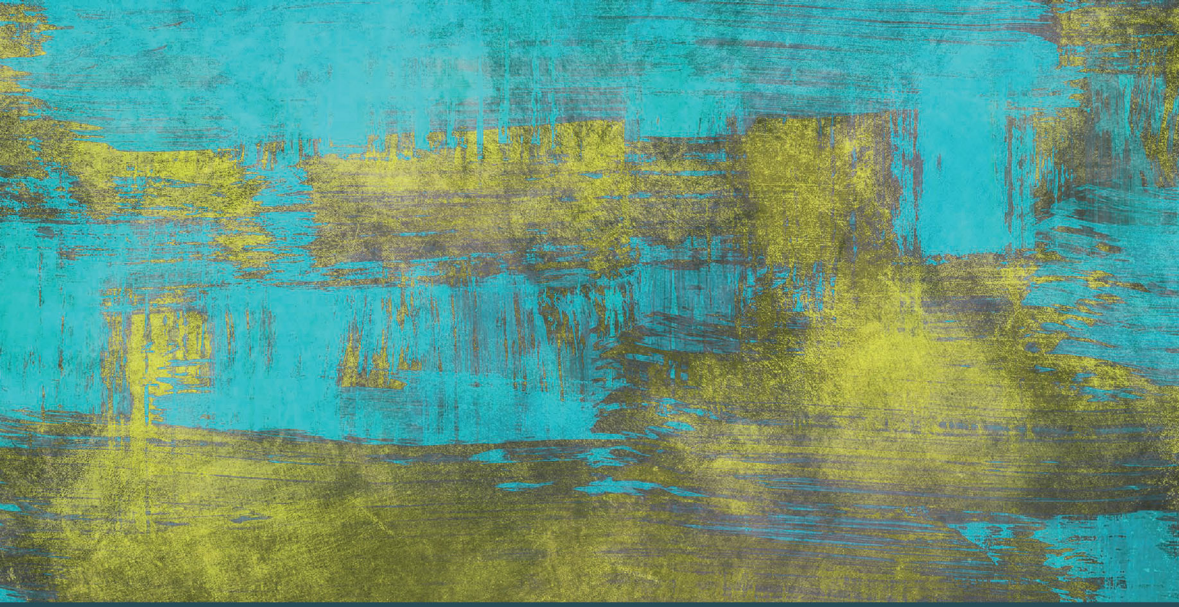

Routledge Research in International Law

INTERNATIONAL LAW AFTER THE UKRAINE WAR

Edited by
Jennifer Giblin, Olena Chub,
Patrick Butchard and Oksana Senatorova

International Law After the Ukraine War

Russia's 2022 invasion of Ukraine was a defining moment for international law and its ability to maintain international peace and security. This book highlights the principles, methods and systems in place to regulate peaceful relations between states, and the implications the war in Ukraine has had on their relevance in the changing geopolitical world.

Bringing together leading experts on international law, including key Ukrainian voices, the book explores the strengths and weaknesses in international law which have been exposed by Russia's invasion. The UN has stated that the war has catastrophic effects for international security and human rights. The book explores these statements, drawing on varied aspects of international law to determine lessons to be learned from the Ukraine conflict. It also explores how international law has had to adapt to tackle the challenges which have arisen. The book asks, has the conflict challenged the theory and fundamental values of international law? Have there been any new legal developments, prompted by the war, which could be applied to future conflicts? Through these timely questions, the book re-evaluates the changing landscape of international law.

The book will be of interest to students and scholars in the fields of international law, the use of force, humanitarian law, criminal law, refugee law and human rights law.

Jennifer Giblin is Associate Head of the School of Law and Criminal Justice at Edge Hill University. Jennifer's general research interests lie in the fields of international peace and security, United Nations peacekeeping/peace operations and post-conflict situations. With a background in international law, Jennifer's research on peacekeeping is interdisciplinary, drawing on perspectives from law, peace and conflict studies and international relations. She is the lead liaison between Edge Hill University and Yaroslav Mudryi National Law University, leading on Universities UK International (UUKi)-funded twinning projects, research collaborations and overseeing the implementation of a dual-degree master's programme.

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Kateryna Latysh as a Marie Skłodowska-Curie Postdoctoral Fellow (MSCA4-Ukraine), led a digital forensics, OSINT and artificial intelligence project at Vilnius University (2023–24, Lithuania). Since 2014, she has been teaching at Yaroslav Mudryi National Law University (Kharkiv, Ukraine). She has also contributed to several public-sector initiatives, serving as an assistant to a Member of the Canadian Parliament (2013), an adviser to the Ukrainian Parliament (2018–19), and a project manager for the Lithuanian Ministry of Justice and the President's Office under the "Kurk Lietuvai" program (2022–23). In addition, she brings 12 years of legal experience in pre-trial and trial advocacy as a Ukrainian barrister.

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Yana Sydorenko holds an MA in law and brings over 15 years of professional experience in both public and private sectors. Throughout her career, she has worked extensively in various legal roles, contributing her expertise in a broad range of legal practices. For the past two years, she has been actively involved with the Twinning Project at Cormack Consultancy Group, an initiative that fosters institutional collaboration between Ukrainian and UK universities. Her work within the Twinning Project has played a vital role in supporting international partnerships and enhancing resilience in higher education during challenging times.

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Acknowledgements

The resilience of Ukraine – its people, its culture, its institutions – and its unbreakable spirit is nothing short of extraordinary. This book is dedicated to the people of Ukraine: to those who have fought to maintain its sovereignty whether militarily or diplomatically; to those who have remained or to those who have been displaced, all of whom continue to maintain Ukrainian society and support its reconstruction; to those who have sacrificed their lives and to those who are raising new lives, supporting the future of Ukraine – this book is dedicated to you.

Since 2021, the co-editors have had the privilege of collaborating after their twinned institutions – Yaroslav Mudryi National Law University (Ukraine) and Edge Hill University (UK) – were introduced by Cormack Consultancy Group (CCG). Since then, the partnership has grown from strength to strength, with numerous collaborative research and teaching projects launched, supported by grants from Universities UK, Fund of the President of Ukraine, CCG and Mosaik. The co-editors would therefore like to thank colleagues at both of our institutions for their support in developing our twinning partnership and to the funders, particularly Universities UK and CCG, whose funding has supported the open access publication of this collection. A special thank you must also be extended to Charles Cormack and the Twinning Team at CCG – Anzhela, Yana, Oleksandr, Oksana and Vladyslav – for all of your support; it has truly been a pleasure to work with you.

Finally, we would like to thank the authors for their rich, insightful contributions. Many of our authors are Ukrainian, highlighting once again the resilience of Ukraine's academia and higher education sector which, against all odds, has remained operational throughout the conflict. We are delighted that we could bring together this diverse range of voices, to explore timely issues in international law and to contribute, in our own small way, to what will hopefully be the reconstruction and recovery of Ukraine in the not-too-distant future.

The editors gratefully acknowledge the support of Universities UK International (UUKi), in collaboration with the Fund of the President of Ukraine and Cormack Consultancy Group, for providing funding through the 'Twin for Hope' campaign to make this publication available through open access.

1 Introduction

Jennifer Giblin

This collection on international law after the Ukraine War has been finalised in February 2025 as the world marks three years since Russia launched a full-scale invasion of Ukraine. The invasion followed years of escalating tensions, beginning with Russia's annexation of Crimea in 2014, and marks the largest military conflict in Europe since the Second World War. The conflict has reignited debates as to whether international law is 'true law',[1] calling into question the relevance of international law and the capabilities of the international legal system (particularly when addressing matters relating to international peace and security, the use of force and territorial integrity) with some stating that the war 'has weakened the international collective security system'.[2] In February 2025 we are now faced with a divided UN Security Council and competing draft resolutions on the conflict which has seen the US siding with Russia, as opposed to its European allies, in votes before the Council.[3] On the one hand, there is a European-drafted resolution condemning Russia's actions and supporting Ukraine's sovereignty and territorial integrity and on the other, a US drafted and voted-for resolution calling for an end to the conflict but containing no criticism of Russia.[4] The latter, Resolution 2774, which was adopted by a vote of 10 in favour and 5 abstentions (including France and the UK),[5] comes after the US Trump administration met with President Putin of Russia to engage in peace talks, ending the international isolation of Russia.[6] This collection therefore provides a contemporary review of international law

1 P. Allott, 'International Law as True Law: A New Approach to a Perennial Problem' (*EJIL:Talk!* 2022) <https://www.ejiltalk.org/international-law-as-true-law-a-new-approach-to-a-perennial-problem/l>; M. Koskenniemi, 'What Is International Law for?' in M. Evans (ed), *International Law* (OUP 2010); P. Allott, 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31–50; P. Allott, 'The True Function of Law in the International Community' (1998) 5(2) *Indiana Journal of Global Legal Studies* Article 2.

2 UN News, 'Ukraine: War "Weakening" International Security, Political Affairs Chief Warns' (23 June 2023) <https://news.un.org/en/story/2023/06/1138047>.

3 J. Landale and P. Jackson, 'US Sides with Russia in UN Resolutions on Ukraine' *BBC News* (25 February 2025) <https://www.bbc.co.uk/news/articles/c7435pnle0go>.

4 UNSC Res 2774 (24 February 2025).

5 UN Meetings Coverage, Security Council 9866th Meeting (24 February 2025) SC/16005.

6 B. Debusmann Jr and G. Wright, 'Trump Says Russia "Has the Cards" in Ukraine Peace Negotiations' *BBC News* (20 February 2025) <https://www.bbc.co.uk/news/articles/cvgwddmjyvzo>; H. Pamuk and P. Magid,

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in an era when the post–Cold War international world order is shifting, with the conflict in Ukraine reshaping Europe.[7]

The purpose of this edited collection is to examine the strengths, weaknesses and gaps in international law which have been highlighted by the Russian invasion, exploring how the conflict has shaped international law. Indeed, Russia's actions since February 2022 have resulted in unprecedented action within the international legal order's key institutions, including proceedings at the International Court of Justice (ICJ),[8] referrals to the International Criminal Court (ICC)[9] and the issuing of United Nations General Assembly (UNGA) and Security Council Resolutions, including the suspension of Russia's membership in the UN Human Rights Council and the condemnation of Russia's annexation of regions in Ukraine as invalid and illegal under international law.[10] Many of these steps have led to landmark moments within international law's history – such as the adoption of the UNGA resolutions during the 11th Emergency Special Session of the General Assembly[11] and the first issuing of an ICC arrest warrant against a sitting president.[12] Whilst President Putin announced that Russia was launching a 'special military operation' against Ukraine on the grounds of self-defence under Article 51 of the UN Charter and in execution of the treaties of friendship and mutual assistance to the Donetsk and Luhansk regions,[13] this collection adopts the same view of the conflict as the majority of the international community – that Russia's actions are a violation of international law and the UN Charter, specifically Article 2(4) on the threat or use of force. It should also be noted that throughout the collection, the terms 'conflict', 'war' and 'invasion' may be used interchangeably, to refer to both the events of February 2022 and the hostilities which have been ongoing since 2014. Similarly, the phrase 'Ukraine War' or 'Russian-Ukraine War' may also be used throughout, and are indeed a part of the title, all of which refer to the hostilities which began

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'US and Russia Forge Ahead on Peace Talks, Without Ukraine' *Reuters* (19 February 2025) <https://www.reuters.com/world/europe/europe-says-it-is-committed-ukraine-ahead-russia-us-talks-2025-02-18/>.

7 The Economist, 'Russia's War on Ukraine Is Changing Europe' (7 June 2023) <https://www.economist.com/europe/2023/06/07/russias-war-on-ukraine-is-changing-europe>.

8 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation),* ICJ, 5 June 2023 <https://www.icj-cij.org/sites/default/files/case-related/182/182-20230609-PRE-01-00-EN.pdf>.

9 UK FCDO, 'UK Leads Call for ICC to Investigate Russia's War Crimes' (2 March 2022) <https://www.gov.uk/government/news/uk-leads-call-for-icc-to-investigate-russias-war-crimes>.

10 UNGA Res A/ES-11/1 (18 March 2022); UNGA Res A/RES/ES-11/2 (28 March 2022); UNGA Res A/RES/ES-11/3 (8 April 2022); UNGA Res A/RES/ES-11/4 (13 October 2022); UNGA Res A/ES-11/6 (2 March 2023); UNSC Res S/RES/2774 (24 February 2025).

11 UNSC, 8980th meeting, 27 February 2022, UNSC Doc SC/14809.

12 ICC Press Release, 'Situation in Ukraine: ICC Judges Issues Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (17 March 2023) <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

13 President of Russia, 'Address by the President of the Russian Federation' (24 February 2022) <http://en.kremlin.ru/events/president/news/67843>.

with the annexation of Crimea in 2014 and were escalated with the Russian invasion of 2022.

The collection begins with **Olena Chub**'s detailed analysis of constitutional rights defence in wartime Ukraine. Chub examines the extent to which the fundamental right to judicial protection of rights and freedoms is guaranteed at the national, interstate and international levels, drawing upon an analysis of regulations, court practice and expert opinions.

Following on from this, **Patrick Butchard** explores how the international community has responded to the Russian invasion through sanctions and countermeasures. Butchard explores how the use of sanctions in response to Russia's actions have been of an unprecedented scale and coordination, testing the boundaries of existing legal frameworks and highlighting the divergent perspectives on the legality and legitimacy of sanctions, particularly when employed outside of United Nations Security Council authorisation.

The third chapter by **Kristina Trykhlib and Mykola Saltanov** also examines responses to the Russian invasion, providing case studies on the national mechanisms of the UK, Germany and Poland as three of the largest contributors of military and economic support to Ukraine. Trykhlib and Saltanov present comparative research on national countermeasures against Russian aggression in Ukraine by the three countries, outlining specific measures that have been implemented, as well as a comprehensive analysis of the international legal frameworks.

Iva Vukušić's chapter is the first of five chapters to address matters relating to international criminal law. Vukušić examines accountability for international crimes in Ukraine, focusing on the International Criminal Court (ICC), domestic-level investigations and prosecutions in Ukraine and the establishment of a Special Tribunal for the Crime of Aggression. The purpose of the chapter is to explore how these accountability efforts were both shaped in, and observed from, The Hague, a city which is self-branded as the 'city of peace and justice'.

Continuing the theme of accountability, **Iryna Krytska and Kateryna Latysh** examine international legal cooperation in the investigation of war crimes, highlighting the challenges, gaps and directions for improvement. Krytska and Latysh explore how conflicts have evolved, including through cyberwarfare and the actions of private companies, creating ambiguities in legal norms and jurisdictions and difficulties in the investigation of war crimes. The chapter explores how there is a need for, amongst other things, greater international cooperation in the combating of serious international crimes, which may include joint investigation teams (JITs) and shared cyber or other forensic technologies to facilitate the collection, sharing and analysis of digital evidence.

Kateryna Buriakovska then provides us with a further exploration of accountability in international criminal law but specifically focused on corporate criminal accountability. Buriakovska explores how businesses may contribute to human rights violations by supplying weapons and finances whilst simultaneously benefiting from this involvement. Providing examples from the Ukraine conflict, Buriakovska examines how corporations contribute to Russia's war of aggression and international crimes and explores potential avenues for accountability.

Following on, **Yulia Ioffe** explores accountability in relation to conflict-related sexual violence (CRSV). Ioffe examines the prevalence and nature of CRSV in Ukraine, which has been used as a weapon of war creating 'profound long-term sociocultural repercussions, fracturing communities, subjugating survivors and perpetuating cycles of violence and trauma'. Ioffe therefore argues that there is an urgent need for global attention and action, including the provision of individual reparations to victims of CRSV. The chapter contributes to the discourse on CRSV reparations by offering a timely analysis of Ukraine's innovative approach to establishing a framework for immediate support through interim reparations which includes a pilot programme that provides a one-time payment of $3000 to 500 CRSV survivors.

Patryk I. Labuda concludes our chapters on international criminal law by focusing on the debate over double standards, exploring how some states' inconsistent action on accountability rises to the threshold of double standards. Embracing a post-colonial Eastern European perspective, Labuda argues that the post-2022 accountability landscape is better understood not as a moment of decline but as a moment of opportunity to 'rebalance the scales of justice in the region that has suffered centuries of unaccountable exploitation and violence'.

The final two chapters take us away from international criminal law to analyse national and international legal frameworks governing the environment and education and, importantly, the chapters examine how these areas will be vital in Ukraine's reconstruction and recovery. **Ievgeniia Kopytsia**'s chapter examines how modern warfare challenges existing international legal frameworks for environmental protection and climate security. Through an analysis of the Russia-Ukraine War, Kopytsia demonstrates how existing frameworks are inadequate in addressing the complex environmental consequences of contemporary armed conflicts and draws upon Ukraine's innovative approach to green reconstruction when reviewing environmental governance and opportunities for legal reform.

In our final chapter, **Anzhela Stashchak, Oleksandr Kryvenko and Yana Sydorenko** provide a detailed analysis of how the right to education has been implemented in Ukraine during the war. The chapter analyses the changes to Ukrainian legislation which have allowed its education system to remain operational during the conflict, including adapting to ensure the right to education for those living in the temporarily occupied territories. Stashchak, Kryvenko and Sydorenko explore how international legal norms and standards continue to be implemented, outlining how international collaboration has played a crucial role in sustaining and developing Ukraine's education system.

The rich collection of chapters therefore provides a timely and in-depth analysis of how international law and the international community have responded to the Russian invasion; highlighting the areas of strengths and weaknesses, the gaps that are still to be overcome and the directions for improvement. The collection also uniquely provides a platform for the voice of many Ukrainian scholars – voices which are ever more vital as we move towards Ukraine's reconstruction and recovery.

2 Constitutional rights' defence in wartime Ukraine

Olena Chub[1]

Introduction

The eastern border region of Ukraine, where Yaroslav Mudryi National Law University continues to function, is Kharkiv. It is the second largest city in Ukraine, with a population of 2.5 million in peacetime, and remains a scientific, educational and cultural centre. The region directly borders the Russian Federation, with a total length of the state border of over 300 kilometres. The city itself is situated just 30 kilometres from the border. On 24 February 2022, the region was one of the first to be attacked. A third of the region was occupied for 6 months, with 20% in the 'grey zone' – line of contact, which is constantly subjected to significant shelling, making it impossible for people to live normally, for critical infrastructure to function, and for government agencies, including law enforcement, to work. The occupational government was ready to hold a sham referendum and introduce another flag and coat of arms for the region. However, a significant part of the occupied territories of the Kharkiv region was liberated during the counteroffensive of the Armed Forces of Ukraine in September 2022. Thus, the region was rescued from the same destiny as the Kherson region in the south. About 5% of the Kharkiv region remained occupied or in the 'grey zone'. Another Russian offensive is underway, with power plants, vital civilian infrastructure and residential buildings being targeted daily with various types of weapons.

The study of human rights violations and ways to protect them is based on analytical data, statistical information from the Ukrainian state authorities, reports of international missions and NGOs, law enforcement agencies, media coverage, research of scientific literature, national legislation, draft laws, legal positions of the Constitutional Court of Ukraine and the Supreme Court of Ukraine. The first part of the chapter will outline the spatial (Kharkiv as one of the 27 regions of Ukraine) and temporal (6 months of temporary occupation) boundaries of the study. The selection of a time and territory is due to the need to (1) outline the perceived state of affairs in the array of human rights violations that continues to

1 Dr Olena Chub is British Academy and Cara Researchers at Risk Fellowship awardee and would like to acknowledge this support.

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grow, (2) identify characteristic trends in protection and (3) assume and comprehend the overall scale of human rights violations and effective mechanisms for their enforcement. The remainder of the chapter examines the state with the right to fair trial on the national, interstate (universal) and international (regional) levels.

