly, the Monitoring Mission has been recording the most serious violations of human rights and international humanitarian law with the aim to contribute to ensuring accountability.[20]

In May 2023, the Council of Europe, following up on a UN General Assembly resolution,[21] set up a register of damage to serve as a record of evidence and claims information on damage, loss or injury.[22]

The International Commission on Missing Persons (ICMP) ramped up its evidence-gathering and data collection activities in Ukraine at the request of the Ukrainian authorities.[23] The ICMP's cooperation agreement with the ICC Office of the Prosecutor is of particular significance: In March 2023, a Pre-Trial Chamber of the ICC issued arrest warrants for Russian President Vladimir Putin and the Commissioner for Children's Rights Maria Alekseyevna Lvova-Belova for allegedly being responsible for the war crime of unlawful deportation of population and that of unlawful transfer of population from occupied areas of Ukraine to the Russian Federation.[24]

In addition to these varied efforts of international bodies further multilateral and national initiatives are also underway. The US, the UK, and the EU set up the Atrocity Crimes Advisory Group (ACA) to support the Office of the Prosecutor of Ukraine (OPG) who, as the legally constituted authority responsible for dealing with investigations of war crimes in Ukrainian territory, was expected to bear the greatest burden of cases.[25] The ACA "seeks to streamline coordination and communication efforts to ensure best practices, avoid duplication of efforts, and encourage the expeditious deployment of financial resources and skilled personnel to respond to the needs of the OPG."[26] The ACA's operational support consists of an advisory group to the OPG staffed by senior war crimes prosecutors, investigators, military analysts, forensic specialists, and other experts as well as of so-called Mobile Justice Teams composed by both international and Ukrainian experts to assist Ukraine's investigators on the ground at the OPG's request.

National investigations into core international crimes have been launched in more than 20 countries, in many of them under the principle of universal jurisdiction.[27] Ukraine had reformed its penal code harmonizing it with international criminal law and international humanitarian law to allow for the effective prosecution of war crimes committed on its territory.[28] As of mid-2023, Ukraine's Office of the Prosecutor General's online tool for the collection of evidence on war crimes has registered about 80,000 alleged war crimes committed by Russian forces.[29]

The US as the leading Western power acts through several arms of government to support Ukraine's accountability efforts as well as the ACA: it provides technical cooperation and capacity building to the OPG and training on war crimes investigative techniques to Ukraine's National Police and State Border Guard Service.[30] The State Department launched the Conflict Observatory, an independent program that uses commercially and publicly available information and geospatial data to identify, track, and document possible atrocities.[31] The US Congress passed legislation such as the "Ukraine Invasion War Crimes Deterrence and Accountability Act" that specifies as US policy the collection, analysis, and preservation of evidence and information related to war crimes and other atrocities as well as the leveraging of international cooperation in accountability matters.[32] The legislation provides enhanced authority for the Executive Branch to assist the ICC's Office of the Prosecutor in its accountability efforts.[33]

Recognizing the need for increased coordination and cooperation between the numerous accountability efforts, 45 states made a political commitment to establish a Dialogue Group on Accountability for Ukraine ("the Dialogue Group") at the Ukraine Accountability Conference in July 2022 "with the objective of promoting dialogue across the various national, European and international accountability and documentation initiatives."[34] In March 2023, the Dialogue Group was officially launched at the United for Justice Conference in Lviv by Ukraine, the ICC and the EU.[35] More informal than the Dialogue Group, yet essentially adopting the same objective, some 50 states are now members of the Group of Friends of Accountability reflecting the group's aim to also include smaller states whose capacity to follow the development of accountability measures may not match the importance they attach to the respect for the rule-based international order.[36]

The foregoing survey demonstrates the energy that democratic states and international organizations are devoting to achieving accountability for core international crimes in Ukraine. Challenges remain: in early January 2023, the UN Secretary General had to disband a fact-finding mission into the attack on a detention camp located in the Russian-occupied town of Olenivka in the Donetsk Province that had killed at least 50 Ukrainian prisoners of war as clear safety and access guarantees had not been received.[37]

Nevertheless, the infrastructure being built up for the documentation of core international crimes is impressive. Through it, actors demonstrate their awareness of both complementarity and inclusiveness being essential elements for harmonizing accountability efforts.

12.3 Strengthening accountability for Russian crimes in Ukraine from Second World War multilateral achievements

A clarifying echo from the 1940s is provided by the United Nations War Crimes Commission established in 1943 – two years before the International Military Tribunal sat at Nuremberg. It was an effective international framework supporting war crimes prosecutions by its member states through legal advice, documentation and assessment of the viability of indictments, based on the principles of complementarity and inclusiveness.[38]

The United Nations War Crimes Commission developed standards for collecting facts of crimes committed by the occupying forces and a system for the presentation, transmission, and assessment of cases, and to provide legal assistance to the domestic authorities. The UNWCC gathered legal scholars and diplomats representing 16 allied countries: Australia, Belgium, Canada, China, Czechoslovakia, France, Greece, India, Luxembourg, Netherlands, New Zealand, Norway, Poland, Yugoslavia, UK, and the US (later joined by Denmark) The Commission's first chairman was Sir Cecil Hurst, former President of the Permanent Court of International Justice. Its unified character is an example that is not being followed today.

As a formally constituted diplomatic body, the UNWCC developed an inclusive cooperation model that enabled taking up leading roles by small and middle states, with agency of Eastern-European, Chinese, and Indian legal representatives. The UNWCC's Far Eastern Sub-Commission of Allied states in Chungking supported prosecutions of thousands of accused Japanese war criminals, and (eventually) support for Ethiopia's own War Crimes Commission, which developed cases against Italian officials under the mandate of the 1947 peace treaty between the allies and Italy.

UNWCC-member states started documenting war crimes already in the first months of war and attempted to gain international support for their accountability efforts. The first proposals concerning coordination of documenting Nazi crimes and defining common war crimes policy of allied countries were developed by Czechoslovak and Polish governments-in-exile in 1940. In September 1941, their members prepared a draft allied declaration on the prosecution of war criminals. The British government, which was more in favor of issuing a statement condemning Nazi crimes than outlining a framework of post-war justice, withdrew from works on the Polish–Czechoslovak proposal in October 1941.[39] Nevertheless, the governments of nine occupied countries: Belgium, Czechoslovakia, France, Greece, Luxemburg, Norway, the Netherlands, Poland, and Yugoslavia, discussed this project drafted the declaration on the prosecution of war criminals, which was adopted on 13 January 1942 at St. James's Palace in London.[40]

The *Declaration of St. James's Palace* outlined the principles of prosecution and punishment of individuals in breach of international law – specifically the IVth Hague Convention. The goal of the Declaration was to guarantee effective jurisdiction on national and international level over crimes committed under Nazi rule, including the surrender of war criminals and through such collaborations ensure

legal due process and avoid acts of revenge through international legitimacy. The Declaration's signatories placed "among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them" and they resolved "to see to it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out, handed over and (b) that the sentences pronounced are carried out."[41]

The Great Powers did not join the Declaration of St. James's nor the works of Inter-Allied Commission on the Punishment of War Crimes, which was established by the governments in exile in spring 1942 to coordinate war crimes documentation and accountability efforts of allied states. In summer 1942, the governments of occupied counties launched a vigorous diplomatic and information campaign on the large-scale atrocities and mass exterminations of civilians under Nazi rule.[42] On 7 October 1942, the British Lord Chancellor Viscount Simon presented the following scope of work of the United Nations Commission for the Investigation of War Crimes just announced by the US and UK: "1) It should investigate and record the evidence of war crimes, identifying where possible the individuals responsible; and 2) It should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming".[43] Nonetheless, it took over a year until the United Nations War Crimes Commission's inaugural meeting on 20 October 1943 as the skepticism of Anglo-American officials continued. Lessons from this 1940's experience for responses to Ukraine are profound in this and other instances. Less powerful – indeed refugee – governments were able to exercise some agency over the US and UK creating effective judicial action in circumstances of intense political pressures.

12.4 A complex approach towards accountability

The UNWCC was divided into three Committees. Committee I examined the charge files and evidence submitted by each state and gave guidance on the investigations and listing of alleged war criminals. Works of Committee II on Means and Methods of Enforcement focused on the technical aspects of prosecuting war criminals, such as the questions of detention of suspects, applicable criminal procedure or means of collecting and securing evidence. Committee III on Legal Questions analyzed the legal issues related to the prosecution and punishment of war criminals, Committee III was on a daily basis advising Committee I, when discussing the admissibility of submitted cases.[44]

The complementary competences of the three Committees illustrate UNWCC's sophisticated approach towards the issue of accountability, including the pre-trial validation of evidence, perceptive discussions on the definition of war crimes, crimes against humanity and crimes against peace, on the rules of criminal liability in these cases or on the scope of national and international jurisdiction.[45] UNWCC practices of further note with relevance to Ukraine include combining development of new legal definitions and estimation of whether cases reached a *prima facie* standard with the documentation process.

The UNWCC decided to use the list of 32 war crimes compiled by the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties for the Paris Peace Conference in 1919 as a guide for preparing the cases, not as a closed catalog of offenses.[46] In May 1944 Committee III presented a proposal concerning the scope of the Commission's work. The report distinguished four categories of crimes:

1) crimes committed for the purpose of preparing or launching the war, irrespective of the territory where the crimes have been committed;

2) crimes perpetrated in the Allied countries and crimes committed against members of the armed forces or civilian citizens of the UN abroad, in the air or on the sea;

3) crimes committed against any persons without regard to nationality, stateless persons, because of race, nationality, religious, or political belief, irrespective of where the crimes have been committed;

4) crimes that might be perpetrated in order to prevent the restoration of peace.[47]

This qualification has not been officially accepted but has an echo in the London Charter for the Nuremberg IMT. The question of crimes committed against enemy nationals and stateless persons, the concept of crimes against humanity (securing international legal protection to civilians experiencing organized mass violence, including the citizens of Axis countries, exposed to persecution and extermination by their own state – German and Austrian Jews)[48] and the issue of criminal liability for waging and launching aggressive war were crucial for determining limits of Commission's authority. In summer 1944, the Commission sought approval from the British government to extend its authority to crimes against humanity and to collect evidence on racially, politically, or religiously motivated crimes committed on enemy nationals, but didn't succeed. However, crimes against humanity were recognized as international crime in the *London Agreement for the prosecution and punishment of the major war criminals of the European Axis*,[49] and subsequently included in UNWCC's competence on 30 January 1946.[50] On the same day the Commission extended its powers to crimes against peace, as defined in Article 6 a) of the Nuremberg Charter. The issue of the criminal character of war (derived from the 1924 Geneva Protocols and Kellogg-Briand Pact of 1928) impacted UNWCC's works from the very beginning, but did not reach a common position on individual liability for the preparation, launching and waging of aggressive war prior to the Nuremberg Charter.[51]

Another principle, debated in the UNWCC, which significantly influenced the war crimes trials after World War II was the concept of criminal organization. When assessing the charges Committee I applied the standard of *prima facie* evidence (sufficient evidence to justify a formal indictment for arrest and trial by member states). In summer 1944 UNWCC issued a recommendation for recognizing the membership in organizations considered as criminals – Sturmabteilungen (S.A), S.S. (Schutzstaffeln), and Geheime Staatspolizei (Gestapo) as sufficient *prima*

facie evidence against the suspects.[52] The Commission considered that beyond individual actions it was necessary to criminalize membership of groups that were created to commit crimes. In the wake of the further discussion on the criminal responsibility of the German Government for offenses committed by its subordinates, by applying its laws and criminal policy, UNWCC agreed to declare the Nazi Government a criminal group.[53] This principle was officially adopted in May 1945, but it was applied already in charges, against state representatives and were dealing with the systematic crimes perpetrated in occupied territories, e.g., Polish charges Nos. 12, 15 and 20 submitted to the Commission between March and June 1944 against Hans Frank, Arthur Greiser, and others members of German Government concerning persecution of intellectuals and crimes committed in concentration camps, Czechoslovak charges Nos. 6–16 against Adolf Hitler and other members of Nazi Government filed between November 1944 and April 1945 or in the Belgian charge file No. 4 from March 1945 against Adolf Hitler, Herman Goering, and others concerning crimes committed in KL Auschwitz-Birkenau.[54]

This argumentation resonated in the judgment of the International Military Tribunal at Nuremberg (IMT), that "the principle of international law which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law."[55] The IMT also recognized the concept of a criminal organization but didn't consider the Reich Cabinet to fall into this category.[56] Nevertheless, the IMT judgment and the UN General Assembly resolution 95(1) of December 1946 affirming the principles of international law recognized by the IMT, confirmed that the principle of inviolability of immunities of state leaders and officials is inapplicable to acts constituting crimes under international law (as defined in the Nuremberg Charter: crimes against peace, war crimes and crimes against humanity).[57]

In the post-World War II-trials, the immunity of civil and military leaders has also been set aside by the national courts of allied countries, prosecuting former heads and high-level officials of local Nazi governments (e.g., trial of Karl Hermann Frank the Secretary of State of the Protectorate of Bohemia and Moravia before people's tribunal in Prague in 1946; trials of Arthur Greiser, the General Governor of Reichsgau Wartheland and Josef Bühler, Hans Frank's deputy in the position of the governor of the General Government before the Polish Supreme National Tribunal in 1946 and 1948[58]).

The UNWCC charge files of 1944 and 1945 challenging the immunity of state representatives can be recalled for use in efforts to pursue Russian leaders for crimes committed in Ukraine and in the context of discussions on the head of states immunity before foreign national courts exercising universal jurisdiction, notwithstanding the judgment of the International Court of Justice in the Arrest Warrant case.[59]

12.5 UNWCC as a centralized model of documenting international crimes

The UNWCC was responsible for the pre-trial validation of documentation of international crimes, it ordered and administered relevant data, compiled lists of alleged war criminals and supported allied countries in conducting investigations, but the

Commission itself possessed no investigative powers or machinery to perform these tasks. All activities related to fact finding were conducted by the allied governments and their special war crimes offices ("National Offices"). Some refugee governments documented crimes committed in their countries and adjusted these structures to UNWCC requirements in autumn 1943, while others procrastinated on starting works in this field, or expected detailed guidance.[60] Given these various attitudes and the difficulties in gaining information from occupied territories, the Commission's role as central coordinating agency, supporting countries in obtaining evidence and providing legal support proved essential for developing international cooperation aiming at the prosecution of war criminals on national and international level.

In 1943, UNWCC instructed member states on transmission of war crimes using a form prepared by Commission's Secretariat that provided a case description in English or French and to "attach translations or summaries (...) to any copies of documents written in other languages." The following information was to be included: (1) what is the offense alleged? (2) Can the offender be identified? (3) What was the degree of responsibility of the offender, having regard to his position? (4) Was the offense committed on the offender's own initiative, or in obedience to orders, or in carrying out a system or a legal disposition? (5) What evidence is available in support of the charge? (6) What will be the probable defense? (7) Can the offender be put on trial with a probability of conviction?[61] In cases where the disclosure of personal data would endanger the witnesses, it was recommended that such details be kept confidential and communicated to the Committee I orally, on request.[62] For the legal qualification of offenses in addition to international laws mentioned above, provisions of national penal codes and of war crimes legislation, issued by the respective countries for the purpose of post-war criminal proceedings were required, such as the *Decree of the President of the Republic of Poland on Criminal Liability for War Crimes* of 30 March 1943, the Belgian *Decree* of 5 August 1943 or the French *Ordinance on Repression of War Crimes* of 28 August 1944.[63]

The governments were advised to

> compile lists of all enemy civil and military persons in authority in each occupied district, such as Gauleiters, Governors, Chiefs of the S.S., Gestapo etc., with identity and some most important crimes committed in the provinces, districts, towns or camps where they are or were in authority.[64]

Particular importance was put on collecting evidence incriminating the Nazi civil and military leaders and proving their responsibility for crimes resulting from orders, legislation (such as decrees ordering deportations or shootings of hostages, laws discriminating on the grounds of religion or nationality), and criminal policy designed and imposed by them.[65] As mentioned above, the membership in organizations, recognised by the UNWCC as criminal, could have been used as sufficient *prima facie* evidence against the suspects. The Commission also compiled special lists of SS, SA, and Gestapo personnel and lists of witnesses.

In January 1945, UNWCC representatives adopted a resolution on obtaining information and evidence from Axis prisoners of war and drafted a special interrogation questionnaire to be used for this purpose. Subsequently the Governments were advised to keep in custody all prisoners of war under their authority until their identity and possible complicity in (or knowledge of) crimes committed in occupied territories has been clarified.[66] UNWCC obtained evidence from refugees and displaced persons in the care of the United Nations Relief and Rehabilitation Administration.[67] In order to strengthen the cooperation between the National Offices and the UNWCC and to coordinate undergoing investigations and their methods, a conference of the National Offices was organized between 31 May and 2 June 1945.[68]

UNWCC focused on the effective prosecution, apprehension, and surrender of suspects. Committee II on Enforcement developed principles of the *Draft Convention on the surrender of the war criminals and other offenders*, using a project prepared by the Ministers of Justice of five allied governments (Belgium, Luxembourg, the Netherlands, Norway, and Poland) in 1943. The Committee defined rules for the surrender of persons wanted for trial (war criminals and persons accused of collaboration with occupying forces) between allied countries, and outlined the rights of the accused and the relevant administrative procedure, based on the UNWCC lists of war criminals. As for handing over the suspects from the enemy countries, Committee II recommended provisions securing the apprehension and surrender of war criminals in the armistice and drafted a clause on "surrender by the Axis Powers of persons wanted for trial as war criminals."[69] Analogous provisions have been included in Article 11 of terms of Unconditional Surrender with Germany.[70]

In summer 1944, the Commission recommended the detention of all members of Gestapo and SS directly after concluding the armistice with Germany and suggested the establishment of an UNWCC-agency in Germany and its allies, responsible for tracking down and arresting suspects, collecting evidence, conducting interrogations, and other investigative tasks. The War Crimes Agency was meant to be an organ of the United Nations War Crimes Commission attached to the Supreme Headquarters of the Allied Expeditionary Force (S.H.A.E.F.), composed of lawyers with functions of investigating judges, assisted by liaison officers.[71] This proposal, aiming at close collaboration with military forces, was communicated to the British Government and to General Eisenhower's Headquarters in summer 1944. To a certain extent it was implemented, when the allied military occupation authorities established the Central Registry of War Criminals and Security Suspects (CROWCASS). This machinery, however, did not provide for an active participation of the UNWCC, but the SHAEF commanders were authorized to use the UNWCC lists of war criminals as sufficient ground for apprehension and detention of listed individuals without requiring any additional proof of their guilt.

Another proposal on extending UNWCC's competence to investigative tasks was raised in November 1944 by Lord Wright, the Australian delegate and Commission's chairman since January 1945. He advocated the establishment of an independent Central Investigating Branch of the United Nations War Crimes

Commission with headquarters in London and branches in capitals of all concerned countries.[72] As the occupied areas were liberated, a massive amount of information became available and the National Offices could operate more effectively – the UNWCC members decided to strengthen the already existing investigative structure and the cooperation between the National Offices with the Commission. Nevertheless, there was a strong need to assign investigative functions to the UNWCC that could be exercised in particularly challenging investigations. In September 1944, the Polish Government appealed to the UNWCC to set up a Special Enquiry Commission that would investigate on site crimes committed in concentration camps and secure evidence immediately after liberation.[73] This motion was raised again in Spring 1945 after UNWCC delegates returned from inspection of KL Buchenwald, which was arranged by General Eisenhower on 26–27 April. Bohuslav Ečer and Lord Wright attempted to set up an investigation team composed of UNWCC delegates from Poland, Czechoslovakia, Greece, Yugoslavia, and Belgium that would investigate on site crimes committed in concentration camps Buchenwald, Belsen, and Dachau.[74]

None of the UNWCC's proposals to perform investigation activities and strengthen the Commission's structure in that respect were approved by the US or British authorities, as result of which, the Commissioners focused on coordinating the exchange of information and documentation and on providing international support and legitimacy for domestic prosecutions. By the end of its work in March 1948, the Commission had examined a total of 8,178 indictments for war crimes and breaches of international law and had compiled 80 lists of suspects with a total of 36,529 names. UNWCC delegates not only supported prosecutors at the International Military Tribunal in selecting evidence for the Nuremberg Trial, but also participated in over 2,000 trials of Axis criminals before the courts of the Allied countries.[75]

12.6 Conclusion

In this chapter, we have argued that documentation is an essential foundation of accountability efforts and that the precedent of the UNWCC and its member states presents an example of effective cooperation between domestic and international authorities for documenting international crimes and developing legal standards supporting effective prosecution, based on the principles of complementarity and inclusiveness.

The UNWCC provides a wealth of precedent and practice of domestic-international cooperation on accountability for international crimes that can be used to reinforce contemporary practice in the case of Ukraine. By creating a centralized model of documenting international crimes, the UNWCC enacted a range of effective measures such as securing and evaluating a mass amount of evidence from multiple countries, uniform system of reporting war crimes, legal advice, sharing best practice, validating indictments at a pre-trial stage to encourage effective prosecution and fair trials. This provides several useful functions that could be drawn upon in modern international criminal justice, either individually

by existing bodies, or in a new body such as a technical assistance organisation that could be called upon, when needed, to play an intermediary role between states and the ICC and provide independent expert advice to domestic judicial systems.[76] The Commission's experience can be also useful to clarify and streamline the plethora of efforts today. While Eurojust performs a core and vital function, other entities, including from civil society, are working in parallel, and there is no firmly established process for the evaluation of documentation to see if they meet a pre-trial standard, first important steps in this direction notwithstanding.

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Part III

Prosecution of crimes committed in the war in Ukraine

13 Ensuring fairness of war crimes trials in Ukraine

Gaiane Nuridzhanian

13.1 Introduction

The war that Russia started against Ukraine in 2014 and escalated in February 2022 inevitably affected the operation of the Ukrainian judicial system. Ongoing hostilities, destruction, and damaging of the court buildings, displacement of the population, and the consequent lack of personnel, lack of electricity resulting from Russia's attacks on the energy infrastructure interrupted work of the courts in Ukraine.[1] Moreover, the courts in the Ukrainian territories under the control of Russian armed forces stopped functioning altogether. At the end of April 2022, about 20% of Ukrainian courts were not functioning.[2] To ensure continued administration of justice, the Ukrainian parliament adopted legislative changes allowing transfer of jurisdiction over the occupied regions to the courts located in the adjacent regions.[3] After Ukraine had re-established control over parts of its territory captured by Russia at the start of the 2022 full-scale invasion, courts in the liberated regions renewed their work.

With some interruptions and adjustments, the Ukrainian judicial system has nonetheless continued functioning during the war. Already in May 2022, a Ukrainian court convicted a Russian soldier of a war crime of killing a civilian committed just several months earlier in February 2022. While trials related to war crimes in Ukraine before February 2022 received little international attention, the judgment delivered in May 2022 and subsequent convictions of Russian soldiers prompted lively expert discussion on challenges of administration of wartime justice. Scholars point out the very large number of alleged war crimes, the ongoing war,[4] and concerns relating to independence of judges[5] as factors that may undermine the fairness of war crime trials in Ukraine.

Another criticism directed at the war crime trials in Ukraine relates to their apparent one-sided nature. To be sure, Ukraine must prosecute war crimes committed within its jurisdiction regardless of the perpetrator's allegiance and nationality. At the same time, the fact that the first war crime cases following Russia's full-scale invasion were brought against members of Russian armed forces is explained by an objective factor. The investigation conducted by the UN Independent International Commission of Inquiry on Ukraine (the UN Commission) demonstrates that overwhelming majority of human rights violations, war crimes, and breaches

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of international humanitarian law in Ukraine are committed by Russian armed forces.[6] These war crimes and violations are of widespread and systematic nature.[7] As regards Ukrainian armed forces, in the first year of Russia's full-scale invasion, the UN Commission documented only two incidents that qualify as war crimes.[8] Any national criminal justice system can reasonably be expected to prioritize prosecution of atrocity crimes of large-scale, repetitive, and systematic character such as are the war crimes committed by the Russian armed forces in Ukraine. Whatever the allegiance and nationality of the perpetrator, however, ensuring fairness of criminal proceedings is imperative.

This chapter analyzes fair trial issues arising in connection with the investigation and prosecution of war crimes in Ukraine and discusses ways of enhancing the fairness of the justice process. For the purposes of this chapter, fairness means the right to a fair trial as it is defined in international human rights law.[9] Independent and impartial court, right to legal assistance, equality of arms and legal certainty form part of the right to a fair trial.

Ensuring fairness of war crime trials in Ukraine is crucial for four main reasons. First, fair trial is a fundamental human right that Ukraine is bound to respect in pursuance of its obligations under international law. Article 6 of the European Convention on Human Rights (ECHR) and Article 14 of the International Covenant on Civil and Political Rights oblige Ukraine to respect the individual's right to a fair trial. Ukraine may have to answer before the European Court of Human Rights (ECtHR) and the UN Human Rights Committee for its justice system's failure to respect the right to a fair trial. Second, fairness of war crime trials is important for Ukraine's self-perception as a society aspiring to live by rule of law and respect for human rights. Third, the legitimacy of the war crime trials will depend on their fairness. So will their acceptance by perpetrators, victims and communities that have been harmed by war crimes, as well as the world at large. Fourth, the historical significance of these war crime trials is clear. Similar to domestic and international trials that dealt with heinous crimes committed in Europe, South America, and Asia in the last century, war crime trials in Ukraine are an example of transitional justice measure to ensure accountability for mass atrocities and heal the wounds inflicted by the war.

This chapter begins with providing an overview of war crime trials in Ukraine in Section 13.2. The chapter proceeds in Sections 13.3–13.7 to investigate five issues arising in connection with the war crime trials in Ukraine. These five issues are independence and impartiality of judiciary, lack of expertise in prosecuting war crimes among legal professionals in Ukraine's criminal justice system, shortcomings of Ukrainian criminal legislation on war crimes, the rights of the defence, and victims' right to justice. Section 13.8 concludes.

13.2 Overview of domestic war crime trials in Ukraine

Russia began its unlawful war against Ukraine in 2014 by occupying Crimean peninsula and waging a proxy war in Donbas region, using organized armed groups that Russia controlled, armed, trained and financed.[10] By February 2022,

the hostilities in Donbas that had been ongoing with varying intensity since 2014 resulted in 51,000–54,000 casualties.[11] In view of the length of the armed conflict in Donbas and of the number of casualties, it is perhaps surprising that Ukrainian courts delivered only three judgments on war crimes committed during the 8 years preceding Russia's full-scale invasion.[12] The explanation lies in the legal qualification of the culpable conduct. Instead of applying Article 438 of the Criminal Code of Ukraine of 2001 (CCU) that punishes violations of laws and customs of war, domestic organs tried acts constitutive of war crimes as "ordinary" crimes or as an act of terrorism criminalized in Article 258 CCU. This choice resulted from unfamiliarity with international humanitarian law, lack of expertise in prosecuting war crimes, uncertainty as to the legal nature of the armed conflict in Donbas, and Ukraine's decision to label the armed conflict as "anti-terrorist operation".[13]

Most of the defendants in the criminal cases that Ukrainian courts tried in connection with the armed conflict in Donbas were accused of being supporters or members of organised armed groups.[14] According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), these proceedings were marked by systematic violations of the right to a fair trial.[15] One such issue consisted in the breach of the defendant's right to legal counsel. In some cases, authorities questioned suspects in the absence of a lawyer thus increasing the risk of forced confessions.[16] Furthermore, state-appointed lawyers did not always act in the best interest of their clients, appearing reluctant to confront the prosecution, to challenge decisions unfavourable to defendants or support defendant's allegations of the authorities' arbitrary or unlawful conduct.[17] The OHCHR also documented instances of attacks on privately-contracted lawyers, which attacks the Ukrainian police tolerated and failed to investigate effectively.[18] Another issue concerned threats to judicial independence. Judges in criminal cases relating to the armed conflict experienced undue pressure from the prosecutors and private persons attempting to influence the outcome of the proceedings.[19]

By February 2022, the Ukrainian legal community had become better acquainted with international humanitarian law. A specialized department for prosecuting crimes committed during the armed conflict was created within the Office of Prosecutor General of Ukraine (OPG) in 2019. As Iryna Marchuk writes, prior training of prosecutors and police officers in investigating atrocity crimes, lack of any doubts as to legal qualification of Russia's full-scale attack on Ukraine as an international armed conflict, and a desire to ensure justice for brutalities committed during the invasion led to prompt investigations and war crime trials before Ukrainian courts.[20]

The first case related to a war crime committed at the very beginning of Russia's full-scale invasion attracted considerable international attention.[21] On 23 May 2022, a district court in Kyiv convicted a Russian soldier for killing an unarmed civilian. The soldier initially received a life sentence, but the court of appeal later reduced his sentence to 15 years' imprisonment.[22] Convictions of other members of Russian armed forces for wilful killing, rape, sexual violence, torture, unlawful confinement of civilians, pillaging, indiscriminate attacks on and intentional targeting of civilian objects followed. According to 3 July 2023 statement of the Prosecutor

General of Ukraine, 53 individuals were convicted by Ukrainian courts and 207 were indicted for war crimes committed since 24 February 2022.[23]

The very high number of war crimes[24] allegedly committed during Russia's large-scale attack on Ukraine stirred discussion on the ability of Ukraine's justice system to investigate and prosecute war crimes effectively and fairly. The main concerns relate to judicial independence and impartiality, lack of expertise in prosecuting atrocity crimes, the adequateness of the national legal framework, and protection of the defence and victims' rights. These issues are discussed in turn in the following sections.

13.3 Judicial independence and impartiality

War crime trials in Ukraine raise two major concerns related to judicial independence and impartiality. The first one is judges' independence from outside influence. Susceptibility to corruption and political interference is a longstanding weakness of Ukraine's judiciary. Indeed, according to the OHCHR, the main threat to judicial independence in trials related to the armed conflict in Donbas in 2014–2020 was undue external pressure from prosecution and private groups.[25] However, as the OHCHR states, since 2018 the frequency of these acts of pressure on judges has decreased.[26] The judicial reform may have been a factor that contributed to the reduction of pressure on judges.[27] The Ukrainian judiciary has undergone significant changes since 2016, when a comprehensive reform to strengthen judges' autonomy and protect their independence from undue political influence was launched. While the judicial reform remains a work in progress and its implementation has not been entirely satisfactory,[28] international monitors have noted considerable progress in enhancing independence of the judiciary in Ukraine.[29]

The second major concern relates to the courts' appearance of independence and judges' impartiality. While the accused's individual perception is important, the decisive test of appearance of independence and impartiality of Ukrainian courts in war crime trials is the existence of any objectively justified doubts.[30] The general context in which the war trials are held may raise questions as to the ability of Ukrainian judges as citizens of the victim state to remain impartial when trying members of armed forces of Russia, the aggressor state.[31] But that context alone does not automatically strip all judges in Ukraine of impartiality towards the accused who are members of Russian armed forces. In other words, Ukrainian courts and judges cannot be presumed to lack independence and impartiality in war crime trials because of Russia's aggression against Ukraine. An individual judge must be presumed to be impartial unless proof to the contrary exists.[32] The impartiality must be assessed based on conduct, convictions, and interests of an individual judge in the circumstances of a particular case.[33]

Furthermore, safeguards allowing correction of possible shortcomings in war crime trials exist in the Ukrainian legal system. First, Ukraine has a functioning three-tier court system in criminal matters. Review on appeal or in cassation by higher courts can cure deficiencies, including those relating to lack of independence and impartiality, in trials before lower courts.[34] Second, the ECtHR acts as an

additional safeguard against violations of the right to a fair trial in war crime trials in Ukraine. Defendants can challenge any potential violation of the right to an independent and impartial court before the ECtHR. Moreover, owing to the authority that the Strasbourg court enjoys in the Ukrainian legal system,[35] the very possibility of such cases being brought to Strasbourg exercises a supervisory function over Ukrainian judiciary.

Additionally, nothing in international law prevents the Ukrainian justice system from investigating and prosecuting war crimes committed by members of Russian armed forces in Ukraine. On the contrary, international law obliges Ukraine to do so. Under customary international humanitarian law, states must investigate war crimes committed on their territory.[36] A similar obligation is found in the Geneva Conventions, which govern the conduct of the parties to an armed conflict.[37] Furthermore, Ukraine has a duty under Articles 2 and 3 of the ECHR to conduct effective investigation into the alleged breaches of right to life and prohibition of ill-treatment, including when committed in the context of armed conflict.[38] Most importantly, trial monitoring conducted by independent experts in 2023 identified no instances of attempts to exercise undue influence on judges in war crimes cases.[39] What is more, judges mainly demonstrated openness to trial monitoring and public attendance of court hearings.[40]

13.4 Expertise in prosecuting war crimes

Although the war in Ukraine began in 2014, insufficient effort had been made to improve expertise in prosecuting war crimes among legal professionals in Ukraine's justice system prior to 2022. The issue became particularly acute after Russia's full-scale invasion when the number of alleged war crimes increased drastically. Knowledge and correct application of international humanitarian law and international criminal law in war crime trials is essential for their fairness.

An immediate solution is to educate and train legal professionals in relevant legal standards and practices of prosecuting war crimes. Many such educational initiatives have been implemented in cooperation with domestic and international partners since February 2022. For example, the UK organized a training with a focus on prosecuting war crimes for Ukrainian judges.[41] A training for Ukrainian investigators and prosecutors took place in Croatia, where their Croatian counterparts shared their experience in prosecuting atrocity crimes. The National School of Judges of Ukraine in partnership with the EU-funded Project Pravo-Justice organized a course on international criminal law for Ukrainian judges and prosecutors.

Ukrainian investigators, prosecutors, and judges could also draw on the knowledge of national and international experts when dealing with specific war crime cases. A good example is the Atrocity Crimes Advisory Group (ACA) established by the EU, US, and UK in May 2022 to support the work of the OPG War Crime Department.[42] ACA consists of Mobile Justice Teams, which are deployed on the ground to support Ukrainian prosecutors and increase their capacity to conduct field investigations, and the Advisory Group, which provides advice and expertise

to the OPG and Mobile Justice Teams.[43] As regards courts, *amicus curiae* could become an additional source of independent expertise for judges in cases involving complex legal issues.[44]

Another measure crucial for consolidating expertise is introducing specialization in war crime cases within Ukraine's justice system. As regards prosecution service, the OPG has had a department specialized in prosecuting war crimes since 2019.[45] Specialization should also be introduced among the investigators and prosecutors on the local level, at least in the regions of eastern and southern Ukraine that still suffer the most from Russia's attacks. It is the local investigators and prosecutors who often have the most direct and prompt access to crime scenes and evidence in these regions.

As to the judiciary, two alternatives exist. The first one is to introduce specialization of individual judges sitting within the existing courts of general jurisdiction. This alternative would be relatively easy to implement, as it builds on existing court structure and is likely to require only minimum legislative changes.[46] Ukraine has a wide network of more than 600 trial courts, which is courts of first instance with jurisdiction to try criminal cases. Using even part of the existing court network would allow the system to process many war crime cases. In view of tens of thousands of alleged war crimes recorded to date and the ongoing character of the war, training a considerable number of judges to adjudicate war crime cases is an advantage.

The other alternative is to create a separate specialized court. The concentration of war crime cases in the hands of one court would expedite building up judicial expertise and would ensure consistency in war crime trials. But a single court, however well-equipped and efficient, may struggle to process thousands of alleged war crimes cases within reasonable time as required by the fair trial standards. An international element could be added to the specialized court to enhance its expertise. International legal advisors to judges are an option.[47] Foreign judges, however, could not sit on a court rooted in Ukraine's legal system. According to the Constitution of Ukraine, which cannot be amended while the state of emergency persists, only Ukrainian citizens can become judges in Ukraine.[48]

The question of the correct application of relevant law in war crime trials in Ukraine is closely connected to the issue of quality of Ukraine's legislation criminalizing violations of laws and customs of war. The following section discusses shortcomings of this legislation and the imperative of its improvement.

13.5 Domestic legal framework

The Criminal Code of Ukraine contains one blanket provision criminalizing conduct amounting to violations of laws and customs of war. Paragraph 1 of Article 438 CCU specifies four different categories of culpable conduct. These categories are cruel treatment of prisoners of war and civilian population; expulsion of civilian population for the purpose of forced labour; pillage of national heritage in occupied territories; and use of means of warfare prohibited in international law. Additionally, Article 438 § 1 contains a residual category, which criminalizes

conduct amounting to "other violations of laws and customs of war." This residual category is applied by Ukrainian courts to various types of war crimes extending from pillaging to indiscriminate attacks to sexual violence. Punishment for crimes listed in Article 438 § 1 ranges from 8 to 12 years' imprisonment. According to Article 438 § 2 CCU, when combined with wilful killing, conduct listed in Article 438 § 1 is punished with 10 to 15 years' imprisonment or life sentence.

The imprecise and open-ended wording of Article 438 CCU, together with lack of sufficient expertise in prosecuting war crimes among legal professionals discussed in the preceding section, poses a challenge to correct application of international law in war crime trials in Ukraine. Coming from a civil law system, Ukrainian judges are accustomed to applying written norms formulated with a certain degree of precision. However, Article 438 CCU is not such a norm. In part criminalizing "other violations of laws and customs war," Article 438 CCU simply refers the judge to the vast body of international humanitarian law contained in international treaties and custom. Another unfamiliar territory for Ukrainian judges trained in civil law system is application of the case law of international criminal courts and tribunals, which have developed important legal principles on individual responsibility for war crimes.

In recognition of the need to improve Ukraine's criminal legislation on atrocity crimes, in May 2021, the Parliament of Ukraine adopted a bill that, among other changes, incorporated a detailed catalogue of war crimes into the CCU.[49] The bill did not enter into force because the President of Ukraine failed to sign it.[50]

Introducing into domestic legislation a detailed list of war crimes accompanied by elements of crimes and definitions of relevant legal concepts would provide Ukrainian judges and prosecutors with a useful tool for navigating the extensive body of international law relating to war crimes. Detailed criminal legislation will contribute to better understanding among legal professionals in Ukraine's criminal justice system of the nature of war crimes and distinctions between them. Spelling out in a legislation the elements of crimes that need to be proved for conduct to amount to war crimes will also bring more clarity into prosecution and trial of war crimes. Moreover, the correct identification of applicable international law rules and accurate qualification of the accused's conduct by judges and prosecutors will improve the quality and therefore fairness of war crime trials. Finally, the principle of legality enshrined in Article 7 of the ECHR, from which no derogations in times of war is permitted, requires that the law defines clearly and with sufficient precision criminal offences and their respective penalties.[51] Making Ukraine's legislation criminalizing conduct amounting to war crimes clearer and more precise will improve the quality of the law and consequently ensure better respect for the principle of legal certainty.

13.6 The rights of the defence

Many of the accused charged with committing war crimes in Ukraine are tried *in absentia*. In February 2023, the Prosecutor General of Ukraine stated that 12 out of 26 persons convicted at the time were tried in their absence, while 14 convicted

defendants were present in court.[52] The right of a person charged with a criminal offence to be present at and participate effectively in court hearings is an essential element of a fair trial. This right is not absolute, however, and a properly notified defendant can wave, either explicitly or implicitly, his or her right to appear before a court.[53] Furthermore, the necessity to effectively prosecute war crimes and to ensure victims' right to justice justifies trying *in absentia* persons who are outside the state's jurisdiction and whose notification and presence cannot be secured because of an ongoing war.[54] A trial *in absentia* is therefore not in principle incompatible with the right to a fair trial, provided domestic law permits a person tried *in absentia* to obtain fresh reconsideration of the case on the merits once this person becomes aware of the criminal case.[55] This requirement of fresh examination on merits applies where the person has not waived the right to appear in court and has not been evading justice.[56]

In absentia war crime trials take place in Ukraine in two types of circumstances. First, the Code of Criminal Procedure of Ukraine (CCPU) permits trying *in absentia* those prisoners of war (POW) charged with committing war crimes in Ukraine who have been returned to Russia during a POW swap between Ukraine and Russia.[57] The participation in POW swaps is voluntary and, according to the CCPU, must be confirmed with the person's written consent.[58] A POW, provided he or she is informed that his or her criminal case will continue *in absentia*, has a choice to remain and appear before the court in person or to return to Russia. Choosing the latter option arguably amounts to a waiver of the right to be present in court and defend oneself in person.

Second, the CCPU permits *in absentia* proceedings in war crime cases against persons who are evading justice by hiding on the Ukrainian territories outside the control of Ukrainian government or in Russia.[59] Evading justice amounts to an implicit waiver of the right to appear before a court.[60] However, a person who has not been properly notified of the criminal charges against him or her cannot be automatically considered to be evading justice.[61] Ukraine therefore needs a special procedure for re-examination of *in absentia* convictions that have been delivered unbeknownst to the defendant.[62] No such procedure exists in the Ukrainian criminal procedural law. According to the ECtHR jurisprudence, other general procedures for re-opening of a criminal case, be it through extension of an appeal time-limit or based on extraordinary grounds, are unlikely to provide an effective re-examination of *in absentia* trials.[63]

Another important element of the right to a fair trial is the right of the person charged with a criminal offence to be effectively defended by a lawyer. According to the OHCHR, this right was often undermined in pre-2022 trials of persons associated with non-state armed groups controlling Donbas: State-appointed lawyers did not always act in their clients' interests, while privately hired lawyers suffered attacks from private groups.[64]

In post-February 2022 war crime trials, defendants were represented by lawyers appointed through a government-funded scheme. A formal appointment of a lawyer, however, does not necessarily guarantee an effective legal assistance to the defendant. A manifest failure of a state-appointed lawyer to act in the defendant's interest may

entail the responsibility of the state for breach of the right to a fair trial.[65] The courts therefore have an obligation to ensure that defendants are not deprived of the right to practical and effective legal assistance. Moreover, Ukrainian authorities must ensure that defence lawyers can fulfil their duties free from undue interference and outside pressure. Any threats and attacks against defence lawyers in connection with their work in war crime trials must be investigated effectively and without delays. Finally, the Ukrainian legal community should cultivate respect for defence lawyers' work among its members and public at large.

13.7 Participation and protection of victims

Securing victims' right to justice is an important function of criminal proceedings in war crime cases. The right to justice means that the state must conduct effective and prompt investigation of war crimes and, where sufficient evidence exist, proceed with their prosecution and trial.[66] Acknowledgement of truthfulness of victims' painful experiences together with legal recognition and reparation of the harm that victims have suffered may help them heal.[67] Ukrainian criminal justice system must therefore ensure that victims of war crimes in Ukraine can effectively exercise their right to participate at the investigative and trial stages of the case. Victim's participation in a criminal case includes the right to know the essence of the charge, to submit evidence, to testify or refuse to do so, to be assisted by a representative, to access certain case materials, to express their view on the sentence and to receive compensation for the damage inflicted by the crime.[68]

The right to justice also requires that the state duly punishes those who have been found guilty of war crimes.[69] Ukraine has returned to Russia some, if not all, POWs convicted of war crimes. The return of convicted POWs undermines the victims' right to justice because the return means that perpetrators do not serve their sentences and their war crimes remain unpunished. In this situation, victims' rights are balanced against another important public interest, namely to secure return to Ukraine of POWs held by Russia. Given that Ukrainian POWs are often tortured, in some instances to death, and held in inhumane conditions in Russia,[70] one could argue that securing their return, albeit by exchanging Russian POWs accused or convicted of war crimes in Ukraine, prevails over victims' interest. Nonetheless, to ensure effective prosecution and punishment of war crimes and respect for victims' right to justice, the Ukrainian government should not be exchanging those Russian POW who have been accused or convicted of war crimes.

A recent positive step in the protection of victims' rights at the domestic level was the recognition of the special vulnerability of victims of sexual violence.[71] The OPG created a special unit responsible for prosecuting sexual violence crimes committed in the context of the war.[72] Additionally, the OPG in cooperation with international experts and civil society developed a new – for Ukraine – victim-oriented strategy of prosecuting conflict-related sexual violence.[73] By providing the necessary support, protection, and safety guarantees to victims and witnesses of sexual violence, the new approach seeks to counter underreporting of sexual

violence crimes and improve victims' access to justice. The practical value of this new victim-centred approach will depend on its successful implementation.

Victim protection measures may also be necessary at the trial stage of proceedings. First, during wartime, the CCPU permits using video recording of witness and victim testimony as evidence in court.[74] The use of recorded testimony may impair rights of the defence as it deprives the defence of an opportunity to challenge the testimony. The courts should therefore limit the use of recorded testimony to exceptional circumstances. Nonetheless, recorded testimony can be an important tool for the protection of particularly vulnerable victims such as victims of sexual violence and children: it allows them to testify while sparing them the trauma of repeatedly recounting their painful experiences and the distress of facing the perpetrators in court. Second, a bill tabled with Ukrainian parliament in June 2023 proposes that cases relating to sexual violence committed during wartime are examined in closed court proceedings unless the victim requests public hearing. Indeed, in practice, court hearings in war crime cases involving allegations of sexual violence are conducted behind closed doors.[75] This exception from the rule of publicity of court hearings is justified by the need to protect private life and well-being of victims of sexual violence. More generally, courts – as well as investigators and prosecutors – must show respect for privacy of particularly vulnerable victims by avoiding disclosure of their identities to the public.

Another welcome development as regards the protection of war crime victims is the creation by the Ukrainian government, with the support from the United Nations Population Fund, of Survivor Relief Centres.[76] In addition to psychological support, these centres provide legal consultations to anyone affected by the war, especially those who fled the hostilities or territories occupied by Russia and suffered from conflict-related sexual violence. Such early legal aid is essential because it may help to identify war crime victims and assist them in exercising their right to justice.

13.8 Conclusion

The Ukrainian criminal justice system faces an extraordinary challenge. Tens of thousands of war crimes allegedly committed in Ukraine to date will have to be handled by Ukrainian investigators, prosecutors, and judges. The Ukrainian criminal justice system is well placed to deal with these war crimes, given its proximity to crime scenes, evidence and victims, understanding of the context and the language, and knowledge of the affected communities. However, ensuring the fairness of war crime trials requires strengthening the expertise of judges, investigators, and prosecutors as well as of defence lawyers and victims' representatives. A more precise and detailed legislation criminalizing conduct amounting to war crimes is needed to improve investigation and adjudication of war crime cases. Other legislative changes are crucial for safeguarding the rights of persons convicted *in absentia* and ensuring the protection of victims.

A recurring problem reported in pre-2022 conflict-related cases in Ukraine was attempts to intimidate and threaten the judges and defence lawyers. In the past, the

attempts to influence the judges emanated not only from private persons but also from prosecutors. It is the responsibility of Ukrainian authorities to ensure that judges and defence lawyers can exercise their functions free from undue influence. To protect judge's independence and integrity, Ukrainian authorities must show zero tolerance for any threats directed at the judges. Furthermore, any attacks on judges or defence lawyers connected to their work in war crime cases must be investigated effectively and without unnecessary delays. An important safeguard against the abuse of power is public scrutiny of criminal investigations.[77] Since February 2022 Ukrainian authorities, in particular the Prosecutor General and the head of the War Crime Department, have kept the public in Ukraine and abroad updated about their working methods and ongoing investigations. This approach is commendable. In contrast, systematized and regular information on war crime trials and their outcome is lacking.[78] An occasional update on the number of convictions does not suffice. Great public interest in accountability for war crimes demands that authorities keep the public regularly and systematically informed about progress in war crime cases.

To conclude, securing accountability for war crimes committed in Ukraine should be a joint effort on the part of the state, its criminal justice system, and the larger legal community. Additionally, cooperation with domestic civil society and international experts, akin to that actively pursued by Ukraine's OPG, may assist Ukraine in finding the best solutions for the challenging task of prosecuting tens of thousands alleged war crimes. However, neither the difficulty of the task that Ukraine's criminal justice system faces, nor the indignation of the Ukrainian people at the unlawful and brutal war must compromise the fairness of war crime trials. International law obliges Ukraine to respect the right to a fair trial. Moreover, the fairness of war crime trials is decisive for Ukraine's establishment as a society based on the rule of law and respect for human rights. These values are what Russia seeks to destroy. Safeguarding these values is another form of victory over the aggressor.

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14 Prosecuting international crimes in Ukraine

The role of Ukrainian domestic courts[1]

Oktawian Kuc

On 24 February 2022, the Russian Federation unprovokedly invaded Ukraine. The nature of the attack – an aggression in violation of the UN Charter – has been confirmed by the international community acting within the United Nations.[2] But the criminal character of the conduct of the Russian armed forces is even more evident in the treatment of the population affected by the invasion. Within the international justice system, international crimes are to be prosecuted and punished first and foremost in domestic courts[3] and international mechanisms should play only a secondary role, supplementing national institutions in limited situations, as inscribed in the Rome Statute.[4] Consequently, the Ukrainian courts are the main institutions responsible for bringing war criminals to justice and securing satisfaction for their victims. Such is also the conviction of the Ukrainian legal community, as expressed by the Supreme Court Judge Stanislav Kravchenko:

> [e]stablishing the tribunal [*special military tribunal*] is very important. At the same time, the main work – consideration of tens of thousands of criminal proceedings regarding crimes of aggression and war crimes registered in Ukraine – will fall on the shoulders of national courts.[5]

The chapter discusses the readiness and capacity of the Ukrainian justice system to prosecute international crimes from the institutional and normative perspective. It argues that Ukrainian domestic courts are capable of carrying out their functions of bringing international perpetrators to justice and have in place adequate mechanisms allowing the system to adapt to fluid circumstances of war.

14.1 Capacity of the Ukrainian justice system to prosecute international crimes

The first indispensable element of effective prosecution of international crimes – genocide, war crimes, crimes against humanity, and crime of aggression – is an adequate legal framework penalizing these offences. National legislation may either transform international norms defining these crimes – often with national or regional additions or supplements – into domestic rules, or resolve to refer directly

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to international instruments and incorporate them into the municipal regime. The Criminal Code of Ukraine (CC)[6] utilizes both methods in its Section XX concerning criminal offences against peace, security of mankind and international legal order, of which most relevant provisions are discussed below.

Article 436 CC punishes any instance of public incitement to an aggressive war or an armed conflict. The Rome Statute does not prohibit war propaganda[7] and limits the incitement crimes only to genocide. Consequently, the Ukrainian legislation is more wide-reaching, but unfortunately it defines neither "an aggressive war" nor "an armed conflict," thus the precise meaning of these terms can only be reconstructed with the assistance of international law.

The crime of aggression is defined in Article 437 CC, which penalizes both "planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes" and "conducting an aggressive war or aggressive military operations" – the former by imprisonment from 7 to 12 years and the latter from 10 to 15 years. Compared to the Rome Statute, the definition seems broader as it first and foremost does not include the leadership requirement. Furthermore, the term "military operations" in the provision covers "acts of aggression" listed in Article 8*bis* (2) of the Rome Statute, but its scope is again rather wider.[8] Finally, the Nuremberg legacy of conspiracy for crimes against peace is missing from the Rome Statute but features in the Ukrainian Criminal Code.

In relation to the crime of aggression as defined in the Ukrainian Criminal Code, Ukrainian courts had rendered a few judgements even before the Russian Invasion concerning previous military operations against Ukraine. Some met with a certain criticism[9] – often justified, nevertheless they provide an interesting insight into the national approach to the matter. In the most important *Yanukovych case*[10] the Kyiv Court of Appeal confirmed the guilt of the former President of Ukraine for complicity in waging an aggressive war and for treason. He was found guilty of issuing a request to the head of a foreign state – the Russian Federation – to use armed forces on the territory of his own country against its population in 2014. Such a qualification is the first example of prosecuting an official for committing the crime of aggression against his own country.[11]

As far as war crimes are concerned, the concise Article 438 CC is rather a criminal blanket norm, which penalizes "any other violation of rules of the warfare stipulated by international treaties" ratified by Ukraine. Consequently, by reference, the provision incorporates the entire normative substance of the four Geneva Conventions and all three Additional Protocols as well as even older instruments, including the II and IV Hague Conventions, and those addressing the prohibition of certain means and methods of warfare. In addition, the provision also contains a sample list of war crimes, including cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labour, pillage of national treasures on occupied territories, and use of methods of the warfare prohibited by international instruments.

Unfortunately, Ukraine has only recognized the jurisdiction of the ICC, but so far has not ratified the Rome Statute, so its extensive compendium of war crimes is not incorporated through Article 438 CC into the Ukrainian legal system. But

the comprehensive war crimes enumeration from Article 8 of the Rome Statute is rarely reflected in criminal legislations of States in Central and Eastern Europe. They rather employ similar methods of criminalizing acts constituting violations of the law of war – providing general penal provisions encompassing many possible acts and indicating international law as the standard of reference.[12]

Prohibition of genocide in Article 442 CC resembles the one from the Genocide Convention and the Rome Statute. Notwithstanding, there is an important material dissimilarity as the Criminal Code of Ukraine does not criminalize crimes against humanity as a distinct category relating to a widespread or systematic attack against civilian population. Naturally, its specific provisions address offences like murder, torture, rape, but not in the context similar to other international crimes. This is yet the most significant deficiency of the international crimes prosecution in Ukraine.

Interestingly, like many other post-Soviet countries,[13] Ukraine penalizes the crime of ecocide. Article 441 CC stipulates in this regard that:

> Mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster shall be punishable by imprisonment for a term of eight to fifteen years.

After the destruction of the Kakhovka Dam on 6 June 2023, which left vast areas of the Lower Dnieper region underwater and devastated valuable ecosystems, the possibility of prosecuting ecocide as a separate crime resurfaced. It is not recognized as an international crime, although there have been attempts to criminalize acts against the environment on international level.[14] Within this context, presently the domestic law of Ukraine allows for a wider reach than international criminal law and in that sense future prosecution of ecocide should be considered as an important and significant contribution to the development of international criminal justice.

Notably, the discussed articles of the Criminal Code of Ukraine have not been amended since the beginning of the Russian Aggression in February 2022, thus guaranteeing stability and legal certainty in prosecuting international crimes. Therefore, issues of retroactivity do not pose a concern in the Ukrainian context. In contrast, a significant number of amendments has been passed in relation to offences against the foundations of national security of Ukraine, including treason, sabotage, collaboration, etc.

Another indispensable element ensuring their adequate, fair, and effective prosecution in domestic justice systems along with substantive penal provisions on international crimes is an institutional set-up. The situation of war and subsequent partial occupation of Ukraine by Russian forces and its satellite militia understandably affected the operation of the Ukrainian judicial system. Thus, the question is whether under such conditions domestic courts are capable of conducting trials with all procedural safeguards, as their willingness is not put into question. To mitigate these conditions, certain solutions have been implemented in Ukraine.

Acting under the "Law on the judiciary and the status of judges" amended at the beginning of March 2022, the President of the Supreme Court considering "the impossibility of courts to administer justice during martial law" signed on 6

March 2022 an order changing the territorial jurisdiction of courts from regions under occupation.[15] Under the order, jurisdiction of courts from the Donetsk, Kyiv, Luhansk and Kherson regions was transferred to courts in other towns and cities, often in adjacent regions. In coming months, the Supreme Court issued several dozen such decisions following the movement of the Ukrainian counter-offensive liberating subsequent towns and areas. Thus, after the Ivankiv District Court from the Kyiv region was able to resume its operations, the relevant order on the restoration of territorial jurisdiction was issued on 21 April 2022.[16] Actually, it was the first court from territories liberated from the Russian forces that resumed operations and during the official ceremony the Supreme Court President emphasized that the main goal of the judiciary was to return to the professional and timely administration of justice throughout the country. He stressed, "Judgments issued in cases against invaders and collaborators are our part in the overall victory of Ukraine over the Russian enemy. The Constitution and laws of Ukraine, decisions made in the name of Ukraine, are also weapons in the fight against the Russian occupiers."[17]

As of 1 June 2023, 56 courts in the Zhytomyr, Kyiv, Mykolaiv, Sumy, Kharkiv, Kherson, and Chernihiv regions reopened and resumed their operations. There are, however, still 35 courts within the Autonomous Republic of Crimea and 79 in other regions that are not exercising their jurisdiction, either due to the occupation by the Russian forces, proximity to the front line or destruction of buildings and infrastructure.[18] Their adequate substitutes have been designated and cases from those areas are heard by Ukrainian courts.[19] In all, however, the operation of less than 20% of Ukrainian courts has been directly affected by the ongoing conflict or the occupation of Ukrainian territories. Around 500 judges together with their families had escaped from the occupied territories and most of them had been seconded to other courts. According to the Chairman of the Council of Judges of Ukraine, seven judges lost their lives and nine were injured during the hostilities. In total, 54 judges and 353 court staff members have been serving in armed forces or other security services of the State. Although several judges agreed to collaborate with the Russian Federation on occupied territories, there are also stories of great heroism and courage among the judiciary. A district court judge Yuliya Matveeva from Mariupol was held captive for 7 months due to her function. While demining the Kharkiv region, Dmytro Konstantinov from the Krasnograd District Court was blown into pieces.[20]

Another important factor in assessment of the institutional readiness of Ukrainian courts to deliver international criminal justice is their experience with armed conflict situations. Since 2014, when the annexation of Crimea and the occupation of Donbas took place, the courts – at least some of them – have started to develop capacities in hearing conflict-related cases. It is reported that prior to the 2022 Invasion, 397 criminal proceedings relating to war crimes were initiated,[21] but only three were concluded. One of the reasons for this is the qualification of crimes from that period as terrorist offences rather than crimes related to violation of laws of war.[22] Although the 2022 Invasion only aggravated negative conditions under which Ukrainian courts operate, the justice system has developed sufficient resilience and instruments of quick adaptation. Also the training institutions within the justice

system have adjusted their offer with classes relating to war crimes prosecution. For example, the Training Centre for Prosecutors of Ukraine have an in-person and online courses relating to forced removal of civilians, prosecution of gender-based and sexual violence in armed conflicts, investigation of environmental offences, priorities of inspecting scenes of shelling targeting civilian objects, genocide – forcible transfer of children, killing of protected persons during armed conflicts, etc.[23]

Finally, the engagement of the Ukrainian civil society operating in the field of human rights violations and war crimes needs mentioning. It has been instrumental in facilitating prosecution of international crimes in Ukraine and beyond, even before the 2022 Russian Invasion. NGOs spread awareness about the international justice mechanisms and sensitized the public as well as Ukrainian authorities about war crimes committed by Russian forces and the responsibility of offenders. Importantly, the role of organizations – e.g., the Ukrainian Helsinki Human Rights Group, the Regional Centre of Human Rights, Truth Hounds, the Kharkiv Human Rights Group – in evidence collection and supporting Ukrainian authorities in their cooperation with the ICC for crimes committed after the Maidan protests in the Crimea and Donbas was invaluable.[24] This shows that not only the judicial system, but also the civil sector has already been sufficiently developed and experienced before February 2022 to support one another in the important task of prosecuting international offenders.