Human rights violations, from the field

To gain an insight of the overall scale of human rights violations in Ukraine, and therefore the scope of documentation and investigation work, it is worth noting that, according to the Office of the Prosecutor General of Ukraine as of May 2024, almost 129,000 criminal proceedings have been documented for violations of the laws and customs of war; 16,000 cases against national security (encroachment on the territorial integrity of Ukraine, treason, collaboration, etc.); 692 suspected representatives of the military and political leadership of the Russian Federation are being investigated in the main case of aggression.[2] By comparison, a total of 161 people were indicted at the International Criminal Tribunal for the Former Yugoslavia (ICTY) during its mandate from 1993 to 2017.

Reports document a significant number of violations of international humanitarian law and international human rights law, war crimes, and crimes against humanity. Ukrainian courts consider cases of violations of the laws and customs of war in particular. Legal scholars can testify from the investigators' first-hand experience the violations of the human rights and presume this to be a universal picture in other temporarily occupied Ukrainian territories. Some of the most vulnerable rights and widespread proven facts of their violations are as follows.

The right to life and protection of health: there have been thousands of deaths and injuries of civilians, including children, caused not only by deliberate and indiscriminate attacks on the civilian population and civilian infrastructure, but also deliberate shooting of columns of emergency transport; spontaneous mass burials were also found in the liberated territories; and the mining of territories also takes place.

For instance, in September 2022, during the liberation of the settlements in the Izyum community, whose temporary occupation lasted for 6 months, a spontaneous mass grave of 451 people was discovered, including 429 civilians.[3] Another example is that in one of the criminal proceedings, law enforcement officers of the Kharkiv region identified one of the Russian Armed Forces servicemen involved in the shooting of a civilian car with a radio interception of his telephone conversation. The court found the Russian serviceman guilty of cruel treatment of civilians,

2 'Crimes Committed During Full-Scale Invasion of the RF as of 29 March 2024, Prosecutor General's Office' (*Армія Inform*, 29 березня 2024) <https://armyinform.com.ua/2024/03/29/v-ukrayini-zadokumentovano-majzhe-129-tysyach-voyennyh-zlochyniv-rosiyi/> accessed 19 October 2024.

3 'Пресконференція Андрія Костіна про роботу прокуратури за рік повномасштабної агресії РФ' (*Офіс Генерального Прокурора України,* 22 лютого 2023) <https://gp.gov.ua/ua/posts/preskonferenciya-andriya-kostina-pro-roboti-prokuraturi-za-rik-povnomasstabnoyi-agresiyi-rf> accessed 19 October 2024.

as well as ordering such actions, combined with a completed attempted murder committed by a group of individuals by prior conspiracy.[4] The shooting of a civilian convoy of 26 people by the military was also proved.[5]

The right for dignity, freedom and personal integrity to be respected: dozens of torture camps arranged by the occupation military government have been discovered; kidnapping, people missing, deportation of thousands of Ukrainians, including children. In particular, the existence of torture chambers set up by the occupation forces in four frontline districts of the Kharkiv region was confirmed.[6] Abductions or disappearances of 1,007 people have been recorded, including local government officials, current and former military servicemen, law enforcement officers, doctors, State Emergency Service staff, teachers, volunteers and other civilians.[7] The UN Office of the High Commissioner for Human Rights (OHCHR) documented the detention of civilians by the Russian forces because of their political views or other legitimate exercise of freedom of expression; cases included local public officials, civil society activists, humanitarian volunteers and informal leaders of communities, including teachers and priests.[8] Criminal proceedings are ongoing over the deportation and forced relocation of Ukrainian citizens to the Russian Federation, the Republic of Belarus and the temporarily occupied territories, some of which involve minors.[9] A problem that arises in the investigation of such proceedings is the witnesses' and victims' presence in the temporarily occupied territories (impossibility to interrogate them), and the lack of objective and reliable data on their border crossings.

The right to education: there is not a single undamaged educational institution left in the region; there have been attempts to conduct the implementation of educational curriculum, standards, materials and textbooks by the occupying country at all educational establishments in the temporarily occupied territories, forcefully sending teachers to the training while banning the Ukrainian language

4 'Військового рф, який на Харківщині відкрив вогонь по родині, засуджено до 15 років ув'язнення' (*Офіс Генерального Прокурора України,* 6 грудня 2023) <https://gp.gov.ua/ua/posts/rosiiskogo-viiskovogo-yakii-na-xarkivshhini-vidkriv-vogon-po-rodini-zasudzeno-do-dovicnogo-uvyaznennya> accessed 19 October 2024.

5 'Французькі експерти ідентифікували зброю, з якої було розстріляно евакуаційну колону на Харківщині' (*Інтерфакс-Україна*, 20 жовтня 2022) <https://interfax.com.ua/news/general/866955.html> accessed 19 October 2024.

6 'Деокупація Харківської області' (*Міністерство внутрішніх справ України,* 6–20 вересня 2022) <https://mvs.gov.ua/news/deokupaciia-xarkivskoyi-oblasti> accessed 19 October 2024.

7 '365 Днів Боротьби' (*Харківська обласна прокуратура,* 24 лютого 2023) <https://khar.gp.gov.ua/ua/golovna_novuna.html?_m=publications&_t=rec&id=328607> accessed 19 October 2024.

8 Report 'Detention of Civilians in the Context of the Armed Attack by the Russian Federation Against Ukraine (24 February 2022–23 May 2023)' (OHCHR, 22 June 2023) <https://www.ohchr.org/sites/default/files/2023-06/2023-06-27-Ukraine-thematic-report-detention-ENG.pdf> accessed 19 October 2024.

9 'Росія вивезла з окупованих територій Харківщини 743 дитини' (*Ґвара Медіа*, 14 березня 2024) <https://gwaramedia.com/rosiia-vyvezla-z-okupovanykh-terytoriy-kharkivshchyny-743-dytyny-prokuratura/> accessed 19 October 2024.

and literature.[10] The systematic approach of the Russian authorities to the implementation of their own education is aimed, among other things, at deepening alienation and conflicts, manipulating worldviews and eradicating Ukrainian students' identity. The educational process was supposed to be carried out entirely according to the Russian standards in the Russian language solely, and includes a powerful propaganda component aimed at shaping the worldview approved of the aggressor state.[11]

The right to freedom of religion: the destruction of churches, using complicit clergy to deny armed aggression as well as glorifying the perpetrators. For example, according to the investigation, the former rector of one of the churches of the UOC-MP Izium Diocese actively supported the aggressor, blessing servicemen of the Russian armed forces and military vehicles of the occupiers. During the liberation of the Kharkiv region, the archpriest and his family fled to the Russian Federation.[12]

The right to citizenship: forcing Ukrainian citizens to obtain passports of the occupying country – so-called russification. The right to free elections and referendums: the organisation and conduction of unlawful local (mayoral) elections by the temporary occupational bodies, sham referendums as justification for the annexation of the Ukrainian territory, forcing Ukrainian citizens to participate in them.

The right to the inviolability of civilians' houses: hundreds of thousands of homes destroyed by shelling.[13] The right to a safe and healthy environment: there is significant and widespread environmental damage caused by bombing; there also remains the threat of ecocide (ecological disaster) due to the shelling of the National Scientific Centre 'Kharkiv Institute of Physics and Technology' as well as possible destruction of the nuclear subcritical installation 'Neutron Source' and the storage of nuclear materials;[14] destruction of the Oskilske Reservoir, Chervonooskilskyi Landscape Park in Izium and Kupiansk districts of the region; and

10 Esveld BV, 'Education Under Occupation' (*Human Rights Watch*, 20 June 2024) <https://www.hrw.org/report/2024/06/20/education-under-occupation/forced-russification-school-system-occupied-ukrainian> accessed 19 October 2024.

11 'Russia's Systemic Policy of Destroying Children's Ukrainian Identity: Special Report by the Ukrainian Parliament Commissioner for Human Rights on the Observance of Children's Rights in the Context of Armed Aggression Against Ukraine' (*Ombudsman*, 16 July 2024) <https://www.ombudsman.gov.ua/storage/app/media/uploaded-files/Special%20Report%20_CROSS-POLLINATED_.pdf> accessed 19 October 2024.

12 'Освячував техніку окупантів, якою вбивали мирних українців, – на Харківщині повідомлено про підозру настоятелю храму УПЦ (МП)' (*Офіс Генерального Прокурора України,* 11 жовтня 2023) <https://gp.gov.ua/ua/posts/blagoslovlyav-texniku-okupantiv-yakoyu-vbivali-mirnix-ukrayinciv-na-xarkivshhini-povidomleno-pro-pidozru-nastoyatelyu-xramu-upc-mp> accessed 19 October 2024.

13 '365 Днів Боротьби' (n 7).

14 'Андрій Костін: Українські прокурори вперше повідомили про підозру у скоєнні злочину екоциду російському генерал-полковнику та чотирьом його підлеглим' (*Офіс Генерального Прокурора України,* 14 лютого 2024) <https://www.gp.gov.ua/ua/posts/andrii-kostin-ukrayinski-prokurori-vperse-povidomili-pro-pidozru-u-skojenni-zlocinu-ekocidurosiiskomu-general-polkovniku-ta-cotiryom-iogo-pidleglim> accessed 19 October 2024.

damage to the territory and extermination of more than 300 rare animals and birds in the Feldman-EcoPark.[15]

The right to protection of cultural heritage: for instance, the destruction of the national literary museum to the Ukrainian philosopher and poet Hryhoriy Skovoroda due to the indiscriminate and deliberate shelling in the absence of military objects in the area of the attack.[16]

These are only several examples of human rights violations on temporarily occupied territories of Ukraine, aiming to emphasise their character, scale and scope. Each of them can be researched additionally, in particular the right to education and freedom of religion. New cases, normative regulation and judicial practice keep arising, causing discussion and developing soft law recommendations. In terms of this chapter, logically it is time to move on to the right to judicial protection, which is one of the fundamentals.

The right to fair trial. The State level

The Constitution of Ukraine (of 1996) contains the list of individuals' rights, coinciding fully with international and regional instruments, including the Universal Declaration of Human Rights, its Further Protocols, and the European Convention of Human Rights. Some articles directly cite these conventions while others give a similar interpretation. ECtHR law is an immanent part of Ukrainian legislation accordingly. On 23 February 2006, the Law of Ukraine 'On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights' was adopted. It establishes a mandatory legal examination of all draft laws for compliance with the Convention and the Court's case law. The Ukrainian courts must apply the Convention and the Court's case law as a source of law when considering cases.

The content of the right to judicial protection established by part 1 of Article 55 of the Constitution of Ukraine should be understood considering the content of the right to a fair trial guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and interpreted by the European Court of Human Rights. As it is evidenced by the Court's position in many cases (e.g. *Bellet v France*),[17] the main component of the right to a court is the right of access and fair trial. The right to judicial protection of rights and freedoms

15 'Вплив воєнних дій на довкілля в Україні та його відновлення до природного стану' (*Верховна Рада України, Комітет з питань екологічної політики, матеріали слухань,* 10 листопада 2022) <https://uncg.org.ua/wp-content/uploads/2023/05/Materialy-slukhan-2-1-1.pdf> accessed 19 October 2024.

16 'Російські військові нищать культурний фонд України – внаслідок обстрілу Харківщини зруйновано музей Сковороди' (*Офіс Генерального Прокурора України,* 7 травня 2022) <https://www.gp.gov.ua/ua/posts/rosiiski-viiskovi-nishhat-kulturnii-fond-ukrayini-vnaslidok-obstrilu-xarkivshhini-zruinovano-muzei> accessed 19 October 2024.

17 *Bellet v France* App no 23805/94 (ECHR, 4 December 1995) <https://hudoc.echr.coe.int/tur?i=001–57952> accessed 19 October 2024.

cannot be restricted even in a state of martial law or a state of emergency (Article 64 of the Constitution of Ukraine). At the same time, according to part 6 of Article 125 of the Constitution, the establishment of extraordinary and special courts is not allowed.

In one of its recent decisions, the Constitutional Court of Ukraine stated that in accordance with part 2 of Article 64 of the Constitution of Ukraine, human rights and freedoms guaranteed by the Constitution of Ukraine in the provisions of Articles 55 (right to judicial protection) and 63 (right to defence) cannot be restricted under martial law. This means that although the restriction of these human rights cannot be caused by the needs related to martial law, state interference in their protection is possible provided that the means chosen by the legislator are justified (proportionate), respect the essence of human rights and do not contradict the provisions of the Constitution of Ukraine, which *expressis verbis* guarantee their scope (clause 8.3).[18]

In addition to the difficulties of ensuring access to justice in times of war, such as territorial jurisdiction, change of location of judicial bodies, and the presence of the person in the temporarily occupied territory, there are also challenges in the practical needs to ensure the impartiality, comprehensiveness and objectivity of justice, in particular, listed below.

'The existing legislation does not protect judges from possible attempts by prosecutors to interfere with their independence through the investigations launched against judges'.[19] 'The provisions that criminalize misconduct of judges should be formulated precisely enough to guarantee their independence and functional immunity in interpretation of the law, assessment of facts or weighing of evidence'.[20] A report by the OHCHR also raises concerns regarding the right to legal counsel. 'State-appointed lawyers handling the majority of conflict-related criminal cases often provided poor quality services and did not act in the best interests of their clients'.[21] In addition, the OHCHR documented cases where private lawyers dealing with conflict-related cases were attacked because of their professional activity.[22]

The Law of Ukraine No 2108-IX dated 3 March 2022 'On Amendments to Certain Legislative Acts of Ukraine on Criminalisation of Collaboration Activities' amended the Criminal Code of Ukraine with Article 111–1; thus, this legislation is new for Ukraine. The law 'criminalizes "collaboration activities" without defining these activities or other important terms with sufficient precision so as to enable individuals to regulate their conduct and reasonably foresee the legal consequences

18 'Рішення № 8-р(II)/2024 у справі про гарантії судового контролю за дотриманням прав осіб, яких утримують під вартою' (*Конституційний Суд України,* 18 липня 2024) <https://ccu.gov.ua/sites/default/files/docs/8_r_2_2024.pdf> accessed 19 October 2024.

19 Report 'Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine (April 2014–April 2020)' (OHCHR) para 76 <https://www.ohchr.org/sites/default/files/2022-08/Ukraine-admin-justice-conflict-related-cases-en.pdf> accessed 19 October 2024.

20 ibid para 176.

21 ibid para 7.

22 ibid.

of their actions or inaction. This raises concerns with respect to compliance of the law with the principle of legality and risks arbitrary detention'.[23] A fairly broad interpretation of the elements of this crime does not ensure the principle of legal certainty. The practice of establishing this liability should be formed in a balanced manner, taking into account the need to reintegrate the liberated territories.

Accordingly, the first instance is the connection between investigation procedures, judicial practice, legislation and international standards. This means both training and admissibility of the material gathered. It is such an array of evidence, that should be properly processed to become acceptable as clear and convincing evidence to international institutions. Importantly, in trials and investigations Ukraine should also respect the human rights and have same standards of accountability.

In absentia

The *in absentia* procedure, a special kind of criminal proceedings (pre-trial investigation and trial) in the absence of the accused, is also relatively new to Ukrainian legislation. It was introduced by the Law of Ukraine of 7 October 2014 No 1689-VII 'On Amendments to the Criminal Code and the Criminal Procedure Code of Ukraine on the Inevitability of Punishment for Certain Crimes Against the Fundamentals of National Security, Public Safety and Corruption Offences'.

The practice of the European Court of Human Rights on criminal proceedings *in absentia* is, in particular, based on the judgement of the Grand Chamber of the ECHR of 1 March 2006 in *Sejdovic v Italy*[24] (reopening the proceedings at the request of the person concerned is, in general, an appropriate means of remedying the established violation); the judgment of the ECHR of 12 February 2015 in *Sanader v Croatia*[25] (the applicant could initiate a new trial only if he returned to Croatia and, in fact, sacrificed his freedom, the violation lies in the disproportionate requirement to sacrifice freedom for the sake of a new trial); Resolution (75)11 of the Committee of Ministers of the Council of Europe of 19 January 1973 on the criteria governing proceedings conducted in the absence of the accused.

For instance, affirming the right of a person convicted *in absentia* to a retrial, the ECtHR in *Sanader v Croatia* considers the requirement that an individual tried *in absentia*, who has not had knowledge of his prosecution and of the charges against him or sought to evade trial or unequivocally waived his right to appear in court has to appear before the domestic authorities and provide an address of residence in Croatia during the criminal proceedings in order to be able to request a retrial to be disproportionate.[26] Even taking into account the particular circumstances of the

23 Report 'Detention of Civilians . . .' (n 8) para 108.

24 *Sejdovic v Italy* App no 56581/00 (ECHR, 1 March 2006) <https://hudoc.echr.coe.int/?i=001-72629> accessed 19 October 2024.

25 *Sanader v Croatia* App no 66408/12 (ECHR, 12 February 2015) <https://hudoc.echr.coe.int/eng?i=001–151039> accessed 19 October 2024.

26 ibid paras 55, 84, 93.

case, which concerns serious charges of war crimes, the Court considers this obligation is 'unreasonable and disproportionate from a procedural point of view'.[27]

Trials *in absentia* have not been conducted at the International Criminal Tribunals for the former Yugoslavia and Rwanda, precisely because of concerns about fair trial requirements, including the right of the accused to be present. On the contrary, in a Dutch District Court's verdict from 17 November 2022 three commanders of Russian-backed forces were found guilty of downing Flight MH17 on 17 July 2014 and sentenced to life imprisonment in an *in absentia* trial.[28] The International Criminal Court, which is investigating war crimes and crimes against humanity in the current full-scale war in Ukraine, is not allowed to prosecute *in absentia*, which means a trial actually takes place only if they can arrest Russian leaders. The debate over trials *in absentia* is particularly cogent now in light of discussion about whether such trials should be allowed in case a special tribunal is established to prosecute Russian leaders for the crime of aggression against Ukraine.[29]

The Criminal Procedure Code of Ukraine does not provide a special possibility for retrial after the verdict in case of appearance of the accused (convicted) in respect of whom special court proceedings were conducted *in absentia*. Such individuals may use the general appeal and cassation procedures, or the right to review a court decision based on newly discovered or exceptional circumstances. The parliament of Ukraine was recommended, by OHCHR in particular, to 'amend the Criminal Procedure Code to allow a full retrial in criminal proceedings conducted *in absentia*, including after a verdict has been delivered, upon the request of the accused who has surrendered or has been detained by the Ukrainian authorities'.[30] 'Contrary to international human rights standards, Ukrainian legislation governing *in absentia* proceedings does not envisage the right of a convicted person to retrial after the verdict has been delivered, thereby depriving them of the opportunity to present a defence. In addition, host States may refer to this procedural shortcoming as grounds for refusing requests for extradition of individuals convicted *in absentia*, thus hampering the enforcement of such verdicts and undermining accountability efforts and the right to a remedy for victims'.[31] According to Article 3 of the Second Additional Protocol to the European Convention on Extradition of 5 June 1983, the requested Party may refuse to extradite a person convicted *in absentia* unless the requesting Party guarantees such person's right to retrial.[32]

27 ibid para 89.

28 See M. de Hoon, 'Dutch Court, in Life Sentences: Russia Had "Overall Control" of Forces in Eastern Ukraine Downing of Flight MH17' (*Just Security*, 19 December 2022) <https://www.justsecurity.org/84456/dutch-court-in-life-sentences-russia-had-overall-control-of-forces-in-eastern-ukraine-downing-of-flight-mh17/> accessed 19 October 2024.

29 ibid.

30 Report 'Human Rights in the Administration of Justice in Conflict-Related Criminal Cases in Ukraine (April 2014–April 2020)' (n 19) para 176-c.