14.2 International assistance and cooperation

The main shortcoming of the Ukrainian judicial system has been an inadequate familiarity of judges, prosecutors, and investigators with international law relating to international crimes committed in Ukraine on a vast scale. Although – as explained – the courts have already gained some experience in this regard, it was rather local and limited, while the Russian Invasion required a substantial shift of the entire justice system and redirecting its focus on prosecuting conflict-related offences. Due to wartime conditions and insufficient resources, Ukraine could not make this shift on its own, but the international community quite swiftly offered its assistance in building and strengthening the capacity and enhancing the expertise on investigating, prosecuting, adjudicating, and monitoring international crimes in Ukraine as well as building-up required infrastructure. These efforts were developed bilaterally and multilaterally, also within existing international organizations and institutions.

The bilateral assistance is rather abundant. In July 2022, the UK Government announced a support package of £2.5 million for the Ukrainian Prosecutor General's Office. It financed the deployment of Mobile Justice Teams to war crime scenes, training by British justices of 90 Ukrainian judges in war crimes prosecution and management, assistance in forensic evidence gathering, and guidance of sexual violence experts.[25] As of February 2023, the United States has assigned $30 million for documenting and prosecuting international crimes committed in Ukraine, while an additional package of $28 million to support the Ukrainian authorities was discussed.[26] This assistance financed, for example, the training of

the Police and Border Guard Service, building capabilities in addressing needs of victims and facilitating their participation in investigations, providing guidance in identification, apprehension, and prosecution of perpetrators as well as asset forfeiture. Also, European countries having significant domestic experience in war crimes investigation and prosecution have assisted the Ukrainian justice system with their know-how transfer. Croatia, for example, organized trainings for Ukrainian investigators and prosecutors in Zagreb touching upon practical aspects of evidence collection and preservation, electronic documentation, and prosecution of responsible commanders. Previous meetings led to the establishment of the Ukrainian Coordinating Centre for the Support of Victims and Witnesses.[27]

More tangible aspects of the international assistance are visible in drafting a *Benchbook on the Adjudication of International Crimes under Ukrainian Domestic Law* as a collaboration of the Ukrainian judiciary, USAID, and international experts[28] to guide domestic judges in their consideration of war crimes, genocide and crime of aggression, discussing also digital evidence and treatment of victims and protection from their revictimization, etc. Deficiencies in material base needed for prosecuting war-related crimes particularly in liberated territories require financial support to resume the administration of justice, as buildings were often affected by hostilities and necessary equipment looted or destroyed. Thus, e.g., UNAID donated computers, electronic equipment and necessary software to local courts to ensure the continuity of justice.[29]

In relation to multilateral actions, there are many modes of assistance developed with and within the European Union, Council of Europe, United Nations, and the Atrocity Crimes Advisory Group – an initiative of the US, UK and EU – that are discussed in other chapters. Notwithstanding, the ongoing cooperation of Ukrainian institutions with the ICC should not be overlooked, as it contributes to knowledge transfer and adoption of international standards and practices in war crimes cases. This collaboration predates the 2022 Invasion, as the Office of the ICC Prosecutor has been conducting preliminary examination of the situation since 2014, but has significantly accelerated its efforts after the referral to the ICC by 43 State Parties. For example, already in May 2022, the ICC Prosecutor deployed a team of 42 investigators, forensic experts, and personnel to Ukraine. The group aimed at "accelerating our independent investigations and strengthening synergy of investigative action with national authorities on the ground in Ukraine."[30]

14.3 Ukrainian preliminary experience with war-related crimes prosecution after the 2022 Invasion

As of 27 December 2023, the Prosecutor General's Office of Ukraine has reported about 119,780 instances of international crimes being investigated in Ukraine. Most of them – 97% – are considered war crimes or violations of laws and customs of war, while 88 instances refer to planning, preparing, initiating, or waging an aggressive war, and 67 cases concern war propaganda. In relation to the crime of aggression, 684 individuals are suspects – among them ministers, parliamentary deputies, military commanders, heads of law enforcement, other officials as well as

propagandists.[31] However, these investigations do not translate into numerous court proceedings. During the briefing of the Supreme Court leadership held on 7 July 2023, Oleksandr Marchuk – the Chairman of the Criminal Chamber – indicated that so far 38 war crimes trials have been concluded out of 130 criminal proceedings initiated. Furthermore, three cases were lodged with courts concerning aggressive war, two relating to genocide and one pertaining to ecocide.[32] Consequently, the international crimes jurisprudence of Ukrainian courts remains scarce, although it is almost 2 years after the Invasion and additional 8 years after the annexation of Crimea. Notwithstanding, a few judgements have already been rendered, and the first war crimes trial is presented below.

On 23 May 2022, the Solomyansky District Court in Kiev found Vadim Shishimarin[33] – a 21-year-old Russian soldier from Ust-Ilimsk – guilty of a war crime stipulated in Art. 438(2) CC and sentenced him to life imprisonment. The defendant killed an unarmed senior citizen in the Sumy region just at the beginning of the Invasion by shooting him in the head a few times from his Kalashnikov assault rifle. Shishimarin stood trial, because together with three other soldiers he voluntarily surrendered to the Ukrainians. His sentence was reduced on appeal to 15-year imprisonment.[34]

In the first instance judgment, the District Court firstly discussed international treaties to which Ukraine is a Party and which regulate conduct during armed conflicts. The court concluded that under the Protocol Additional I, the defendant should be considered a combatant due to his participation in an invasion as a member of armed forces of the Russian Federation. It then proceeded to establish that the victim was a civilian within the meaning of IHL as "dressed in civilian clothes, unarmed, returning on a bicycle to his home," posing no danger. The court found that actions of the defendant were committed in violation of the laws and customs of war as stipulated in Art. 51(2) and 85(3)(a) PA I.[35] Shishimarin claimed that he was acting on instructions from another soldier in the vehicle, who was neither his direct commander nor even from his unit. He admitted during the trial that "the serviceman was not obliged to carry out clearly criminal orders, such as the order to shoot an unarmed, defenceless, elderly civilian who was walking on the street and did not pose any danger to the servicemen." At the same time, the defendant admitted his guilt, expressed regret, apologized for his behaviour, and stated that he had acted without an intent to kill. His admission was elaborated on by testimonies of witnesses – the victim's wife and neighbour and a member of the Russian armed forces who was present in the vehicle during the shooting – as well as forensics: e.g., reports from autopsy and inspections of the crime scene, victim's phone, and weapon.

The Solomyansky District Court established that the defendant was not obliged to act on instruction of a fellow army member, thus the superior order defence was not applicable in this case. It stated that the defendant "had the opportunity not to follow the order of an unknown person and not to shoot at a civilian. The unknown person who gave this order was without the insignia that reflected his military rank, the accused did not know him personally, the order was illegal and, therefore, he should not have carried it out." Furthermore, the court was convinced

that Shishimarin was acting with a direct intent to kill as he himself stated during his testimony that he could have acted differently reaching the same result. The defendant and his comrades in the vehicle were allegedly worried that the victim was contacting the Ukrainian army on his phone to inform on their position. But he could have simply stopped the victim and taken the phone, or he could have frightened the victim with a round of shots in the air. Nevertheless, he resolved to target the victim and shoot him in the head not once, but at least three times. The totality of the evidence indicated that the defendant was aware while shooting about the consequences of his actions – namely the death of the victim – and wished for them to occur.

Furthermore, the court observed that the act committed by the defendant "is a crime of an international nature, that is a socially dangerous intentional act that encroaches on the international legal order and harms the peaceful cooperation of States." Additionally, it explained its approach to sentencing by listing factors considered: "the degree of gravity of the crime committed (especially a serious crime), the identity of the culprit (a military serviceman under the contract of the army of the aggressor country, a sergeant), who understood that as part of a military formation he was invading the territory of an independent and sovereign state," but also his partial admission of guilt and cooperation with the prosecution on establishing the circumstances of the case.

The Shishimarin verdict was neither rendered against a high-level official or military commander nor a result of a complex war crime trial. Nevertheless, this judicial decision is symptomatic of the Ukrainian courts' approach and paints a rather positive picture in this regard. Firstly, it shows that Ukrainian adjudicators have at least a sufficient understanding of international law relating to international crimes. Secondly, the judgment demonstrates that even quite a simple criminal case was built on extensive evidentiary material. It was not limited solely to the admission of guilt but reinforced by testimonies from witnesses. Thirdly, the defendant was supported by a defence attorney, who raised important issues relating to lack of intent, superior order defence, and duress. Although unsuccessful, these efforts indicate that the rights of the accused were protected in accordance with international standards and that attorneys are likewise ready to provide effective defence in war crimes cases. Finally, the impartiality of the Ukrainian justice system was confirmed by the Kyiv Court of Appeal, which substituted the harsh sentence of life imprisonment for 15-year jail time, once again considering mitigating factors of the case.

14.4 Challenges for prosecuting international crimes in Ukrainian courts

Despite clear signs of the willingness and readiness of the Ukrainian judicial system to prosecute war-related crimes, domestic courts may not be able to overcome certain inherent limitations. These refer first and foremost to access to identified suspects sought for international crimes and restricted possibilities for Ukrainian investigators to access evidence located in occupied territories, Russia, or third countries. Next, the limited resources of the domestic system may not be sufficient to ensure efficient proceedings for all violations of international criminal

law. A possible option to strengthen the national judicial system facing large-scale prosecution of international crimes – along with proceedings of the ICC – is to introduce an internationalized element in the form of a special criminal tribunal.[36] Such courts, embedded within the judicial system of a State, are established mostly on the basis of an international agreement between the State concerned and an international organization with a jurisdiction over international crimes and certain national crimes to provide transitional justice. From a procedural point of view, they operate based on national laws, but domestic judges and prosecutors exercise their functions along with international colleagues or are supported by international advisors. These mechanisms strengthen the cooperation in criminal matters with other States, provide adequate legitimacy – particularly in high-profile cases, streamline financial and other resources of the international community, draw much of public attention, and could be instrumental in addressing certain legal issues, including the lack of jurisdiction of the ICC in prosecuting the crime of aggression in the case of Ukraine[37] and personal immunities of top senior leaders of the aggressor.[38]

Within the Ukrainian context, such proposals have surfaced on many occasions and on the highest level, including the Federal Minister of Foreign Affairs of Germany,[39] the US State Department,[40] the UK Foreign Secretary,[41] and even the European Commission.[42] The Government of Ukraine is a vocal proponent of a special tribunal[43] established with an authorization from the United Nations. Its structure could resemble that of the Extraordinary Chambers in the Courts of Cambodia,[44] although the model is still a subject of an international debate.

Certain concerns pertaining to the creation of an internationalized tribunal are, however, of legal nature. Some experts indicate that the Constitution of Ukraine[45] prohibits such a possibility. They point out to Article 125, which specifies that "Establishment of extraordinary and special courts is not permitted." The Constitutional Court of Ukraine explained in its opinion[46] from 2001 that such "Extraordinary and special courts within the meaning of this article are, firstly, not international but national courts, secondly, courts created to replace ordinary courts that do not properly follow statutory procedures." Consequently, the *ratio legis* of the prohibition is the aftermath of the Soviet practice of extra-judicial mechanisms dominated by secret service within the structure of a totalitarian state. Such concerns, however, have no basis in the situation of prosecuting international crimes recognized by the international community and within international law through mechanisms and institutions that aim at securing fair trial standards, ending impunity, and introducing an international element to guarantee impartiality.

Furthermore, Article 124 of the Constitution specifies that justice is administered by courts in Ukraine and delegation of judicial functions to other bodies is prohibited. Again, the Constitutional Court, when considering the Rome Statute and the role of the ICC vis-à-vis domestic judicial system, found that

> unlike the international judicial bodies provided for in the fourth part of Article 55 of the Constitution of Ukraine [*international human rights courts*], which

> by their nature are auxiliary means of protecting the rights and freedoms of a person and a citizen, the International Criminal Court complements the system of national jurisdiction. The possibility of such an addition to the judicial system of Ukraine is not provided for by Chapter VIII 'Justice' of the Constitution of Ukraine.[47]

Consequently, these considerations were a constitutional impediment to ratifying the Rome Statute, but a constitutional amendment has been passed allowing Ukraine to become a State Party to the Statute.

But these legal impediments are not similarly applicable to an internationalized tribunal being actually a part of the domestic justice system. Under the Constitution, the Supreme Court is the highest court in the system of judiciary in Ukraine, but its structure and organization are not constitutionally prescribed, leaving these matters for statutory determinations. This indicates that probably an internationalized chamber within the Supreme Court would be a reasonable solution, having its basis both in domestic legislation and a treaty with the UN. It would facilitate compliance with constitutional requirements and enable the international involvement in prosecuting international crimes, particularly the crime of aggression. Such models already exist in the case of Bosnia and Herzegovina or Cambodia. At the same time, the Constitution allows in the already mentioned Article 125 the formation of specialized courts.[48] Thus, there is a normative space between allowed specialized judicial institutions and banned special (extraordinary) courts for an internationalized mechanism.

Notwithstanding, the most problematic inhibition in establishing a hybrid mechanism is, unfortunately, the constitutional requirement of Ukrainian citizenship for judges. Article 127 of the Constitution makes it clear that only citizens of Ukraine may be appointed as judges, while Article 126 cites loss of citizenship or acquisition of a foreign passport among grounds for dismissal from judgeship. Addressing this issue is thus the most prominent challenge.

Proponents of a special international tribunal,[49] preferably established on the basis of an international agreement between Ukraine and the United Nations endorsed by the UN General Assembly, stress that a fully international tribunal would not pose constitutional challenges similar to those of an internationalized or hybrid mechanism. Notwithstanding, this optimism seems to be at least excessive. One cannot forget that in order to ratify the Rome Statute – which has not yet happened – Ukraine needed to amend its own constitution. It was necessary as the Constitutional Court of Ukraine[50] assessed that the ICC complements the existing judicial system, which is not permitted, as it is seen as a transfer of judicial powers outside the system. At the same time, the proposition that the constitutional supremacy of the Ukrainian Supreme Court would not be somehow curtailed by an international tribunal, but would be by a chamber within its own structure, seems to be totally incorrect.

Either way, the prosecution of the crime of aggression and other international offences by whatever mechanism – international or hybrid – would require a strong commitment from Ukraine and adoption of adequate measures to ensure compliance

with its constitutional order. The impediments for both options seem to be very similar. Likewise, more progressive and teleological interpretation of constitutional provisions would also assist in resolving the issue. The Constitution of Ukraine has been drafted with neither a full-fledged international armed conflict nor the recent development of international justice mechanisms in mind.

But there is yet another challenge for the Ukrainian judiciary that needs to be addressed in order to ensure justice, the required degree of neutrality in prosecuting international crimes, and impartiality even in a situation of an armed conflict – the issue of investigating and punishing war crimes, if any, committed by members of the Ukrainian armed forces and militia units. Undoubtedly, Ukrainian alleged violations[51] pale in comparison to the sheer scale, scope, and gravity of crimes committed by the Russians forces, nevertheless the laws and customs of war applies equally to all parties to a conflict and shall be likewise enforced by their respective courts. Under the traditional separation between *ius ad bellum* and *ius in bello*, no exceptions to rules of international humanitarian law are permitted and no justification rooted in the nature of a conflict, its character or even the enormity of violations perpetrated by armed forced of a belligerent may be accepted.

Within this context, the general framework of the Ukrainian justice system already presented and pertaining to both the substantive rules of criminal law and institutional arrangements adopted in response to the Invasion creates a neutral basis for prosecuting combatants from both Ukrainian and Russian armed forces responsible for war crimes and other international infractions. Even the law on combat immunity[52] introduced in Ukraine in the wake of the Russian Invasion recognizes this important aspect, as it stresses that such an immunity does not grant impunity and shield from prosecution for violations of international humanitarian law. Consequently, the justice system of Ukraine is well-equipped to deal with alleged war crimes committed by its own citizens. The hindrances in this regard are not legal in nature, but rather relating to an overall situation of the armed conflict and a possible bias and personal experience of officers of law as well as public sentiments.

Despite that, there are, however, some information on criminal proceedings being initiated by Ukrainian authorities against alleged crimes of their own armed forces, mostly in response to media condemnations or international reports. Nevertheless, the present author is not aware of any situations, when such proceedings have resulted in indictments or criminal trials in Ukrainian courts. For example, social medial videos showing the capture of Russian soldiers in Makiyivka have been verified as authentic by reputable media outlets.[53] They appeared to have been shot at close range as one of the surrendering soldiers had abruptly opened fire against Ukrainian combatants. After Moscow accusations of war crimes, the incident has been officially investigated by the Ukrainian prosecutors,[54] who concluded that the captured Russians committed perfidy codified in Article 37 of PA I, which justified the opening of the fire. Similarly, some pre-trial investigations have been opened into possible shooting, wounding, or even torturing of captured Russian soldiers in response to inquiries from the UN Independent International Commission of Inquiry on Ukraine.[55] Those are, however, rather isolated instances.

14.5 Conclusions

Despite significant challenges posed by ongoing hostilities, physical destruction of infrastructure and imminent danger, the justice system of Ukraine shows signs of resilience and adaptability, while ensuring the compliance with fundamental standards of fair trial. Even more importantly, the Ukrainian judicial and other authorities signalled that delivering justice to perpetrators of international crimes committed on the Ukrainian soil or against Ukraine is but one of the means of accomplishing victory and an important element of post-conflict rebuilding aimed at closing the impunity gap in this region of the world. Hence, the role of domestic courts is embedded in the general strategy against Russian aggression. This irrefutably shows that Ukraine is not only willing but also able to prosecute international criminals through its courts.

The measures adopted within the judicial system in response to the Russian Invasion not only ensured the constant operation of the judiciary and capacity to administer justice over territories occupied by the Russian Federation, but also guaranteed the access to courts to residents of regions affected the most by the armed conflict. The first war crimes trials prove that the courts of Ukraine are well-equipped to safeguard fair proceedings and address issues relating to international criminal law. Although the Criminal Code of Ukraine does not criminalize crimes against humanity, other international crimes are reflected in national legislation and give the basis for sufficient prosecution of atrocities committed by foreign armed forces. In some instances, e.g., ecocide, they even go further than existing international norms.

The judicial system of Ukraine shows certain deficiencies, some predating the 2022 Invasion, others closely related to the on-going hostilities. Nevertheless, the significant assistance of international community and individual States in the field of rule of law and conflict-related atrocity crimes, as well as active engagement of international institutions – including the International Criminal Court – reinforce the conviction that those challenges may be addressed or overcome in a reasonable timeframe.

Although domestic courts of Ukraine have only just started trying perpetrators of war crimes and other international offences, and related efforts of public authorities and international partners now focus mostly on practical matters relating to these trials, it would also be advisable to reflect on the possible legacy of war crimes trials in Ukraine, their contribution to transitional justice and probable influence on the status of current international law. The first step would be to ensure publicity of, and accessibility to, judicial decisions for the public and interested scholars.

Notes

1 This article was prepared within the framework of the research project no. 2021/43/D/HS5/00674 financed by the Polish National Science Centre.

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> "An act (act or omission) committed under conditions of martial law or during an armed conflict and aimed at repelling and deterring the armed aggression of the Russian Federation or an aggression of another State is not a criminal offence, if it results in damage to life or health of a person who carries out such aggression, or results in damage to legally-protected interests, in the absence of signs of torture or the use of means of warfare prohibited by international law, other violations of the laws and customs of war."
>
> The second change amended the Law on the Defense of Ukraine by adding a definition:
>
> "combat immunity - the immunity of military command, servicemen, volunteers of the Territorial Defense Forces of the Armed Forces of Ukraine, law enforcement officers who, in accordance with their powers, participate in the defense of Ukraine (…), from liability, including criminal liability, for the loss of personnel, military equipment or other military property, the consequences of the use of armed and other force during the repulsion of armed aggression against Ukraine or the liquidation (neutralization) of

the armed conflict, the performance of other tasks for the defense of Ukraine using any what types of weapons (…), the occurrence of which could not be foreseen with reasonable prudence during the planning and execution of such actions (tasks) or which are covered by a justified risk, except in cases of violation of the laws and customs of war (…)".

53 Malachy Browne et al., "Videos Suggest Captive Russian Soldiers Were Killed at Close Range" *The New York Times* (New York, 20 November 2022) www.nytimes.com/2022/11/20/world/europe/russian-soldiers-shot-ukraine.html (accessed: 27 December 2023).

54 Prosecutor General's Office, Імітація здачі у полон та відкриття вогню по військових ЗСУ – розпочато провадження за фактом віроломства російських військових, (22 November 2022) https://gp.gov.ua/ua/posts/imitaciya-zdaci-u-polon-ta-vidkrittya-vognyu-po-viiskovix-zsu-rozpocato-provadzennya-za-faktom-virolomstva-rosiiskix-viiskovix (accessed: 27 December 2023).

55 *Report* ... (n 51), 86.

15 Polish involvement in prosecuting international crimes committed in Ukraine

Bartłomiej Krzan

15.1 Introduction

The atrocities committed during the Russian aggression against Ukraine may trigger various accountability mechanisms. Naturally enough, much ink has already been spilt on prosecuting the international crimes before the ICC (as a result of, *inter alia*, the joint referral submitted by the coordinated group of 38 States Parties, including Poland, on 2 March 2022)[1] or seeking an alternative internationalized solution. The present contribution, however, delves into a different channel of criminal prosecution, namely the proceedings carried out by the organs of the Republic of Poland and the concerted actions with Polish involvement.

Brought together, these attempts reflect the actual involvement of Poland in prosecuting international crimes committed in Ukraine after the Russian aggression. Other restrictive actions undertaken according to the Polish law (e.g., the Act of 13 April 2022 on special solutions for counteracting the support of aggression against Ukraine and for the protection of national security[2]) are outside the scope of the present considerations. Instead, they aim at an overall assessment of the actual involvement by Polish authorities in (facilitating) the prosecution of international crimes committed in Ukraine and thus at offering a comprehensive picture of a specific kind of domestic attitudes towards the international criminality.

15.2 Reactions to Russian aggression

There have been various attempts to prosecute crimes arising out of the Russian aggression against Ukraine. The Polish Parliament condemned the recognition by the Russian Federation of the independence of two territories that are integral parts of Ukraine, describing this as "Russian aggression" in a special resolution adopted on 23 February 2022.[3] On the following day, the Polish Sejm adopted a statement condemning in strongest terms the Russian aggression on the territory of Ukraine.[4] In the resolution of 23 March 2023 on the commission of war crimes and crimes against humanity and violations of human rights by Russia in Ukraine, the deputies called on all states that recognize Ukraine's sovereignty, territorial integrity, and right to self-determination to support by all means the initiation and conduct of

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proceedings before the International Court of Justice and the International Criminal Court, and to use their powers in any international organizations of which they are members, to hold Vladimir Putin, members of the Russian Security Council and the commanders of the armed forces of the Russian Federation accountable for directing war crimes, crimes against humanity, acts of genocide and systemic human rights violations committed on the territory of sovereign Ukraine.[5] Accordingly, "publicly available evidence of these crimes justifies the recognition of Vladimir Putin by the Sejm of the Republic of Poland and the international community as a war criminal."[6]

The subsequent resolution, adopted on 8 April 2022, resulted from the shocking evidence of heinous practices for which Bucha may be considered a bloody symbol.[7] The Sejm called on the international community to react adequately to the scale of the crime committed against the Ukrainian nation and indicated that violence deliberately and systematically used by the military of the Russian Federation against civilian citizens of Ukraine bears the hallmarks of genocide. The Sejm expressed its expectation of an immediate appointment of an international commission of inquiry to document and verify facts, accounts and opinions, and the urgent trial of war criminals, and also demanded the immediate suspension of Russia's membership in all international organizations that uphold the modern legal and security order. While agreeing with the content of the complaint submitted by the democratic authorities of Ukraine to the UN Security Council, it called on the international community to prosecute those responsible before the International Court in The Hague.[8]

When commemorating the 90th anniversary of the *Holodomor*, the Polish Parliament – in addition to its support for disseminating information on that unimaginable human tragedy – expressed the belief that, despite the disinformation campaign conducted by the Russian Federation, the terrible war crimes committed by the Russian Federation will be revealed, thoroughly investigated, and the perpetrators punished.[9]

The resolutions referred to above prove that accountability is of crucial importance. They were accompanied by the respective actions of the law enforcement agencies.

15.3 Polish investigation

On 28 February 2022, the Mazovian Branch Office of the Department for Organized Crime and Corruption of the National Prosecutor's Office in Warsaw launched an investigation into the war of aggression started on 24 February 2022 by the authorities and officers of the Russian Federation, directed against the sovereignty, territorial integrity and political independence of Ukraine.[10] The scope of the investigation also refers to the continuation of the armed attack on Ukraine by the Armed Forces of the Russian Federation, including jointly and in agreement with the authorities and officials of the Republic of Belarus, making the territory of this state available for acts of armed aggression against Ukraine.

As explained in the information provided by the Prosecution/Ministry of Justice, initiation or conduct of a war of aggression against Ukraine also poses a threat to European and international security, and as such is directed against the interests of the international community, including the Republic of Poland, within the meaning of Art. 110 § 1 of the Criminal Code.[11] This latter part of the explanation may serve as justification of the activities undertaken with regard to crimes committed by either party of the conflict, despite the explicit reference to the crime of aggressive war (Art. 117 § 1).

According to Art. 110 § 1 of the Criminal Code, referred in the explanation by the Prosecution, "The Polish penal law applies to a foreigner who has committed a prohibited act abroad against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organizational unit without legal personality, and to a foreigner who has committed a terrorist offense abroad." Thus, the protective principle has been the basis for the investigation.

Before scrutinizing this jurisdictional base, it may be worthwhile to overview all the options available under the Criminal Code of Poland, whose Chapter XIII refers to liability for offenses committed abroad. These complement the territorial principle as reflected in Art. 5 of the Criminal Code.

In a broader context, it should be noted that the regulation of the responsibility for acts committed abroad in the present Criminal Code draws on the interwar Criminal Code of 1932,[12] rather than on its formal predecessor of 1969.[13] The latter code defined its framework of application rather irrationally, since under Article 114 a foreigner could be held responsible, e.g., for a theft by a Chinese in China, with the obligatory prosecution, and – at the same time – created serious loopholes, since it was not possible to prosecute thereunder a foreigner murdering a Pole in a territory not subject to the sovereignty of any other state(s).[14] Officially, the to-date development of inter-state relations as regards criminal prosecution was duly considered in the drafting of the present Criminal Code. Yet, contrary to the official justification for introducing penal codes, the new provisions do not take into account the contemporary trends of international criminal prosecution, instead repeating outdated constructs based on the axiology of a state jealously guarding its sovereignty, and thus preventing an effective fight against international and transnational criminality. It is even claimed that the chance for Poland to join effective criminal prosecution on an international scale has been squandered by the use of highly imprecise terms and limitations, which may lead to the extinction of these provisions in their practical dimension.[15]

The opening provision of Chapter XIII of the Criminal Code, namely Art. 109, refers to nationality (personal) principle, providing that the Polish penal law shall be applied to Polish nationals who have committed an offense abroad. In parallel, Polish penal law may be applicable under the protective principle, either in its conditional form, as reflected in Article 110 § 1, depending on the condition of double criminality as laid down in Article 111, or without this limitation as defined in Article 112. Article 110 § 1 merges protective principle (concerning acts affecting the security of the forum State) and passive personality (concerning acts committed

against nationals of the forum State). While the former protects the interests of the State, the latter aims at protecting the interests of citizens (natural and legal persons).

Under Article 110 § 2, Polish criminal law also applies to foreigners who have committed a prohibited act abroad other than those listed in § 1, if, under Polish criminal law, the prohibited act is subject to a penalty exceeding 2 years' imprisonment, where the offender is in the Republic of Poland and where no decision on his or her extradition has been taken.

Against the background of Article 110 § 1 of the Polish Criminal Code, it may be underlined that this provision also applies to values of a supranational nature, which the Polish state considers worth protecting. In many cases, attacks on goods defined in this way are penalized on the basis of the principle of universal jurisdiction, and the application of the protective principle proves necessary only in the absence of relevant international agreements.[16]

The protective principle in its unconditional version (i.e., irrespective of the regulations in force at the place where the offense in question was committed) is defined in Article 112 of the Criminal Code. It stipulates that Polish penal law is applicable to a Polish citizen or a foreigner in the event of committing crimes against internal or external security of the Republic of Poland, crimes against Polish offices or public officers, crimes against significant Polish economic interests, crimes of false confessions filed against a Polish office, or an offense from which was reached, even indirectly, the benefit of the property in the territory of the Republic of Poland.

Some tensions between the conditional and unconditional versions of the protective principle were present already in the interwar period. The Criminal Code of 1932 distinguished between the passive personality principle, as reflected in Article 5, and the protective principle defined in Article 8. These formulae were analogous to the present legislation; thus, it may be worthwhile to quote Kopek Mikliszanski, who dealt with this issue in a monograph. According to the mentioned author, Article 5 of the 1932 Criminal Code was "in fact in flagrant contradiction with this feeling of sincere interstate collaboration in the repression of crime, which drives the entire Polish system of international criminal law."[17] Such criticism, however, could not be leveled against the protective principle in its unconditional form as stipulated in Article 8. Given the similarity with the present Article 112, it may again be desirable to borrow from the justification offered by the mentioned disciple of Henri Donnedieu de Vabres. In contradistinction to his objections towards the passive personality principle, Mikliszanski was in favor of the strengthened protective principle and considered the reasons why the state cannot leave to other states the task of settling the crimes, which attack its vital interests: on the one hand, it would be very problematic that a territorial state considers it necessary to repress offenses, which are directed against another state, but on the other, even supposing that it does, it would do so in a lenient manner.[18] Definitely, these considerations have not lost their validity.

Finally, the Criminal Code of Poland provides for universal jurisdiction. According to Art. 113,

> Regardless of regulations in force in the place where the offense was committed, Polish criminal law applies to a Polish national, or to a foreigner for whom no decision on extradition has been taken, in respect of an offense committed abroad, which the Republic of Poland is obliged to prosecute under international agreements or a crime defined in the Rome Statute of the ICC.

Undoubtedly, proximity has played a crucial role here – the aggression has been directed at a country neighboring Poland. Contrary to some initial expectations, the undertaken investigation has not been based on universal jurisdiction, which is reflected in Article 113 of the Polish Criminal Code. The conceptual distinction between the protective principle and that of universal jurisdiction may be blurred. From a theoretical standpoint, whereas the purpose of the former is to protect the interests of a particular State, universal jurisdiction aims to protect the interests of the international community. Yet, the line between strictly (merely) national and international values is very often thin and subject to interpretation. In addition, it must be borne in mind that the principles of jurisdiction are overlapping and interdependent. One should also pay attention to the distinction between the protection of vital State interests, which are shared by the international community, and universality. As argued by one commentator, this is crucial when establishing the basis of jurisdiction over war crimes, since what was often perceived to be universality was in fact an expanded principle of protective jurisdiction.[19] Obviously, the fundamental principles of international law dealing with territorial sovereignty and equality of states would limit the competence of states to establish penal standards applicable to crimes committed abroad.[20]

The investigation of the Mazovian Branch of the Department for Organized Crime and Corruption of the National Prosecutor's Office in Warsaw does not rely on this principle, although it covers acts prosecuted under international agreements. Among the crimes committed by the armed forces of the Russian Federation on the territory of Ukraine, the Prosecution identified murdering civilians and the wounded and sick, treating civilians and prisoners of war as "human shields," attacking undefended towns and objects and sanitary zones, using methods of warfare prohibited by international law (cluster bombs, phosphorus ammunition), as well as destroying property and cultural assets through artillery and rocket fire in residential areas, city centers, and historic buildings. These actions meet the characteristics of Polish criminal provisions. In this regard, one could mention the provisions on impermissible attacks and means of warfare (Art. 122), attacks on personal targets (Art. 123) or attacks on culture (Art. 125). It is worth underlining that Poland was the first country, apart from Ukraine itself, to initiate an investigation into this matter.

Initiation or conduct of a war of aggression is penalized by the Polish Criminal Code. Art 117 § 1. Para. 3 of the same Article criminalizes also publicly calling for the initiation of a war of aggression or publicly approving of the initiation or conduct of such a war.

Instead, as already mentioned, the official base of the investigation is the protective principle under Article 110 § 1:

> The Polish penal law applies to a foreigner who has committed a prohibited act abroad against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organizational unit without legal personality, and to a foreigner who has committed a terrorist offense abroad.

The list of the types of prohibited conduct is formulated in a rather general manner, without any reference to the titles of the respective chapters of the Criminal Code. It may be concluded that the Prosecution relied on "a prohibited act against the interests of the Republic of Poland." The crucial question in this regard is whether an act was committed directly or merely indirectly against the interest of the State.[21] The wording of Article 110 § 1 may suggest that the provision relates to any good of public or private sphere, thus referring to the types of conduct, which both directly and indirectly threaten the interests of the Republic. Such interpretation would be difficult to reconcile with the rather restricted treatment of the protective principle in its ordinary form, i.e., the double criminality requirement as laid down in Article 110 § 2. According to some commentators, the formula "directed against the interests of…" excludes indirect conflict with those interests.[22] Be that as it may, the Polish legislator is very inconsistent in this regard, which led some commentators to strongly advocate the amendment of the very provision.[23]

Given the concise justification provided by the Prosecution, it may also be questioned whether the very investigation should not have been based on the protective principle in its unrestricted (unconditional) version, which may be inferred from Article 112 of the Polish Criminal Code. This provision deals i.a. with "an offense against the internal or external security of the Republic of Poland (…) [or] an offense against Poland's material economic interests." Had this jurisdictional base been chosen, the requirement of double criminality would not be applicable, even though this would not be a problem since the Ukrainian Criminal Code[24] in Chapter XX defines criminal offenses against peace, security of mankind and international legal order. In particular, Article 437 prohibits any planning, preparation, and waging of an aggressive war, and the subsequent provision criminalizes violation of rules of the warfare (Article 438). In this regard, it is worth recalling that Article 444 relates to criminal offenses against internationally protected persons and institutions. A separate provision, Article 447 of the Ukrainian Penal Code, deals with mercenaries.

Against the background of the Russian aggression on Ukraine, the decision to rely on the protective principle by the Polish prosecution may no longer be explained by the traditional reasoning that a state cannot really rely upon other state to protect vital interests of the former, or to protect them to the extent which the former State considers necessary or desirable.[25] Instead, one can note a substantive change in this classical rationale. It was clear from the briefings of the Polish Prosecution that the undertaken activities were not (only) to protect the interest of the Republic of Poland, but (rather) to contribute to the external/foreign investigation, not excluding the possibility of international(ized) proceedings. The effect is that there are no conflicts of jurisdiction. Thereby, it is no longer possible to consider the protective principle as "the denial of a community of interests."[26]

Instead of insisting on the non-cooperative nature of the principle,[27] one would be tempted to rely – time and again – on the suggestion by Dame Rosalyn Higgins that extraterritorial jurisdiction should be used in a more flexible manner to protect common values rather than to invoke state sovereignty for its own sake.[28] This would underline international solidarity in the fight against crime in parallel to the traditional (still valid) perspective asserting protective jurisdiction on the basis of self-defense.[29]

The goal of the investigation of the Mazovian Branch of the Department for Organized Crime and Corruption of the National Prosecutor's Office in Warsaw was to collect, secure and preserve the evidence of the Russian aggression and to comprehensively explain its circumstances. The first and foremost purpose of the investigation was to quickly secure evidence proving that war crimes were committed by the Russian armed forces on the Ukrainian territory, this primarily by means of gathering accounts from witnesses of war crimes, mostly citizens of Ukraine who arrived in the Polish territory because of the aggression, as well as identifying victims and securing photos and videos documenting the commission of these crimes. The Polish National Prosecutor's Office also posted on its website an appeal in Ukrainian language to fleeing people to report to the prosecutor's offices in order to testify and provide evidence of the crimes. It suggested that whenever it was impossible for a witness to appear in person, investigation activities might take place in a location convenient for the refugee. Interrogation required consent and was possible only when the psychophysical condition of the interviewee allowed it. It was ensured that an expert psychologist took part in the interview.

The task of collecting, securing, and preserving the evidence is of course to be carried out first of all by public prosecutors. However, a crucial role in this regard can be played by other initiatives, such as the Lemkin Center, the Bar Association and the NGOs. The Polish Prosecution has from the very beginning undertaken actions to coordinate the process.

In a press briefing organized by the Ministry of Justice on 24 February 2023, the Prosecutor General informed that over 1,700 witnesses had been questioned so far, of which several hundred had given testimonies that were extremely valuable.[30] It was also pointed out that the testimonies had been reinforced with film materials and photos. During the same conference, the National Prosecutor, who supervised the investigation, said that on the basis of the testimonies of key witnesses, 24 threads concerning the murder of civilians, forced deportations, and torture were distinguished. Some of the perpetrators have also been identified.

However, there has been no information available so far on any indictment or any other charging instrument. Nor are there any reports concerning a decision to initially charge any person with a crime. Instead, the activities of the Polish Prosecutor's Office are mostly auxiliary to the main proceedings conducted by Ukraine.

Such an approach may be praised given numerous challenges in addressing international crimes – especially when committed abroad – in domestic courts. Among the plethora of problems there is the incompatibility of the national legal instruments with the requirements of such enormous ("mammoth") trials – to

borrow from the famous opening sentence by the presiding judge of the adjudicating panel, Jürgen Hettich of the Higher Regional Court in Stuttgart, handing down convictions in the trial of two Rwandan leaders of a combat organization *Forces Democratiques de Libération du Rwanda* (FDLR).[31]

15.4 Joint initiatives

Apart from domestic actions following the National Prosecutor's Office decision of 28 February 2022, several initiatives have been undertaken jointly with other partners interested in pursuing accountability for international crimes committed in Ukraine. Only a few days after the Russian attack on Ukraine, on 2 March 2022, a coordination meeting was organized by Eurojust at the request of the Lithuanian, Polish, and Ukrainian national authorities. On 10 March 2022, Polish prosecutors met in Warsaw with representatives of the International Criminal Court. Two weeks later, during a meeting in Ukraine on 25 March 2022, an agreement to establish a joint investigative team (JIT) between Ukraine, Lithuania, and Poland on the Russian attack/aggression against Ukraine was signed between the Prosecutors General of the respective states to enable a direct exchange of evidence and to simplify legal procedures. This may be considered yet another development in a welcome enrichment of the traditional instrumentation available in the field of international mutual assistance in criminal matters.[32] A month later, on 25 April 2022, the JIT was joined by the Office of the Prosecutor of the ICC as a participant, which was an unprecedented step. Indeed, it was crucial for facilitating the cooperation of the ICC with the participating states as competent national authorities. Subsequently, the JIT was joined by Estonia, Latvia and Slovakia (at the end of May 2022), and Romania (on 13 October 2022).

After amendment of the Eurojust Regulation that entered into force on 1 June 2022,[33] the Core International Crimes Evidence Database (CICED) was established. It became operative in February 2023 with a special judicial database to preserve, store and analyze evidence of core international crimes in a secure mode, offering technical solutions for the safe transmission and secure storage of evidence.

On 3 March 2023 in Lviv, at the United for Justice Conference, organized by the Prosecutor General of Ukraine, Adryi Kostin, a Memorandum of Understanding was signed between the member states of the Joint Investigative Team and the US to support investigations of potential war crimes and related crimes following the invasion of Ukraine by the Russian Federation. On the next day of the conference, during a meeting of the heads of the prosecutor's offices participating in the JIT, the agreement on the establishment of the JIT was amended to reflect the future role of the International Centre for the Prosecution of the Crime of Aggression against Ukraine within Eurojust, first announced by the EC President Ursula von der Leyen at a joint press conference with Ukrainian President Volodymyr Zelensky on 2 February 2023 in Kyiv. Another change was introduced at the working meeting of the JIT in Vilnius in April 2023 to extend its scope to include the investigation of possible cases of genocide that may have occurred in the territory of Ukraine following the Russian aggression.

Practically, it is important to identify the defendants and the proper forum/fora of prosecution, including an *ad hoc* special jurisdiction of purely international or hybrid nature and also its/their relation to the domestic criminal justice systems.

From the very beginning, Poland was an active member of the "Core Group" on the creation of a Special Tribunal for the Crime of Aggression against Ukraine, and in a working statement of 4 March 2023,[34] the Polish Ministry of Foreign Affairs openly expressed support for the solution. For obvious reasons, the preparation process was confidential. After alluding to the lack of jurisdiction by the ICC with regard to the crime of aggression and the impossibility of the Security Council's referral given Russia's right to veto, it was stated that Poland supported the establishment of the Tribunal by means of an agreement between the UN Secretary General and Ukraine, based on the recommendation of the General Assembly. At the same time, some other ways of establishing this Tribunal have not been ruled out, if this resulted in international arrangements. It was also emphasized that the prosecution of the perpetrators of crimes committed in and against Ukraine is necessary to show that international law does not allow for impunity, and that individual criminal liability may also be borne by the heads of state.

The support for establishing a Special Tribunal for the Crime of Aggression against Ukraine was also expressed in the resolution of the Polish Sejm of 14 April 2023.[35] It was preceded by other resolutions dealing with the accountability for atrocities committed in Ukraine, which have been discussed above.

On various occasions, Polish organs made it utmost clear in their statements that in order to effectively prosecute this type of international crime, it is necessary to properly secure the evidence. Thus, they have supported all initiatives in this area, in particular, the establishment of the International Center for the Prosecution of Aggression Crimes. The center was opened at the Eurojust's headquarters in The Hague on 3 July 2023. This is yet another example of the concerted action facilitating the prosecution of international crimes.

Against a broader background, the involvement in joint efforts to eradicate impunity for international crimes in Ukraine may be seen as complementing previous attempts by the Republic of Poland to address systemic criminality.[36]

15.5 Concluding remarks

The examination of the events in Ukraine is a very complex task, which serves as an additional test for prosecution of international crimes, in general. There are, of course, numerous channels of support for accountability for atrocities committed in the Ukrainian territory. The Republic of Poland has been actively involved in these efforts since the very outbreak of the aggression, paying special attention to the complexities and interdependencies of the accompanying mechanisms. This has been reflected in differentiated actions, including the joint referral to the International Criminal Court, but also in active participation in the core group discussing the establishment of a Special Tribunal or other initiatives aimed at securing evidentiary material. The importance of participation in the JIT should not be underestimated.

Last but not least, it is the national proceedings that play a crucial role. Rather than to claim the domestic fate of international criminal justice, the preceding analysis shows the relevance and advantages of concerted action in addressing international crimes. Yet, without being too optimistic or biased, it is important to realize the associated challenges and clarify problems with the chosen basis of jurisdiction and its impact on practice. The scale of the atrocities committed in Ukraine exceeds the capabilities of individual states and therefore the Polish decision to contribute, by means of the domestic proceedings, to the joint efforts deserves appreciation, even if no indictment has so far been formulated by the National Prosecution. Rather, this apparent reluctance may signal a readiness to play an auxiliary role in facilitating prosecution in different fora.

Notes

1 The joint referral was preceded by the first State Party referral from the Republic of Lithuania – www.icc-cpi.int/sites/default/files/2022-04/1041.pdf (all online sources cited in this chapter have been last accessed on 15 February 2024).
2 Ustawa z dnia 13 kwietnia 2022 r. o szczególnych rozwiązaniach w zakresie przeciwdziałania wspieraniu agresji na Ukrainę oraz służących ochronie bezpieczeństwa narodowego [The Law of 13 April 2022 on special solutions for counteracting support for aggression against Ukraine and for protecting national security], Dz.U. 2022 poz. 835.
3 Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 23 lutego 2022 r. w sprawie agresji Rosji na Ukrainę [=Resolution of the Sejm of the Republic of Poland of 23 February 2022 on Russia's aggression against Ukraine], M.P. 2022 poz. 281.
4 Oświadczenie Sejmu Rzeczypospolitej Polskiej z dnia 24 lutego 2022 r. w sprawie agresji Federacji Rosyjskiej na Ukrainę [Statement of the Sejm of the Republic of Poland of 24 February 2022 on the aggression of the Russian Federation against Ukraine], M.P. 2022 poz. 284.
5 Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 23 marca 2022 r. w sprawie popełniania zbrodni wojennych i zbrodni przeciw ludzkości oraz łamania praw człowieka przez Rosję w Ukrainie [Resolution of the Sejm of the Republic of Poland of 23 March 2022 on committing war crimes and crimes against humanity and violating human rights by Russia in Ukraine], M.P. 2022 poz. 367.
6 In this regard, it does not come as a surprise that Poland welcomed the later (March 2023) decision of the International Criminal Court to issue an arrest warrant against Vladimir Putin (President of the Russian Federation) and Maria Lvova-Belova (Children's Rights Plenipotentiary to the President of the Russian Federation) on suspicion of committing war crimes involving the unlawful deportation of people (children) and unlawful resettlement of the population (children) from the occupied areas of Ukraine to the Russian Federation. The MFA considered this decision to be the first decisive formal step of the ICC towards putting the highest authorities of Russia on trial and to form part of the broader efforts of the international community to hold to account the perpetrators of Russian crimes committed in Ukraine – see www.gov.pl/web/dyplomacja/komunikat-mtk-w-sprawie-wydania-nakazu-aresztowania-w-sprawie-w-putina-i-m-Bielowej.

7 Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 8 kwietnia 2022 r. w sprawie potępienia zbrodni ludobójstwa na terenie Ukrainy [Resolution of the Sejm of the Republic of Poland of 8 April 2022 on condemning the crime of genocide in Ukraine], M.P. 2022 poz. 407.
8 By mistake, the resolution referred to the ICJ instead of the ICC.
9 Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 1 grudnia 2022 r. w sprawie upamiętnienia 90. rocznicy Wielkiego Głodu na Ukrainie [Resolution of the Sejm of the Republic of Poland of 1 December 2022 on the commemoration of the 90th anniversary of the Great Famine in Ukraine], M.P. 2022 poz. 1191.
10 See, National Prosecutor's Office, "Mazowiecki pion PZ PK wszczął śledztwo w sprawie napaści Rosji na Ukrainę" www.gov.pl/web/prokuratura-krajowa/mazowiecki-pion-pz-pk-wszczal-sledztwo-w-sprawie-napasci-rosji-na-ukraine. This author's reliance on the websites is due to limited possibilities to otherwise obtain relevant information.
11 Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny [The Law of 6 June 1997 - Penal Code], Dz. U. z 2022 poz. 1138, 1726, 1855, 2339.
12 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 11 lipca 1932 r. - Kodeks karny [= Regulation of the President of the Republic of Poland of 11 July 1932] Dz.U. 1932 nr 60 poz. 571.
13 Ustawa z dnia 19 kwietnia 1969 r. Kodeks karny [The Law of 19 April 1969, Penal Code], Dz.U. 1969 nr 13 poz. 94 (with amendments).
14 See Michał Płachta, 'Jurysdykcja państwa w sprawach karnych wobec cudzoziemców' (1992) 1–2 Studia Prawnicze 129, 130; Andrzej Wąsek, "Kilka uwag odnośnie do unormowania odpowiedzialności karnej za przestępstwa popełnione za granicą w kodeksie karnym z r. 1997" in: Lech Antonowicz et al. (eds.), 2 *Polska lat dziewięćdziesiątych: przemiany państwa i prawa* (Wydawnictwo UMCS 1998) 306f.
15 Justyn Piskorski, *Odpowiedzialność karna cudzoziemców w Polsce* (Dom Wydawniczy ABC 2003), 135, Tomasz Ostropolski, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym* (IWEP 2008), 32.
16 Dominik Zając, *Odpowiedzialność karna za czyny popełnione za granicą* (Krakowski Instytut Prawa Karnego Fundacja 2017), 427.
17 Kopek Mikliszanski, *Droit pénal international d'après la législation polonaise: étude de droit comparé: thèse pour le doctorat* (Éditions de l'Imprimerie idéale 1935), 61.
18 Mikliszanski (n 17), 62.
19 Matthew Garrod, "The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality" (2012) 12 International Criminal Law Review 763, 766ff.
20 See Rüdiger Wolfrum, "The Decentralized Prosecution of International Offences through National Courts," in Yoram Dinstein, Mala Tabory (eds.), *War Crimes in International Law* (Nijhoff 1996), 233.
21 Andrzej Wąsek, "Zakres obowiązywania ustawy karnej polskiej wobec cudzoziemców" in: Andrzej J. Szwarc (ed.), *Przestępczość przygraniczna. Postępowanie karne przeciwko cudzoziemcom w Polsce* (Wydawnictwo Poznańskie 2000), 33. Cf. similar controversies mentioned by Dapo Akande, "Protective Principle (Jurisdiction)" in: Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (OUP 2009), 474.
22 Zając (n 16) 422; see also: Bartłomiej Filek, *Odpowiedzialność karna w Polsce za czyny zabronione popełnione za granicą* (Wolters Kluwer 2023), 180 (fn 148).
23 See Piskorski (n 15), 124. Cf. the strong rejection of the double criminality: Hans-Heinrich Jescheck, "Strafrecht, Internationales" in: Hans-Jürgen Schlochauer (ed.), 3 *Wörterbuch des Völkerrechts* (de Gruyter 1962), 396, 397.

24 Criminal Code of Ukraine (The Official Bulletin of the Verkhovna Rada (BVR), 2001, No. 25–26, Article 131), https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text
25 Iain T. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth 1994), 31.
26 Manuel R. Garcia-Mora, "Criminal Jurisdiction over Foreigners for Treason and Offenses against the Safety of the State Committed upon Foreign Territory" (1958) 19 University of Pittsburgh Law Review 567, 568.
27 See Cameron (n 25) 47f., who mentioned also limited solidarity or cooperation in the repression of the crimes dealt with by means of this principle yet recognized the occasional employment of the protective principle to protect another state's interests.
28 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994), 77.
29 Henri Donnedieu de Vabres, *Les principes modernes du droit pénal international* (Recueil Sirey 1928) 87; Cameron (n 25), 45.
30 Polish National Prosecutor's Office, Press briefing of February 24, 2023 www.gov.pl/web/prokuratura-krajowa/briefing-w-sprawie-sledztwa-dotyczacego-napasci-rosji-na-ukraine.
31 OLG Stuttgart, Urteil vom 28. September 2015, 5-3 StE 6/10. Hettich emphatically highlighted the incompatibility of the national legal instruments with the requirements of such an enormous ("mammoth") trial, saying "It does not work that way. Such mammoth proceedings cannot be managed by means of the Code of Criminal Procedure" (So geht es nicht. Ein solches Mammutverfahren ist mit den Mitteln der Strafprozessordnung nicht in den Griff zu kriegen). See also Denise Bentele, "Völkerstrafprozesse in Deutschland voranbringen – Eine rechtpolitische Betrachtung" (2016) 11 Zeitschrift für Internationale Strafrechtsdogmatik 803 and Bartłomiej Krzan, "German Code of Crimes against International Law: A Look from Outside" in: Patrycja Grzebyk, *International Crimes in National Regulations of Selected States* (IWS 2022), 29.
32 See Michael Plachta, "Joint Investigation Teams: A New Form of International Cooperation in Criminal Matters" (2005) 13 European Journal of Crime, Criminal Law and Criminal Justice 284, 301.
33 Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022 Amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offenses.
34 Polish Ministry of Foreign Affairs, "Poland Supports Establishment of the Special Tribunal for the Crime of Aggression" 4 March 2023, www.gov.pl/web/dyplomacja/polska-popiera-utworzenie-specjalnego-trybunalu-ds-zbrodni-agresji-przeciwko-ukrainie3.
35 Uchwała Sejmu Rzeczypospolitej z dnia 14 kwietnia 2023 r. w sprawie ustanowienia Specjalnego Trybunału ds. Zbrodni Agresji przeciwko Ukrainie, M.P. 2023, poz. 427.
36 See, e.g., Krzysztof Masło, "A Polish initiative aimed at establishing an international Tribunal to judge crimes committed by the communists," in: Patrycja Grzebyk (ed.), *The Communist Crimes: Individual and State Responsibility* (IWS 2022), 105.

16 Prosecuting war crimes in Ukraine

The German contribution

Stefanie Bock

16.1 Introduction: Germany and war crimes in Ukraine – the status quo

Since the beginning of the war, Germany demands and supports criminal investigations of war crimes committed in Ukraine. On 2 March 2022, together with 37 other States, Germany submitted a joint referral of the situation in Ukraine to the International Criminal Court (ICC),[1] thereby empowering the Chief Prosecutor of the ICC, Karim Khan, to immediately initiate investigations without requiring prior authorization by the Pre-Trial Chamber.[2] Only a few days later, the then Federal Public Prosecutor General Peter Frank announced that he had opened structural investigations into the situation in Ukraine on the national level.[3] Structural investigations are not directed against concrete persons, but concern a situation in which there are grounds to believe that international crimes have been committed. They serve to prepare individual cases, identify potential suspects, determine patterns of criminality and secure evidence, in particular, statements of victims and witnesses.[4] In May 2022, the Bundestag decided to staff the Federal Public Prosecutor General with additional personnel to effectively investigate crimes committed in Ukraine.[5] The German Foreign Minister Annalena Baerbock actively supports the establishment of a Ukraine Special Tribunal to prosecute Russia's crime of aggression against Ukraine.[6] And shortly after the ICC had issued an international arrest warrant against Vladimir Putin,[7] the German Minister of Justice Marco Buschmann announced that he will arrest the Russian President if he sets foot on German territory.[8] All these activities must be seen and assessed against the wider backdrop of modern German international criminal law.[9]

16.2 The legal background – the German Code of Crimes Against International Law

More than 20 years ago – on 30 June 2002 and thus one day prior to the Rome Statute of the International Criminal Court (Rome Statute) – the German Code of Crimes Against International Law (*Völkerstrafgesetzbuch* – CCAIL)[10] entered into force. Of course, the timing was no coincidence.[11] The CCAIL is a direct answer to the Rome Statute's vision of a multilevel system of international criminal justice.[12] As is well known, the ICC is designed as a court of last resort, which steps in only

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when the competent national jurisdictions fail to address the matters themselves.[13] The prime responsibility for the enforcement of international criminal law rests with the States.[14]

Germany has taken this mission seriously. The newly enacted CCAIL creates the basis for a decentral enforcement of international law and allows for the national prosecution of the international core crimes – genocide, crimes against humanity, war crimes, and the crime of aggression.[15] Its goal is to harmonize German substantive criminal law with the Rome Statute and to ensure that Germany is able to prosecute the core crimes itself.[16] One of the most important elements of the CCAIL is its broad jurisdictional reach.[17] Section 1 CCAIL introduces the principle of universal jurisdiction and empowers the German judicial authorities to prosecute genocide, crimes against humanity, and war crimes even when they are committed abroad and have no specific link to Germany.