31 ibid para 11.

32 ibid 19.

Documenting the evidence

Regarding the implementation of the principle of accountability, there are several ongoing initiatives on the collection and preservation of evidence on the global, regional and national levels by both public and private actors.[33] Eurojust is authorised to store evidence of war crimes, including satellite images, photographs, videos, audio recordings, DNA profiles and fingerprints, to process and analyse this evidence in cooperation with Europol, and to share it with national and international judicial authorities. The ICC and Eurojust have also published guidelines for civil society representatives on collecting evidence of war crimes and crimes against humanity.[34] The scale and scope of digital evidence for war crimes prosecutions in this war is unprecedented. However, the assessment of this evidence will take into account its admissibility under the Criminal Procedure Code of Ukraine.

On this note, the establishment of the ICTY, the temporary court to prosecute war crimes during the conflict in the Balkans in the 1990s, marked 'the beginning of the end of impunity for war crimes in the former Yugoslavia'.[35] As Iva Vukušić writes, its 'archives are, in a word, colossal. Collectively, the archives of the ICTY and the IRMCT "Hague branch", i.e. the section dealing with the former Yugoslavia, contain approximately 2400 linear meters of physical and 1.5 petabytes of digital records'.[36] 'There is nothing easy about investigating and prosecuting war crimes, crimes against humanity, and genocide'.[37] As we also can see from the ECtHR decision on the case of *Ukraine and the Netherlands v Russia*, Approach to the Evidence chapter, the 'factual disputes in the present case are extensive. Over 1,000 different pieces of evidence have been produced in annexes or cited in footnotes to support the respective positions of the three parties and thousands of pages of supporting documentation have been submitted'.[38] Reports of the OSCE and the OHCHR, NGOs and research collective reports, government reports and intelligence, witness statements, interviews and press conferences, and media reports are undoubtedly elements which can also be taken into account by the court.[39]

33 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022' (OSCE ODIHR GAL/26/22/Rev.1, 13 April 2022, by Professors Wolfgang Benedek, Veronika Bílková and Marco Sassòli) para 94 <https://www.osce.org/files/f/documents/f/a/515868_0.pdf> accessed 19 October 2024.

34 'Eurojust: Council Adopts New Rules Allowing the Agency to Preserve Evidence of War Crimes' (*Consilium*) <https://www.consilium.europa.eu/en/press/press-releases/2022/05/25/eurojust-le-conseil-adopte-de-nouvelles-regles-permettant-a-l-agence-de-conserver-des-preuves-de-crimes-de-guerre/> accessed 19 October 2025.

35 'The Tribunal – Establishment' (*International Criminal Tribunal for the Former Yugoslavia*) <https://www.icty.org/en/about/tribunal/establishment> accessed 19 October 2024.

36 I. Vukušić, 'Archives of Mass Violence: Understanding and Using ICTY Trial Records' (2022) 70(4) *Comparative Southeast European Studies* 585–607 CSES 586 <https://doi.org/10.1515/soeu-2021-0050> accessed 19 October 2024.

37 ibid 589.

38 *Ukraine and the Netherlands v Russia* Apps nos 8019/16, 43800/14 and 28525/20 (ECHR, 30 November 2022) para 396 <https://hudoc.echr.coe.int/eng?i=001–222889> accessed 19 October 2024.

39 ibid 472.

Therefore documenting the current war evidence is expected to become a systematic, interrelated process.

Inter-State (universal) mechanisms

'Even where an international criminal tribunal has jurisdiction, it lacks police powers and it is entirely dependent on the cooperation of sovereign States'.[40] As experts of one of the OSCE missions noted in July 2022, in addition to Ukraine and the Russian Federation, 'several other countries, which are not party to the current conflict, have opened investigations into crimes committed in the territory of Ukraine. Some cases concerned crimes committed by the citizens of these countries having joined one or the other party to the conflict (e.g. foreign fighters[41] or volunteers).[42] Others relate to international crimes, especially war crimes, committed mostly by members of the Russian armed forces.[43] Third countries are also involved in the investigation carried out by the Ukrainian law enforcement agencies, for instance by providing forensic experts.[44,45]

40 T. Meron, *Standing Up for Justice: The Challenges of Trying Atrocity Crimes* (OUP 2021) 336.

41 'Czech Tried Over Killings with Pro-Russian Separatists in Ukraine' (*Radio Prague International*, 17 March 2022) <https://english.radio.cz/czech-tried-over-killings-pro-russian-separatists-ukraine-8745077> accessed 19 October 2024.

42 J. Kotwicka, 'Hearing in Prague: Czech Volunteer Accused of Illegal Service in Ukraine and Looting' (*UNN*, 4 July 2024) <https://unn.ua/en/news/hearing-in-prague-czech-volunteer-accused-of-illegal-service-in-ukraine-and-looting> accessed 19 October 2024.

43 See, for instance, 'Lithuania Prosecutors Launch Ukraine War Crimes Investigation' (*Reuters*, 3 March 2022) <https://www.reuters.com/world/europe/lithuania-prosecutors-launch-ukraine-war-crimes-investigation-2022-03-03/> accessed 19 October 2024; 'Germany Opens Investigation into Suspected Russian War Crimes in Ukraine' (*The Wall Street Journal*, 8 March 2022) <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE-30f2REH8BCi> accessed 19 October 2024; 'Polish Prosecutors Launch Investigation into Russia's Attack on Ukraine' (*First News*, 1 March 2022) <https://www.thefirstnews.com/article/polish-prosecutors-launch-investigation-into-russias-attack-on-ukraine-28331> accessed 19 October 2024; 'Spain Opens Probe into "Serious Violations" by Russia in Ukraine' (*The Local Spain*, 8 March 2022) <https://www.thelocal.es/20220308/spain-opens-probe-into-serious-violations-by-russia-in-ukraine/> accessed 19 October 2024; 'Swedish Prosecutors Open Preliminary Investigation into War Crimes in Ukraine' (*Reuters*, 5 April 2022) <https://www.reuters.com/world/europe/swedish-prosecutors-open-preliminary-investigation-into-war-crimes-ukraine-2022-04-05/> accessed 19 October 2024.

44 'France Dispatches Team to Ukraine to Investigate Russian War Crimes' (*Anadolu Ajansı*, 11 April 2022) <https://www.aa.com.tr/en/europe/france-dispatches-team-to-ukraine-to-investigate-russian-war-crimes/2561103> accessed 19 October 2024; 'Criminologists from Slovakia Arrive in Ukraine to Assist in Investigation of Russian War Crimes' (*Ukrainian News*, 24 April 2022) <https://ukranews.com/en/news/852231-criminologists-from-slovakia-arrive-in-ukraine-to-assist-in-investigation-of-russian-war-crimes> accessed 19 October 2024.

45 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine (1 April–25 June 2022)' (OSCE ODIHR GAL/36/22/Corr.1, 14 July 2022) <https://www.osce.org/files/f/documents/3/e/522616.pdf> accessed 19 October 2024.

Promptly after the war began, Eurojust supported the establishment of a Joint Investigation Team into alleged core international crimes committed in Ukraine. It was set up between Ukraine, Lithuania and Poland, followed by the prompt membership of four additional countries (Estonia, Latvia, Slovakia and Romania), the participation of the ICC and later also Europol, and a Memorandum of Understanding with the US. The JIT enables close cooperation between all parties involved, and an effective and swift exchange of information and evidence. Various national Ukraine-related investigations are currently ongoing in over 20 countries. During 2022, 18 cases were opened at Eurojust by national authorities in eight Member States and two third countries in support of ongoing investigations in relation to war crimes and crimes against humanity, following Russia's invasion of Ukraine.[46]

According to the Office of the Prosecutor General, within the framework of the principle of universal jurisdiction in 2023 various activities have occurred or are ongoing, including the US competent authorities representatives notified four Russian-affiliated servicemen of suspicion of torture and ill-treatment of an American citizen; one of the leaders of the Rusich unit was arrested in Finland on suspicion of committing international war crimes; information is being exchanged with representatives of the Prosecutor General's Office of the Kingdom of the Netherlands regarding investigations into identified employees at illegally functioning penal colonies and other law enforcement agencies in the temporarily occupied territories of Donetsk and Luhansk regions of Ukraine; France and Ireland set up a joint investigation team into the deaths of their citizens, three Ukrainian citizens and the injury of a British citizen; information is being exchanged with Germany on the initiation of a pre-trial investigation under the rules of universal jurisdiction into the commission of international war crimes by Russian military personnel; and Spain handed over materials on a soldier of the 64th Separate Guards Motorised Rifle Brigade of the Russian Army to Ukraine.[47]

Ukrainian investigators are also cooperating with the Chief Prosecutor of the International Criminal Court, with Slovak police officers, Lithuanian specialists, as well as experts of the National Gendarmerie of France, the Royal United Services Institute for Defence and Security Studies, and so on. The Flight MH17 investigation by various national (decision of the District Court of The Hague, November 2022,[48] two-thirds of the victims were Dutch nationals) and international (ECtHR decision

46 'Joint Investigation Team into Alleged Crimes Committed in Ukraine' (*Eurojust*) <https://www.eurojust.europa.eu/joint-investigation-team-alleged-crimes-committed-ukraine> accessed 19 October 2024.

47 'Результати роботи з протидії злочинам, вчиненим в умовах збройного конфлікту, за 2023 рік' (*Офіс Генерального Прокурора України,* 18 січня 2024) <https://www.gp.gov.ua/ua/posts/rezultati-roboti-z-protidiyi-zlocinam-vcinenim-v-umovax-zbroinogo-konfliktu-za-2023-rik?fbclid=IwZXh0bgNhZW0CMTEAAR1dn4eSEn7HC5z6oSxxTlm7QC9I2TYf1TPTfr2kR5vvFHXg90cNoXQwXeE_aem_AQlVXkXw0m06CQ2101uHs2-OrDuq0O0VXxDlb6dpTSnjKLI0FKxq8JxIVnZsHcZj_uhLB8ZItD0EehhsfzpIHf23&d=n> accessed 19 October 2024.

48 Ministerie van Justitie en Veiligheid, 'MH17 Plane Crash' (*Netherlands Public Prosecution Service*, 6 March 2023) <https://www.prosecutionservice.nl/topics/mh17-plane-crash> accessed 19 October 2024.

on admissibility, January 2023)[49] courts is an example of the international community combining forces to find the truth and bring justice to the victims. Given the numerous challenges in national and international justice, the involvement of other democratic states with well-established rule of law principles and practices in their judicial systems can be an essential link in ensuring justice.

International and interstate search and extradition

The international system of search and extradition of criminals and their accomplices does not work in case the crimes might have political, military, religious or racial features (Article 3 of the Constitution of the International Criminal Police Organization).[50] It means that crimes connected with the war in Ukraine are not followed up by Interpol. It signifies that the international criminal justice system operation principle needs to be reviewed. The recent creation of the International Centre for the Prosecution of the Aggression Crime against Ukraine at European Commission's Eurojust in The Hague might be a step in this direction.

Interpol, namely its information system, is only a search tool, not a searching authority. It is the responsibility of the law enforcement agencies of the Member States to take practical measures to search for individuals.[51] An international search can be carried out only through Interpol channels, but international cooperation in criminal proceedings can also be carried out through Europol and Eurojust, as well as on the basis of other bilateral and multilateral treaties on international legal assistance in criminal matters.

In an illustrative case, on 8 December 2023 the Supreme Court of Finland ruled that it could not grant Ukraine's request for extradition of war crimes and terrorism suspect Vojislav Torden (formerly known as Jan Petrovsky). This decision was particularly based on the European Court of Human Rights' previous recognition of violations of the detention conditions in Ukrainian prisons during the kinetic military action in the country. However, the defendant was not released and was detained immediately after leaving the court, and the Central Criminal Police launched a preliminary investigation and is studying the materials provided by Ukraine. It is possible that a corresponding investigation may be launched in Finland.[52]

In 2023 the Office of the Prosecutor General of Ukraine sent 125 extradition requests to different countries. So far, 20 of them have been granted, 15 have

49 *Ukraine and the Netherlands v Russia* (n 38) 396, 472.

50 'Constitution of the ICPO-Interpol I/CONS/GA/1956' (2023) <https://www.interpol.int/content/download/590/file/01%20E%20Constitution_2024.pdf> accessed 19 October 2024.

51 'Interpol's Rules on the Processing of Data III/IRPD/GA/2011' (2023) <https://www.interpol.int/content/download/5694/file/26%20E%20RulesProcessingData_RPD_2023.pdf> accessed 19 October 2024.

52 A. Nuutinen, Ukraina Ei Ole Luopunut Toivosta Saada Voislav Torden Suomesta Tuomiolle – 'Jatkamme Keinojen Etsimistä' (*Ilta-Sanomat*, 9 December 2023) <https://www.is.fi/ulkomaat/art-2000010047113.html> accessed 19 October 2024.

been rejected, and the rest remain pending.[53] Ukrainian extradition requests to other countries are often rejected on the same grounds as in the above case. In 2023 alone, the European Court of Human Rights issued 130 judgments against Ukraine, mainly for inadequate detention conditions of applicants, ill-treatment of applicants by law enforcement officers and/or failure to conduct effective investigations due to complaints about such treatment.[54]

Within the European Union, the European Arrest Warrant could be used as a useful tool to ensure that international crime perpetrators do not escape justice by moving to another EU country.[55] The European Arrest Warrant makes it obligatory for EU States to arrest and transfer suspects to another EU State in certain serious crimes including 'crimes within the jurisdiction of the International Criminal Court'.[56] Until 2015 the criminal procedure theory in Ukraine considered the interstate search concept regarding cooperation with the Community of Independent States countries. Although Ukraine has never ratified the relevant agreements, the exchange of investigative information took place on the basis of the Cabinet of Ministers of Ukraine resolution. After its cancellation, the concept of interstate search remained in the Criminal Procedure Code, and it would be relevant to interpret it as broadly as possible. Given the dysfunction of international search during the war, interstate cooperation could become an effective mechanism. At the same time Interpol, as a database covering more than 190 countries, would greatly facilitate this task.

International protection mechanism

The right to a fair trial is a part of customary international human rights law and customary international humanitarian law. State-to-state relations continue to be based on the concept of national sovereignty and the uneven distribution of political and military power. International judicial bodies will always be limited to resolving a small number of major cases, while most cases will be heard by local courts or extrajudicial bodies aimed at ensuring justice and reconciliation. International mechanisms should normally play a complementary and supportive

53 'Важке питання: чи дістане Україна військових злочинців РФ з-за кордону' (*Кореспондент.net*, 20 грудня 2023) <https://ua.korrespondent.net/articles/4649639-vazhke-pytannia-chy-distane-ukraina-viiskovykh-zlochyntsiv-rf-z-za-kordonu> accessed 19 October 2024.

54 'Від знання та розуміння практики ЄСПЛ залежить те, наскільки впевнено ми наближатимемо нашу правову систему до європейських стандартів – Голова ВС' (*Верховний Суд України,* 22 квітня 2024) <https://supreme.court.gov.ua/supreme/pres-centr/news/1593606/?fbclid=IwZXh0bgNhZW0CMTAAAR29ihOSmVKukuABAI_OwwCLfgzv8fMwUpsvxZkmDH2auE988nkilXZTkz4_aem_AfW1pVxhHmCxLqctJzXOtPvgXxTPe_Ah6eU_g5x2h_tzAJqJJJ3HDCmUwncyuF7AAcmxtN3mDfm6kGitkpJbnOhh> accessed 19 October 2024.

55 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine (1 April–25 June 2022)' (n 45) 113.

56 European Union, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Article 2(2) <http://data.europa.eu/eli/dec_framw/2002/584/oj> accessed 19 October 2024.

role and should only be activated when national mechanisms are not functioning effectively. Different judicial institutions complement rather than compete with each other.[57] There is an opinion that the ICC, 'namely providing the supranational judicial intervention into cases of transitional justice, should take better account of prevailing efforts towards justice of different sorts and levels, particularly at the domestic level'.[58] 'Often when we think of the interaction between human rights and transitional justice, we are concerned with looking at attempts to deal with the human rights violations of the previous regime'.[59] The term *transitional justice* is widely used in the Ukrainian perspective, namely from communist totalitarianism to democracy (within the third wave of democratisation in Eastern Europe), or from war to peace, we come across institutional challenges and decisions.

International, foreign, and domestic human rights trials are all part of an interrelated trend that Kathryn Sikkink has called 'the justice cascade'.[60] It is presumed to be 'nested in a larger norm cascade around accountability for past human rights violations. Since the 1980s, states have not just been initiating trials; they have also been using multiple mechanisms increasingly, including truth commissions, reparations, lustration or vetting, museums and other memory sites, archives, and oral history projects to address former human rights violations'.[61] This 'system is decentralised because there is no single international court or agency deciding who should be prosecuted, yet it is interactive because decisions made at one level have effects on other levels. Even the International Criminal Court (ICC) is doing only a small part of the work of enforcement. Decisions about whom to prosecute are made in hundreds of different courts around the world, most of them domestic courts'.[62] 'The doctrine of complementarity in the ICC can be seen as a broader expression of the model in which the primary institutions for enforcement are domestic criminal courts and the ICC and foreign courts are the backup institutions or the last resort when the main model of domestic enforcement fails'.[63]

A need for justice to be achieved

The 'very existence of international criminal jurisdictions introduces the paradigm of resolving conflicts by restoring to justice, due process and law'.[64] All the

57 Н. Мельцер, *Міжнародне гуманітарне право: Загальний курс* (Міжнародний Комітет Червоного Хреста 2020) 330, 334 <https://blogs.icrc.org/ua/wp-content/uploads/sites/98/2021/05/4231_154-.pdf> accessed 19 October 2024.

58 R. Teitel, 'Transitional Justice and Judicial Activism a Right to Accountability' (2015) 48(2) *Cornell International Law Journal* 385–422, 417.

59 J.A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge 2012) 25–26.

60 K. Sikkink and H.J. Kim, 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations' (2013) 9 *Annual Review of Law and Social Science* 269–85.

61 ibid 270.

62 ibid 272.

63 ibid.

64 Meron (n 40) 342.

mechanisms (universal, international, non-government) act as 'a safety net to domestic national law and in most cases, it must be demonstrated that national courts and systems have failed or been unable to address alleged wrongs before many of these mechanisms can be invoked'.[65] In particular, under the Rome Statute 'unwillingness' or 'inability' of the national state to prosecute becomes the basis for possible ICC admissibility.[66] However, it is different in the Ukrainian case: the scale of human rights violations in the middle of Europe is such that it is vital to emphasise the position of the international community and to guarantee the prosecution of higher state individuals in particular, overcoming personal immunity and state sovereignty.

'It is hoped that such a forum, with as wide international support as possible, will make 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'.[67] 'This is exactly what Ukraine aims for the potential aggression trial to do: 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 the Russian society'.[68] 'The "right to truth" was grounded in the obligation of customary international law to provide an effective remedy for human rights violations. It was considered in the Inter-American context as indivisible from human rights obligations relating to effective remedies for human rights violations, access to courts and judicial protection, fair trial, recognition as a person before the courts and access to information'.[69] 'Peace without the acknowledgment of the human and material costs of war is a kind of peace without justice. . . . Cessation of violence is the first step, but certainly not the last. It is the process of restitution of cultural, personal, historical, ideological, and societal integrity that defines real peace'.[70] 'A sound coordination of the multiple national and international accountability initiatives in Ukraine is key to guarantee strict adherence to relevant standards for the collection of evidence and for its use in judicial processes that satisfy due process guarantees'.[71] In a victim-centred

65 D. Groome, *The Handbook of Human Rights Investigation: A Comprehensive Guide to the Investigation and Documentation of Violent Human Rights Abuses* (Human Rights Press 2011) 18.