Notably, the principle of universality does not apply to the crime of aggression. Insofar, the CCAIL only applies to acts committed abroad if the perpetrator is German (principle of active personality) or if the offence is directed against the Federal Republic of Germany (protective principle – Section 1 sentence 2 CCAIL). The jurisdiction of German courts over the crime of aggression is thus dependent on the existence of a genuine link between the respective conduct and Germany. This also means that German authorities cannot prosecute Russian leaders for waging an aggressive war against Ukraine.[18] This more reluctant approach is owed to the fact that aggression trials, which are (usually) directed against military or political leaders,[19] are politically sensitive.[20] The German legislator therefore considered it more appropriate that the crime of aggression be prosecuted in one of the States involved or by an international criminal court.[21] Against this background, it is politically logical (irrespective of the legal difficulties involved) for Germany to advocate for a special "Ukrainian" tribunal for the crime of aggression.

The principle of universality that applies to the other international core crimes is in some way reversed by Section 153f of the German Code of Criminal Procedure (*Strafprozessordnung* – CCP),[22] which can be seen as a kind of "procedural safety net".[23] In order to prevent that the implementation of the principle of universal jurisdiction leads to an overload of cases and overburdens the national criminal justice system,[24] Section 153f CCP offers the public prosecutor extended possibilities[25] to dispense with prosecuting international crimes committed abroad. The rather complex provision distinguishes between cases, which are linked to Germany and those which are not.[26] Such a link can be established by the German nationality of the suspect or her or his (expected) presence in Germany. In these cases, prosecutions are – as a rule – mandatory. The public prosecutor may, however, cease proceedings if the suspect is tried by an international criminal tribunal, by the territorial State or by the home State of the victim. If the crime is not linked to Germany, prosecutors have full discretion whether to prosecute or not. In making their decision, they must take into account, in particular, if the crime is being prosecuted by other States or by an international criminal tribunal. In its essence, German law is based on the idea of a three-step international criminal justice system: the responsibility for the prosecution of international crimes lies primarily with those States that may

exercise territorial or (active or passive) personal jurisdiction, secondary with the ICC, and other international tribunals, and tertiary with third States exercising universal jurisdiction.[27]

16.3 The practical application of the CCAIL

The practical application of the CCAIL was – at first – rather disappointing. The Federal Public Prosecutor General was initially very reluctant to use his new competencies; the non-prosecution of international crimes was the rule and Section 153f CCP became a kind of "impunity instrument".[28] Ten years after its entry into force, there had not been a single judgement under the CCAIL. Prime examples of the initial "teething problems" of the CCAIL are the refusal to open investigations against the then US Secretary of Defence Donald Rumsfeld for torture and mistreatment of Iraqi prisoners in the Abu Ghraib prison complex[29] or the dismissal of criminal complaints against the former president of China Jiang Zemin and Chinese government members for human rights violations against practicing members of Falun Gong in China.[30]

Over the last 10 years, however, the situation has fundamentally changed. Germany meanwhile plays an active role in the fight against impunity for international crimes. International criminal law has been given a firm place in everyday judicial life, and the trials conducted in Germany under the CCAIL are attracting international attention. The most prominent examples are the Koblenz torture trial against former members of the Assad Regime[31] and the conviction of Taha Al-J. for genocide against the Yezidis by the Higher Regional Court of Frankfurt.[32] This new, active approach towards international criminal law is based on a rather strict "no safe haven Germany" strategy,[33] that is, Germany thus seeks to prevent becoming a refuge for perpetrators of international crimes.[34] At the same time, the principle of universality is used to promote justice for victims who found refuge in Germany. In this vein, the Federal Public Prosecutor General tends to focus on situations (like, e.g., Syria) that are linked to a diaspora community in Germany. On the one hand, this has practical reasons. On arrival in Germany, refugees are available as witnesses to the national judiciary. They enable with their statements the identification of concrete crimes, which, in turn, facilitates investigation into international crimes.[35] On the other hand, the link to a local diaspora community makes universal jurisdiction cases more concrete and tangible.[36] Germany does not act as one of many potential representatives of the international community of States, but specifically as the host State where the victims have found refuge.[37] The prosecution of international crimes becomes an act of "judicial hospitality"[38] that serves the social integration of the refugees. They receive recognition for the injustice they have endured in their home State and are at the same time accepted as members of the society of the host State, which grants them access to its criminal justice system. The host State stands in solidarity with the victims and condemns the crimes they suffered in their names.[39]

This (diaspora focused) "no safe haven Germany" approach is coherent in itself, but leads to the fact that the principle of universality is applied only to cases that

have some relation or link to Germany. The only exception I know of is the already mentioned conviction of Taha Al-J. for the killing of a Yazidi girl by the Higher Regional Court of Frankfurt in November 2021.[40] At first, the German wife of Taha Al-J., Jennifer W. – who was later convicted by the Higher Regional Court of Munich for membership in a terrorist organization and aiding murder, crimes against humanity, and war crimes[41] – was at the center of the investigations. Her husband was considered the main perpetrator but was not present in Germany. Nevertheless, the Federal Public Prosecutor General decided to apply for his extradition from Greece in order to put him on trial in Germany. This is a very proactive use of the principle of universality, which led to the prosecution of a crime, which is in no way linked to Germany – not even by residence of the defendant.[42] But this is unlikely to initiate a general shift in prosecutorial strategy towards more "pure" universal jurisdiction proceedings. The Taha Al-J. case seems to be rather unique because of the involvement of his German wife in the commission of crimes.

16.4 Germany's (possible) role in prosecuting war crimes in Ukraine

What does this mean for the situation in Ukraine? From a theoretical point of view, the CCAIL empowers German authorities to prosecute genocide, crimes against humanity, and war crimes committed in Ukraine without restriction. In practice, however, it seems likely that the Federal Public Prosecutor General will stick to its "Germany-based approach." This means that the structural investigations will focus on evidence (in particular, statements of victims and witnesses) that are available on or accessible from German territory. In contrast to other European States,[43] Germany decided not to engage in on-site investigations. Germany participates neither in Eurojust's Joint Investigative Team on alleged core international crimes in Ukraine[44] nor in the International Centre for the Prosecution of the Crime of Aggression against Ukraine.[45] After all, evidence gathered during structural investigations can and will be made available for core crimes proceedings before foreign courts or the ICC. They are thus a form of (anticipated) mutual assistance in criminal matters.[46] To facilitate the exchange of evidence, Germany works closely together with international partners, for example, under the umbrella of the Genocide Network[47] or the Core International Crimes Evidence Database.[48] But as far as individual cases are concerned, it stands to reason that the Federal Public Prosecutor General will concentrate on alleged perpetrators who have fled to Germany or are residing in Germany and/or war crimes, which are committed against German nationals.

Germany's actual contribution to bringing justice to the Ukrainian people may therefore be smaller than a first glance at the CCAIL (and its ambitious provision on universal jurisdiction) might suggest. One should, however, not underestimate the impact of German jurisprudence on the consolidation and further development of the international criminal justice system.[49] The work of the German judiciary may indirectly contribute to Russian war criminals being held accountable. This is particularly true for the decision of the Federal Court of Justice on the irrelevance of functional immunities. Background to this decision was the conviction of

a former officer of the Afghan National Army for, inter alia, grievous bodily harm, and the war crime of outrages upon human dignity.[50] In the appeals proceedings, the question arose of whether the accused as a member of State armed forces enjoyed functional immunity as a State official. The Federal Court answered it in the negative and argued that according to the general rules of international law, domestic core crimes prosecutions are not precluded based on the notion of functional immunity – at least not when the crimes have been committed by lower-ranking defendants.[51] This decision leaves some questions open; in particular, the Court confined its findings to subordinates and did not expressly exclude the possibility that functional immunity might be applicable in proceedings against high-level perpetrators.[52] Nevertheless, with a view to the still ongoing controversial discussions within the International Law Commission on limitations and exceptions of functional immunities, the decision of the Federal Court is an important step in the global fight against impunity.[53] It also sends a strong message to the people in Ukraine and Russia: persons who commit war crimes in Ukraine cannot hide behind their official status but will face justice. Although, it currently appears the vast majority of atrocities is committed by the Russian side, one must not overlook that all conflicting parties have to respect international humanitarian law. In the long run, the legitimacy and credibility of the international justice system will also depend on how the international community and Ukraine respond to possible war crimes committed by Ukrainian soldiers. If necessary, Germany should (and probably will) contribute to an equal application and enforcement of international (criminal) law – which, of course, does not preclude prioritizing the investigation of particularly serious crimes.

Notes

1 International Criminal Court, "Situation in Ukraine" www.icc-cpi.int/situations/ukraine (accessed: 20 December 2023).

2 During the Rome Conference that led to the establishment of the ICC it was highly controversial among the States if the prosecutor of the ICC should have the power to initiate investigations *proprio motu*. Some States – among them the USA and China – feared that *proprio motu* powers might be misused by an overzealous prosecutor to initiate politically motivated, unfounded investigations. It was finally agreed that the prosecutor should be able to initiate proceedings on the basis of information received from any source (Art 13 lit c) Rome Statute), but must seek authorization from the Pre-Trial Chamber before opening formal investigations (Art 15 (3), (4) Rome Statute), see Stefanie Bock, "International Adjudication Under Particular Consideration of International Criminal Justice: The German Contribution" in Peter Hilpold (ed), *European International Law Traditions* (Springer 2021) 279, 281 with note 10. By referring the situation in Ukraine to the ICC, the States have spared the prosecutor the often time-consuming judicial approval process, in more detail Stefanie Bock, "Potentiale und Grenzen des Völkerstrafrechts. Das Völkerstrafrecht im Ukrainekrieg" (2022) 72 *OSTEUROPA* 87, 94–95.

3 Cf Duscha Gmel and Ines Peterson, "Der Krieg in der Ukraine aus völkerstrafrechtlicher Sicht" (2022) 5 *Zeitschrift für das Gesamte Sicherheitsrecht - Sonderausgabe* 20, 25; Julia Geneuss, "Ermessensausübung im völkerstrafrechtlichen Kontext" in Stefanie

Bock and Markus Wagner (eds), *Gerechtigkeit aus der Ferne?* (Duncker & Humblot 2023), 45–55.

4 Christian Ritscher, "Die Ermittlungstätigkeit des Generalbundesanwalts zum Völkerstrafrecht: Herausforderungen und Chancen" in Christoph Safferling and Stefan Kirsch (eds), *Völkerstrafrechtspolitik. Praxis des Völkerstrafrechts* (Springer 2014) 223, 277; Gmel and Peterson (n 3) 25; Stefanie Bock, "The German Code of Crimes Against International Law at Twenty: Overview and Assessment of Modern 'German International Criminal Law'", 2023 (21) *Journal of International Criminal Justice* 793, 802.

5 See Viktoria Riederer, "Einrichtung zweier neuer Referate zum 'Ukraine-Krieg' bei der Bundesanwaltschaft" (2022) 1 *Ukraine-Krieg und Recht* 163.

6 Speech by Foreign Minister Annalena Baerbock at the Ministerial Side-Event "The ICC and the Crime of Aggression: In Defense of the UN Charter," 17 June 2023, www.auswaertiges-amt.de/en/newsroom/news/-/2609314 (accessed: 20 December 2023); in more detail on the controversial discussion Nicolai Bülte, Franziska Gruber and Stefan Vasovic, "Zwischen normativem Anspruch und prozessualer Wirklichkeit – Teil I und II. Zum Vorschlag eines Ad-hoc-Tribunals für das Verbrechen der Aggression gegenüber der Ukraine" (*Völkerrechtsblog*, 21 September 2022) https://voelkerrechtsblog.org/zwischen-normativem-anspruch-und-prozessualer-wirklichkeit-teil-i/ and https://voelkerrechtsblog.org/de/zwischen-normativem-anspruch-und-prozessualer-wirklichkeit-teil-ii/ (accessed: 20 October 2023).

7 ICC, Decision of Pre-Trial Chamber II of 17 March 2023, www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed: 20 December 2023). The legal situation is complex. It is a contested issue if national authorities have the right to execute an international arrest warrant against a person who – like Putin as an acting head of State – enjoys absolute immunity. The Appeals Chamber of the ICC has answered this question in the affirmative, Prosecutor v. Omar Hassan Ahmad Al Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr, Appeals Chamber, 6 May 2019, para 124 (to hold otherwise would "clearly be incompatible with the object and purpose" of the Rome Statute), see in more detail Stefanie Bock and Nicolai Bülte, "The Politics of International Justice" in Sergey Sayapin and others (eds), *International Conflict and Security Law: A Research Handbook.* Conflict (Asser Press 2022) 957, 973 et seq; with a particular view to the arrest warrant against Putin Stefanie Bock and Franziska Gruber, "Der Haftbefehl gegen den russischen Präsidenten Vladimir Putin – Hintergründe und Folgen" (2023) 2 *Ukraine-Krieg und Recht* 161.

8 Elias Sedlmayr and Burkhard Uhlenbroich, "Justizminister Buschmann: Wir würden Putin sofort verhaften" (*Bild*, 18 March 2023) www.bild.de/politik/inland/politik-inland/justizminister-buschmann-wir-wuerden-putin-sofort-verhaften-83251392.bild.html, (accessed: 20 October 2023).

9 In more detail Bock (n 4).

10 English translation of the CCAIL available at www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.pdf, (accessed: 20 October 2023).

11 This section is based on Bock (n 4).

12 See, e.g., Bock (n 2) 293.

13 Kai Ambos and Stefanie Bock, "Procedural Regimes" in Luc Reydams, Jan Wouters and Cedric Ryngaert (eds), *International Prosecutors* (Oxford University Press 2012) 488, 536 with further references. According to the principle of complementarity as enshrined in Art 17 of the Rome Statute, investigations and prosecutions before the ICC are

inadmissible if the respective case is dealt with on the national level unless the State is unwilling or unable to genuinely prosecute the crimes in question.

14 Gerhard Werle and Florian Jeßberger, "International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law" (2002) 13 *Criminal Law Forum* 191, 194. The duty of States to prosecute the international core crimes is stressed in the Preamble of the Rome Statute and in Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Prosecutor v. Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1234), Appeals Chamber, 25 September 2009, para 85.

15 On the prosecution of international crimes in Germany before the adoption of the CCAIL see Wolfgang Kaleck, "German International Criminal Law in Practice: From Leipzig to Karlsruhe" in Wolfgang Kaleck and others (eds), *International Prosecution of Human Rights Crimes* (Springer 2007) 93, 98 et seq; Christoph Safferling and Gurgen Petrossian, "Universal Jurisdiction and International Crimes in German Courts – Recent Steps Towards Exercising the Principle of Complementarity after the Entry into Force of the Rome Statute" (2021) 11 *European Criminal Law Review* 242, 246 et seq; Florian Jeßberger, "Kleine Geschichte der Verfolgung von Völkerrechtsverbrechen in Deutschland" in Florian Jeßberger and Aziz Epik (eds), *Zwanzig Jahre Völkerstrafgesetzbuch: Anwendungspraxis und Reformbedarf* (Nomos 2023), 25.

16 Cf Deutscher Bundestag, "Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zum Römischen Statut des Internationalen Strafgerichtshofs vom 17. Juli 1998 (IStGH-Statutgesetz)" (14 February 2000) BT-Drs 14/2682, https://dserver.bundestag.de/btd/14/026/1402682.pdf – (accessed: 20 December 2023), at 7; Werle and Jeßberger (n 14) at 199; Helmut Satzger, "German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes against International Law" (2002) 2 *International Criminal Law Review* 261, 263 et seq.

17 See also André Klip, "Zehn Jahre Völkerstrafgesetzbuch: Mitfeiern aus europäischer Perspektive" in Florian Jeßberger and Julia Geneuss (eds), *Zehn Jahre Völkerstrafgesetzbuch. Bilanz und Perspektiven eines "deutschen Völkerstrafrechts"* (Nomos 2013) 141, 143: "the most far-reaching innovation of the CCAIL" / a "masterstroke".

18 Bock (n 2) 93.

19 The Rome Statute and the CCAIL perceive aggression as an absolute leadership crime, which can only be committed "by a person in a position effectively to exercise control over or to direct the political or military action of a State," in more detail Stefanie Bock, "Individuelle Verantwortlichkeit für staatliche Angriffshandlungen. Überlegungen zum Verbrechen der Aggression" in Jan C Bublitz and others (eds), *Recht – Philosophie – Literatur. Festschrift für Reinhard Merkel zum 70. Geburtstag* (Duncker & Humblot 2020) 1433.

20 See only Patrycja Grzebyk, "Key Risks and Difficulties of Aggression Trials" in Stefanie Bock and Eckart Conze (eds), *Rethinking the Crime of Aggression – International and Interdisciplinary Perspectives*. Aggression (Asser Press; Springer 2022), 269.

21 Deutscher Bundestag, "Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zur Änderung des Völkerstrafgesetzbuchs" (1 June 2016) BT-Drs 18/8621, https://dserver.bundestag.de/btd/18/086/1808621.pdf, (access: 20 December 2023).

22 English translation of the CCP available at www.gesetze-im-internet.de/englisch_stpo/ (accessed: 20 December 2023).

23 Werle and Jeßberger (n 14) 213; see also Florian Jeßberger, "Universality, Complementarity, and the Duty to Prosecute Crimes Under International Law in

Germany" in Wolfgang Kaleck and others (eds), *International Prosecution of Human Rights Crimes* (Springer 2007), 213, 216.

24 See only Kai Ambos, "§ 1 VStGB" in Christoph Safferling (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 9. Nebenstrafrecht III* (4th ed C.H. Beck 2022) mn 25 and Jeßberger (n 23) 215.

25 German criminal procedure is based on the principle of mandatory prosecution, which means that – as a rule – police and public prosecutors are obliged to prosecute all crimes which come to their knowledge; cf. Section 152(2) CCP: "Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications") and Section 170(1) CCP: "If the investigations offer sufficient reason for preferring public charges, the public prosecution office shall prefer them by submitting a bill of indictment to the competent court".

26 Jeßberger (n 23) 216; Ambos (n 24) mn 26.

27 German Constitutional Court, Decision of 1 March 2011, 2 BvR 1/11, 31 *Neue Zeitschrift für Strafrecht* (2011) 353; see also Bock (n 4) 794–797.

28 Ibid; see also Geneuss (n 3) 54.

29 GBA, "Keine deutschen Ermittlungen wegen der angezeigten Vorfälle von Abu Ghraib / Irak" (2005) 60 *Juristenzeitung* 311; for a critical assessment see Kaleck (n 15) 103 et seq; Jeßberger (n 23) 217 et seq; Rainer Keller, "Das Völkerstrafgesetzbuch in der praktischen Anwendung: Eine kritische Bestandsaufnahme" in Florian Jeßberger and Julia Geneuss (eds), *Zehn Jahre Völkerstrafgesetzbuch. Bilanz und Perspektiven eines "deutschen Völkerstrafrechts"* (Nomos 2013) 141; Ambos (n 24) mn 29 et seq.

30 In more detail on these cases Kaleck (n 15) 106 et seq; Keller (n 29) 145 et seq; Stefanie Bock, "Western Sahara and Universal Jurisdiction in Germany" (2010) 43 *Revue Belge de Droit International* 43, 57 et seq.

31 Higher Regional Court of Koblenz, Judgement of 24 February 2021, 1 StE 3/21 confirmed in Federal Court of Justice, Decision of 20 April 2022, 3 StR 367/21; Higher Regional Court of Koblenz, Judgement of 13 January 2022, 1 StE 9/19; see for more details the documentation of the Koblenz trial by the Syrian Justice and Accountability Centre and the Marburg International Research and Documentation Centre for War Crimes Trials available at https://syriaaccountability.org/the-trial-of-anwar-raslan-and-eyad-al-gharib/ (accessed: 20 December 2023).

32 Higher Regional Court of Frankfurt, Judgement of 30 November 2021, 5-3 StE 1/20-4-1/20, confirmed in Federal Court of Justice, Decision of 10 November 2022, 3 StR 230/22.

33 Cf. Thomas Beck, "Das Völkerstrafgesetzbuch in der praktischen Anwendung – ein Kommentar zum Beitrag von Rainer Keller" in Florian Jeßberger and Julia Geneuss (eds), *Zehn Jahre Völkerstrafgesetzbuch. Bilanz und Perspektiven eines "deutschen Völkerstrafrechts"* (Nomos 2013), 161.

34 In general, on the "no safe haven" concept, Máximo Langer, "Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction" (2015) 13 *Journal of International Criminal Justice* 245.

35 Geneuss (n 3) 52; Bock (n 4) 801.

36 See also Frédéric Mègret, "The Elephant in the Room in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality, and the Constitution of the Political" (2015) 6 *Transnational Legal Theory* 89, 99.

37 Yuan Han, "Should German Courts Prosecute Syrian International Crimes? Revisiting the 'Dual Foundation' Thesis" (2022) 36 *Ethics & International Affairs* 37, 53.

38 Mègret (n 36) 43; Geneuss (n 3) 52.
39 Geneuss (n 3) 52; Bock (n 4) 805.
40 Higher Regional Court of Frankfurt, Judgement of 30 November 2021, 5-3 StE 1/20 - 4 - 1/20.
41 Higher Regional Court of Munich, Judgement of 25 October 2021, 8 St 9/18. The judgement was overturned by the Federal Court of Justice because the Higher Regional Court has found the case to be of lesser gravity without taking into account that the accused acted out of racial motives, Federal Court of Justice, Judgement of 9 March 2023, 3 StR 246/22.
42 See already Bock (n 4) 805.
43 France and the Netherlands, for example, send investigation teams to Ukraine to assist the local authorities, see "The war in Ukraine: Dutch support for investigations into war crimes" (*Government of the Netherlands*, 26 July 2022) www.government.nl/latest/news/2022/07/26/the-war-in-ukraine-dutch-support-for-investigations-into-war-crimes; Shweta Desai, "France dispatches team to Ukraine to investigate Russian war crimes" (*Anadolu Ajansi*, 11 April 2022) www.aa.com.tr/en/europe/france-dispatches-team-to-ukraine-to-investigate-russian-war-crimes/2561103, (accessed: 20 December 2023).
44 European Union Agency for Criminal Justice Cooperation, "Joint investigation team into alleged core international crimes committed in Ukraine – Milestones" (*Eurojust*, 4 May 2023) www.eurojust.europa.eu/publication/joint-investigation-team-alleged-core-international-crimes-committed-ukraine-milestones (accessed: 20 December 2023).
45 European Union Agency for Criminal Justice Cooperation, "International Centre for the Prosecution of the Crime of Aggression against Ukraine" (*Eurojust*, n.d.) www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine (accessed: 20 December 2023).
46 In more detail Martin Böse, "Das Völkerstrafgesetzbuch und der Gedanke 'antizipierter Rechtshilfe'" in Florian Jeßberger and Julia Geneuss (eds), *Zehn Jahre Völkerstrafgesetzbuch. Bilanz und Perspektiven eines "deutschen Völkerstrafrechts"* (Nomos 2013) 167.
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50 Higher Regional Court of Munich, Judgement of 26 July 2019, 8 St 5/19.
51 Federal Court of Justice, Judgement of 28 January 2021, 3 StR 564/19, *Entscheidungen des Bundesgerichtshofs in Strafsachen* 65, 286–313, English summary in *International Legal Materials* 61 (2022), 483–489; for the position of the Federal Public Prosecutor General see Peter Frank and Christoph Barthe, "Immunity of Foreign State Officials Before National Courts. A Stress Test for Modern International Criminal Law?" (2021) 19 *Journal of International Criminal Justice* 700; for a detailed analysis see Aziz Epik, "No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from the German Federal Court of Justice" (2021) 19 *Journal of International Criminal Justice* 1263.

52 Claus Kreß, "Functional Immunity of Foreign State Officials Before National Courts. A Legal Opinion by Germany's Federal Public Prosecutor General" (2021) 19 *Journal of International Criminal Justice* 697, 698; Epik (n 51) 1276; Kai Ambos, "Anmerkung" (2021) 37 *Strafverteidiger* 557. In July 2024, the German Bundestag passed a law on the further development of international criminal law. The new Section 20 of the Courts Constitution Act now expressly states: 'Functional immunity does not prevent the extension of German jurisdiction to the extension of German jurisdiction to the prosecution of crimes under the Code of Crimes against International Law'.

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17 The Ukrainian struggle for internationalization of the problem of punishment of the crime of aggression

Anton Korynevych

17.1 Introduction

This research deals with the need to analyze the issue of establishing a special tribunal for the crime of aggression against Ukraine as a mechanism to ensure accountability for this crime. The establishment of such a tribunal would help internationalize the problem of punishment for the crime of aggression against Ukraine and close the existing accountability gap, as there is no international court or tribunal, which can exercise jurisdiction over the crime of aggression against Ukraine. Moreover, the international community as a whole would benefit from the establishment of such a tribunal, as it would constitute a legal response to the biggest aggression in Europe after World War II. It would thus be a clear signal that the perpetrators of the crime of aggression will not go unpunished and that the rule of law still prevails in international relations. It would also enhance the implementation of the foundational principle of the prohibition of the use of force, as it would clearly demonstrate that blatant and flagrant violations of this principle lead to appropriate punishment.

The text was written by the author in his official capacity as an ambassador-at-large in the Ministry of Foreign Affairs of Ukraine responsible for Ukrainian efforts towards developing a legal response to Russian aggression.

17.2 Raison d'être of a Special Tribunal for the Crime of Aggression against Ukraine

Ten years ago, in February 2014, Ukraine became the victim of acts of aggression committed by Russia in a blatant denial of the foundational principle of the prohibition of the use of force against sovereignty, political independence, and territorial integrity of another State and the right of all peoples to freely determine their political status and freely pursue their economic, social, and cultural development.[1] On 24 February 2022, Russia launched a full-scale invasion of Ukraine, which was recognized as aggression by the United Nations General Assembly.[2]

War crimes and crimes against humanity committed during Russia's war against Ukraine are being investigated by Ukraine and a number of other states, as well as by the International Criminal Court (ICC). The referral of the situation in Ukraine

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made by 43 States and Ukraine's previously given consent to the ICC's jurisdiction over all crimes committed during the armed conflict since 2014 provide a solid basis for the work of the Office of the Prosecutor of the ICC. And it is crucially important that the ICC has already issued arrest warrants for Mr. Putin, Ms. Lvova-Belova, Mr. Kobylash, Mr. Sokolov, Mr. Shoigu and Mr. Gerasimov. Ukraine is strongly committed to cooperating with the ICC in its efforts.

While international criminal justice has important achievements in addressing genocide, crimes against humanity and war crimes, progress concerning the crime of aggression – or crimes against peace as it was labelled during the Nuremberg Trials – has been very limited. Unlike in the case of other core international crimes, the ICC faces objective difficulties in exercising jurisdiction over the crime of aggression, the reasons for which will be further discussed.

One may note the time has come to complete the architecture of international criminal justice, initiated by the 1942 London St. James Declaration on Punishment for War Crimes,[3] by identifying the accountability gap for the crime of aggression and suggesting solutions to fill it. Russia's war of aggression against Ukraine is the biggest war of aggression in Europe since 1945 and the legal response to it shall be appropriate and resemble the solution, which the international community found to bring perpetrators to justice after World War II.

The root cause of the commission of all grave crimes in the territory of Ukraine, the primary crime is the crime of aggression committed against Ukraine by the highest political and military leadership of the Russian Federation. As the International Military Tribunal in Nuremberg noted in its judgment: "... To initiate a war of aggression … is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".[4] This accumulated, absolute evil must not go unpunished. The gap must be closed.

17.3 Support for the establishment of the Special Tribunal and ongoing work

The idea of establishing a special tribunal for the crime of aggression against Ukraine has received high-level support since the beginning of Russia's full-scale invasion of Ukraine. On 28 February 2022, Professor of International Law Philippe Sands wrote an op-ed in the "Financial Times" on the need to establish a tribunal for the crime of aggression against Ukraine.[5] Leading experts, academics, and politicians supported this idea by signing the Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine.[6]

The first high-profile event dedicated to the need to establish a special tribunal was held on 4 March 2022 in Chatham House.[7] Numerous intellectuals have since published their articles and research papers on the need to ensure accountability for the crime of aggression against Ukraine.[8] More statements and declarations of support for the establishment of a special tribunal followed and continue to be adopted.[9] Public campaigning for the creation of such a tribunal was also in place.[10] Parliamentary assemblies of international organizations adopted

resolutions supporting the establishment of a special tribunal. Resolutions of the Parliamentary Assembly of the Council of Europe 2433 (2022),[11] 2436 (2022),[12] 2463 (2022),[13] 2473 (2022),[14] 2476 (2023),[15] 2482 (2023),[16] 2506 (2023),[17] 2516 (2023),[18] 2519 (2023),[19] of the European Parliament 2022/2655 (RSP),[20] 2022/2825 (RSP),[21] 2022/2851 (RSP),[22] 2022/2896 (RSP),[23] 2023/2558 (RSP),[24] declaration "Standing with Ukraine,"[25] resolution "NATO Post-Madrid Summit: Fit for Purpose in the New Strategic Era"[26] and declaration "United and Resolute in Support of Ukraine"[27] of NATO Parliamentary Assembly, resolution "The Russian Federation's war of aggression against Ukraine and its people, and its threat to security across the OSCE region," adopted at the 29th Annual Session of the OSCE PA on 2–6 July 2022[28] and Vancouver Declaration and resolution "OSCE and OSCE Parliamentary Assembly credibility in the face of continued Russian aggression against Ukraine," adopted at the 30th Annual Session of the OSCE PA on 30 June–4 July 2023[29] are prominent examples of the need to act. Also the Seimas of the Republic of Lithuania,[30] Verkhovna Rada of Ukraine,[31] Riigikogu of Estonia,[32] Parliament of the Netherlands,[33] Parliament of the Czech Republic,[34] Parliament of France,[35] Parliament of Latvia,[36] Parliament of Slovakia,[37] Parliament of Poland,[38] and German Bundesrat[39] adopted resolutions supporting the establishment of a special tribunal. Moreover, in an address to the European Union from 19 June 2022, Verkhovna Rada (the Ukrainian Parliament) called on the EU as the regional leader to become involved in preparation and creation of the Special Tribunal for the Crime of Aggression against Ukraine.[40]

On 22 September 2022, by Decree 661/2022, the President of Ukraine Volodymyr Zelenskyy established a working group on the creation of a special tribunal.[41] In a Joint Statement dated 16 October 2022, the foreign ministers of Estonia, Latvia, and Lithuania supported and called for the establishment of the Special Tribunal for the Crime of Aggression against Ukraine.[42]

On 19 January 2023, the European Parliament adopted the special resolution "The establishment of a tribunal on the crime of aggression against Ukraine" (2022/3017 (RSP)[43] in which it supports and calls for its urgent establishment. In the Bucha Declaration on accountability for the most serious crimes under international law committed on the territory of Ukraine, which was adopted as the result of the Bucha Accountability Summit on 31 March 2023, it is affirmed that those responsible for planning, masterminding, and committing the crime of aggression against Ukraine must not go unpunished, and there is a call on the international community to consider appropriate actions, including through the establishment of an appropriate justice mechanism to ensure effective accountability for the crime of aggression, which is of concern to the international community as a whole.[44]

The Committee of Ministers of the Council of Europe in its Decision of 15 September 2022 noted with interest the Ukrainian proposal to establish an ad hoc special tribunal for the crime of aggression against Ukraine and welcomed ongoing efforts, in cooperation with Ukraine, to secure accountability for the crime of aggression against Ukraine.[45] The Committee of Ministers in its Decision of 24 February 2023 reaffirmed the need for a strong and unequivocal international legal

response to the aggression against Ukraine, permitting no place for impunity for serious violations of international law, including for the crime of aggression, the prosecution of which is of interest to the international community as a whole. It expressed support for the development of an international center for the prosecution of the crime of aggression against Ukraine in The Hague, and emphasized that individual legal responsibility of the perpetrators of such violations is of utmost importance. It also welcomed ongoing international efforts, in cooperation with Ukraine, to ensure accountability for the crime of aggression against Ukraine through the possible establishment of an appropriate mechanism for this purpose.[46] On 30 April 2024 the Committee of Ministers of the Council of Europe adopted a decision on authorizing the Secretary General of the Council of Europe to prepare draft texts of bilateral agreement between Ukraine and the Council of Europe on the establishment of the Special Tribunal, Special Tribunal's draft statute and draft enlarged partial agreement governing the modalities of support to such a tribunal, its financing and other administrative matters. This is an important signal that the Council of Europe is ready to play active and direct role in the establishment of the Special Tribunal.[47]

In the Reykjavik Declaration of the Summit of the Heads of State and Government of the Council of Europe, held on 16–17 May 2023, the Heads of State and Government of the Council of Europe welcomed international efforts to hold to account the political and military leadership of the Russian Federation for its war of aggression against Ukraine and the progress towards the establishment of a special tribunal for the crime of aggression, as highlighted at the Summit of the Special Tribunal's Core Group chaired by President Zelenskyy.[48] The Reykjavik Declaration also provides that the Council of Europe "should participate, as appropriate, in relevant consultations and negotiations and provide concrete expert and technical support to the process."[49]

In the Conclusions of the European Council meeting on 20–21 October 2022, the European Council acknowledged Ukraine's efforts to secure accountability, including for the crime of aggression against Ukraine. It invited the High Representative and the Commission to explore options so that full accountability can be ensured.[50] In the Conclusions of the European Council meeting on 15 December 2022, the European Council welcomed and encouraged further efforts to ensure full accountability for war crimes and the other most serious crimes in connection with Russia's war of aggression against Ukraine, including ways to secure accountability for the crime of aggression. It invited the Commission, the High Representative, and the Council to take work forward, in accordance with EU and international law, stressing that the prosecution of the crime of aggression is of concern to the international community as a whole.[51] In the Conclusions of the European Council meeting on 9 February 2023, the European Council fully supported Ukraine's and the international community's efforts in relation to accountability for the most serious crimes, including the establishment of an appropriate mechanism for the prosecution of the crime of aggression, which is of concern to the international community as a whole. It underlined the European

Union's support for the investigations by the Prosecutor of the International Criminal Court as well as for the creation, in The Hague, of an international center for the prosecution of the crime of aggression against Ukraine. This center was meant to be linked to the existing Joint Investigation Team supported by Eurojust.[52]

In the European Council meeting Conclusions of 23 March 2023 it is mentioned that the EU is firmly committed to ensuring full accountability for war crimes and the other most serious crimes committed in connection with Russia's war of aggression against Ukraine, including through the establishment of an appropriate mechanism for the prosecution of the crime of aggression, which is of concern to the international community as a whole.[53] The European Council welcomed the agreement to create the new International Centre for Prosecution of the Crime of Aggression against Ukraine (ICPA) in The Hague, which was meant to be linked to the existing Joint Investigation Team supported by Eurojust.[54] In the Conclusions of the European Council meeting on 29–30 June 2023, it is mentioned that the EU remains firmly committed to ensuring that Russia is held fully accountable for its war of aggression against Ukraine. The European Council welcomed the fact that the ICPA is ready to start its support operations. The European Council "took stock of efforts to establish a tribunal for the prosecution of the crime of aggression against Ukraine, including work done in the Core Group, and called for the work to continue."[55] In view of the European Council, the tribunal should enjoy the broadest cross-regional support and legitimacy.[56]

In the Conclusions of the European Council meeting on 26–27 October 2023 it is mentioned that Russia and its leadership must be held fully accountable for waging a war of aggression against Ukraine and other most serious crimes under international law. The European Council calls for work to continue, including in the Core Group, on efforts to establish a tribunal for the prosecution of the crime of aggression against Ukraine that would enjoy the broadest cross-regional support and legitimacy.[57] In the Conclusions of the European Council meeting on 14–15 December 2023 it is mentioned that Russia and its leadership must be held fully accountable for waging a war of aggression against Ukraine and other most serious crimes under international law. The European Council encourages further efforts, including in the Core Group, to establish a tribunal for the prosecution of the crime of aggression against Ukraine that would enjoy the broadest cross-regional support and legitimacy.[58]

In a joint statement following the 24th Ukraine-EU Summit on 3 February 2023, in paragraph 12 "Accountability," Ukraine and the EU supported the development of the ICPA in The Hague with the objective to coordinate investigation of the crime of aggression against Ukraine, as well as to preserve and store evidence for future trials.[59]

On 4 March 2023 in Lviv, as a key outcome of the "United for Justice" conference, the seven partner countries of the Eurojust (Ukraine, Lithuania, Poland, Estonia, Latvia, Slovakia, and Romania) supported joint investigation team (JIT) and decided to amend the agreement between them in order to reflect the future

role of the ICPA.[60] The ICPA is part of the existing support structure for the JIT, with a specific focus on supporting and enhancing investigations into the crime of aggression. The current amendments to the JIT agreement formalized Eurojust's role in support of the ICPA and specified that JIT partner countries may benefit from the additional logistical, financial, and operational support it offers. After the ICPA has officially been made part of the JIT agreement, Eurojust proceeded with the practical implementation. On 3 July 2023, the International Centre for the Prosecution of the Crime of Aggression Against Ukraine officially started operations at Eurojust. The ICPA supports the preparation of crime of aggression cases, by securing crucial evidence and facilitating the process of case building at an early stage.[61] As Eurojust notes, Ukraine and five other JIT members (Lithuania, Latvia, Estonia, Poland, and Romania) are participating in the ICPA's start-up phase. The ICPA also benefits from the participation of the ICC. Following a Memorandum of Understanding with the JIT members, the United States of America has appointed a Special Prosecutor for the Crime of Aggression, who supports the ICPA's activities.[62]

The ICPA's establishment and start of operations is a real historic moment, as it is the first international initiative on investigating the crime of aggression in the case of its real perpetration after World War II.[63] "History in the making" – this is how its commencement of operations was described.[64] Taking into consideration the abovementioned facts, the ICPA can be seen as a first step and the most important interim result of the work towards establishing a special tribunal.

The Core Group on the establishment of the Special Tribunal for the Crime of Aggression against Ukraine functions as a platform where state representatives discuss various legal issues related to the establishment of the Special Tribunal. The Core Group consists of 41 states as of 30 June 2024. It has already become a forum for finding solutions and paving the way forward to the establishment of the Special Tribunal. The Core Group held its meetings on 26 January 2023 in Prague, on 21–22 March 2023 in Strasbourg, on 12 May 2023 in Tallinn, on 30 June 2023 in Warsaw, on 22 September 2023 in The Hague and on 16 November 2023 in Berlin, on 19 January 2024 in Luxembourg, on 7 March 2024 in Vienna, on 10 May 2024 in Vilnius, on 28 June 2024 in Bucharest. On 9 May 2023, during an online summit of the Heads of State and Government of the Core Group, a joint statement on efforts to establish a tribunal on the crime of aggression against Ukraine was adopted.[65] The activities of the Core Group were supported in several European Council Conclusions, in particular in the Conclusions of 29–30 June 2023, where the European Council "took stock of efforts to establish a tribunal for the prosecution of the crime of aggression against Ukraine, including work done in the Core Group, and called for the work to continue".[66]

Support for the establishment of the Special Tribunal keeps coming in different forms and formats. With this in mind, it may be considered that the issue will remain high on the agenda of the international community and Ukrainian struggle for internationalization of the problem of punishment of the crime of aggression will have its result – the establishment of the Special Tribunal.

17.4 Interrelations with the International Criminal Court

The establishment of the Special Tribunal for the Crime of Aggression against Ukraine will not in any way impede further investigation of the situation in Ukraine by the International Criminal Court and such a tribunal shall be complementary to the ICC.[67] The ICC is investigating the situation in Ukraine for alleged genocide, crimes against humanity and war crimes. The ICC remains a key body of international criminal justice, and Ukraine is actively cooperating with the ICC. For instance, the law amending Ukraine's Code of Criminal Procedure establishing provisions (in a separate chapter) for Ukraine's cooperation with the ICC has been adopted[68] and an agreement on the opening of the ICC office in Ukraine has been signed.[69] However, the ICC cannot investigate and prosecute individuals for the crime of aggression against Ukraine unless both states ratify the Rome Statute and the Kampala Amendments on the crime of aggression or the act of aggression is established in a UN Security Council resolution and the Security Council refers the situation to the ICC. That is why the establishment of the Special Tribunal for the Crime of Aggression against Ukraine will not affect the jurisdiction of the ICC regarding its investigation of the situation in Ukraine but will only complement its important work due to the fact that the Special Tribunal shall have jurisdiction to investigate and prosecute senior political and military leadership of the Russian Federation for the crime of aggression against Ukraine.

Moreover, the ICPA, which is already established and operating, will benefit from the participation of the ICC[70] and it may be considered that there shall be effective and active cooperation on the issue of investigation and prosecution of the crime of aggression against Ukraine between different relevant authorities.

Since, as mentioned above, the Special Tribunal shall be positioned as complementing the ICC, it seems reasonable to argue that its work should be based on the norms and approaches applied by the ICC and set out in its Rome Statute, as they represent the best international legal standards. Further, it also seems reasonable that the Special Tribunal should investigate and prosecute for the crime of aggression against Ukraine, committed on the territory of Ukraine, in line with the "leadership" definition and understanding of the crime of aggression. The temporary jurisdiction of the Special Tribunal could cover preparation for and all events since February 2014 – the beginning of the Russian Federation's aggression against Ukraine. As the Special Tribunal shall be an instrument of individual criminal responsibility, it shall have jurisdiction over natural persons. Persons participating in the crime of aggression against Ukraine shall be individually responsible and liable for punishment. These provisions shall apply to persons in a position to exercise effective control over or to direct the political or military action of the state.

All in all, a lot of work has been done on the issue of internationalization of the prosecution of the crime of aggression against Ukraine since February 2022. More work shall follow. It is important to establish the Special Tribunal for the Crime of Aggression against Ukraine. It is important not only for the Ukrainian People, but also for the international community as a whole, for the very concept of the crime

of aggression and the prohibition of the use of force. If the crime of aggression is not properly prosecuted in this particular situation, the concept itself may suffer severe damage. Ukrainians believe that, together with their international partners, this task will be accomplished.

Notes

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18 Accountability for Russian imperialism in the Global East

The Special Tribunal for Aggression from a post-colonial Eastern European perspective[1]

Patryk I. Labuda

18.1 Introduction

A significant majority of states in the UN General Assembly has condemned Russia's full-scale invasion of Ukraine in 2022.[2] In addition to economic sanctions against Russia, several accountability efforts are underway, including at the International Court of Justice, the European Court of Human Rights, the International Criminal Court (ICC) and domestic courts.[3] This chapter focuses on the proposal to create an *ad hoc* Special Tribunal for the crime of aggression (STA) against Ukraine, which has proved contentious. Ukraine and other Eastern European states have embraced the idea of a new tribunal. Western powers have exhibited caution. Meanwhile, most states outside Europe and the wider "West" have remained silent, including on account of perceived double standards in the enforcement of international (criminal) law.

Against the backdrop of these divisions, this chapter adopts a post-colonial, Eastern European perspective to assess the arguments for and against aggression trials of Russia's leadership.[4] First, it foregrounds Ukraine's history of foreign subjugation to show how the STA can provide an overdue reckoning with Nuremberg's distorted legacy in Eastern Europe while countering Russia's neo-imperial phantasies of a "Russkiy mir" and false "de-Nazification" justifications for war. Second, by highlighting Ukraine's liminal place within the global order as a post-colonial state straddling boundaries between North and South, East and West, Europe and Asia, the chapter nuances critiques of double standards leveled against the STA and emphasizes its counter-hegemonic potential. It suggests that the tribunal could help address myths about the Soviet Union's benevolent role in the Cold War and Second World War while providing inspiration for anti-imperial struggles in other parts of the world. Third, by interrogating "mental maps" of civilizational hierarchy in Eastern Europe and the "Global East,"[5] the chapter considers why Ukraine has embraced international law as an emancipatory tool for countering Russian aggression and how this relates to Eastern European states' support for an "international" over a "hybrid" tribunal. It explains that the traditional arguments in favor of hybrid tribunals are less relevant for aggression, where the expressive dimension of international trials outweigh their long-term "shadow effects" on the domestic rule of law.

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By adopting a post-colonial perspective, this chapter illustrates the cross-regional stakes of the ongoing debates over the STA and emphasizes how Ukraine's quest for accountability can serve emancipatory purposes by bridging different experiences of anti-imperialism. To overcome the limitations of West-centric commentary on the tribunal, it restores the agency of Eastern European states and scholars in debates over Russian imperialism, *inter alia* by critiquing west(s)plaining, "the phenomenon of people from the Anglosphere loudly foisting their analytical schema and political prescriptions onto the [Central and Eastern European] region."[6] Despite Eastern Europe often being considered 'too European to be southern, and too eastern to be western,'[7] this region's history of repeated aggression and exploitation – by both Russia and Western powers – is foregrounded to challenge dominant narratives, especially a scholarly focus on selectivity along a binary "West versus Global South" axis, which obscures Ukraine's predicament and overlooks common histories of counter-imperial resistance by weaker states in the global order. By emphasizing the anti-imperial potential of aggression prosecutions for smaller and weaker states in the global order, this chapter nuances West-centric arguments about the selectivity of international criminal law, transcends geo-political rivalries to build bridges between oppressed peoples in the world, and encourages Eastern European states and scholars to reciprocate the counter-hegemonic aspirations of other post-colonial societies.

The chapter proceeds in five parts. After briefly sketching global divisions over the STA and introducing how post-colonialism applies to Eastern Europe, it sheds light on three contested aspects of the proposed tribunal: first, why Ukrainians consider aggression trials of Russia's leadership necessary, despite critiques that an *ad hoc* tribunal might undermine the ICC; second, how accounting for Eastern Europe challenges West-centric critiques of "double standards" or "neglecting the Global South," and unveils alternative readings of an aggression tribunal's counter-hegemonic potential; and, third, how attention to Eastern Europe illuminates debate over the STA's institutional design.

18.2 The Special Tribunal's origins and uneven global support

Russia's 2022 invasion of Ukraine has seen important developments in international criminal justice. In addition to various domestic and regional initiatives on atrocity crimes, including a mass referral of the Ukraine situation to the ICC Prosecutor, the war has revived the idea of prosecuting the crime of aggression.[8] Yet, while there is little doubt Russia's full-scale invasion meets the definition of a "manifest violation" of the UN Charter, giving rise to individual criminal responsibility under Article 8*bis* of the Rome Statute, the ICC Prosecute cannot charge this crime in Ukraine because of the Statute's unusual "Kampala jurisdictional regime" for aggression,[9] and the fact that neither Ukraine nor Russia are parties to the Rome Statute.[10]

Despite the ICC's inability to act, the proposed STA has not met with universal approval. The Ukrainian government endorsed the idea of a Special Tribunal in early March 2022,[11] but the STA also generated critique and disagreements. Initially,

Ukraine and a handful of Eastern European states pushed for a tribunal, followed by key Western powers' endorsement of an aggression mechanism in early 2023. However, despite the creation of an investigative office in July 2023,[12] divergences remain among the tribunal's backers over its institutional design.

Meanwhile, most non-Western and non-European countries have remained on the sidelines of diplomatic negotiations, with commentators highlighting "Western double standards" and doubts about the Global South's willingness to impose consequences on Russia in the form of sanctions, reparations, or criminal accountability on the Russian leadership.[13] As argued by Kai Ambos, "it is not easy to provide an [STA] with sufficient legitimacy in the eyes of the world, above all in the eyes of the Global South," adding further that "one wonders… why such a tribunal was not set up during the unlawful (US-led) invasion of Iraq… show[ing] a strange understanding of the so-called rule-based international legal order, which should guarantee the same application of the law for everyone."[14] Such concerns have also shaped policy, with the US ambassador at large for global criminal justice noting "the growing perception by many states, especially from the Global South, that the concerted response to Ukraine is a stark exception" and that "[w]e must engage seriously with these perceptions of bias, double standards, and selective justice."[15]

18.3 Post-colonialism in Eastern Europe and the global east

Before addressing the merits of arguments for and against the STA, this section places the prospect of aggression trials within a post-colonial perspective, to foster a richer debate about international criminal law and a more just legal order going forward. Although post-colonialism is a broad term, it is defined here as a critical approach to the study of international law, where relationships rooted in unequal relations of power, arbitrary hierarchies of inclusion and exclusion, and discriminatory relationships inherited from the past define both the present and the conditions of possibility for alternative futures.[16] Most scholars reflexively associate post-colonialism with (Western) European imperialism in Africa, the Americas, or Asia, but the term applies *mutatis mutandis* to (post)-imperial and (post)-colonial relations in other parts of the world, including the experiences of Eastern Europeans, such as the Ukrainians.[17]

While Eastern Europe remains a separate regional grouping at the UN, distinct from Western states,[18] it occupies a liminal and contested space within the global order and the international (legal) imaginary. As a country from the former Soviet bloc and the "Second World" – a term used in contra-distinction to the first (western) and third (non-Western) world[19] – Ukraine straddles boundaries between Europe and Asia, East and West, and Global North and South.[20] Eastern Europe is part of the wider "Global East," which Martin Müller defines as "all those societies… too rich to be in the South, too poor to be in the North… suspended somewhere in the shadows… not quite belonging to either."[21] Ukraine is also a post-colonial society, whose right to exist has been denied systematically by empire.[22]

Yet the post-2022 debates on the Russo–Ukraine war reveal deep misunderstandings about Ukraine's liminal and post-colonial status. This is not

surprising. As Olesya Khromenyuk notes, most people "didn't imagine Ukraine at all" before February 2022 and many still conjure up "caricatures based not on knowledge of the country or the people who inhabit it but on mythology".[23] I and other Eastern European scholars have similarly shown how reductionist mental maps of Ukraine matter for international legal debates, which often default to West-centric assumptions and fail to grapple with histories that escape a paradigm of Western imperialism.[24] Fragmentary knowledge of Eastern Europe has allowed Russia's imperial ambitions to be ignored while fueling generalizations about Ukrainians *qua* avatars of the "West," "Global North," or "whiteness" and "privilege."[25] Not only do such generalities ignore anti-Slavic racism or Ukrainians' "inferior" cognitive status at the gates of Europe,[26] Ukraine is also Europe's poorest country, which is in turn poorer than many "Global South" states. Not only has this region suffered repeated episodes of both Western and Russian imperialism, colonialism and genocidal violence,[27] simplistic imaginaries of Eastern Europe contribute to reductionist analyses of the causes and consequences of Russian aggression, with commentators trivializing Ukraine's struggle for self-determination as a proxy fight between the West and the Rest or the Global North and South, while denying the agency of Ukraine in a neo-colonial fashion.[28]

Although it is important not to mistake post-colonialism in the Eastern European context as cover for xenophobia or exclusion,[29] reductionist mental maps and neo-colonial argumentative frames also structure international law conditions of possibility in this war, including in debates over the STA's legitimacy, institutional design, and the selectivity of international criminal law. By centering Eastern European experiences to challenge some narratives in the scholarly debate, the following sections note efforts to deny local agency and impose institutional arrangements on Ukraine, while providing an alternative reading of how smaller and weaker states from both the Global South and East can harness Ukraine's invasion to unleash the anti-imperial potential of international law.

18.4 Undermining the ICC, resurrecting aggression, and overcoming Nuremberg's legacy

Although the ICC cannot prosecute the crime of aggression in Ukraine and it is generally acknowledged that amending the Kampala amendments would take too long for Ukrainians,[30] some critics object that a new *ad hoc* tribunal for only Ukraine (but not other victims of aggression) would damage international criminal law. In this regard, one concern is that *ad hoc* arrangements undermine the long-term universal aspirations of the ICC, which was created as a permanent institution to overcome the *ad hoc*-ness of the Rwanda and former Yugoslavia tribunals. As Claus Kreß notes, "[i]t cannot be doubted that a Special Tribunal falls behind the most stringent rule of law standards and that many national constitutions rule out the establishment of a tribunal *ex post facto*".[31] France and Germany have expressed similar concerns,[32] and the ICC Prosecutor has opposed the STA, arguing that "[w]e should avoid fragmentation, and instead work on consolidation."[33]

There are important counterpoints, however. For one, STA-related critiques of *ad hocness*, and an idealization of the ICC's universality, downplay the latter's selectivity problems, which would continue if the ICC had jurisdiction over aggression in Ukraine.[34] For another, *ad hoc* tribunals have regularly been established in Africa and Asia, with fewer criticisms of their legitimacy. Lastly, by emphasizing how the Nuremberg and Tokyo tribunals' reputations grew over time, former ICC President, Chile Eboe-Osuji, suggests "[y]ears from now, [the STA] would have correctly earned its place as one of the building blocks in the never-ending construction project of international law."[35]

A second concern is that by prosecuting the same people as the ICC Prosecutor (namely Russia's leadership) albeit for different crimes, the STA would divert resources and attention away from the ICC. While these concerns became a reality after the March 2023 arrest warrant for Putin,[36] they downplay the importance of accountability for aggression specifically. Skeptical of claims that the STA would merely duplicate war crimes trials, Tom Dannenbaum notes that "[a]ggression matters as a distinct crime because… [it] is uniquely responsive to a form of wrongdoing that can otherwise be obscured by those with the power to project violence in a way that exploits IHL's sanitizing effect."[37]

Other scholars similarly emphasize the different benefits of aggression trials, which go beyond whether the same people end up in jail,[38] but overlooked in these analyses is the regional context of the aggression debate. In Eastern Europe, and Ukraine in particular, aggression prosecutions have a symbolic and expressivist dimension that extends to violations of other countries' territorial integrity, beginning with Crimea and the Donbas in 2014 or Georgia in 2008, but stretching back in time to the Russian Empire's 18th century partitions of Poland and countless wars of conquest in between, in both Eastern Europe and central Asia. Echoing the transtemporal, imperial aspect of Russia's invasion of Ukraine, Oleksandra Maatvichuk, a 2022 Nobel Peace Prize winner, observes "Russia is a modern-day empire. The imprisoned peoples of Belarus, Chechnya, Dagestan, Tatarstan, Yakutiia, and others endure forced russification… If Russia is not stopped in Ukraine, it will go further."[39]

While the STA will not have jurisdiction to address centuries of conquest in the region, affected states embrace both the tribunal's symbolic anti-colonial dimension and its utilitarian deterrent function vis-à-vis Russia's expansionist policies.[40] As the STA Group of Friends observes, "[e]nsuring accountability for the crime of aggression committed against Ukraine would signal that waging blatantly unlawful and colonizing wars will not go unpunished – whether in Ukraine or elsewhere".[41] Invocation of "colonialism" is not coincidental, and Eastern European scholars emphasize direct links between Soviet imperial–colonial genocidal policies in 1930s Ukraine and Putin's actions.[42]

Another important dimension is the contested memory of Nuremberg in Eastern Europe. Westerners remember Nuremberg primarily as a recognition of Nazi criminality, vindicating the Allies' "righteous" cause in the Second World War. While critiques of Nuremberg's "victors justice"[43] are well known, Eastern European memory of the tribunal is more complicated. Not only did it whitewash the brutal

crimes committed against Ukrainians and other Eastern European peoples (with Katyń constituting a paradigmatic example of Soviet impunity), it also bestowed legitimacy on the Soviet Union as a "liberator" from Nazi rule while re-writing history by eliding that the Second World War began because of Nazi Germany *and the Soviet Union's* joint invasion and partition of Poland.

This history is still alive in Eastern Europe, which emerged from Soviet imperial rule just over 30 years ago.[44] This explains why Eastern Europeans have been at the forefront of efforts to establish the STA, with the memory of Nuremberg serving as a cognitive shortcut for the necessity of aggression trials. However, the Nuremberg frame resonates in the region less because of its catalytic role for international criminal law (although this argument is also made) and more due to its pernicious legacy for the Russian neo-imperial psyche and fantasies of a benevolent "Russkiy mir," which foments aggression against Ukraine. Emphasizing how Nuremberg's "competing national mythologies about World War II and postwar justice" live on today, Francine Hirsch explains that "Putin has been invoking Nuremberg to rally the Russian people for the war against Ukraine" by "promulgat[ing] the lie that Ukraine is being run by Nazis" and "defin[ing] his goal as Ukraine's 'de-Nazification'."[45]

The symbolism and distortions embedded in Nuremberg are at the heart of Ukraine's demands for a Special Tribunal. However, as Kateryna Busol emphasizes, "the symbolism of Nuremberg boils down not to a strict historical analogy of an international agreement between several nations to prosecute Russia's leadership" but "the expression of an aspiration for an extraordinary and specialised nature of a potential forum".[46] What matters is that an institution with as much prestige and legitimacy makes "an unequivocal pronouncement that Russia has encroached not just on Ukraine's sovereignty and individual lives of its people but more widely on the international rule-based order – and for that, it receives the judgment of law, reason and history".[47] Because the Nuremberg verdict shaped a specific historical narrative, Ukraine intends aggression trials "not just to render convictions, but, first and foremost, to use fact, law and due process to build an argumentative, intricate and multifaceted narrative for future generations, especially for Russian society," including "how a delirious neo-colonial idea of a 'gathering of historic Russian lands'" shapes events in the region to this day.[48]

This regional context explains why Eastern Europeans have championed an STA to provide an overdue reckoning with Nuremberg's distorted legacy and to decolonize the Russian neo-imperial psyche. However, it may be less obvious that a second Nuremberg tribunal could address not only Russia's historical memory, but also the Global South's celebratory and reductionist understanding of the Soviet Union *qua* anti-imperial force in the global order.[49]

18.5 "Western" double standards and "Global South" resistance: what of the "Global East"?