66 'Rome Statute of the International Criminal Court' (*Rome Statute,* 17 July 1998) <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf> accessed 19 October 2024.

67 K. Busol, 'Russia's Aggression Against Ukraine and the Idealised Symbolism of Nuremberg' (*EJIL:Talk!* 16 June 2022) <https://www.ejiltalk.org/21022-2/> accessed 19 October 2024.

68 ibid.

69 *Ukraine and the Netherlands v Russia* (n 38) para 931.

70 G.E. Schafft, 'The Ethical Dimensions of Peace' in B.R. Johnston and S. Slyomovics (eds), *Waging War, Making Peace: Reparations and Human Rights* (Routledge 2008) 31–56, 33.

71 'Report of the Independent International Commission of Inquiry on Ukraine, Submitted in Accordance with Paragraph 11 (f) of Human Rights Council Resolution 49/1, on the Situation of Human Rights in Ukraine Stemming from the Russian Aggression' (*A/77/533 Advance Unedited Version,* 18 October 2022) para 112 <https://www.ohchr.org/sites/default/files/2022-10/A-77-533-AUV-EN.pdf> accessed 19 October 2024.

way, other forms of accountability 'supplement criminal accountability, including measures of recognition, reparation, rehabilitation, reconstruction, and importantly guarantees of non-repetition'.[72] This is not solely a legal issue, but also a mental and moral cornerstone for Ukrainian society.

The overlap of international human rights law and international humanitarian law (human rights of civilians)

'While under IHRL every violent death has to be investigated for the right to life to be respected, under IHL this is only necessary when a reasonable suspicion exists that a war crime has been committed'.[73] The fundamental difference that remains even in areas of overlap is that 'human rights law examines the actions of the state towards its subjects and international criminal law examines the conduct of individuals. In cases in which the individual is acting on behalf of the state both areas of law can be directly implicated. An experienced investigator will be cognizant of the applicability of both areas of law as well as the applicability of domestic national law' when engaged in their work.[74] 'International human rights law and international humanitarian law both seek to protect individuals'.[75] 'The most culpable are the ones prosecuted under international criminal law – commanders, military leaders and those who give the orders or hatch the plans for war crimes. Otherwise, the international criminal courts and tribunals would be overflowing with prosecutions. The idea is that soldiers and others who commit crimes on the ground will be prosecuted and punished at the national level. But those who bear the most responsibility, who shoulder the most blame will be tried as criminals at the international level. This ensures that justice is seen to be done, and that corruption cannot occur within national courts in countries where many war criminals still have supporters'.[76]

As Mary Kaldor notes, the 'pattern of violence in the new type of warfare is confirmed by the statistics of the new wars. The tendency to avoid battle and to direct most violence against civilians is evidenced by the dramatic increase in the ratio of civilian to military casualties'.[77] 'The growing array of agencies, institutions, and courts that invoke human rights in war tend to be pragmatic as well. The greater the disparity of power and risk between soldiers and civilians, the more these bodies tend to emphasize the human rights of civilians as against the war rights of belligerents'.[78] Some of the violations of IHRL in Ukraine are likely to amount to crimes against humanity. The OSCE mission found credible evidence suggesting that at least some patterns of violent acts, which had been repeatedly documented

72 ibid para 115.

73 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022' (n 33) 87.

74 Groome (n 65) 17.

75 R. Freedman, *Failing to Protect: The UN and the Politicization of Human Rights* (OUP 2015) 28.

76 ibid 30.

77 M. Kaldor, *New and Old Wars* (Polity Press 2012) 106.

78 T.W. Smith, *Human Rights and War Through Civilian Eyes* (U of Pennsylvania P 2016) 15.

during the conflict, qualified as a widespread or systematic attack against a civilian population.[79] Previously, the justice system of Ukraine mainly focused on bringing the criminal to justice; now, when most cases are judged in the absence of the accused, the focus is on the protection and support of victims.

'Traditionally, human rights were the law of peace and IHL was the law of war; that dichotomy is fading fast'.[80] 'Human rights do not have free range in war. Even core rights are filtered through IHL'.[81] 'Sceptics will say that trying to leverage human rights in a battle zone is naïve or even reckless. Human rights activists are often accused of overreaching'.[82] Thus, international human rights law implies the states responsibility, whilst international humanitarian law implies the individual responsibility with the overcoming of personal immunity.

State sovereignty and personal immunity

'Designing a system of universal accountability on human rights issues has been a seemingly intractable problem, primarily because such accountability can, in some cases, be a direct infringement on the sovereignty of individual states'.[83] 'The International Criminal Court has been heralded as a new way forward to prosecuting international criminals, but the main problem is that states are not required to submit to the Court's jurisdiction. It all comes back again to state sovereignty, and a country's right to choose the laws and legal mechanisms by which it is bound'.[84] 'The Court's arrest warrants seem little more than an exercise in public relations. . . . Even where mechanisms for protecting individuals and punishing abusers under international law exist a lot still depends on state sovereignty and international politics'.[85] 'Despite the availability of some courts, tribunals or other bodies for adjudicating on alleged violations of the law, enforcement remains a key problem'.[86] The lack of enforcement mechanisms means that the system relies upon international relations and diplomatic processes. 'In terms of international human rights law, one main problem for enforcement – and indeed for individuals' certainty about their rights – is that the vast majority of the obligations are not universally binding and there are many variations in terms of which states are bound by which laws. Enforcement, then, becomes a difficult and complex diplomatic game'.[87]

The Rome statute gives the ICC the authority to hold individuals responsible for the defined crimes and does not recognise immunity for heads of state.[88]

79 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine (1 April–25 June 2022)' (n 45) 87.
80 Smith (n 78) 7.
81 ibid 11.
82 ibid 14.
83 Groome (n 65) 28.
84 Freedman (n 75) 30.
85 ibid 31.
86 ibid 34.
87 ibid 34–35.
88 Groome (n 65) 27.

Senior political leaders have personal functional immunity before domestic courts, at least as long as they are in office. However, this does not prevent from investigating crimes and gathering evidence for trial at a later date.

ECtHR

Human rights courts have been judging the conduct of war for half a century. The ECtHR has adjudicated hundreds of combat and occupation cases, all stemming from 'intractable' ethnic, separatist or insurgent conflicts: Northern Ireland, Cyprus, Turkey, Chechnya, Armenia and Azerbaijan.[89] More than 3,000 petitions arising from the 2008 South Ossetia war have been lodged with the Court. 'The ECtHR tends to apply human rights law directly to the conduct of war, scarcely mentioning IHL at all'.[90] However, for the first time in its history the Court has been flooded with applications due to the international military conflict that is currently taking place in Europe.

The ECtHR has recognised that international human rights systems are subsidiary to domestic systems.[91] National courts, on the other hand, have to ensure that human rights are respected in their countries. According to Mykola Hnatovsky, the current ECtHR judge from Ukraine, this Court has always supported the principle that the best solution to problems occurs at the place of their occurrence.[92] This requires cooperation between the judiciary and the legislature and would significantly reduce the workload of the courts and restore public confidence.[93]

The Russian Federation ceased to be a High Contracting Party to the European Convention on Human Rights. Though the Court remains competent to deal with applications directed against it in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred until 16 September 2022.[94] Aside from the case of *Ukraine and the Netherlands v Russia*,[95] currently there are four other *Ukraine v Russia* inter-State applications and over 8,500 individual applications pending before the Court concerning the events in the Crimea, eastern Ukraine, the Sea of Azov and the armed attack which began in February 2022.[96]

89 Smith (n 78) 15–16.

90 Smith (n 78).

91 Teitel (n 58) 415.

92 'Про значення судової влади під час війни та післявоєнної відбудови: учасники міжнародної конференції обговорюють важливі питання сьогодення' (*Верховний Суд України,* 9 грудня 2023) <https://supreme.court.gov.ua/supreme/pres-centr/news/1523848/> accessed 19 October 2024.

93 ibid.

94 'Resolution on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in Light of Article 58 of the European Convention on Human Rights' (ECHR, 22 March 2022) <http://www.echr.coe.int/documents/d/echr/Resolution_ECHR_cessation_membership_Russia_CoE_ENG> accessed 19 October 2024.

95 *Ukraine and the Netherlands v Russia* (n 38) 396, 472.

96 Press Release, Decisions on Admissibility, 'Grand Chamber Decision *Ukraine and the Netherlands v Russia* – Flight MH17 and Eastern-Ukraine-Conflict Case Partially Admissible, Will Proceed to Judgment' (ECHR, 25 January 2023) <https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7550165-10372782%22]}> accessed 19 October 2024.

Inter-State cases brought by Ukraine against Russia (most of them currently pending before the Court) are: the case of *Ukraine v Russia (re Crimea)*;[97] the abovementioned *Ukraine and the Netherlands v Russia* concerning complaints related to the conflict in eastern Ukraine involving pro-Russian separatists which began in 2014, including the downing of Malaysia Airlines Flight MH17; *Ukraine v Russia (VIII)*,[98] concerning a naval incident which took place on 25 November 2018 at the Kerch Strait, which connects the Black Sea to the Sea of Azov, and the allegedly unlawful seizure and detention of the Ukrainian crew members by the Russian authorities; *Ukraine v Russia (IX)*[99] concerning the Ukrainian Government's allegations of an ongoing administrative practice by the Russian Federation consisting of targeted assassination operations against perceived opponents, in Russia and in the territory of other States;[100] and *Ukraine v Russia (X)*[101] concerning the Ukrainian Government's allegations of mass and gross human rights violations committed by the Russian Federation in its military operations on the territory of Ukraine since 24 February 2022. Twenty-three Governments and one non-governmental organisation, the Geneva Academy of International Humanitarian Law and Human Rights, have requested leave to intervene as third parties in the proceedings concerning this case. On 17 February 2023 the Grand Chamber decided to join this application to the inter-State applications in *Ukraine and the Netherlands v Russia*, which was already pending before, and which was declared partially admissible on 30 November 2022 in a decision that was delivered on 25 January 2023.

There was an attempt to use the ECtHR mechanism by the Russian Federation as well. The Court, unanimously, decided to strike this application out of its list of cases.[102] Thus, it can be assumed that the aggressor state, for its part, is methodically documenting signs of alleged violations and has attempted to apply to the ECtHR. International missions have repeatedly drawn attention to the tendency to document and investigate only violations by the other side.[103] Violations committed

97 *Ukraine v Russia (re Crimea)* Apps nos 20958/14 and 38334/18 (ECHR, 25 June 2024) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–234982%22]}> accessed 19 October 2024.

98 *Ukraine v Russia (VIII)* App no 55855/18 (ECHR, lodged 28 November 2018, published 23 October 2023).

99 *Ukraine v Russia (IX)* App no 10691/21 (ECHR, 19 February 2021).

100 See J. Batura and I. Risini, 'Of Parties, Third Parties, and Treaty Interpretation: Ukraine v Russia (X) Before the European Court of Human Rights' (*EJIL:Talk!* 26 September 2022) <https://www.ejiltalk.org/of-parties-third-parties-and-treaty-interpretation-ukraine-v-russia-x-before-the-european-court-of-human-rights/> accessed 19 October 2024.

101 *Ukraine v Russia (X)* App no 11055/22 (ECHR) <https://hudoc.echr.coe.int/eng-press?i=003-7442168-10192988> accessed 19 October 2024.

102 *Russia v Ukraine* App no 36958/21 (ECHR, 18 July 2023) <https://hudoc.echr.coe.int/eng?i=001–226077> accessed 19 October 2024.

103 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022' (n 33) 4 'Right to a Fair Trial'; 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine (1 April–25 June 2022)' (n 45) 2 'Individual Criminal Responsibility'; Report 'Detention of Civilians . . .' (n 8) 143.

by its own citizens are usually hushed up in order to preserve the image of the state. Though according to the Western understanding of the principles of justice and impartiality lies in objectivity, which, on the contrary, ultimately forms the appropriate legal democratic image.

In the case of *Ukraine and the Netherlands v Russia*, the ECtHR declared admissible the complaints for violation of the following human rights:[104] right to life (consisting of unlawful military attacks against civilians and civilian objects); prohibition of torture (torture of civilians and Ukrainian soldiers, inhuman and degrading detention conditions); prohibition of forced labour; right to liberty and security (consisting of abductions, unlawful arrests and lengthy unlawful detentions); freedom of thought, conscience and religion (deliberate attacks on and intimidation of various religious congregations); freedom of expression (targeting independent journalists and blocking Ukrainian broadcasters); protection of property (private property destruction including civilian homes and vehicles, the theft and looting of private and commercial property, and the unlawful appropriation of private property without compensation); right to education (prohibition of education in the Ukrainian language); and prohibition of discrimination (targeting civilians of Ukrainian ethnicity or citizens who supported Ukrainian territorial integrity). The remaining complaints of administrative practices were declared inadmissible; it was indicated that the Ukrainian government had provided insufficient evidence and testimony regarding their violations. These included freedom of assembly and association (the Ukrainian Government stated that membership of political organisations supporting Ukrainian territorial integrity was violently suppressed by the armed groups) and the right to free elections (the right to free and fair elections in the territory under the control of Russia's paramilitary proxies has been comprehensively disrupted) as, for example, local citizens were prevented from voting in the Ukrainian presidential elections through acts of intimidation and violence.[105]

Over the course of its half-century history, the European Court has repeatedly considered cases related to warfare without referring to IHL, but rather using IHRL. It is clear that there is no mechanism to enforce its judgments, yet states and individuals still turn to the authority of its jurisdiction. In fact, this seems to be not so much an immanent feature of the normative concept of law, but rather the philosophy of common law principles.

Other institutional options

There are different views on the merits of establishing a Special Tribunal for Aggression against Ukraine. Its critiques write that 'unlike other international crimes the crime of aggression focuses on decisions that are taken and plans that are made behind closed doors, not actions on the battlefield . . . Russia would obviously refuse to cooperate with a Special Tribunal' when the war ends, and 'the only

104 *Ukraine and the Netherlands v Russia* (n 38) 889–90.
105 ibid 373.

avenue that would exist for enforcing its cooperation, the Security Council, would be of no use' due to Russia's permanent veto. 'Given these considerations, it is difficult to see why the international community should create the Special Tribunal. One possible answer is that such a tribunal would send a powerful message to Russia and other would-be-aggressors that the international community will not tolerate aggression'. The most significant contribution of the Special Tribunal, from their point of view, would be the message its establishment would send about the 'selectivity of international criminal justice'.[106]

The first OSCE ODIHR mission of experts during the war, established under the Moscow Mechanism, emphasised the importance of ensuring accountability for IHL and human rights violations, war crimes and crimes against humanity, states that the 'impartial, independent and reliable establishment of facts by a neutral, legitimate body greatly contributes to ensuring better respect of IHL and IHRL. It is the necessary basis to ensure individual accountability and state responsibility. It allows Ukrainians and Russians, including future generations, to know the truth. It also serves to prevent or suppress rumours, perceptions or propaganda that IHL is always violated (at least by the respective adversary), all of which has led to further violations in the past. Such fact-finding also provides third States with reliable information on the situation, allowing them to make appropriate decisions in light of their aforementioned obligations to ensure respect of IHL'.[107]

'The International Criminal Court (ICC) is fundamentally a human rights court. The Rome Treaty applies whether violations are committed in international or domestic conflicts, during humanitarian or non-humanitarian missions, or even during peacetime; no nexus with war is required. These courts have internalized much of the language and many of the assumptions of rights'.[108] 'If human rights locate justice in the universal sphere, the law of war drags it back into the national orbit of interests and strategy'.[109] At the same time, the ICC has always been 'criticized for picking low-hanging fruit'.[110] This is a moment to agree that in such a severe and lengthening in time European (and potentially world) war, one country or institution is not capable to return justice in place. The complexity and scale of human rights violations entails the strong need of multilevel and structural efforts to review and restore the legal order.

Fiona Hill calls this war 'an epic struggle of democracies versus autocracies'; because of its 'size and location, Ukraine is a multi-regional state'.[111] Judge Theodor

106 K.J. 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 October 2024.

107 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 February 2022' (n 33) 89.

108 Smith (n 78) 18.

109 ibid 44.

110 ibid 176.

111 'Lennart Meri Lecture 2023 by Fiona Hill' (*Lennart Meri Conference*, 23 May 2023) <https://lmc.icds.ee/lennart-meri-lecture-by-fiona-hill/> accessed 19 October 2024.

Meron, who served as the president of the International Criminal Tribunal for the former Yugoslavia, points out that one of the reasons for the accountability gap is 'undoubtedly political. Whether at the national, regional or international level political decisions often dictate when accountability efforts are undertaken – and when they are not. States may prioritize the self-interest of senior officials and alliances among governments over adherence to other principles'.[112] Mary Kaldor emphasises that precisely 'because the new wars are a social condition that arise as the formal political economy withers, they are very difficult to end'.[113] The modern warfare applies 'rational thinking to the aims of war and refuse normative constraints'.[114] If 'governments respected human rights, they would not go to war'.[115] The ECtHR defends human rights from both democratic and authoritarian countries. It is obvious that court decisions made without the accused party recognising the jurisdiction of the ECtHR and international arrest warrants are part of public relations, but at the same time a proper process for confirming common values. Nowadays it is difficult to imagine their practical implementation yet even more difficult to abandon them.

In conclusion

The international community has developed the most detailed legal regulation of a treaty and customary nature in history. However, an aggressor in a military conflict is an aggressor only if it completely disregards the norms of international (humanitarian) law. Therefore, the requirements for respectful treatment of hostages, avoidance of indiscriminate (and thus most 'effective' and 'efficient') weapons, prohibition of terrorising civilians would look formal if the consequences of their neglect were not so dire. The superpowers do not fear the authority of international institutions, disregarding 'grave concerns' and 'cease and desist' orders. This leads to populist statements that the institutions of the international community have proved ineffective and discredited themselves. At the same time, the international community, for its part, can only act through legal conventional methods, relying on the advantage of political and economic expediency to end the war through diplomatic means, and bring the perpetrators to justice without a statute of limitations – to establish the truth, restore justice and promote reconciliation – that is, to restore the rule of law.

Finally, along with war crimes accusations by the ICC and/or a future special tribunal, common regional justice mechanisms (ECtHR), inter-State agreements in this sphere and corresponding domestic legal guarantees are the system to empower accountability and justice.

112 Meron (n 40) 313.
113 Kaldor (n 77) 118.
114 ibid 106.
115 E.A. Posner, *The Twilight of Human Rights Law* (OUP 2014) 123.

3 Sanctions, countermeasures, and responding to Russia's invasion of Ukraine

Patrick Butchard[1]

Introduction

Russia's invasion of Ukraine has marked a notable shift in the use of sanctions as a tool of foreign policy, particularly between "Western"-aligned states. While the use of sanctions has been increasing steadily in recent years, and notably since Russia's first invasion of Ukraine in 2014, the full-scale attack by Russia from February 2022 has ignited a much more robust approach to sanctions than we have seen before. While sanctions have long been a tool of foreign policy, the response to Russia's actions has been marked by an unprecedented scale and coordination, particularly among Western-aligned states. This situation has not only tested the boundaries of existing legal frameworks but has also highlighted the divergent perspectives on the legality and legitimacy of sanctions, particularly when employed outside of UN Security Council authorisation.

One of the most contentious issues arising from the Ukraine conflict is the proposition of seizing sovereign assets as a form of sanction. This has reignited debates on the legal basis of sanctions and the applicability of principles such as non-intervention and state immunity.[2] The lack of a clear consensus on these fundamental principles underscores the need for a comprehensive examination of the legal and policy implications of sanctions, especially in light of their increasing prominence in international relations.