Notwithstanding Ukraine's interest in aggression trials, the STA has received less support in other parts of the world. Asia or Latin America's passivity can be

explained partly by distance, but ambivalence about aggression trials dovetails with critiques of "Western" double standards and a general wariness to condemn Russia. Observing "a vast feeling" – especially in public opinions and ordinary citizens [in Africa] – around the duplicity of western states when it comes to respecting international law, Benjamin Sâ Traoré notes "[t]he perception is that the western zealotry over Ukraine – and not for other situations of blatant violation of international law – is troubling, shocking and nothing short of hypocrisy and double standards in international politics".[50]

Echoing this critique, debates over the STA have also involved allegations of hypocrisy and double standards. According to Kevin Heller,

> the war in Iraq [did not] lead to high-profile calls for creating a Special Tribunal for the Punishment of the Crime of Aggression Against Iraq… [so] to create a Special Tribunal now for Russia's invasion of Ukraine would… send a message that the 'international community' cares about some crimes of aggression more than others.[51]

In a similar vein, Reed Brody emphasizes that "[f]or Western countries to create a Special Tribunal to prosecute a crime by Russian and Belarusian leaders for which they are unwilling to submit their own leaders… reinforc[es] a perception that international justice only kicks in against 'enemies or outcasts'."[52] At stake is the moral standing of the tribunal's sponsors, with critics emphasizing that an *ad hoc* tribunal is needed only because Western powers – specifically the US, UK, and France – lobbied for the Rome Statute's two-track jurisdictional regime that now prevents aggression investigations on Ukrainian soil.[53]

Yet this critique, pushed almost exclusively by Western scholars, overlooks many nuances and counterpoints, ranging from the commonsensical observation that "the revival of the crime of aggression has to begin somewhere"[54] to the fact that some Global South representatives support the STA's catalytic, forward-looking potential.[55] While it is true that not all cases of inter-state violence, for instance, Israel's annexations of Palestinian land, prompt debates over aggression trials,[56] the double standards critique also reveals implicit assumptions about the STA's law-making process. For one, critics have tended to emphasize the pro-STA views of Western celebrities like Gordon Brown and Philippe Sands, while ignoring the Eastern European states pushing for aggression trials.[57] For another, although Heller or Ambos' simplistic narrative about the STA *qua* "Western" or "Global North" project has cascaded through commentary,[58] this framing conflates academic analysis with official state positions and gets the facts wrong on important issues, especially since Western powers initially opposed the tribunal because it could expose them to future prosecution.[59] One unintended effect of this West-centric commentary has been its backward-looking emphasis on the double standards of great powers at the expense of Ukrainian agency, the counter-hegemonic potential of sanctioning Russia's leaders, and the precedent this sets for post-colonial states in other parts of the world.[60]

A curious aspect of the STA debate is the reductionist "West" versus "Global South" register within which arguments and counterarguments often appear.

Despite suggestions that Global South states are reluctant to support prosecutions of Putin, there are few statements on the STA by a state that could be labeled Global South but there are three non-Western states among the Group of Friends.[61] Relatedly, an overly capacious reading of who belongs to the "West" ignores many European states' principled positions on aggression, while romanticizing the Global South's adherence to norms of non-aggression. After all, many European states did not support the Kampala amendments that undermine the ICC's ability to act in Ukraine today and that the STA seeks to overcome. By the same token, overstating Western support for the STA elides that Western powers' ambivalence vis-à-vis Ukraine is a proximate cause of this war, with Ukrainian attempts to join NATO repeatedly ignored, to say nothing of the fact that the same "supportive" Western states did nothing to prosecute aggression in 2008 or 2014, which may have facilitated Russia's full-scale invasion in 2022 and – if left unchecked – may facilitate further invasions down the line.[62]

To be sure, resentment of Western powers' interventions in Africa or the Middle East, including the impunity of Western colonialism in the Global South, deserve attention.[63] But this should not overshadow these states' imperfect track record and contested positions on aggression. Scholars correctly observe that the African Union (AU)-led Malabo Protocol, including its criminalization of aggression, was born of Africans' frustration with, *inter alia* how the Rome Statute marginalizes certain types of crimes such as colonialism or economic crimes that, not coincidentally, would target Western actors. But one must be clear-eyed about the fact that, aside from rhetorical denunciations of Western hypocrisy, the AU's codification of immunities for heads of state in the same Malabo Protocol makes it impossible to prosecute not just African but also Western heads of states, including for aggression. The Protocol's immunity paradox should be troubling for all those genuinely concerned about the STA and double standards since, after all, many cases of (inter-state) aggression – for instance, Ugandan or Rwandan interventions in the DRC, Turkey's involvement in Syria, China's expansion into the South China Sea, or Morocco's occupation of Western Sahara – are intra-South violations of international law. One risk of a selective "Western double standards" critique is that, rather than looking for commonalities between the positions of (Eastern) European and non-Western peoples, especially from smaller and weaker states in the global order that have the most to gain from the criminalization of aggression, critics uncritically harness pre-existing analytical frames to Ukraine to reiterate well-rehearsed claims about Western hypocrisy, while ignoring that the ambitions of Global South hegemons like China (in the South China sea) or India (vis-à-vis Pakistan) put them at odds with the aspirations of many of their "southern" neighbors.

Equally problematic in this regard are allegations of "disparities of attention" implying that Western actors "privilege" Ukrainians but ignore suffering elsewhere. Brody, for instance, suggests that mobilization around Ukraine is "precisely the kind of overwhelming judicial response that *all* mass atrocities should elicit" and that "[v]ictims in places like Ethiopia and Yemen can only hope they will now get the same attention, not to mention Palestinians."[64] Such criticisms may have

merit in areas like migration,[65] but they discount that international criminal law's "disparity of attention" to Africa provoked backlash against the ICC. As I explain elsewhere, most striking about the STA "double standards" critique is that few critics portray Western-backed *ad hoc* tribunals in other regions as evidence of hypocrisy, though they all face the same issues of selectivity.[66] Western powers have backed all the post-1990s *ad hoc* international, hybrid, and internationalized criminal tribunals, mainly in Global South countries, from Rwanda, Cambodia, and Sierra Leone to Chad, the Central African Republic and Colombia, with further proposals for South Sudan, Liberia, and the Democratic Republic of Congo.[67] It should be recalled also that, for many years, Western attention focused overwhelmingly on the war in Syria, including proposals for an *ad hoc* tribunal for Syria.[68]

While the scale of support for Ukraine deserves critical analysis, including valid concerns about earmarked funding for ICC investigations,[69] a logical consequence of "principled" opposition to double standards is that either no *ad hoc* initiatives happen unless all other impunity is eradicated, or that *ad hoc* tribunals move ahead without "hypocritical" Western powers. Although such arguments for Western inaction may have the merit of absolute consistency, they risk throwing the baby out with the bathwater, whereas Dannenbaum reminds us that, ultimately, "the marginalization of aggression has itself been understood as primarily benefitting the powerful."[70]

Not only do such arguments fail to persuade; importantly, another framing of the longer-term prospects of prosecuting aggression in Ukraine is possible. In fact, a revival of aggression through the STA can be in the interest of some African, Latin American, Middle Eastern, Asian states, together with (Eastern) Europeans, who – bar the UK, France, and US – have spearheaded efforts to criminalize aggression.[71] From the perspective of weaker and smaller states from both the "Global South" and "East," prosecuting aggression against Ukraine reflects long-standing advocacy around these issues from marginalized actors in the global order.[72] Some even emphasize that accountability for Ukraine indirectly helps victims of Russian violence in Syria, Libya or Mali. As Ibrahim Olabi notes, "[w]hile some called out double standards, I personally am happy with how the world responded to Ukraine for a number of reasons, including that it has exposed a big perpetrator that we have a problem with in Syria…".[73] In this spirit, STA advocates also increasingly support a two-track approach to aggression, coupling a tribunal for Ukraine with amendments to the Rome Statute that would remove the ICC's jurisdictional limitations for the future.[74] This approach would benefit marginalized Global South and Global East countries.

18.6 What type of tribunal? Unpacking the "international" v. "hybrid" debate

In the shadow of disagreements over *whether* to establish a Special Tribunal, another question is *how* to prosecute aggression, or what type of tribunal is best placed to hold the Russian leadership to account. There are three options: (1) an international (or regional) tribunal established by a multilateral treaty;[75] (2) an

international tribunal created with the blessing of the UN General Assembly; and (3) a "hybrid" tribunal based directly on Ukraine's domestic criminal jurisdiction.[76]

While the terms "international," "hybrid," and "domestic" are open-ended and liable to different interpretations,[77] a rift between proponents of the "hybrid" and the (second) "international" option maps onto the pre-existing divergences between Western and Eastern European actors. Ukraine and its neighbors favor a UN General Assembly resolution "*[r]equest[ing]* the Secretary-General to negotiate an agreement with the Government of Ukraine to create an independent international tribunal with jurisdiction over crimes of aggression committed against Ukraine and to submit the agreement for the review of the General Assembly".[78] Meanwhile, Germany, the UK and US have embraced a "hybrid" or "internationalized" court.[79] The Ukrainian government appeared initially to be open to both options, but President Zelenskyy announced in May 2023 that his government would "work without any hybrid formats… [w]e have seen the Minsk agreements since 2014 – they were a kind of hybrid peace… Ukraine does not want… [a] hybrid tribunal as a continuation of this."[80]

Although many lawyers and diplomats support Ukraine's push for an international tribunal,[81] the disagreement boils down to several overlapping issues of legality, legitimacy, and realpolitik. In a narrow legal sense, the debate revolves around international law immunities. As Heads of state, of government and foreign ministers benefit from personal immunity under customary international law, a "hybrid" tribunal based on Ukraine's criminal jurisdiction would struggle to try Russia's leadership.[82] Accordingly, advocates of an "international" tribunal rely on case law to suggest that an "international" – as opposed to a "domestic" or "hybrid" – tribunal may ignore head of state immunity, indict and eventually prosecute senior Russian officials, including the troika itself.[83]

Nevertheless, some Western states have embraced the hybrid route, though their rationales for doing so remain ambiguous. Germany advocates a hybrid court as "a way to strengthen the [ICC] rather than weakening it,"[84] while the US ambassador at large for global criminal justice argues that "an internationalized national court" "builds upon the example of other successful hybrid justice mechanisms" and will "facilitate broader cross-regional international support and demonstrate Ukraine's leadership in ensuring accountability for the crime of aggression."[85] German and US support for hybridity seem also to be driven by a mix of legitimacy and realpolitik considerations, with the German foreign minister worrying about the critique that

> [w]e only care about this war because it is in Europe… [which] is why it is so important to me that we talk to our partners about it, and work together to bring partners on board with this process in particular from other regions of the world.[86]

Since it is far from clear how a "hybrid" tribunal mitigates the tribunal's European focus or enhances its legitimacy, some observers believe the main argument in favor a "hybrid" tribunal is that it avoids a contentious vote in the UN General

Assembly.[87] The crux of the matter is at what point an "international" tribunal can be considered sufficiently "international" and, hence, "legitimate enough" to overcome critiques of selectivity. Ambos warns that "a GA resolution passed by only a weak majority would prove a heavy mortgage on the legitimacy of a [STA]" and that "the tribunal will not be able to concentrate fully on its actual task – investigating, prosecuting and trying the Russian war of aggression."[88] Equally contentious is the number of states that must endorse such a resolution to constitute the voice of the international community, with some arguing for a higher 2/3 threshold while others endorse a simple majority of around 90, or as few as 60 states.[89]

Although the better view is that Ukraine should invoke its anti-imperial and post-colonial credentials to marshal cross-regional support from all continents and that a simple majority of states drawn from different continents should suffice – as seen in, for instance, the contentious ICJ advisory opinion on the decolonization of Chagos, triggered by a simple majority vote[90] – it is worth pausing on traditional arguments for hybridity and how they relate to the Ukrainian case and post-colonialism in Eastern Europe. In other contexts, hybrid tribunals were created to overcome the shortcomings of international *ad hoc* tribunals, while merging the benefits of both the domestic and international sphere.[91] As Antonio Cassese argued in relation to the Special Court for Sierra Leone, it "was designed to improve on" the tribunals for the former Yugoslavia and Rwanda, which were "marred by four essential flaws": their "costly nature," the "excessive length" of proceedings, their "remoteness from the territory where crimes had been committed and" and "the unfocussed character of the prosecutorial targets resulting in trials of a number of low-ranking accused".[92]

One problem is that Russia's aggression against Ukraine – a classical inter-state war, where transitional justice has never been used before[93] – does not lend itself to the traditional arguments for hybrid courts, which have all operated in intra-state wars, for atrocity crimes, and against the backdrop of state collapse.[94] Not only are domestic prosecutions of aggression contentious under international law,[95] a core argument in favor of "hybridity" – capacity-building – has little purchase for trials of aggression, where the symbolic dimension of international criminal trials outweighs any longer-term "shadow effects" on the domestic rule of law. Given the small number of trials, it is doubtful that the training given to Ukrainian experts on aggression can be re-used elsewhere in the future. Similarly, while hybrids are supposed to blend the best of two worlds, and overcome the shortcomings of domestic or international trials, a hybrid tribunal for aggression based on Ukrainian criminal jurisdiction suffers from the same major weakness as a domestic Ukrainian court – it cannot overcome immunity, lest it be considered an international tribunal.[96]

Last but not least, another condition for a hybrid tribunal, local ownership by the national government, is missing. While some foreign states, organizations, and scholars have pushed for a hybrid court, left unaddressed is the fact that Ukraine, the host state, seems opposed to the idea. In that sense, a hybrid court for Ukraine is a contradiction in terms. By definition, hybridity cannot be imposed upon an unwilling state, with some Western analysis of accountability

ignoring Ukrainian agency and imposing institutional arrangements on an Eastern European state.[97]

To avoid *westsplaining* the STA, it is worth considering why Ukraine opposes a hybrid court. Although neither the Ukrainian government nor local civil society have advanced a formal rationale for an international tribunal,[98] official statements and documents point to its greater legitimacy (understood as "reaffirm[ing] the post-war international legal order"), efficiency,[99] overcoming immunities,[100] deterrence and preventing future Russian aggression,[101] parallels with Nuremberg, including the need for an "appropriate" legal response "resembl[ing] the response which the international community found to bring perpetrators to responsibility after World War II".[102] In addition, the Lithuanian deputy minister of justice emphasizes the "inter-state" and "political" dimensions of aggression and a lack of international consensus on the desirability of domestic prosecutions of this crime.[103] Another argument against a hybrid tribunal is that Ukraine would be seen as a judge in its own case, though – viewed from a global perspective – the same problem attaches to a (nominally) international tribunal that does not sufficiently reflect cross-regional condemnation of Russia's aggression.[104]

While a consistent Ukraine-sponsored legal, political, or moral rationale for an international tribunal is lacking, post-coloniality may explain why Ukraine and Eastern European states are reluctant to accept a hybrid tribunal. In this regard, Eastern Europe's former subjugation by the Russian empire and its semi-peripheral position vis-à-vis the West help illuminate the stakes of this debate. Drawing on Milan Kundera's idea of Central Europe as a liminal space between Western and Eastern Europe, and Müller's conceptualization of the (Global) East's "dual exclusion," wherein it "serves as the Other against which Western Europe has long narrated its own civilisation and progress,"[105] Ukraine's policy choices – in response to Russia's invasion generally – can be understood as channeling a latent desire to be recognized, belatedly, as part of the international community. In harnessing international law, Ukraine not only attempts to separate itself from the legacy of Russian empire but also to achieve recognition as a full member of the global order.[106] In this regard, despite similar stories of colonial subjugation, Ukraine's situation is different from African or Asian states who justify hybridity to assert local agency and object to excessive foreign intervention in civil wars. It is this regional context that better explains Ukraine's embrace of an "international" over a "hybrid" tribunal, differentiating the STA from the rationales of hybrid courts in other parts of the world.

18.7 Conclusion: building cross-regional alliances for accountability

Unfolding in a complex global environment, the debate over the STA has spawned two narratives. Some argue against any form of *ad hoc* tribunal, which – according to the former ICC prosecutor, Luis Moreno Ocampo – "promotes nothing short of selective justice."[107] Others retort that that the crime is dead if not prosecuted in Ukraine. As Sands observes, "we may as well give up on the Nuremberg moment and the crime of aggression".[108] While both narratives may overstate the case for

and against the tribunal, the debate over the STA can be seen as either a moment of crisis or as an opportunity for international (criminal) law. In arguing that a post-colonial perspective on Russia's invasion can provide a more holistic understanding of what is at stake, this chapter makes three points.

First, while some analyses of the STA ignore Ukrainian agency in a neo-colonial fashion and emphasize prior cases of aggression committed by Western states, the STA has, in fact, been opposed by Western powers and advocated by Eastern European countries with a long history of Russian and Western empire, none of which has been addressed in a court of law. Second, attention to the regional context illuminates Eastern European states' support for a Nuremberg equivalent, understood as a means of overcoming the post-Second World War tribunal's distorted legacy, whitewashing the Soviet Union's complicity in Nazi aggression and constituting the basis for Putin's fantasies of a *Russkiy mir* and de-Nazification. Third, despite simplistic narratives painting a unified "Global South" opposed to "Western" hypocrisy over the STA, Eastern European, and some non-Western states may have more in common than what separates them. Although Eastern Europe and the wider "Global East" are often invisible on mental maps of the global order, the anti-imperial potential of aggression prosecutions of Putin's inner circle may constitute a landmark for other post-colonial states to build on. There may be little hope of convincing China, Iran, or Turkey – regional hegemons with their own expansionist ambitions – about the merits of accountability, but greater attention to the sensibilities and concerns of small and weak states in Africa, Asia, and Latin America could unlock greater support for the STA.

Whatever the politics of aggression trials, Eastern European states should lead diplomatic negotiations to harness the STA's full potential. By illuminating the common interests of the Global South and Global East, this chapter suggests that too many analysts overlook the anti-imperial potential of prosecuting a powerful actor like Russia, with a real risk that opposition to the STA reifies a system of international criminal enforcement intervening only if one dominant actor exists, or no powerful actors have interests. To be sure, one must remain vigilant about "double standards, including Western powers" suspicious embrace of a "hybrid" tribunal. However, a principled approach to sovereign equality requires as many states as possible to support Ukraine's appeal for a Special Tribunal against Russian aggression. By the same token, as many states as possible, including from Eastern Europe, should support analogous accountability initiatives in other parts of the world.

Notes

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19 Ukraine and the investigation of systemic war crimes

Learning from the UK's investigative failures in the Iraq and Afghanistan wars

Andrew Williams

19.1 Introduction

The British Government has been at the forefront of the call for war crimes investigations into the conduct of Russian forces in Ukraine. Following Russia's direct targeting of civilians and non-military objects, the use of indiscriminate and prohibited weapons, crimes of sexual violence and general tactics of bombardment and siege, the UK marshalled 38 other countries soon after the commencement of hostilities to refer the situation to the Office of the Prosecutor at the ICC in The Hague for investigation.[1] In June 2022, the UK Attorney General also announced support for the Ukrainian Prosecutor General's Office and confirmed that she was "determined that British expertise continues to be available to our friends in Ukraine in their search for justice … as they uncover the truth and hold those responsible in Putin's regime to account for their actions."[2] Collecting evidence that will identify particular crimes and how they form a pattern that links them to Russian military and political leaders will be vital in achieving meaningful accountability.

The UK's involvement in this mission of investigating and potentially prosecuting war crimes in Ukraine, has prompted accusations of hypocrisy. How can a state which has been involved in multiple recent wars and military conflicts attracting allegations of illegality look at others and condemn them for similar accusations? Kevin Jon Heller has suggested that the specific act of establishing a Special Tribunal to prosecute Vladimir Putin and other Russian leaders for the crime of aggression would send an unpalatable message "about the selectivity of international criminal justice."[3] The lack of prosecution of American or British leaders for attacking Iraq in 2003 (also an invasion that "was unlawful and criminal") would show that the international community "cares about some crimes of aggression more than others."[4] Similar arguments apply to charges of war crimes, allegations which have plagued the UK as regards its operations in Iraq and Afghanistan.

One could argue that the hypocritical position adopted by any state is simply a reflection of international relations founded on traditional theories of realism.[5] To

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expect anything other than hypocrisy would be naïve. States will do whatever is in their interests to do and these will "take precedence over the good of international society as a whole".[6] If it serves those interests to breach international law, then this will not preclude the condemnation of similar breaches committed by other states when their interests are also served in doing so. The test is not consistency or even adherence to the law, but whether or not a state benefits from adopting a particular position at any given time. The realist approach accepts this as a likely product of states protecting their own security or economic or geo-political concerns.

Hypocritical actions by states can, however, severely undermine any development of international law as a set of norms, which have value. When the UK places itself at the forefront of those initiatives designed to hold Russia and its leaders to account, there should at least be a clear rationale for doing so, one that outweighs the political cost of the hypocritical charge. If that rationale cannot be identified and articulated, then arguably the UK should recuse itself from such investigatory and prosecutorial initiatives for the cause of pursuing international justice.

I take a different approach and argue that it would be more beneficial for the UK to acknowledge its first-hand experiences of both war crimes allegations, *and* accusations that it took part in an illegal war, and utilize these experiences for the benefit of pursuing more effectively those suspected of such crimes in Ukraine. That this might also lead to calls for a re-evaluation of the UK's actions over the past 20 years may be a political and legal consequence. But that would provide an objective advantage for the development of international criminal justice that simply ignoring or condemning the political hypocrisy would not.

I explore this argument through, first, the crime of aggression, then systemic war crimes, as the two offences which are the most salient in the Ukrainian *and* Iraq situations.[7] In both cases, civil and military leaders of the Russian Federation and the UK, respectively, might be held ultimately responsible. Though there remains the vital work of investigating and prosecuting those persons who commit individual crimes of war, the political imperatives of international criminal law and justice (pursuing "those most responsible" for international crimes and ending impunity) are invariably associated with holding the military and civilian leaders of states to account.

Section 1, therefore, examines the crime of aggression and Section 2, considers the issue of war crimes.

In Section 3, I consider the implications of my analysis. I argue that (a) it should be acknowledged where similar allegations of crimes of war have been made against the UK and Russia; and (b) lessons should be learned from the UK experience so as to ensure Russian individuals do not escape international criminal processes in relation to the Ukraine conflict.

Overall, I argue that failure to take this approach and ignore the UK's hypocrisy or attempt to ostracize it in the pursuit of justice in Ukraine, will only undermine an already imperfect international criminal law regime. If any meaningful legal action should eventually begin against senior Russian figures, those enduring critiques that ICL is merely a product of victor's justice and a plaything of western political power will be reinforced. Notions of international justice can only suffer if so.

19.2 The crime of aggression

Few outside Russia and its close allies take seriously the argument that Russia's invasion of Ukraine in February 2022 conformed to international norms governing the use of force.[8] The UN General Assembly has adopted a resolution identifying the "unlawful use of force" and deploring the "aggression against Ukraine" soon after the conflict began.[9]

Though the UK shares this consensus, it was not quick to promote some form of international prosecution of Russian leaders for the crime of aggression. As early as March 2022, various prominent lawyers and other figures from the UK proposed that a special tribunal for a prosecution should be established, but the UK government did not publicly support the initiative at first.[10] The prospects seemed slim in any event given that the International Criminal Court does not have jurisdiction to commence an investigation as neither Russia nor Ukraine is a state party to the ICC Statute – the crime of aggression is only applicable if states expressly ratify the amendments relating to that crime or the UN Security Council refer the situation, something that will not happen so long as Russia holds a veto.

Instead, the emphasis was on investigating those responsible for war crimes, which posed fewer such jurisdictional restrictions.[11] Only several months after the invasion did official advocacy for some form of tribunal to prosecute selected Russian leaders for the crime of aggression become pronounced. In January 2023, the UK Foreign Secretary finally declared that the UK "will play a leading role in a core group of likeminded partners to pursue criminal accountability for Russia's illegal invasion of Ukraine".[12] He stated that the UK would "shape thinking on how to ensure criminal accountability for Russia's aggression" and support an inquiry so as to "ensure all crimes are fully investigated and that perpetrators are held to account."[13] This was intended to consider the possibility of a "new 'hybrid' tribunal" to conduct a prosecution.[14]

It would be to state the obvious that the UK faced similar accusations of embarking on an illegal war due to its participation in the invasion of Iraq in 2003. But there has been no special tribunal to examine or investigate individuals who might be held responsible for that act, even though there is general consensus that the Iraq war did not qualify as a legal use of force under international law.[15] That is not to say that a defence against a charge of aggression could not be mounted, but neither is it credible to argue that there is, or was, no basis for leveling such a charge against UK political and military leaders. That being so, what are the implications for the search for accountability directed towards Russian individuals?

A cynical answer might be that the attempts to hold Vladimir Putin and others criminally responsible are no more than political gestures, that there is no likelihood of accountability for aggressive war in the case of Ukraine or indeed elsewhere; and that the crime of aggression has been, and is likely to remain, an empty vessel as far as any direct legal application is concerned.

These critical perspectives are supportable in light of the development of international criminal law since 1945. Although the Nuremberg and Tokyo Tribunals were able to pursue Axis leaders for crimes against peace, no similar

international process of accountability has since been held. The inclusion of the crime of aggression in the ICC has not resolved this fact nor made it more likely that some re-examination of past aggression will occur through a formal, internationally recognized legal process.[16] This might lead us to conclude that the crime of aggression will have no real substance so long as the international community continues to ignore both past and present offences and individuals are not held to account for them. Unlike war crimes, crimes against humanity and genocide – which continue to provoke practical initiatives to hold individuals criminally responsible – illegal war has not attracted similar action.

We might indeed presume that the UK's engagement in investigating the possibility of a special tribunal for the invasion of Ukraine in 2022 will only further undermine international efforts to prepare the ground for establishing accountability for this crime. By the UK's past leaders themselves escaping formal criminal investigation domestically and internationally, the charge of hypocrisy attaching to one of such tribunal's major proponents could prevent greater numbers of states wishing to support the initiative, thus reducing further the likelihood of its success.

However, should a special tribunal be avoided in the Ukraine situation simply because of the involvement of the UK? What is at stake here is not only the efficacy of constructing a process that examines and reaches some unified position regarding the evidential basis upon which any crime of aggression charge might be brought against individual leaders of Russia, but also the on-going search for the credibility of the criminalization of aggression as a cornerstone of contemporary international criminal law. If there is no attempt to hold Putin accountable when there is significant international recognition that an aggressive war has been perpetrated, then a further nail in the coffin of the criminalization of aggression will have been added. Thus, if the UK's involvement would benefit and advance efforts to pursue accountability for the clear case of illegal action in the invasion of Ukraine, then the fact that it does so without a "clean pair of hands" might be considered irrelevant.

Such a consequentialist approach may have its ethical drawbacks, but adopting a cost–benefit (or utilitarian) analysis could justify the UK's continuing role in whatever process develops. The legal and financial resources it offers could be seen as sufficiently outweighing the drawbacks of its (tainted) engagement. Consistency of application would therefore be sacrificed for the goal of holding Putin et al. to account, just as it was at Nuremberg for all the prosecuting allies including, ironically, the Soviet Union.

Some might also argue that the invasion and occupation of Iraq was of a very different order from the current war against Ukraine. Tony Blair's mantra that attacking Iraq was "the right thing to do" regardless of a failure to adhere to any strict notion of international legal process, may have been a trite way of suggesting that the 2003 invasion was legal (or at least legitimate) in some undefined way. But even if those arguments remain flimsy – or at least difficult to encompass within norms of self-defence, specific approval by the UN Security Council or some form of humanitarian intervention – the absence of any court ruling of illegality leaves the question open.[17] That, of course, is also the position vis-à-vis the leadership of

Russia. Establishing a special tribunal is thus precisely what is offered to remedy this uncertainty. Failure to pursue that option for the UK in Iraq (or any other conflict) may have been undesirable but repeating the failure in the case of Russia and Ukraine will merely entrench the notion of the crime of aggression having no practical legal substance.

Here then is the dilemma: if no formal, international investigation into aggression is undertaken, then it seems unlikely that it can remain a core component of international criminal justice as envisaged post-Nuremberg. But if an investigative tribunal is pursued with the assistance, perhaps direction, of the UK, then it will be interpreted as "selective" or "victor's" justice, reinforcing the critiques that have plagued international criminal law since at least 1945.