This chapter aims to analyse this legal framework, focusing on the challenges posed by the recent initiatives aimed at seizing Russian assets. It will explore the existing legal frameworks governing the principle of non-intervention and the doctrine of countermeasures, and assess how these frameworks apply to the novel

1 This chapter builds upon work completed for the House of Commons Library in the UK Parliament, but is written in a purely academic capacity. See Patrick Butchard, 'Sanctions, International Law, and Seizing Russian Assets' House of Commons Library Research Briefing CBP-10034 <https://commonslibrary.parliament.uk/research-briefings/cbp-10034/>. All websites accessed 28 February 2025. Contains Parliamentary information licensed under the Open Parliament Licence v3.0.

2 The issues relating to state immunity are beyond the scope of this chapter, which focuses specifically on the impact of these developments on the principle of non-intervention and the doctrine of countermeasures.

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approaches adopted in response to the Ukraine crisis. The chapter also aims to shed light on the divergent legal positions amongst states and the potential implications of the current trends in sanctions for the future of international law and relations.

An uncertain legal basis of sanctions

Unfriendly or coercive: the spectrum of sanctions

Sanctions taken outside of the UN peace and security framework do not have a definitive legal basis in international law. In fact, there is even some disagreement as to whether using sanctions even needs a legal basis in the first place. But the reality of the situation is that the legality of sanctions, and whether a legal justification is required, largely depends on the type of sanction adopted in the first place. This is because the term *sanction* refers to numerous types of measures that can vary in their coercive nature.[3]

Some measures may simply amount to unfriendly, but not illegal, acts or retorsion. The International Law Commission describes acts of retorsion as " 'unfriendly' conduct which is not inconsistent with any international obligation of the State engaging in it"[4] and "may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes".[5]

On the other hand, certain measures may engage a range of international legal obligations that require further justification before the sanction can be considered lawful in international law. Much has been written elsewhere about the many forms of sanctions – whether in the form of travel bans, asset freezes, trade restrictions, or otherwise – and how corresponding obligations might be infringed under World Trade Association (WTO) law, International Monetary Fund rules, bilateral investment treaties, or other international legal obligations.[6]

But this chapter focuses on the legal boundaries of these measures in light of the principle of non-intervention and the doctrine of countermeasures, and how the responses to Russia's invasion of Ukraine are further revealing where those boundaries might be. One of the primary issues that comes up in that regard is how international law does or does not restrict the ability of states to take sanctions under the general prohibition of non-intervention. The following section addresses

3 See, for example, Tom Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2016) as published at SSRN <https://ssrn.com/abstract=2760853 or http://dx.doi.org/10.2139/ssrn.2760853>.

4 International Law Commission, 'Draft Articles on the Responsibility of International Organisations, with Commentaries' <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf> accessed 1 January 2025; also included in ILC, 'Report of the International Law Commission on the Work of Its Sixty-Third Session' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, at 128, para 3.

5 ibid.

6 See, for example, Ruys, 'Sanctions, Retorsions and Countermeasures' (n 3) 10–11; see also in Butchard, 'Sanctions, International Law, and Seizing Russian Assets' (n 1) sections 3–4.

the clear divide that exists between developed and developing states over the use of sanctions, and how this impacts the legal framework in which we find these types of measures. As will be discussed in section 3, the response to Russia's invasion of Ukraine not only pushes the boundaries of that divide further but also reveals some areas of the legal framework that are in need of clarification or compromise.

Divergent legal positions at the UN

While there is no clear consensus on an autonomous legal rule in customary international law covering unilateral sanctions, there is certainly evidence of division in the international community about their use. The clearest evidence for this divide is at the UN General Assembly where, since 1983,[7] the Assembly has adopted numerous Resolutions on unilateral sanctions in many different forms and contexts.[8] While there is clearly nuance between those Resolutions to be unpacked, a common theme across those Resolutions is the fact that a significant number of developing states are critical of the use and legality of unilateral sanctions in general.

Specifically, one series of Resolutions has generally tended to criticise the use of unilateral economic measures against developing states but has also tended to broadly endorse the principle that "no State may use of encourage the use of economic, political or any other type of measures" to coerce another state in order to subordinate the exercise of that state's sovereign rights.[9] As detailed below, this is connected to the principle of non-intervention.[10] The Resolutions have also explicitly condemned, or called on the international community to condemn and reject "the imposition of unilateral coercive economic measures that are inconsistent with the principles of international law and the Charter of the United Nations".[11] They have also condemned measures "which are not authorised by the relevant organs of the United Nations" "and which contravene the basic principles of the multilateral trading system".[12]

7 UNGA Res 38/197, 'Economic Measures as a Means of Political and Economic Coercion Against Developing Countries' (20 December 1983) UN Doc A/RES/38/197.

8 See UNGA Resolutions titled 'Economic Measures as a Means of Political and Economic Coercion Against Developing Countries' (1983–96) or 'Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries' (1998–2023). Further in-depth analysis of these resolutions has been outlined in A. Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention' (2017) 16 *Chinese Journal of International Law* 17 – who also examines the regular Resolutions of the General Assembly on "Human rights and unilateral coercive measures"; Patrick Butchard, *The Responsibility to Protect and the Failures of the UN Security Council* (Hart 2020) 131–41; Butchard, 'Sanctions, International Law, and Seizing Russian Assets' (n 1) section 2.

9 See, for example, UNGA Res 39/210, (18 December 1984) UN Doc A/RES/39/210, preamble; UNGA Res 40/185, (17 December 1985) UN Doc A/RES/40/185, preamble; and more recently UNGA Res 76/191, (10 January 2022) UN Doc A/RES/76/191, preamble; UNGA Res 78/135, (21 December 2023) UN Doc A/RES/78/135, preamble.

10 See below, section 2.3.

11 See for example, UNGA Res 78/135, (21 December 2023) UN Doc A/RES/78/135, para [6].

12 See for example, UNGA Res 52/181, (18 December 1997) UN Doc A/RES/52/181, para [2]. A full list of these resolutions is included in Butchard, 'Sanctions, International Law, and Seizing Russian Assets' (n 1) Annex A.

As summarised by this author in a UK House of Commons Library Research Briefing, the voting records indicate not only a lack of consensus but also a real divide between states on the use of "unilateral economic" or "unilateral coercive" measures against developing states.[13]

From 1983 to 1995, between 115 and 128 states would vote in favour of these Resolutions, made up mainly of developing countries and non-aligned states.[14] A group of between 19 and 32 mostly Western or Western-aligned states would vote against, with a similar number absent from voting and a handful abstaining in the vote. From 1997, there was a noticeable shift of states from voting against to abstaining, leaving only the US voting against, joined on occasion by Israel and one or two other states.[15] Then, in 2021 and 2023, six and then eight states voted against the text, with the UK for example switching to voting against after abstaining in previous years.[16]

This pattern of votes, while demonstrating a majority of states in favour of restricting unilateral coercive measures, might not be enough to demonstrate that a rule prohibiting unilateral coercive measures exists in customary international law. But it also is not enough to demonstrate the opposite, either – that unilateral coercive measures are permitted in general terms in international law. As outlined below, it seems that states are too divided on the issue to demonstrate a position either way. For that reason, the reality of the law may be hidden in the nuance of the debates and reports linked to these Resolutions.

In the substance of the debates surrounding these Resolutions, the focus tends to be on the wider legitimacy of unilateral coercive measures in general terms, rather than revealing states' positions on the precise legal framework that applies.[17] The US's consistent position of voting against the Resolutions, for example, was based on the argument that each state has "the right to decide with which other states it would engage in commerce" and that, if a state decides to limit its economic relations with any other state, then "such action was not a coercive measure: it was the exercise of a sovereign right".[18]

While EU states tended to abstain from supporting the Resolutions, their statements in the second committee did show a more nuanced position, highlighted

13 Butchard, 'Sanctions, International Law, and Seizing Russian Assets' (n 1) sections 2.2–2.4 and Table 1.

14 ibid.

15 ibid.

16 ibid.

17 Hofer (n 8) at paras [19]–[28], provides a thorough overview of the debates in the UNGA Second Committee on these Resolutions, as well as the debates during the drafting of Resolutions relating to "human rights and unilateral coercive measures". An overview of more recent positions on Resolutions relating to measures against developing states is outlined in Butchard, 'Sanctions, International Law, and Seizing Russian Assets' (n 5) sections 2.2–2.4.

18 See, for example, UN General Assembly, Second Committee, Summary Record of the 47th Meeting (52nd Session), (4 December 1997) UN Doc A/C.2/52/SR.47, para [15]; see also, for example, UN General Assembly, Second Committee, Summary Record of the 36th Meeting (68th Session), (9 December 2013) UN Doc A/C.2/68/SR.36, para [8].

particularly form 2007, there the state speaking on behalf of the EU stated that unilateral measures should respect international law, but are permissible in certain circumstances:

> unilateral economic measures should respect the principles of international law, including the international contractual obligations of the State applying them and the rules of the World Trade Organization, where applicable.
>
> The European Union [considers] that such unilateral economic measures were admissible in certain circumstances, in particular when necessary in order to fight terrorism and the proliferation of weapons of mass destruction, or to uphold respect for human rights, democracy, the rule of law and good governance. The European Union [is] committed to using sanctions as part of an integrated, comprehensive policy approach including political dialogue, incentives, conditionality and even, as a last resort, coercive measures in accordance with the United Nations Charter.[19]

But there were also statements opposing unilateral economic measures altogether. For example, in 2012, Mexico explained its support for the Resolution, explaining that unilateral economic measures have "serious humanitarian consequences" and have "no basis in the Charter of the United Nations and violated international law".[20] Mexico argued:

> Sanctions, whether political, economic or military, must be imposed only in pursuance of decisions or recommendations of the Security Council or the General Assembly, not through the extraterritorial application of national laws.[21]

In 2019, a notable number of states spoke in the Second Committee in much clearer terms about their views that unilateral economic measures could undermine international law, or were outright illegal.[22] For instance, Russia said that they "ran counter to international law";[23] Zimbabwe said that "in total disregard of the principles of the Charter of the United Nations, certain Western powers frequently resorted to the imposition of illegal unilateral coercive measures, economic

19 UN General Assembly, Second Committee, Summary Record of the 28th Meeting (62nd Session), (24 December 2007) UN Doc A/C.2/62/SR.28, paras [29]–[30]. See also, for example, UN General Assembly, Second Committee, Summary Record of the 41st Meeting (64th Session), (17 March 2010) UN Doc A/C.2/64/SR.41, para [10].

20 UN General Assembly, Second Committee, Summary Record of the 37th Meeting (66th Session), (15 February 2012) UN Doc A/C.2/66/SR.37, para [3].

21 ibid.

22 UN General Assembly, Second Committee, Summary Record of the 23rd Meeting (74th Session), (16 December 2019), UN Doc A/C.2/74/SR.23.

23 ibid para [32].

blockades and financial sanctions against other countries";[24] and China said "the imposition of unilateral coercive economic measures against developing countries undermined the principles and purposes of the Charter of the United Nations, the norms governing international relations and the efforts of the affected countries to advance social and economic development".[25]

In 2021, six states voted against the Resolution – the highest vote against since 1997, and the debates in the Second Committee were notably even more polarised and divisive than previously.[26] In the Second Committee, the UK (also speaking on behalf of Australia, Canada, and Ukraine) explained:

> sanctions [are] a legitimate tool to preserve peace and the rule of law, uphold human rights and strengthen international security. Their delegations had voted against the draft resolution after many years of abstaining.
>
> . . .
>
> Australia, Canada, Ukraine and the United Kingdom imposed carefully targeted and proportionate sanctions designed to prevent serious human rights violations, weapons proliferation, terrorism and other situations of international concern. They were transparent, allowed for due process protections and were neither inconsistent nor in conflict with the Charter of the United Nations.[27]

Following Russia's full-scale invasion of Ukraine in February 2022, the 2023 iteration of the Second Committee debate further demonstrated the divisions between states on this issue.[28] During the Second Committee debate on the draft, the EU had proposed amendments to this iteration of the resolution, and one of these sought to include a paragraph acknowledging the usefulness of targeted sanctions by recognising:

> restrictive measures that are legal, targeted and in line with international law and the UN Charter are a useful non-military response to grave violations of international law and crimes against humanity.[29]

But this was rejected by a majority of states by a vote of 48 in favour to 120 against.[30] Breaking from the EU position of abstaining, Lithuania voted

24 ibid para [36].
25 ibid para [37].
26 UN General Assembly, Second Committee, Summary Record o the 10th Meeting, (3 February 2022) UN Doc A/C.2/76/SR.10.
27 ibid para [19].
28 UN General Assembly, Second Committee, Summary Record of the 24th Meeting, (19 January 2024) UN Doc A/C.2/78/SR.24.
29 UN General Assembly, Second Committee, Spain/EU amendment 1 to Draft Resolution A/C.2/78/L.6/Rev.1, (20 November 202), UN Doc A/C.2/78/CRP.2.
30 Second Committee, Summary Record of the 24th Meeting (n 28) paras [2]–[3].

against the Resolution as a whole and specifically addressed the fact that sanctions needed to be imposed on Russia in response to its "illegal war of aggression", arguing:

> Sanctions were an integral part of a broader political strategy and a legitimate tool with which to respond to grave violations of the Charter of the United Nations, and to uphold human rights and the principles of international law. They were a means of fostering international peace, security and democracy, rather than an end in themselves. Those imposed by the European Union, in particular, were targeted and measured, and not used against developing countries.[31]

The UK maintained its stance that the resolution misrepresented sanctions.[32] The UK emphasised:

> Targeted sanctions were one part of a comprehensive and proportionate foreign policy strategy, and were imposed by many Member States, including developing countries and regional bodies. They served to deter and constrain serious human rights violations, breaches of international law, proliferation and the obstruction of peace processes. The Charter of the United Nations provided no blanket prohibition on sanctions applied for such purposes, which could be entirely consistent with the purposes and principles of the Organization. Sanctions imposed by the United Kingdom provided for a range of exceptions, including in relation to medicine, food and humanitarian assistance.[33]

Similarly, the US also reportedly countered that "those who suggest sanctions are inherently unjustified advance a false narrative".[34] The EU, referencing Russia's invasion of Ukraine, advocated for the adoption of sanctions, stating that the EU imposes restrictive measures in response to violations of international law, "such as the unprovoked war of aggression perpetrated by Russia against Ukraine". Without explicitly detailing a legal basis for its sanctions, the EU representative emphasised that the EU's restrictive measures are

> temporary, selective and carefully calibrated to target those responsible for the relevant policies or actions, as well as always being consistent with international law and the Charter of the United Nations. To ensure full compliance with humanitarian principles and international humanitarian law, the

31 ibid para [19].
32 ibid para [21].
33 ibid para [22].
34 UN Meetings Coverage and Press Releases, 'Second Committee Approves 16 Resolutions, Including on Achieving Gender Equality, Eliminating Unauthorized Unilateral Trade Measures' (21 November 2023), Press Release GA/EF/3596.

restrictions imposed by the European Union systematically included humanitarian exceptions.[35]

The EU also made a notable comment that it recognised "that unilateral economic measures could have broader consequences when they [are] applied in a manner incompatible with international law", and "if they were not subject to legal challenge or reversal".[36]

Assessment of the UN Resolutions on unilateral economic measures

Authors have addressed these Resolutions when trying to understand the legal foundations of sanctions in international law. For example, an early assessment of the Resolutions by Elagab in 1988 suggested that "there are no rules of international law which categorically pronounce either on the prima-facie legality or prima-facie illegality of economic coercion".[37] Ruys also highlights this lack of clarity, noting that "one cannot ignore the fact that a majority of the international community has consistently voted in favour" of these Resolutions, but an authoritative answer remains lacking on the legal framework.[38]

In a detailed analysis of the Resolutions, Alexandra Hofer argues that these resolutions do not demonstrate the existence of an autonomous customary rule prohibiting economic coercion,[39] nor even an emerging prohibition.[40] Hofer argues that the required criteria for establishing a new customary norm is not being satisfied by these resolutions, particularly, given the disagreements among the states.[41] On this, Hofer also points to the examples of practice where states use unilateral coercive measures and declare them to be lawful.[42]

Instead, Hofer argues, the resolutions and the debates surrounding them clearly demonstrate a tension between "the aspirations of developing countries to restrict the use of economic coercion, even when their alleged aim is to enforce compliance with essential international norms, and the continuing practice of developed States".[43] In this respect, Hofer argues that the dispute on the legality of economic coercion may also be read as a dispute on the legitimacy of these measures.[44]

35 Second Committee, Summary Record of the 24th Meeting (n 28) paras [27]–[28].
36 ibid.
37 O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Clarendon Press 1988) 212–13.
38 Ruys, 'Sanctions, Retorsions and Countermeasures' (n 3) 24, and see further discussion of Ruys' position below.
39 A. Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention' (2017) 16 *Chinese Journal of International Law* 175, paras [17], [30]–[37].
40 ibid.
41 ibid paras [34], [36].
42 ibid para [34].
43 ibid para [37].
44 ibid.

Russell Buchan points to the relatively consistent abstentions of Western states or regarding the UN General Assembly's resolutions, and the relatively consistent practice of such states in using economic measures unilaterally.[45] On this basis, he argues that "[a] freestanding prohibition on unilateral restrictive economic measures has therefore not crystallised under [customary international law], and the key question is whether they breach the pre-existing . . . principles of non-intervention".[46]

Milanovic similarly suggests that the constant and consistent resort to economic measures by "a substantial number of states . . . would seem to negate any effort to render 'unilateral coercive measures' (as the UNGA calls them) unlawful on the basis of custom".[47]

Barber takes the more nuanced position, recognising an apparent contradiction in the General Assembly both calling for sanctions in some cases by denouncing them in others. She argues that the Resolutions should not be read as indicating that unilateral coercive measures are illegal per se, but that they indicate the illegality of sanctions when "if they either coercively encroach upon a State's *domaine réservé*, and/or fail to respect established principles of due process, negatively impact human rights, apply extraterritorially or amount to a blockade".[48]

The General Assembly's Resolutions have also been (indirectly) addressed by General Court of the Court of Justice of the European Union in *Venezuela v Council of the European Union*,[49] where Venezuela challenged restrictive measures adopted by the European Union. When Venezuela referred to Resolutions of the General Assembly in support of its arguments that these restrictive measures were prohibited in international law,[50] the Court pointed out that these "were adopted with a significant number of negative votes or abstentions, in particular on the part of Member States of the European Union", and therefore that this indicated that they "cannot be considered to reflect 'a general practice accepted as law'".[51] While Venezuela seemed to be relying on this to argue there was a rule requiring restrictive measures to be adopted with the prior authorisation of the UN Security Council, the Court's decision seems to take into account the numbers of abstentions over the two-thirds majority achieved by the outcome of many of the votes. The impact on these Resolutions on the interpretation of the principle of non-intervention or the role of economic coercion was not discussed. Commenting on this case,

45 Russell Buchan, 'Collective and Third-Party Cyber Countermeasures' in N. Tsagourias, R. Buchan and D. Franchini (eds), *The Peaceful Settlement of Inter-State Cyber Disputes* (Hart 2024) 203.

46 ibid.

47 M. Milanovic, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law' (2023) 117 *American Journal of International Law* 601, 604.

48 R. Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (2021) 70 *International and Comparative Law Quarterly* 343, 377. Barber also argues that unilateral sanctions may also be justified as countermeasures in some circumstances, to preclude the wrongfulness certain measures including when there is a breach of the principle of non-intervention by the sanctioning states.

49 Case T-65/18 RENV, *Venezuela v Council of the European Union*, EU:T:2023:529.

50 It is not clear from the judgment itself what specific resolutions Venezuela referred to.

51 *Venezuela v Council of the European Union* (n 49) paras [95]–[98].

Kassoti suggests that the Court "could have probed deeper in order to ensure that the restrictive measures do not violate international law".[52]

While these General Assembly Resolutions may not explicitly identify a specific rule of international law prohibiting unilateral coercive measures, they suggest a broader disagreement regarding the policy and application of these measures. Furthermore, they may reflect differing interpretations of how general principles of international law, such as non-intervention and state sovereignty, apply in this context. Although the resolutions themselves may not definitively resolve the debate surrounding non-intervention, the accompanying Secretary-General Reports, particularly those detailing expert group deliberations, often highlight the principle's relevance. These diverse positions on non-intervention will be elaborated upon in the following section.

Significance of the work of the Secretary-General's expert groups

When the General Assembly Resolutions asked the UN Secretary-General to consult experts on the underlying legal issues relating to unilateral coercive measures, a series of reports by expert groups recorded the development of international law during a period of clarification.

For example, in the early reports of the groups of experts, there was some agreement at that time that there was a lack of consensus in international law as to when unilateral economic measures are improper.[53] The 1993 report, for example, initially seems to support the conclusion that there is no clear consensus on whether economic coercion is prohibited by the principle of non-intervention. Tom Ruys highlights the 1993 report's conclusion that there was "insufficient consensus" in international law on the matter.[54]

But, as the expert groups were asked to develop the legal understanding of sanctions, the 1995 report agreed on the basic principles that are relevant when considering the legality of unilateral economic measures. In particular, the group of experts agreed on the importance of the principle of non-intervention, and sovereign equality as underpinning the framework relevant to sanctions.[55] The group agreed:

> the basic principle to be applied in the judgement of the legality of coercive economic measures is that of non-intervention and non-discrimination, based

52 Eva Kassoti, 'Beyond Collective Countermeasures and Towards an Autonomous External Sanctioning Power? The General Court's Judgement in Case T-65/18 RENV, *Venezuela v Council*' (2024) 9 *European Papers* 247, 256–57. In particular, arguing that the "General Court could have explored whether, in the hypothetical scenario that the measures at hand are considered as contravening the customary law principle of non-intervention, they could still be regarded as lawful on the basis of the regime governing countermeasures." On this point see section 2.3 below.

53 See, for example, Report of the Secretary-General: Economic Measures as a Means of Political and Economic Coercion Against Developing Countries (10 October 1989) UN Doc A/44/510, Annex; Note by the Secretary-General: Economic Measures as a Means of Political and Economic Coercion Against Developing Countries (25 October 1993) UN Doc A/48/535.

54 Ruys, 'Sanctions, Retorsions and Countermeasures' (n 3) 7.

55 Report of the Secretary-General: Economic Measures as Means of Political and Economic Coercion Against Developing Countries (18 September 1995) UN Doc A/50/439, pp 11–15.

> on such norms as the sovereignty of nation States and the sovereign equality of States. This prohibits intervention into the domestic affairs of sovereign States, either by forcible (military) or non-forcible (economic) intervention, as a general rule. The strict observation and application of these basic principles of international law, backed by specific declarations adopted by international organizations, prohibits the application of coercive economic measures as instruments of intervention, including any attempts at an extra-territorial application of coercive economic measures. This establishes the generally applicable rule.[56]

It is important to note that these reports were produced during the International Law Commission's [ILC] work on the Articles on State Responsibility. This context is crucial, because the ILC's work on state responsibility was still in its early stages, and the development in the expert group's understanding of the law was evident in how their reports changed to incorporate the ILC's developing understandings. By 1997 and 1999, the group of experts incorporated the ongoing work of the ILC into their considerations.[57]

Reiterating the basic principles of non-intervention as a starting point, the 1997 group confirmed that these prices prescribe "the imposition of coercive economic measures as instruments of intervention in matter that ae essentially within the domestic jurisdiction of any State, without prejudice, however, to the application of preventive or enforcement measures under Chapter VII of the Charter".[58] But the report also went on to consider potential exceptions to the general rule, including the doctrine of countermeasures that was under consideration by the ILC at that time.[59] In 1999, the report discussed the influence of the ILC's work:

> The group was also apprised of the work of the International Law Commission on the development and codification of the law of State responsibility, in particular draft articles regarding countermeasures in respect of an internationally wrongful act (that is to say, prior breach of international law by the target State). . . . These legal conditions and restrictions seek to constrain the resort to coercive economic measures and to prevent or reduce the abuse and misuse of such measures, especially their unilateral application. Therefore, the group stressed the importance of the progressive development and codification of relevant norms of international law, in particular the law of State responsibility, including prohibited countermeasures in response to prior injury or internationally wrongful acts, as well as the need for strengthening

56 ibid para [45].

57 Report of the Secretary-General: Economic Measures as a Means of Political and Economic Coercion Against Developing Countries (14 October 1997) UN Doc A/52/459; and Report of the Secretary-General: Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries (21 October 1999) UN Doc A/54/486.

58 ibid 1997 Report, para [73], see also paras [74]–[75]; 1999 Report, ibid at paras [48]–[49].

59 ibid 1997 Report para [76].

specific enforcement provisions and dispute settlement procedures or mechanisms incorporated in various international regimes.[60]

Since 1999, no other panel of experts has been consulted for the Secretary-General's reports under the General Assembly's Resolutions on unilateral economic measures against developing states. While the contemporary role of the doctrine of countermeasures will be considered further below, it is notable that the Secretary-General's groups of experts seemingly did come to a relatively settled conclusion on the foundations of the legal framework for unilateral economic measures – that the principle of non-intervention and other core principles are the starting point for legal analysis, and there may be a role for limited exceptions.

Towards a general framework of non-intervention and countermeasures?

This section seeks to set out the legal contours relating to the debate on unilateral sanctions with particular regard to the principle of non-intervention, and whether some types of sanctions may initially breach that principle before being justified as a lawful countermeasure. It should be noted that there does seem to be a preference in other legal commentary to discuss certain measures, such as the freezing or seizure of Russian state assets, as being primarily affected (or not) by the principles of state immunities and the immunity of foreign assets.[61] This chapter does not seek to address this issue; it focuses instead on the wider principle of non-intervention that also stems from the same principle of sovereign equality.

The principle of non-intervention and sanctions

The prohibition of intervention is a rule generally accepted in customary international law. It has been recognised in the *Declaration on the Inadmissibility of Intervention* in 1965[62] and later in the *Declaration on Friendly Relations* in 1970.[63]

60 Report of the Secretary-General (1999) (n 57) para [49].

61 See, for example, Tom Ruys, 'Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions' in T. Ruys and N. Angelet (eds), *Cambridge Handbook on Immunities and International Law* (CUP 2019); Tom Ruys, 'Non-UN Financial Sanctions Against Central Banks and Heads of State: In Breach of International Immunity Law?' (*EJIL: Talk!* 12May2017)<https://www.ejiltalk.org/non-un-financial-sanctions-against-central-banks-and-heads-of-state-in-breach-of-international-immunity-law/>; Ingrid W. Brunk, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds' (2023) 91(6) *George Washington Law Review* 1616; Ingrid (Wuerth) Brunk, 'Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?' (*Lawfare*, 7 March 2022) <https://www.lawfaremedia.org/article/does-foreign-sovereign-immunity-apply-sanctions-central-banks>; Scott Anderson and Chimène Keitner, 'The Legal Challenges Presented by Seizing Frozen Russian Assets' (*Lawfare*, 26 May 2022) <https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets>.

62 UNGA Res 2131(XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (21 December 1965) UN Doc A/RES/2131(XX).

63 UNGA Res 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations (24 October 1970) UN Doc A/RES/2625 (XXV), Annex, principle 3.

The latter declaration outlines this principle as "the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter", and states that:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.[64]

But the Resolution also goes on to specifically refer to a prohibition of economic measures being used for this purpose:

> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.[65]

The International Court of Justice (ICJ) has referred to the Declaration on Friendly Relations in support of the principle of non-intervention, considering it to be declaratory of customary international law in the provisions it has considered so far.[66] In interpreting the principle of non-intervention, the ICJ in the *Nicaragua Case* famously outlined that:

> A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.[67]

The ICJ also said that "intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones".[68]

Several academics have considered the principle of non-intervention more widely,[69] but some recent works have looks at the issues of coercion and sanctions more specifically. One of the key questions surrounds the legal limitations on

64 ibid Annex, principle 3, para [1].

65 ibid Annex, principle 3, para [2].

66 See, for example: *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14 *(Nicaragua Case)* 106–7, [202]; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005 (2005) ICJ Reports 168, [162].

67 *Nicaragua Case* (n 66) para [205].

68 ibid.

69 See, for example, N. Aloupi, 'The Right to Non-Intervention and Non-Interference' (2015) 4(3) *Cambridge Journal of International and Comparative Law* 566; A.W. Thomas and A.J. Thomas, Jr, *Non-Intervention: The Law and Its Import in the Americas* (Southern Methodist UP 1956); F. Kriener, 'Prohibition of Intervention' in *Max Planck Encyclopedia of Public International Law* (Online edn,

coercive interference in a state's *domaine réservé* (the "reserved domain") – in other words, the affairs of the state untouched by international obligations. Buchan, for example, notes that

> Even if unilateral restrictive economic measures amount to "coercion", some commentators claim that they do not violate the principle of non-intervention where they respond to a breach of international law by the target state, the reason being that such measures do not coerce the target state in relation to policies or choices that fall within its *domaine réservé*.[70]

Barber similarly suggests that broad international protections, such as human rights obligations and obligations *erga omnes*, demonstrated that the reserved domain of a state no longer encompasses the unlimited freedom to violate such fundamental international obligations and rights.[71] With this in mind, Barber suggests that some unilateral sanctions do not breach the principle of non-intervention, particularly those related to human rights, because they are directed at addressing human rights issues[72] and are not aimed at subordinating a state's sovereign rights.[73]

A similar argument is offered by Milanovic, who suggests that "coercive measures directed to compelling compliance with existing legal obligations, regarding which the target state enjoys no measure of discretion, do not constitute intervention at all".[74] Milanovic justifies this by suggesting that "it is not for the prohibition of intervention, but for other rules of international law, such as sovereignty, human rights, or WTO law, to regulate any harmful effects of coercion".[75]

Logically, this might seem correct. If a state has not impacted or coerced an issue that is within that state's sovereign choice, then that is not a violation of the principle of intervention. But in reality, these arguments fail to identify the fact that a lot of these unilateral measures affect more than just the issues that they target. This approach to coercion and the "reserved domain" does not address two issues. The first is about the legal scope of coercion and the limitation of sovereignty. The fact that a State does not have the sovereign power to violate international law, by for example committing atrocities including war crimes, genocide, and crimes against humanity, does not automatically imply that coercion may be used against that state just because those crimes themselves are not exclusively within the "reserved domain" of a state. The perpetrating state may have surrendered jurisdiction over

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August 2023); Marco Roscini, *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles* (OUP 2024).

70 Buchan (n 45) 204; see also Barber (n 48) 343, 354.

71 Barber (n 48) 354.

72 ibid.

73 ibid 361–62; though Barber does note some circumstances where unilateral sanctions may breach other international rules or principles (see 369–71).

74 Milanovic (n 47) at 622–23, 649.

75 ibid.

the legality of those crimes, but this is not the same as consenting to be subject to coercive methods by other states – at least not by reference to those crimes alone. The atrocities are clearly unlawful under international law, and that is a legal aspect no longer exclusively within the "domestic jurisdiction" of the State – however, the legality of being subject to coercive measures does not automatically follow from these international obligations. If international law allowed coercion for any issue or policy that was now covered by international law may also render the principle of non-intervention without any practical effect if justifications are not required and if proportionality is not to be considered.

Second, there is a practical issue with the types of measures usually employed. This is because the methods of coercion often employed under unilateral sanctions do not target in a limited or specific way, but instead actively target the ability of a state to govern and enjoy separate activities, such as international travel, trade, and more crucially its financial assets and its economy.

Such an argument would only likely apply where the coercive measure in question is restricted to the policy choice in question.[76] Freezing sovereign funds, on the other hand, is much broader in scope. Although unilateral measures might be directed at restricting a state's ability to fund an illegal war, or fund some other internationally wrongful act, they also tend to impact that state's ability to use those funds for any other reason that is clearly *within* its reserved domain – including is its choice to fund external initiatives or foreign policies outside of the wrongful act. So, the coercive measures are logically not just directed at the wrongful policy, they are directed at policies within the reserved domain, and require a legal justification. This issue becomes even more apparent when the proposal is not just to freeze sovereign funds, but to seize them or their profits.

The way in which a state uses its funds and property, internally or externally, is likely to be considered the sole policy choice of that State. Those choices may be restricted by the law of the host state, a rejection of a transaction, or the rules of investment or disposal within the relevant state. But the complete restriction of a state's choice over whether to attempt to do anything at all with those funds, including transferring them back to its domestic jurisdiction, is a sovereign choice. The restriction or prevention of that sovereign choice is therefore a coercion of its ability to make free sovereign choices, and thus an intervention that would require a lawful justification in international law.

Based on the original position of the final groups of experts consulted for the work on unilateral coercive measures for the General Assembly,[77] the preference of treating the principles of non-intervention as the general rule not only matches the reality of taking unilateral coercive measures but also provides a path to legality through countermeasures. This, in turn, addresses the risks of abuse by making sure

76 For example, freezing a bank account from which funds are solely used for a wrongful act might well fit within this narrower reading of non-intervention, but the broader measures that are taken in reality may well affect other perfectly lawful choices of a wrongdoing state too.

77 See above, section 2.2.

the safeguards and procedural protections when taking countermeasures apply to these unilateral measures.

The destination is therefore still the same, but as outlined below, the path to countermeasures may provide for further legitimacy and, ultimately, perhaps a route to compromise and agreement between the divided camps on the issue of unilateral restrictive measures. It is to this doctrine we shall now turn.

Countermeasures and non-intervention

Countermeasures are generally recognised in international law as one of the circumstances precluding the wrongfulness of an act – in simple terms, effectively they are a legal defence to breaching an international obligation. Their place in customary international law has been recognised by the ICJ in the *Gabčíkovo-Nagymaros* case,[78] and included in the International Law Commission's Articles on State Responsibility.[79]

Here, the court recognised a number of conditions for taking countermeasures, including: (1) a countermeasure "must be taken in response to a previous international wrongful act of another State and must be directed against that State";[80] (2) the injured State must call upon the State committing the wrongful act to "discontinue its wrongful conduct or to make reparation for it";[81] (3) the countermeasure must be proportionate, "the effects of a countermeasure must be commensurate with the injury suffered";[82] and (4) the purpose of the countermeasure must be to induce the wrongdoing State to comply with its obligations under international law, and so the countermeasure must therefore be reversible.[83] These conditions were included in the ILC's Articles on State Responsibility, but were also expanded on to include additional requirements too.

One of the most notable requirements listed by the ILC is the requirement that "[a]n *injured State* may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations".[84] This provision makes clear that it is *injured states* that are recognised under the Articles as having the ability to take countermeasures. This is further nuanced by the differentiation in the Articles between states who are entitled to take countermeasures and those who are entitled to "invoke" the responsibility of the wrongdoing state and make a legal claim that the wrongdoing state owes compensation or reparations.

78 *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), Judgment of 25 September 1997, [1997] ICJ Rep 7, paras [83]–[87].

79 UNGA Res 56/83, Responsibility of States for Internationally Wrongful Acts (28 January 2002) UN Doc A/RES/56/83, Annex, Article 22, and Articles 49–53.

80 *Gabčíkovo-Nagymaros* (n 78) para [83].

81 ibid para [84].

82 ibid para [85].

83 ibid para [87].

84 ILC, 'Draft Articles on State Responsibility' (n 4) Article 49(2).

A state is considered injured, under Article 42 of the ILC's Articles, where there is a breach of an obligation that is owed to that state individual,[85] to a group of states, or the international community as a whole,[86] and the breach specially affects that state,[87] or is of a character to radically change the position of all other states who are owed that obligation, and how that obligation can continue to be performed.[88]

So, for the types of sanctions that are the focus of this chapter, the relevant legal question would be whether Russia's breach of the obligations they are accused of breaching either "specially affects" states taking sanctions; can be considered a breach of an obligation that is of a particular character that "radically affects" their enjoyment of that obligation; or whether states, if they must rely on countermeasures, are able to take them as non-injured states.

The ILC Articles deliberately leave open the question of whether states not directly injured by the wrongful act of a target state can take countermeasures to uphold obligations that all states have an interest in protecting. Article 54 of the ILC Articles intentionally remains ambiguous on whether these states can take action to uphold obligations owed to the international community as a whole.[89] And so, the Articles do not explicitly confirm that allies of an injured state can respond to breaches of international law that have not directly affected them.

The compromise reached with that provision reflects a nuanced history of debates over the status of state practice on non-injured parties taking countermeasures, and the fears of abuse and legitimacy that were made in the Sixth Committee of the General Assembly.[90]

Since the ILC's work, further studies have outlined state practice regarding unilateral restrictive measures, potentially constituting countermeasures by non-injured states.[91] Some scholars argue this practice is more prevalent than

85 ibid Article 42(a).

86 ibid Article 42(b).

87 ibid Article 42(b)(i).

88 ibid Article 42(b)(ii).

89 ILC, 'Draft Articles on State Responsibility' (n 4) Article 54, which states: "This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."

90 See, for example: ILC, Fourth Report on State Responsibility by Mr James Crawford, Special Rapporteur (2001) UN Doc A/CN.4/517, [72]; but see in contract C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005), 246–247. On the status of state practice at the time, see, for example: Martin Dawidowicz, 'Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council', (2006) 77 *British Yearbook of International Law* 333; J Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law' (1994) 248 *Recueil des cours de l'Académie de droit international* 353, 416–22.

91 See, for example, studies by Dawidowicz, 'Public Law Enforcement Without Public Law Standards?' (n 90) 333; Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 231–38; Tams (n 90); Dr Talita Dias, 'Countermeasures in international law and their role in cyberspace' (*Chatham House*, May 2024), at 37–48 <https://www.chathamhouse.org/sites/default/files/2024-05/2024-05-23-countermeasures-international-law-cyberspace-dias.pdf>. See also research

previously acknowledged, suggesting customary international law may permit non-injured states to employ countermeasures under certain conditions.[92] Dawidowicz, for example, argues that there is more recent, consistent, and widespread state practice to demonstrate the potential legality of these collective countermeasures.[93] Dawidowicz highlights examples, including trade restrictions against South Africa in the 1960s in response to apartheid,[94] and measures against Syria supported by the Organisation of Islamic Cooperation and the League of Arab States from 2011, demonstrating that such practice is not limited to Western or developed states.[95]

However, it remains uncertain whether this additional evidence supporting countermeasures in the general interest is sufficient to signify an evolution in customary international law, and this point remains contested.[96] Recent research by Talita Dias for Chatham House[97] found that state practice is often ambiguous, as states do not often explicitly invoke the doctrine of countermeasures;[98] alternative legal justifications may exist for certain measures, or they may not be inherently illegal in every case;[99] and states' policy or domestic justifications rarely reveal a belief in acting under the doctrine of countermeasures in international law.[100] Ultimately, Dias concluded that

> there seems to be insufficient state practice and *opinio juris* in support of a right of indirectly injured states to take general interest countermeasures under customary international law. However, there is clear evidence that a few states, particularly in the West, consider that the law has evolved since 2001 such that it now permits general interest countermeasures in response to breaches of *erga omnes* [obligations owed to all states] and *erga omnes partes* [owed to a group of states] obligations, whether in support of an

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by the current author in the context of responding to atrocity crimes: Butchard, *The Responsibility to Protect* (n 8) Chapter 5 and 165–87.