Kevin Jon Heller, for one, has explored these arguments and concluded that it might be preferable to avoid a special tribunal on these latter grounds.[18] He was also of the opinion that it was a bad idea for such a tribunal to be introduced only for Russian officials vis-à-vis Ukraine.[19] Far better to consider a permanent international tribunal for aggression which "might at least deter some future acts" even if it might not reassess past actions such as the invasion of Iraq. A process focused on Russia and supported and prompted by the UN General Assembly may also be preferable, particularly one that did not include the UK or USA as its main instigators. That would still not make up for the disparity between the responses to the UK's involvement in the invasion of Iraq and to Russia in Ukraine. However, in the unlikely event that the UK publicly recused itself from any involvement in determining the scope and direction of such a process, but continued to provide its practical support, a special tribunal could still gain some greater legitimacy. It might also leave open the prospect of a similar review of the Iraq invasion.

It is highly unlikely that the UK will take such a step for the good of international criminal law and justice. As Heller commented, "if states like the US and UK do end up supporting a Special Tribunal, it will almost certainly be because they know such a tribunal will never be created for their own criminal acts of aggression".[20] But insisting on the removal of the UK from initiatives in the Ukraine case, or failing to support it because of the UK's involvement, will not alter the prospects for accountability regarding the Iraq invasion one way or the other. The entrenched narrative of failure in the pursuit of those state leaders responsible for ordering unlawful uses of force since the Second World War will only be reinforced. International condemnation of illegality through a special tribunal, even supported by hypocritical states, may thus have value in its own right. It will keep the UK's past actions in mind and perhaps ultimately promote the prospects of some accountability however unlikely. The absence of effective action in the case of Russian aggression certainly will not improve those prospects.

19.3 War crimes

There can be little doubt about the pain, suffering, and destruction that has been endured by the civilian population in Ukraine since the beginning of the war. The information made publicly available on an almost daily basis suggests a complete

disregard for the principles of international humanitarian law. Attacks directed against purely civilian targets and the civilian population in general are prima facie grave breaches of the Geneva Conventions and Articles 7 (crimes against humanity) and 8 (war crimes) of the ICC Statute. They are also both individual crimes (where each breach has been perpetrated by one or more individual combatants) and command crimes in so far as together they allegedly form "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (Article 7) and/or are "part of a plan or policy or as part of a large-scale commission" of war crimes (Article 8). The potential therefore exists for pursuing both direct perpetrators for each and every violation and those military and political commanders who have ordered such criminal actions to take place or have allowed them to go unchecked or unpunished.

Much of the international condemnation has focused on these alleged crimes. There have already been a number of formal reports into the situation. The crimes identified in the March 2023 Report of the Independent International Commission of Inquiry on Ukraine fall into four main categories.[21] First, individual attacks or atrocities described as "personal integrity violations," where there is evidence of "wilful killings, unlawful confinement, torture, rape, and unlawful transfers of detainees." Second, "violations committed during the conduct of hostilities" relating to indiscriminate attacks against civilians and civilian objects as well as a failure "to protect civilians or civilian objects against the effects of hostilities." Third, breaches of the laws of occupation. And fourth, the forced deportation and transportation of children.[22] Of these, the first two concern alleged crimes committed by both sides to the conflict. The last two only relate to the forces of the Russian Federation and its commanders.

The Report calls for "a comprehensive approach to accountability that includes both criminal responsibility and the victims' right to truth, reparation, and non-repetition."[23] It "encourages robust coordination of the many national and international accountability actors" and recommends a "timely, effective, thorough, independent, impartial and transparent investigation and prosecution of all allegations of international crimes, violations of international human rights law and international humanitarian law."[24] All perpetrators are to be "held responsible through judicial proceedings."[25]

Such robust statements on the necessity of investigation and prosecution reflect the classic approach of international criminal justice deployed after the Second World War and the establishment of the ICC. Unsurprisingly, therefore, the UK has committed itself to support whatever measures are needed to fulfil these aims vis-à-vis the war in Ukraine. In May 2022, in partnership with the US and EU, it established the Atrocity Crimes Advisory Group to support Ukrainian authorities in their investigations as a prelude to prosecutions of individuals.[26] One year on, the ACA reinforced its commitment to continue the support.[27]

None of these initiatives are objectionable. However, they stand in stark contrast to the initial lack of formal international response to allegations made against the UK (and US) in its Iraq and Afghanistan operations. The Office of the Prosecutor of the ICC took 3 years to even recognize that it should respond to communications

about the conduct of UK forces in Iraq. Only in 2006 did it reveal conclusions on some preliminary inquiry into referred allegations.[28] The use of suspect weapon systems (large-scale deployment of cluster munitions, in particular) and targeting decisions were, however, dismissed. A small number of individual unlawful killings were accepted but they were deemed to be insignificant in number when compared to other conflicts (such as in the Democratic Republic of the Congo, Northern Uganda, and Darfur). They did not therefore qualify as "of sufficient gravity to justify further action" under article 17(1)(d) ICC Statute.

As many allegations of ill-treatment and unlawful killing later came to light, prompted by cases such as the killing of Baha Mousa and the long legal saga in the search for accountability for his death, the OTP launched a preliminary examination in 2014.[29] It took until 2020 for a final report to be produced, which concluded that there was a "reasonable basis" to believe sufficiently grave war crimes had been committed including wilful killing, torture, rape, and other forms of sexual violence.[30] Nonetheless, even though there had been no prosecutions in relation to these crimes, it could not find that members of the armed forces had been shielded from prosecution or that the national attempts to investigate allegations were not genuine. The examination has thus been closed.

Concerns regarding the UK's observance of some human rights standards in the Iraq conflict were also noted by the UN Committee against Torture, but since 2003 there has been no insistence on comprehensive justice where all responsible should be held accountable. Nor have there been coordinated formal processes to identify and investigate the potential crimes committed.[31] The need for timely, effective, thorough, independent, impartial, and transparent investigations (all established criteria associated with proper procedures where the right to life has been breached and/or commissions of inquiry into human rights violations have been instituted)[32] were also reduced only to recommendations for the UK to "make public the result of all investigations into alleged conduct by its forces in Iraq and Afghanistan, particularly those that reveal possible actions in breach of the Convention [against Torture]."[33] There were no calls by UN human rights bodies for each and every suspected war crime to be investigated and pursued to criminal prosecution and no intervention to undertake proper investigations by suitably qualified organizations.

Undoubtedly, the assurances given by the UK regarding its determination to address any allegations of war crimes may have been taken on trust. This would follow the assumption, perhaps unfounded, that a liberal democracy will comply with its international obligations. Merely by issuing assurances that it would investigate all credible allegations of wrongdoing (something that is clearly lacking in the case of Russia and its actions in Ukraine), the UK escaped any effective or timely scrutiny. That alone would beg the question whether a different standard of investigative duty is presumed to apply depending on the state concerned.

Many may argue that such a distinction is morally as well as practically justifiable. Much of the UK's resistance to external scrutiny of its military actions, rests on the virtuous assumption that as a democratic state there is no reason or right for international bodies to investigate its activities. Any alleged breach of the laws of war should be the preserve of the established and trusted

systems of internal military justice. This, it would be argued, is reinforced by the principle of complementarity.

Many, of course, would also disagree, pointing to the repeated failures of the UK (amongst others) to hold to account any military or political personnel for crimes associated with multiple wars and conflicts since 1945. Despite accepting the jurisdiction of the ICC and international human rights instruments, its repeated and formal refusal to recognize that the European Convention on Human Rights applied to its overseas operations from 2003, particularly in relation to the treatment of detainees, until the European Court of Human Rights held otherwise in *Al Skeini*, indicates an institutional resistance to adopting anything other than a minimalistic approach to its obligations in relation to investigation of serious allegations.[34] Although it has engaged in the legal debate about applicability of standards to its operations – the UK has essentially placed itself in the same position as the Russian Federation as regards the war in Ukraine.[35] In both cases, there has been no state acceptance that external examination of conduct in war is justified.

The point takes on a particular relevance when considering the issue of weapons and targeting. On the former, little formal mention was made internationally of cluster munitions used by the UK in its Iraq air attacks during 2003 or subsequently. Some designs of cluster bomblets are notoriously difficult to target accurately and prone to leaving unexploded ordnance that poses direct threat to civilians. They have therefore been widely condemned as in contravention of IHL standards. Though the weapons use was politically contentious at the time and provoked Parliamentary scrutiny in 2004, the UK government's position was that cluster munitions were both legal and militarily useful.[36]

It was a position largely supported by the OTP in its review of 2006. The Chief Prosecutor noted that cluster munitions were not then specifically prohibited. It also commented positively that 85% of the weapons released by the UK's aircraft were precision guided.[37] Use of cluster munitions was not then deemed a prima facie violation of the laws of war. Only if their specific deployment breached IHL standards by deliberately targeting civilians and civilian objects, failing to take proper precautions in relation to individual attacks, or causing civilian casualties disproportionate to the military advantage obtained in any strike, would criminal liability arise. The OTP stated it could not find any evidence to contradict assertions that the UK had adopted appropriate safeguards in its targeting decisions.[38] That was the end of the scrutiny on civilian casualties either specifically or in general. No investigations were undertaken officially into the use of cluster munitions or any targeting decisions that caused civilian casualties.

This contrasts with critical observations made against both belligerent parties in Ukraine where the use of such weapons is also generally viewed as inherently indiscriminate and thus unlawful.[39] Russia's suspected use of cluster munitions has been identified as one of the early indications of its lawless approach.[40] Ukraine has also been criticized for deploying them.[41] However, as Russia and Ukraine are not parties to the 2008 Convention on Cluster Munitions, which aims to ban the use of such weapons, any condemnation of either country for their deployment would have to rely on the same arguments used against the UK's use of such weapons

in Iraq – namely that cluster bombs are inherently indiscriminate whether or not civilian casualties result from such an attack. Simply dropping cluster munitions in urban areas runs a foreseen and real risk of harming civilians in breach of Article 57(2)(ii) of the First Protocol to the 1949 Geneva Conventions, which requires states to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."

Ironically, despite the UK's past use and defence of cluster munitions in Iraq, the current UK government has taken a leading role in the condemnation of these weapons in Ukraine. Following its leading role in the development of the Convention on Cluster Munitions in 2008, and in its capacity as President of the Convention in 2022, it issued a statement which repeated the "obligation never under any circumstances to use cluster munitions" and condemned "any use of cluster munitions by any actor," expressing its grave concern at "reports of the use of cluster munitions in the Russian invasion of Ukraine".[42] It stated that the parties to the Convention remained "steadfast in our determination to achieve a world entirely free of any use of these weapons."[43]

As a powerful advocate for a reformed and more condemnatory approach to cluster munitions, the UK is perhaps well placed to lead on why IHL standards should now apply to their use in Ukraine. However, its position has now been severely challenged by the Biden administration's decision to supply cluster munitions for use by Ukrainian forces.[44] The UK Prime Minister has "discouraged" the use of the weapons in the conflict, but the UK now finds itself caught between pursuing those responsible for their deployment and ignoring such incidents so as to avoid supporting the possible prosecution of its allies.[45] Independent and impartial investigations would still be justified against all parties on the basis of the analysis that such weapons are inherently unlawful. Whether the UK would be prepared to do that remains to be seen.

On targeting in general, whatever weapon systems are deployed, individual attacks that cause the deaths of civilians are too easily dismissed as unfortunate consequences of military action even by a state engaged in an unlawful war. Again, the experience in Iraq and Afghanistan is informative. Collateral damage – the disingenuous phrase that masks the civilian casualties of military attacks – was defended either as an unfortunate mistake or a consequence of legitimate and necessary military action.[46] The uncovering of the civilian cost has not ceased for the UK, which has recently been challenged on the officially recognized civilian casualties emanating from airstrikes against Islamic State targets in Iraq and Syria between 2016 and 2018.[47] Yet a systematic approach to achieving state or individual accountability has never been countenanced let alone pursued. Nor has there been an evaluation of these casualties by any international criminal justice body.

None of this is to suggest that the persistent outrage at the civilian objects struck by Russian missiles and bombs, leading to multiple deaths in Ukraine, is not justified. Nor does it obviate the need to pursue those responsible through the established legal framework. But it does indicate that to do justice to the claims that Russia and its leaders have committed war crimes, the UK and US's established approach

to specific and general civilian casualties sustained in Iraq and Afghanistan, which have proven resistant to legal condemnation or accountability, would have to alter. This would require a different analytical approach that looked beyond individual instances of attacks to examine the overall pattern, systems, and human cost of warfare. The UK military institutions would appreciate the importance of accumulating information and evidence regarding individual attacks so as to construct a more holistic picture of IHL violation. Indeed, its support for detailed and immediate investigation of all claims of breach in theatre demonstrates the lessons to be learned from the accountability defects in Iraq and Afghanistan. That this will stand in contradistinction to the mode of scrutiny applied to the UK's own operations should not detract from that effort.

This might also open the possibility of a retrospective review of the UK's past operations. Whether that is feasible given the passage of time is another question. But, as the critique of UK bombing missions in Iraq and Syria in more recent years has demonstrated, there remain matters that continue to merit some effective examination. Failure to respond to these systemic issues only underscores the accusation that the UK is operating double standards. Whether fair or not, this can only weaken any determination to see justice done in the Ukraine conflict.

The final relevant element under war crimes allegedly committed in Ukraine relates to the treatment of civilian detainees and prisoners of war.[48] The Human Rights Committee Commission of Inquiry has found that:

> Russian authorities have unlawfully detained wide categories of civilians and other protected persons, frequently in absence of valid reasons or without respect of procedural requirements. Detention conditions were generally inhuman. Such confinements constitute war crimes and are violations of the right to liberty and security of persons.[49]

Torture, inhuman treatment, and sexual violation have also been documented with regard to both belligerent parties. The Commission concluded that there should be accountability for such alleged crimes.[50]

Again, the international approach towards the UK's record regarding its policy and practice of detention in Iraq, and Afghanistan, contrasts with this new consensus. Although the UK has been found in contravention of the same legal standards as applied to the Ukrainian conflict, its resistance to the form of accountability now considered vital for justice in the Ukrainian war has been tolerated by the international community.

The OTP bears some responsibility for this. It ceased its investigations into admitted and proven, as well as alleged, war crimes committed by the UK in the full knowledge that victims would see their rights unfulfilled. In 2020 the Chief Prosecutor confirmed that claims against UK forces of unlawful killing, rape, torture, and ill-treatment in detention were credible and, in many cases, proven beyond reasonable doubt[51] But she also acknowledged that the UK's own investigation "has resulted in not one single case being submitted for prosecution: a result that has deprived the victims of justice."[52] No criminal responsibility for either

individual violations or the systems of abusive treatment in detention has therefore been achieved.

Despite these damning findings, the Chief Prosecutor felt unable to "conclude that the UK authorities have been unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions," or that it had shielded personnel from criminal responsibility.[53] She could not say that there had been "unjustified delay in the proceedings" or that the UK's processes were not "conducted independently or impartially" in a manner "inconsistent with an intent to bring the person concerned to justice."[54] Consequently, there would be no further examination by the ICC. The principle of complementarity was respected, where a state is left to investigate itself, and though no accountability of note occurred, that was the end of the matter.

If the commitment to comprehensive justice is real, then even if it was alleged that the scale of abuse in Iraq was of a different order to that developing in Ukraine – a claim that is not self-evident – the effective forgiving of the UK's violations stands as a poor advertisement for international criminal law and justice. It implies that any western democratic nation, which insists on the complementarity principle as a protection against external investigation even in the face of acknowledged war crimes, can escape effective censure. It also suggests that the victims of such a state's illegal actions have no prospect for their rights to be respected or some form of accountability to follow. That, of course, is an affront to any understanding of universal human rights or international justice system.

If the political aim is to hold the leadership of the Russian Federation to account for all those war crimes occurring as part of the conflict, then the failure to examine the UK offers a detrimental precedent. But having the UK involved in the examination of allegations and their pursuit through legal process might just prompt a re-evaluation of those claims relating to Iraq and Afghanistan. At the very least, it will keep them in mind.

19.4 Conclusion

The UK's role in responding to the allegations of international crimes leveled against Russia and its personnel has been affected by claims of hypocrisy. For both the crime of aggression and war crimes, the UK government's failure to acknowledge and investigate comparable allegations of wrongdoing in its own military escapades in Iraq (and Afghanistan) casts doubt on both its own sincerity and the force of international criminal law. If justice can be avoided so effectively by one powerful state, what chance is there that it can be applied in the case of war in Ukraine? And if the law fails now, as well as regards these past conflicts, how can ICL be a serious force for ending impunity?

Those who have always critiqued ICL as lacking in credibility and afflicted by partial application – mostly against weak or failed states and their leaders – would see the UK's position as confirmation of their perspective. The difficulty here, though, is that hopes for a more robust defence of humanitarian standards in war and severe consequences for those responsible for flouting them, will be undermined even further if the investigation and prosecution of international

crimes in Ukraine is diminished or dismissed because of the UK's involvement. Given this realization, it would be sensible to consider how accountability for past as well as current international crimes might become more, rather than less, likely *because* of the UK's involvement. As regards the former, the UK's resources and public support for condemning international crimes in Iraq has considerable value. It has, as we have seen, provided funds and expertise independently and as part of international groups. With some persistent attention to allegations of atrocity and aggression it has maintained a consistent approach to supporting the accumulation of evidence that will make any possible future prosecution achievable. Its role as a leading member of the Convention on Cluster Munitions has also forced it to take a counter view to the supply and use of such weapons to Ukraine as well as their deployment by Russia. That might not have much practical impact, but it nonetheless maintains some line against the acceptability of a "total war" mentality becoming entrenched. From a legal perspective, the UK is reinforcing IHL standards as valid and worthy of respect.

Equally, the continual promotion of the laws of war in Ukraine leaves the UK perpetually open to scrutiny for its past violations. The charge of hypocrisy can then have a galvanizing effect by challenging the UK government's position that examination of serious allegations directed at British personnel are unnecessary and unwarranted. The establishment in 2022 of an independent inquiry into unlawful killing and detention by UK Special Forces in Afghanistan, following media exposé, demonstrates how difficult it has become for the government to ignore allegations of war crimes.[55]

If, alternatively, the UK is ostracized from international efforts to obtain accountability of Russian perpetrators and commanders, because of its own unresolved record, what benefit would accrue? It might suggest a greater moral authority resting in those who continue to pursue current perpetrators (provided they too come with clean hands). It might also encourage states opposed to the involvement of the UK to join the effort for accountability. That factor alone could be significant. But it would be unlikely to lead to justice vis-à-vis persistent Iraq and Afghanistan allegations.

I conclude that two positions are worth taking. Both accord with the generally accepted goals of international criminal justice.

First, acknowledging where similar allegations of crimes of war have been made against the UK and Russia, as I have shown above, will both underscore the unlawfulness of actions in Ukraine and recollect those crimes that allegedly occurred in the UK's recent military actions. Keeping alive the accounts of wrongdoing has been a vital part of seeking justice after war. When atrocities are allowed to be forgotten, victims and affected societies alike suffer anew. The UK government should accept this as a natural consequence of its stance as regards Ukraine. Even if this is not done explicitly, practical action to achieve accountability for actions in Iraq and Afghanistan should continue to be encouraged and advocated by civil society.

Second, specific lessons should be learned from the UK experience in avoiding responsibility so as to ensure Russian individuals do not escape international

criminal processes. This is already happening. The UK's determination to apply the resources necessary to collect and preserve evidence (a noted failure in Iraq), its recognition and support for the Murad Code in pursuing allegations of sexual violence, in particular,[56] are necessary precursors to successful future prosecutions. In Iraq this did not occur and the international community did little to intervene. Applying these standards retrospectively to situations related to Iraq and Afghanistan should not be precluded, however.

Overall, failure to fulfil these goals will only undermine an already imperfect international criminal legal regime. On balance, then, I argue that the UK should be encouraged to continue in its support for investigations and prosecutions in Ukraine. But this should be accompanied by equally robust reminders that allegations regarding wrongdoing in Iraq and Afghanistan remain unresolved. Given that it is the 20th anniversary of the death of Baha Mousa at the time of writing and no one has yet been brought to justice for his killing (despite clear and available evidence as to those responsible), anything that causes the UK government to withdraw from its moral stance on international crimes should be resisted.

Notes

1 The situation in Ukraine was referred to the Office of the Prosecutor of the ICC by 43 states. See www.icc-cpi.int/situations/ukraine (accessed: 19 December 2023).
2 See UK Government "UK provides lawyers and police to support ICC war crimes investigation" (Gov.UK, 6 June 2022) www.gov.uk/government/news/uk-provides-lawyers-and-police-to-support-icc-war-crimes-investigation (accessed: 19 December 2023).
3 Kevin Jon Heller, "Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea" (*Opinio Juris*, 7 March 2022) https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/ (accessed: 19 December 2023).
4 Ibid.
5 These generally accept that states are never beholden to universal ethical obligations or standards. See, for instance, Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999). For a good review of the realist tradition, see Jack Donnelly, *Realism and International Relations* (CUP 2000).
6 Christian Reus-Smit, "The Politics of International Law" in Christian Reus-Smit (ed), *The Politics of International Law* (CUP 2004) 14-44 at 16.
7 Although claims may be made that genocide and crimes against humanity have been perpetrated in both Iraq and Ukraine, aggression and war crimes are my focus in this chapter.
8 See, for instance, Kevin Jon Heller, "Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis" (2022) *Journal of Genocide Research* https://doi.org/10.1080/14623528.2022.2095094 (accessed: 2 January 2024), James A. Green, Christian Henderson, Tom Ruys, 'Russia's attack on Ukraine and the *jus ad bellum'* (2022) 9 *Journal on the Use of Force and International Law* 1, 4–30.
9 See General Assembly Resolution A/RES/ES-11/1 Aggression against Ukraine adopted 2 March 2022.
10 The proposal for a special tribunal was debated at a Chatham House event in London on 4 March 2022. See Statement and draft Declaration https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf (accessed: 2 January 2024).

11 See UK Government Press Release, "Justice Secretary to offer support in investigating Russian war crimes in visit to The Hague" (*gov.uk*, 13 March 2022) Justice Secretary to offer support in investigating Russian war crimes in visit to The Hague – GOV.UK (www.gov.uk)
12 See UK Government Press Release, UK joins core group dedicated to achieving accountability for Russia's aggression against Ukraine (*gov.uk*, 20 January 2023) www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine (accessed: 2 January 2024).
13 Ibid.
14 Ibid.
15 See, for instance, the Davids Committee on the Legality of Using Force in Iraq, set up by the Dutch government in 2009, and which reported in 2010. See Nico J Schrijver, The Dutch Committee of Inquiry on the War in Iraq and the Basis in International Law for the Military Intervention, (2017) 87:1 *British Yearbook of International Law*, 125–148.
16 The crime of aggression was included in the ICC Statute by way of the Kampala Amendments in 2010 and Article 8 *bis*.
17 To date, no domestic or international legal process has examined the question of whether the invasion of Iraq was lawful under international law.
18 Kevin Jon Heller n8 above.
19 Ibid.
20 Heller ibid at 14.
21 Human Rights Council *Report of the Independent International Commission of Inquiry on Ukraine* (A/HRC/52/62) 16 March 2023. For an earlier report, see also the OSCE Office for Democratic Institutions and Human Rights (ODIHR) *Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity committed in Ukraine since 24 February 2022* (ODIHR.GAL/26/22/Rev.1) 13 April 2022.
22 Arrest warrants have been issued for Vladimir Putin and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation on 17 March 2023.
23 HRC n21 above in "Summary."
24 Ibid para 106.
25 Ibid para 112(g).
26 Lord Ahmad speech at the Ukraine Accountability Conference in The Hague 14 July 2022 www.gov.uk/government/speeches/the-uks-support-to-ukraine-in-investigating-war-crimes (accessed: 2 January 2024).
27 Statement at the Atrocity Crimes Advisory Group's Leadership Forum, Warsaw, Poland 12 May, 2023 www.eeas.europa.eu/delegations/ukraine/us-eu-and-uk-offer-practical-support-ukraine-push-war-crimes-accountability%E2%80%AF%E2%80%AF_en (accessed: 19 December 2023).
28 See The Office of the Prosecutor, International Criminal Court, letter to correspondents concerning the situation in Iraq, 9 February 2006.
29 See Andrew Williams, "The Iraq abuse allegations and the limits of UK law," (2018) PL, 461–481.
30 The ICC Chief Prosecutor's 2020 Final Report into alleged war crimes committed by British troops in Iraq between 2003 and 2009 www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf (accessed: 23 December 2023).
31 The absence of such processes is presumably the product of resistance by the US and UK as permanent members of the UN Security Council. Though also holding that status, the Russian Federation has not been able to prevent examination of its record in Ukraine.

32 UNHR Office of the High Commission, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (UN 2015), 33–35 in particular.
33 UN Committee against Torture, Thirty-third session 15–26 November 2004 "Conclusions and recommendations" CAT/C/CR/33/3 10 December 2004 at paragraph 5(f); these concerns were reiterated in its 2008 report (CCPR/C/GBR/CO/6 30 July 2008). It was still pleading for due accountability in 2019 (CAT/C/GBR/CO/6 7 June 2019).
34 *Al-Skeini and Others v. UK* App no 55721/07 (ECHR, 7 July 2011).
35 See Williams n29 above for a review of the UK's approach.
36 See HC Defence Committee Session 2003-04 *Third Report* which recorded the questioning of various government and military figures about where and why cluster munitions were used in Iraq by UK forces www.bits.de/public/documents/iraq/3-seite/lessonsofiraq-HoC-DC-Vol2+3.pdf; see, in particular, Human Rights Watch *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (2003), which recorded that the "British used … seventy air-launched and 2,100 ground-launched cluster munitions, containing 113,190 submunitions" and complained of the weapon's inherently indiscriminate nature.
37 The Office of the Prosecutor n30 above.
38 Ibid 7.
39 See Human Rights Council n21 above at para 36 et seq.
40 Some were quick to point out, however, that there was no prohibition on cluster munitions used by Russia or Ukraine. See William H. Boothby, "Cluster Munitions and the Ukraine War" (*Articles of War* 28 February 2022) (accessed: 2 January 2024)
41 Human Rights Watch *Ukraine: Civilian Deaths from Cluster Munitions: New Research Details Ukrainian Use of Widely Banned Weapon* 6 July 2023 at www.hrw.org/news/2023/07/06/ukraine-civilian-deaths-cluster-munitions#:~:text=(Kyiv%2C%20July%206%2C%202023,causing%20other%20serious%20civilian%20harm (accessed: 2 January 2024).
42 See Statement from the UK Presidency of the Convention on Cluster Munitions on their use in Ukraine 2 March, 2022 at www.clusterconvention.org/statement-from-the-uk-presidency-of-the-convention-on-cluster-munitions-on-their-use-in-ukraine-2/ (accessed: 2 January 2024).
43 Ibid.
44 "Biden approves cluster munition supply to Ukraine" *The Washington Post* (Washington, 7 July 2023).
45 See "Rishi Sunak says the UK discourages use of cluster bombs in Ukraine" *BBC News* (London, 8 July 2023). At www.bbc.co.uk/news/uk-66142554 (accessed: 2 January 2024).
46 The HRW Report *Off Target* identified numerous missile attacks that led to civilian casualties; n36 above.
47 Emma Graham-Harrison Sanjana Varghese and Julia Nueno, "Multiple civilian deaths linked to 2016-17 British airstrikes against IS in Mosul" (*The Guardian,* 21 March 2023).www.theguardian.com/world/2023/mar/21/multiple-civilian-deaths-linked-to-2016-17-british-airstrikes-against-is-in-mosul (accessed: 2 January 2024).
48 Human Rights Council *Report of the Independent International Commission of Inquiry on Ukraine* 15 March 2023 at www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (accessed: 2 January 2024).
49 Ibid., para 67.
50 Ibid., para 105.
51 The Office of the Prosecutor, International Criminal Court, *Situation in Iraq/UK* (2020) at para 2 www.icc-cpi.int/sites/default/files/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf (accessed: 2 January 2024).

52 Ibid., para 6.
53 Ibid., para 502.
54 Ibid.
55 Ministry of Defence, "Independent inquiry into alleged unlawful activity by UK Special Forces during deliberate detention operations in Afghanistan" (*uk.gov,* 15 December 2022) www.gov.uk/government/publications/independent-inquiry-into-alleged-unlawful-activity-by-british-armed-forces-during-deliberate-detention-operations-in-afghanistan (accessed: 2 January 2024).
56 See *Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence* (2020) www.muradcode.com/murad-code (accessed: 2 January 2024).

Index

Note: Endnotes are indicated by the page number followed by "n" and the note number e.g., 48n6 refers to note 6 on page 48.