92 See, for example, Alina Miron and Antonios Tzanakopoulos, 'Unilateral Coercive Measures and International Law' (November 2022) Report for The Left in the European Parliament 2022 at 19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4235572>.

93 Dawidowicz, *Third-Party Countermeasures in International Law* (n 91) 242–45.

94 This included, for example, India, Ghana, Indonesia, Kuwait, Nigeria, Pakistan, Sierra Leone, Tanzania, Uganda, Zambia, and Zimbabwe, according to Dawidowicz, *Third-Party Countermeasures in International Law* (n 93) 242–43, 113–17.

95 ibid, 243, 220–31.

96 See, for example, M. Jackson and F.I. Paddeu, 'Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?' (2024) 118(2) *American Journal of International Law* 231; Federica Paddeu, 'Transferring Russian Assets to Compensate Ukraine: Some Reflections on Countermeasures' (*Just Security*, 1 March 2024) <https://www.justsecurity.org/92816/transferring-russian-assets-to-compensate-ukraine-some-reflections-on-countermeasures/>.

97 Dias (n 91) 37–48.

98 ibid at 43.

99 ibid.

100 ibid 44.

> injured state or in response to violations affecting the responsible state's own population.[101]

In 2016, Ruys noted the legal and policy issues with the use of countermeasures by states not directly injured by a wrongdoing state – noting arguments in favour of their use to strengthen the international rule of law and promote compliance with international law, but also noting the risks of leaving enforcement of collective interest to the mercy of powerful states and organisations, and potentially creating "a recipe for chaos and subjectivism, and possible for escalation of disputes".[102] For this reason, Ruys argued it would be productive to move the conversation from the legality of countermeasures in the general interest towards defining the boundaries of their use.[103]

Sanctions to seize Russian assets: a new challenge for countermeasures

The proposed seizure of assets

There has been an unprecedented adoption of sanctions against Russia following its 2022 invasion of Ukraine.[104] But, more specifically, recent proposals and initiatives regarding the seizure of Russian assets to aid Ukraine have both intensified the legal debate on sanctions, but also revealed some states' positions on the use of countermeasures as a route to justify certain measures.

While Canada[105] and the US[106] have both adopted domestic legislation to provide a legal route to the seizing of Russian assets for Ukraine, there are also wider international proposals to seize Russian state assets. The Council of Europe's Parliamentary assembly explicitly endorsed the idea, when the Assembly unanimously adopted Resolution 2539.[107]

The Resolution also explicitly cited the doctrine of countermeasures as a legal basis for taking such action:

> Under international law, States possess the authority to enact countermeasures against a State that has seriously breached international law. Now is the

101 ibid at 48.
102 Ruys, 'Sanctions, Retorsions and Countermeasures' (n 3) 24.
103 ibid.
104 Claire Mills, 'Sanctions Against Russia (February 2022 to January 2025)' House of Commons Library Briefing Paper CBP-9481 <https://commonslibrary.parliament.uk/research-briefings/cbp-9481/>.
105 See, for example, the amendments made to the Special Economic Measures Act (SEMA), the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) and the Seized Property Management Act in Budget Implementation Act 2022 (or Bill C-19), Division 31 of Part 5.
106 See, Rebuilding Economic Prosperity and Opportunity (REPO) for Ukrainians Act, section 104(b)(1).
107 Council of Europe Parliamentary Assembly, Resolution 2539 (2024), 'Support for the Reconstruction of Ukraine' (16 April 2024) <https://pace.coe.int/en/files/33494/html>.

> time for Council of Europe member States to move from sanctions to countermeasures. The Assembly further notes that countermeasures are intended to induce the offending State to cease its unlawful behaviour or to comply with its obligations arising from that conduct, such as paying compensation for damage caused. The Assembly emphasises that the legitimacy of the recommended countermeasures remains unassailable within the framework of sovereign immunity.[108]

The G7 and EU states sought a coordinated approach, and in February 2024, the G7 announced their intention to find a way to use frozen Russian assets to support Ukraine.[109] The statement said:

> Russia's sovereign assets in our jurisdictions will remain immobilised until Russia pays for the damage it caused to Ukraine. We welcome the adoption of the EU legal acts concerning extraordinary revenues of central securities depositories gained from Russia's immobilised sovereign assets and encourage further steps to enable their use, consistent with applicable contractual obligations and in accordance with applicable laws. We ask our ministers to continue their work and update ahead of the Apulia Summit on all possible avenues by which immobilised Russian sovereign assets could be made use of to support Ukraine, consistent with our respective legal systems and international law.[110]

While there have not been many official statements on the G7's discussion of the legal issues, statements and reports to reputable news outlets reveals both the potential legal justifications, but also the tensions between the G7 states. A consensus on the legality of seizing Russian state assets remained elusive. In May 2024, the *Financial Times* revealed a division between the US and European states regarding the scope of legal justification for such actions.[111] Specifically, the US had presented a discussion paper to the G7 in December 2023, advocating for the use of these assets as a lawful countermeasure.[112] Reportedly, the US had argued that:

> G7 countries are "specially affected" by Russia's unlawful invasion, including through the impact on their economies, and can therefore act to make Moscow end its aggression.[113]

108 ibid para [6].

109 UK Prime Minister's Office, 10 Downing Street, 'G7 Leaders' Statement: 24 February 2024' (Press Release, 24 February 2024) <https://www.gov.uk/government/news/g7-leaders-statement-24-february-2024>.

110 ibid.

111 Paola Tamma, Laura Dubois and Sam Fleming, 'The Clash Over Whether to Commandeer Russia's Frozen Assets' *Financial Times* (3 May 2024) <https://www.ft.com/content/0d77f54b-af74-4186-9cae-237528ad7d69>.

112 Paola Tamma and James Politi, 'Washington Puts Forward G7 Plan to Confiscate $300bn in Russian Assets' *Financial Times* (28 December 2023) <https://www.ft.com/content/d206baa8-3ec9-42f0-b103-2c098d0486d9>.

113 Tamma, Dubois and Fleming (n 111).

As previously discussed, "specially affected" states are considered "injured" for the purpose of countermeasures.[114] The US, therefore, seems to be arguing that states beyond Ukraine could qualify as injured states due to Russia's invasion. This strategy allows them to justify countermeasures under established international law, bypassing the controversial issue of general interest countermeasures by non-injured states. But in February 2024, following a G7 finance minister's meeting, French Finance Minister Bruno Le Maire was asked directly by reporters about the US's "countermeasures theory".[115] He replied that he did not think the legal grounds were sufficient:

> We don't think this legal basis is sufficient. . . . This legal basis must be accepted not only by the European countries, not only by the G7 countries, but by all the member states of the world community, and I mean by all the member states of the G20. We should not add any kind of division among the G20 countries.[116]

Foreign Secretary Lord Cameron explained in the UK House of Lords on 5 March 2024 that he supported a route to using Russian assets to support Ukraine via a loan to Ukraine secured by those Russian assets. Such a loan was suggested to be "returned" when Russia paid reparations in the future.[117] Lord Cameron said that the government was still aiming for a united approach at the G7 and in the EU:

> The moral case is there – this money should be used for the benefit of the Ukrainian people. I think that the economic case is very strong. Here we are in the City of London, one of the great financial centres of the world. I do not think that using that money will disadvantage us in any way. There are a bunch of different legal justifications, of which collective countermeasures is one that could be used – but there is also the opportunity to use something such as a syndicated loan or a bond that, in effect, uses the frozen Russian assets as a surety to give that money to the Ukrainians, knowing that you will be able to recoup it when reparations are paid by Russia. That may be a better way in which to do it. We are aiming for the maximum amount of G7 and EU unity on this but, if we cannot get it, we will have to move ahead with allies that want to take this action. I think that it is the right thing to do.[118]

Ultimately, the EU Council agreed to provide up to €35 billion to support the G7 plan, known as the "Extraordinary Revenue Acceleration Loans for Ukraine"

114 See above, and accompanying discussion.

115 Andrea Shalal and Christian Kraemer, 'G7 Finance Meeting Marred by Divisions Over Seizing Russian Assets' *Reuters* (29 February 2024) <https://www.reuters.com/world/g7-finance-meeting-marred-by-divisions-over-seizing-russian-assets-2024-02-28/>.

116 ibid.

117 HL Deb 5 March 2024, col 1545.

118 ibid.

(ERA) initiative.[119] The announcement confirmed that these loans would be secured by future extraordinary revenues generated from the immobilisation of Russian sovereign assets.[120] Furthermore, the loan mechanism would distribute the funds – along with any voluntary contributions from Member States, third countries, or other sources – as financial support to Ukraine, aiding in the servicing and repayment of the "loans".[121]

On 25 October 2024, the G7 Finance Ministers released a statement outlining further details on the ERA initiative, confirming that the initiative will be made up of bilateral loans to Ukraine from G7 members.[122] The G7 ministers agreed that the profits from the frozen Russian assets would be used to repay the loans:

> Principal and interest will be repaid by extraordinary revenues stemming from the immobilisation of Russian sovereign assets (RSA) held in European Union (EU) jurisdictions, and possibly in other G7 countries, in line with our respective legal systems and international law, and by any other voluntary contributions.[123]

The terms also state that Russia's sovereign assets will be immobilised "until Russia ceases its war of aggression and pays for the damage cause to Ukraine by its war".[124] It also provided for what should happen if Russia agreed to a peace settlement and paid damages:

> Should there be a peace settlement in which Russia pays for the damages it has caused, the outstanding balances that cannot be covered by extraordinary profits shall be repaid by Ukraine to each lender. The modalities of that repayment will be agreed among the G7 lenders taking into account the need to ensure equal treatment amongst all lenders' claims.[125]

The statement reiterates in general terms that the use of Russian assets in this way is in accordance with international law.[126] The G7 Leaders' Statement on the same day similarly argues that the loans would be "serviced and repaid by future

119 European Council, 'Immobilised Assets: Council Agrees on Up to €35 Billion in Macro-Financial Assistance to Ukraine and New Loan Mechanism Implementing G7 Commitment' (European Council, 9 October 2024) <https://www.consilium.europa.eu/en/press/press-releases/2024/10/09/immobilised-assets-council-agrees-on-up-to-35-billion-in-macro-financial-assistance-to-ukraine-and-new-loan-mechanism-implementing-g7-commitment/>.

120 ibid.

121 ibid.

122 G7 Finance Ministers, 'Statement on Extraordinary Revenue Acceleration (ERA) Loan Initiative' (25 October 2024) <https://www.consilium.europa.eu/media/vexjsedk/g7-finance-ministers-statement-on-extraordinary-revenue-acceleration-era-loan-initiative.pdf>.

123 ibid.

124 ibid term 12.

125 ibid.

126 ibid.

flows of extraordinary revenues stemming from the immobilization of Russian Sovereign Assets, in line with G7 respective legal systems and international law".[127]

Assessing the legal details

The proposals to seize Russian assets to aid Ukraine has naturally attracted the attention of legal commentators, seeking to address both the legal challenges to these measures but also the practical issues faced with the different proposals that have been raised.[128] This section briefly outlines some of the main international legal and policy issues that have been raised in recent legal commentary.

Seizure of assets and non-intervention

It is arguable that the seizure of assets goes beyond the relative ambiguities and disagreements over the application of the principle of non-intervention to lesser forms of economic coercion. The act of seizing property, or taking the "profits" of invested property away from those assets, is arguably much more of a direct coercion of a state's sovereign choices than other forms of economic sanctions previously employed. It would seem only logical to suggest that if there was some doubt over whether the freezing of assets leaves a state no choice over its internal or external affairs, then the confiscation of those assets certainly does. This is all to say, however, that this is only one step in the question of determining the final legality of those measures – with countermeasures being a popular part of the discussion so far.

Countermeasure to seize assets: legal challenges

While the proposals outlined above stop short of an outright seizure or confiscation of Russian assets, they do intend to use, tax, or transfer the interests and profits made on those assets. Whether this would itself amount to the seizure of assets to which Russia is entitled to is yet to be determined, but it is clear that this goes beyond the usual freezing of funds under the traditional sanctions regimes.

Commentators have pointed to Article 49(3) of the International Law Commission (ILC) Articles on state responsibility, where it states:

> Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.[129]

127 US, White House, 'G7 Leaders' Statement on Extraordinary Revenue Acceleration (ERA) Loans' (25 October 2024) <https://www.whitehouse.gov/briefing-room/statements-releases/2024/10/25/g7-leaders-statement-on-extraordinary-revenue-acceleration-era-loans/>.

128 See, for example, Philippa Webb, 'Reparations for Ukraine: Three Proposals from Europe' (*Just Security*, 26 February 2024) <https://www.justsecurity.org/92708/reparations-for-ukraine-three-proposals-from-europe/>.

129 UNGA Res 56/83, Responsibility of States for Internationally Wrongful Acts (28 January 2002) UN Doc A/ES/56/83, Annex, Article 49.

This is often read as a requirement that countermeasures be temporary. On the face of it, it would seem that the seizure of assets, profits, or interest on such assets would be a permanent measure. On the other hand, some arguments suggest there may be more nuance to the safeguard that countermeasures should be temporary and reversible, pointing out that this obligation applies "so far as possible", arguing that that this may allow states to use such extraordinary measures against Russia. For example, a group of experts in a recent report from the International Institute for Strategic Studies argue that the seizure of the assets would be reversible, even if the appropriation of the proceeds from the assets was not:

> Once Russia has complied with its legal obligations, its normal legal relations will be restored. Its future or remaining deposits will again be entitled to respect. But Russia would not be entitled to regain any money that has been lawfully transferred to compensate Ukraine. It could only ask that these transfers not exceed its liability, and be credited as an offset against such liability.[130]

They therefore argue that:

> The countermeasure proposed herein – the transfer of frozen Russian States assets to an international compensation mechanism that would disburse compensation on Russia's behalf to Ukraine or other injured parties in satisfaction of Russia's legal obligation – would fully satisfy the condition of reversibility as understood by the ILC. The prior legal relations would be restored.[131]

The ILC's commentary on this issue indicates that states should choose measures that are not permanent, if they have such a choice:

> The phrase "as far as possible" in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.[132]

130 The International Institute for Strategic Studies, 'On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine' (*IISS*, 20 May 2024) para [35] <https://www.iiss.org/globalassets/media-library-content-migration/files/research-papers/2024/05-new/iiss_on-proposed-countermeasures-against-russia-to-compensate-injured-states-for-losses-caused-by-russias-war-of-aggression-aga.pdf>.

131 ibid para [37].

132 See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' 131, [9] <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>, also included in ILC, Report of the International Law Commission on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, reproduced in [2001] (Vol II, Part Two) Yearbook of the International Law Commission, 31ff.

It should also be noted that the temporary nature of countermeasures is also recognised by Article 53 of the ILC Articles, which provides that "countermeasures shall be terminated as soon as the responsible State has complied with its obligation". In the case of Russian assets, this means that any countermeasures would need to be terminated when Russia pays any and all reparations or compensation owed to Ukraine.[133]

Professor Philippa Webb conducted a detailed legal assessment for the European Parliament of each of the possible routes to using Russian assets for aiding Ukraine, where she addressed the temporary nature of countermeasures:

> States therefore cannot use countermeasures as a basis for the permanent confiscation of RCB assets. When a state deals with a foreign property as a countermeasure, it must ensure that it can be returned intact (including interest and contractually agreed profit) when the countermeasures end.[134]

Professor Webb therefore supported a workaround, which has eventually become the preferred policy of states, of transferring assets to Ukraine as a loan, to be paid back if and when Russia complies with its obligations to pay reparations.[135] Webb commented that "if Russia agrees to pay reparation one day, that amount is likely to exceed what has been 'confiscated' so there will not be any repayment owed [by] Ukraine".[136]

Philip Zelikow and Paul Stephan similarly also discuss this issue in some detail.[137] Paul Stephan argued in May 2022 that using assets as securities rather than seizing them outright could avoid this potential incompatibility with countermeasures.[138] However, it seems that the loan scheme being adopted by states goes beyond this, and actively uses the profits from securities depositories to may repayments on the "loans" to Ukraine.

On the issue of countermeasures needing to be reversible, Federica Paddeu has said that reversible countermeasures can still have permanent effects:

> The suspension of a license can be revoked, a frozen asset unfrozen. It is by means of revocation, cancellation, or termination of the measure that

133 See also IISS Report (n 130) para [39].

134 Philippa Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine' (*European Parliamentary Research Service*, February 2024) at 27 <https://www.europarl.europa.eu/RegData/etudes/STUD/2024/759602/EPRS_STU(2024)759602_EN.pdf>.

135 ibid 27–28.

136 ibid 49. Webb also conducted a detailed review of other possible legal routes, rating the legal risk for each suggestion. ibid 49–52.

137 See, Philip Zelikow, 'A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine' (*Lawfare*, 12 May 2022) <https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine>; Paul Stephan, 'Response to Philip Zelikow: Confiscating Russian Assets and the Law'(*Lawfare*,13May2022)<https://www.lawfareblog.com/response-philip-zelikow-confiscating-russian-assets-and-law>.

138 ibid.

> performance of the obligation is resumed. But it is not necessary that the countermeasure disappears "without a trace". For example, suspension of an air services agreement may cause loss of revenue to an airline (indeed, even drive it to the point of insolvency). These losses are effects, or consequences, of the license suspension and will persist even after the suspension is lifted. The persistence of these effects does not render the countermeasure impermissible.[139]

Paddeu also suggested that the ILC was "seeking to create some elbow room for irreversible consequences of reversible measures, and not for irreversible measures as such".[140] However, she concluded that it seems doubtful whether the transfer of Russian assets to Ukraine would meet the relevant requirements in this regard. Although, Paddeu notes, "There may be plausible technical work-arounds to make the proposal meet these requirements, but they may involve some straining of the rules. . . . At the very least, the implementation of this proposal would be a break from the settled practice of not confiscating assets of the wrongdoing State as a countermeasure".[141]

It is notable that the US legislation designed to seize Russian assets concedes that the US must rely on countermeasures as a legal basis in international law in order to do this.[142] Assessing this Act, Ingrid Brunk also argues that using the doctrine in this way risks undermining it in the future:

> It throws the doctrine of countermeasures wide open to include not only the traditional form (measures by an injured state such as Ukraine), but also measures taken by any or all countries on the injured states' behalf. It will expand the use of countermeasures out of the limited situations in which they have been used – as reversible measures to induce compliance with international law – into an open-ended self-help device for any country that believes it is entitled to reparations.[143]

Countermeasures to seize assets: policy issues

Aside from the concerns relating to the legal basis for seizing assets, some commentary has highlighted political, practical, or policy concerns relating to the proposals to seize Russian assets. For example, the Renew Democracy Initiative argue that repurposing Russia's assets "is the only practicable policy action that will hold Russia accountable for its heinous acts while allowing Ukraine to survive and

139 Paddeu (n 96).
140 ibid.
141 ibid.
142 Ingrid (Wuerth) Brunk, 'The Controversial REPO Act Is Now Law' (*Lawfare*, 25 April 2024) <https://www.lawfaremedia.org/article/the-controversial-repo-act-is-now-law>.
143 ibid.

recover from the war's devastating effects".[144] On the other hand, Butler comments that the confiscation of Russian assets should be a measure of last resort, warning that such a move may increase investors' perception of risk perceived by other countries, with potential financial risks on the global markets.[145]

In a report arguing in favour of confiscating Russian assets, the KSE Institute (Kyiv School of Economics) argues that taking this action against Russia is justified because of "Russia's ability to shield itself from any other means of international responsibility by virtue of its veto powers in the UN Security Council" and so this "prompts invocation of third state countermeasures".[146] They also argue that "concerns regarding Russia's potential retaliation [are] misplaced since Russia has already adopted measures amounting to expropriation against a number of Western companies and enacted legislation severely restricting rights of all Western investors in Russia".[147]

One of the most pressing policy dilemmas is whether this unprecedented change in state enforcement practices could destabilise the very foundations of international law. Hathaway and others have argued in this regard that a move to seize assets "may provide money to Ukrainians now, but they undermine the very international legal legitimacy that has proven Ukraine's greatest asset in the war".[148]

The new sanctions legacy: A path to creative countermeasures?

The international legal framework for taking sanctions is clearly in a state of flux, characterised by a significant divergence between the legal positions of states. But it is also in a state of change and development, and this period of development presents a critical choice: states can either exacerbate existing divisions or foster a path towards compromise. While we should recognise that it would be highly unlikely to achieve consensus on the absolute legality or illegality of all sanctions, there is still room for a pragmatic approach towards compromise on the fundamental principles and parameters underpinning sanctions in more general terms.

144 Laurence H. Tribe and others, 'Making Putin Pay: The Legal, Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine' (*Renew Democracy Initiative*, 17 September 2023) <https://rdi.org/articles/making-putin-pay/>. The group's report also made several moral and practical arguments in favour of asset seizure.

145 Creon Butler, 'Confiscating Sanctioned Russian State Assets Should Be the Last Resort' (*Chatham House*, 1 May 2024) <https://www.chathamhouse.org/2024/05/confiscating-sanctioned-russian-state-assets-should-be-last-resort>.

146 Anna Vlasyuk, 'Legal Report on Confiscation of Russian State Assets for the Reconstruction of Ukraine' (*KSE Institute*, February 2024) 21 <https://kse.ua/wp-content/uploads/2024/02/CBR-Assets-Legal-Report_February-2024.pdf>.

147 ibid 41.

148 Maggie Mills, Thomas Poston and Oona A. Hathaway, 'How to Make Russia Pay to Rebuild Ukraine' (*Just Security*, 20 February 2024) <https://www.justsecurity.org/92460/how-to-make-russia-pay-to-rebuild-ukraine/>; see further, Oona Hathaway, Maggie M. Mills and Thomas M. Poston, 'War Reparations: The Case for Countermeasures' (2024) 76 *Stanford Law Review* 971, 980.

In these recent initiatives to seize Russian assets to aid Ukraine, Western states are demonstrating a willingness to utilise the countermeasures framework, but a more consistent acknowledgement that other forms of sanctions also require justification remains elusive. In reality, many current sanctions regimes likely fulfil the procedural and substantive criteria of the law of countermeasures.

The reluctance to formally label sanctions as "unilateral coercive measures", as preferred by the UNGA Resolutions, likely stems from a number of political hesitancies. It may stem from diplomatic sensitivities, to avoid the explicit recognition of sanctions as inherently coercive in nature, and often implemented outside of multilateral frameworks. While some of these sensitivities might be understandable in delicate diplomatic relationships, the reluctance to confront the reality of unilateral coercion hinders the development of a shared understanding of the limitations of sanctions and justifications for their use.

In some cases, avoiding the reality of "unilateral coercive measures" may be a conscious choice by some states who may be wary of limiting their options for future action should they explicitly acknowledge or accept constraints on the use of sanctions. States may wish to keep options available for future crises and maintain the option of flexibility going forward.

But, ultimately, this reluctance certainly hinders progress towards clarifying the legal framework governing the use of sanctions internationally. Indeed, the choice to avoid addressing the minimum threshold of illegality for sanctions could undermine both the legitimacy and efficacy of sanctions in the long term. By failing to engage with the core legal parameters of sanctions, states perpetuate a situation where the legal basis for their use remains ambiguous and contested. This ambiguity undermines the long-term legitimacy and efficacy of sanctions by hindering the development of a unified approach to their application, further entrenching the divide in legal positions and limiting the possibility of more unified collective action to protect their common peace and security interests.

Iran, often opposed to US sanctions and seeking to have the issue of unilateral coercive measures taken up of the UN General Assembly's Sixth Committee, noted at the outset of its position paper that countermeasures *are* a lawful basis for sanctions.[149] Although Iran's proposals have not yet been taken up by the Committee, and are largely aimed at criticising the use of unilateral measures by Western states, it is notable that the possibility of their *lawful* use in principle was acknowledged.[150] The road to compromise may be fraught with diametrically opposing positions – but it is up to states to take those steps towards it.

Furthermore, if some sanctions measures do infringe on the principle of non-intervention, and if countermeasures do offer that proportionate, temporary,

149 See, UNGA Sixth Committee, Further revised proposal by the Islamic Republic of Iran, Identification of New Subjects: Obligations of Member States in Relation to Unilateral Coercive Measures: Guidelines on Ways and Means to Prevent, Remove, Minimize and Redress the Adverse Impacts of Unilateral Coercive Measures (19 February 2024), UN Doc A/AC.182/L.165, 1.

150 ibid.

and reversible response, it also means that one significant thing is true – that countermeasures provide a route to legal intervention. Not physical intervention, or forcible intervention,[151] but a route to taking action against wrongdoing states that would otherwise interfere with the internal and external affairs of another state. While the substantive limits of countermeasures in Articles 49–54 of the ILC Articles prevent this tool from going too far, there are still inherent risks with this perception that need to be balanced against the legitimate needs of states to be able to respond to wrongful acts.

This is not only the reason why the safeguards for countermeasures should be stringently followed, but it is also the main reason why institutional coordination and direction of countermeasures would be much more preferred. This would limit the risks of abuse but then also limit the risks of countermeasures being counterproductive to the responsibility of states to maintain international peace and security.

And so, with this in mind, it is clear that a path to more creative countermeasures may be revealing itself. So long as their responses are proportionate, states may use countermeasures beyond just the pattern of sanctions we see today – and much more creatively to provide a useful form of persuading the wrongdoing state to return to acting in accordance with international law.

Conclusion

This chapter has sought to outline how the initiatives of states in response to Russia's invasion of Ukraine are testing our understanding of the legal framework relating to unilateral sanctions and other unilateral restrictive measures. The opposing positions between mostly Western-aligned states and developing states are clearly divided on this issue, but it seems to be only as a matter of policy rather than as a matter of law. As a starting point, it seems that the legal framework of measuring sanctions firstly against the principle of non-intervention, and whether they coerce the sovereign choices of a state, could provide a route to acknowledge the fears and address the protections of smaller states, while also not completely removing the possibility of taking unilateral measures where a situation requires it. The initiatives to seize Russian assets to aid Ukraine have revealed the willingness of some states to utilise the doctrine of countermeasures in these situations – but we have also seen that this position is not without its legal, practical, and political challenges.

Although we must acknowledge that this framework is far from settled and uncontroversial, the path to compromise between them is there. Should states seek to uphold the international legal rules that underpin global peace and security, it may be necessary to revisit the basic principles of unilateral sanctions to ensure the long-term stability of international law itself.

151 On this point see *Corfu Channel Case* (Merits) (*United Kingdom v Albania*), Judgment of 4 April 1949, [1949] ICJ Reports 4, 34.

4 National mechanisms for countering Russian aggression in Ukraine

The experience of Great Britain, Germany and Poland

Kristina Trykhlib and Mykola Saltanov

Introduction

First, it should be clarified that we use the term *countermeasure mechanism* as we consider it the broadest and most appropriate term, especially in the context of national measures; that is, measures that are carried out by individual states. At the same time, the mechanism for countering Russian aggression against Ukraine includes a wide and quite comprehensive system of sanctions (enforcement measures and restrictive measures)[1] at the international and European levels (the United Nations [UN], the European Union [EU] and the Council of Europe) in various fields, primarily economic (such as asset freezes, travel bans, arms embargoes and restrictions on financial transactions), as well as a system of so-called autonomous (unilateral, decentralised and smart/targeted)[2] sanctions that are applied by individual states at the national level. In fairness, it should also be noted that in international law, there is no one right answer and a certain inaccuracy around the very definition of the term *sanctions*, their content, types and justification for the legitimate subjects of their imposition.

Under international law, sanctions can be defined as 'coercive measures taken [in response to a violation of international law] in execution of a decision of a competent social organ, i.e., an organ legally empowered to act in the name of the society or community that is governed by the legal system'.[3] Thus, the term *sanctions* was used to broadly cover the coercive measures taken against the will of the target state or entity.[4]

1 Council of the European Union Basic Principles on the Use of Restrictive Measures (Sanctions) of 7 June 2004, Which Covers Both UN and Non-UN (autonomous) Sanctions [2004] <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010198%202004%20REV%201> accessed 20 April 2024.

2 George A. Lopez and others (eds), *Smart Sanctions: Targeting Economic Statecraft* (Rowman and Littlefield 2002).

3 Georges Abi-Saab, 'The Concept of Sanction in International Law' in Vera Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer Law International 2001) 29, 38.

4 Asada Masahiko, 'Definition and Legal Justification of Sanctions' in Asada Masahiko (ed), *Economic Sanctions in International Law and Practice* (Routledge 2020) 5.

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UN enforcement measures (sanctions) are taken in response to a threat to peace, a breach of the peace or an act of aggression (Article 39 of the UN Charter), which is usually an internationally wrongful act, and the legal qualification of such acts can sometimes be ambiguous. Thus, UN enforcement measures cannot be considered sanctions in a strict sense.[5]

Thus, the mechanism for countering aggression and other types of violations of international law, including 'autonomous' sanctions, can be applied not only at the international level but also at the national level, especially when, at the international level, in particular at the UN level, these sanctions are not effective, or their implementation is problematic for different reasons, as in the case of the Russian Federation, which is a permanent member of the UN Security Council and which constantly blocks key UN decisions, as exemplified in the following quote:

> The Security Council is sometimes slow in reacting to international crises or remains deadlocked due to the casting, or the threat, of a veto by some of its permanent members; thus, it is, in the view of some States, not necessarily effective in addressing the problems of rapidly evolving international relations. Second, conversely, individual States or regions may be more cautious than the Security Council in lifting sanctions; therefore, an originally UN-based sanction may become an autonomous sanction. This might happen to States that are not permanent members of the Council, its permanent members being able to veto the termination resolution to maintain the UN sanction.[6]

In addition, the use of the term *countermeasures* includes a wide range of measures that should be carried out in various spheres of public life, including the cultural, sports and scientific spheres, and so on. Of course, the greatest challenge is maintaining a fair balance and boundaries, which can become a stumbling block when it comes to human rights restrictions, namely, restrictions on the human rights of ordinary citizens of the Russian Federation who, for example, support aggression and indirectly take part in it, using all available means for conducting hybrid information warfare. In this respect, 'there is a strong legal argument that the sanctions have a discriminating effect on the basis of the country of residence, or nationality, of the targeted populations'.[7] In particular, at its 73rd session in 2018, the UN General Assembly reiterated its previous calls on the international community to refrain from using *unilateral coercive measures*, a term that is primarily used to refer to economic sanctions that have not been authorised by the UN Security Council.[8] Moreover, the international community is divided on the legitimacy of unilateral coercive measures.[9]

5 ibid 4.

6 ibid 10.

7 Pierre-Emmanuele Dupont, 'Human Rights Implications of Sanctions' in Asada Masahiko (ed), *Economic Sanctions in International Law and Practice* (Routledge 2020) 42.

8 ibid 39.

9 Alexandra Hofer, 'The Beliefs and Practice of Enforcing Collective Obligations Through Unilateral Sanctions' (DPhil thesis, Ghent University, Faculty of Law and Criminology 2019) 274; *See*

Therefore, depending on the subjects that are the target of imposing sanctions, we can distinguish between sanctions against the state, personal sanctions against civil servants, sanctions against separate natural persons and legal entities, and sanctions against all citizens of the country. It is the latter that raises the most questions and objections.

The legal justification for imposing autonomous sanctions could derive from the Security Council resolutions and may be understood as the implementation of some of the provisions of a general character in a Council resolution.[10]

> [U]nilateral coercive measures were regarded by States or a group of States that resorted to them as an instrument of their foreign policy. Those affected by such measures considered them to be infringements on their sovereign rights, and on the principles of non-discrimination and non-interference in their internal affairs. Whether in terms of legitimacy or effectiveness, many speakers recognized that unilateral coercive measures had been tools to achieve their proclaimed objective of forcing the States targeted to change their policies. Where such policies were challenged on the grounds of violations of human rights, unilateral coercive measures might even be self-defeating if they themselves denied the enjoyment of such human rights as the rights to food, to health and to education. Thus, some participants maintained, instead of being assisted in upholding their rights, innocent civilians might be doubly victimized.
>
> Furthermore, . . . if States resorted unilaterally to coercive measures, other States might follow suit and thus undermine the rule-based international system. Measures outside this framework and with an impact on the enjoyment of human rights required . . . an assessment of their legitimacy and effectiveness. The impact on human rights of extraterritorial extension of domestic policies via third States or multilateral institutions was also mentioned as a cause of concern to some. There was broad-based recognition of the need for an independent assessment of the impact on human rights of unilateral coercive measures, and for jurisdictions to uphold human rights and accountability in this context.[11]

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also Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16(2) *Chinese Journal of International Law* 175 <https://doi.org/10.1093/chinesejil/jmx018> accessed 20 April 2024.

10 Masahiko (n 4) 10.

11 Annual report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General of 24 June 2013 UN Doc A/HRC/24/20, paras 29–30 <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/24/20> accessed 20 April 2024; *See* also draft UNGA Resolution A/C.3/73/L.32 on human rights and unilateral coercive measures, submitted by China and Cuba (on behalf of the State Members of the United Nations that are members of the Movement of Non-Aligned Countries) and joined in sponsoring the draft resolution by the Russian Federation of 13 November 2018 <https://digitallibrary.un.org/record/1650903?v=pdf> accessed 20 April 2024.

In the doctrine of international law, there is also no consensus on the legality of applying autonomous (unilateral) sanctions by individual states rather than international organisations, primarily the UN. Thus, for example, some scholars are of the opinion that there is probably a minimum quasi-consensus in the international community that has given rise to a new rule of customary law, whereby at least those economic sanctions regimes that do not include and do not provide minimal attention to fundamental human rights (including, but not limited to, the existence of judicial or quasi-judicial reviews and effective mechanisms to provide remedies and redress to victims of human rights violations arising from the unlawful imposition of sanctions), nor to the requirements of proportionality and discrimination in relation to the intended objectives and the corresponding humanitarian exceptions, are illegal under international law.[12] In particular, in the resolution adopted by the UN General Assembly on 25 September 2015, titled 'Transforming Our World: The 2030 Agenda for Sustainable Development', it is stated that

> States are strongly urged to refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance with international law and the Charter of the United Nations that impede the full achievement of economic and social development, particularly in developing countries.[13]

What is noteworthy is that this resolution was adopted after the illegal annexation of the Autonomous Republic of Crimea by Russia that began in late February 2014, which also calls into question the effectiveness of the UN in maintaining peace and security and preventing conflict.

For a countermeasure to be lawful, it must meet requirements, such as the existence of a prior internationally wrongful act on the part of the target state, the requirement for the first invocation of the obligation, the requirement for proportionality and compliance with the prohibition of the use of force, as well as certain other rules.[14]

12 Dupont (n 7); *See* also UN CESCR, General Comment No 8: The relationship between economic sanctions and respect for economic, social and cultural rights of 12 December 1997 E/C.12/1997/8, para 16 <https://www.refworld.org/docid/47a7079e0.html> accessed 20 April 2024; Research-Based Progress Report of the Human Rights Council Advisory Committee Containing Recommendations on Mechanisms to Assess the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights and to Promote Accountability of 10 February 2015 UN Doc A/HRC/28/74, para 15 <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/28/74> accessed 20 April 2024.

13 Resolution of the General Assembly of 25 September 2015 [without reference to a Main Committee (A/70/L.1)] 70/1 on Transforming Our World: The 2030 Agenda for Sustainable Development UN Doc A/RES/70/1, para 30 <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F70%2F1&Language=E&DeviceType=Desktop&LangRequested=False> accessed 20 April 2024.

14 Responsibility of States for Internationally Wrongful Acts adopted by the UN ILC [2001] <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 20 April 2024.

According to Article 42 of the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility [ASR]):

> a State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.[15] ('Interdependent obligation', e.g., violation of a disarmament treaty or a nuclear-free zone treaty, environmental pollution, etc.)[16]

Subparagraph (b)(i) provides that a state is injured if it is 'specially affected' by the violation of a collective obligation. The term *specially affected* is taken from Article 60, paragraph (2)(b) of the 1969 Vienna Convention.[17] For instance, this is exemplified by a breach of the prohibition of aggression by Russia. Thus, more than one state may be injured by an internationally wrongful act and is entitled to invoke responsibility as an injured state under Article 42 ASR.

Also, due to Article 48 ASR (Invocation of responsibility by a State other than an injured State):

> 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.[18]

Article 48 provides for cases of a breach of the obligation *erga omnes partes* (Article 48, paragraph 1(a)) and of the obligation *erga omnes* (Article 48, paragraph 1(b)).[19] In the judgement of the *Barcelona Traction case*[20] (1970), the International

15 ibid.
16 Masahiko (n 4) 13.
17 UN ILC (n 14).
18 ibid.
19 ibid.
20 Barcelona Traction, Light and Power Company, Limited (*Belgium v Spain*) ICJ Judgement of 5 February 1970, paras 33–34 <https://www.icj-cij.org/sites/default/files/case-related/50/5389.pdf> accessed 20 April 2024.

Court of Justice (ICJ) first articulated the idea of obligations *erga omnes*, defining them as 'the obligations of a State towards the international community as a whole' that 'are the concern of all States by their very nature'.[21] The Court also pointed out that 'in view of the importance of the rights involved, all States can be held to have a legal interest in their protection' and listed, as examples of such obligations, those arising from the prohibition of aggression, genocide, slavery and racial discrimination.[22]

Therefore, Article 42, paragraph (b) covers obligations to a group of States (i.e. collective obligations), and Article 48, paragraph 1(a) covers certain types of collective obligations that are established for the protection of a collective right – interests of the group (i.e. obligations *erga omnes partes*). Due to the additional element ('to protect a collective interest of the group'), added in Article 48, 'obligations *erga omnes partes*' can be considered as a type of 'collective obligation'.[23]

Moreover, 'interdependent obligations' (in paragraph (b)(ii) of Article 42) can be considered as a subset of 'obligations *erga omnes partes*' since their performance by each party necessarily depends on the corresponding performance by all other parties. Interdependent obligations are part of obligations *erga omnes partes*, the latter being part of collective (non-bilateral) obligations. It should be noted, however, that Article 48 will apply to any breach of the obligation *erga omnes partes*, regardless of the gravity or nature of the breach.[24]

However, the question arises: Can states implement countermeasures not listed in paragraph 2, Article 48 ASR?

Article 54 ARS (Measures taken by States other than an injured State) states:

> This Chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.[25]

Hence, everything depends on the interpretation of the term *lawful measures* and the correlation between 'countermeasures' and 'lawful measures'. Herewith, it should be emphasised that Article 54 is placed in Part 3 of Chapter II ASR, entitled 'Countermeasures'. Thus, the 'lawful measures' in Article 54 must be countermeasures, although Article 54 does not expressly provide that 'States other than injured States', as stated in Article 48, have the right to take 'countermeasures'.[26]

21 Brian D. Lepard, *Defining Erga Omnes Customary Norms in Customary International Law: A New Theory with Practical Applications* (CUP 2010) 261 <https://doi.org/10.1017/CBO9780511804717>.
22 Masahiko (n 4) 15.
23 ibid.
24 ibid.
25 UN ILC (n 14).
26 Masahiko (n 4) 17.

Moreover, in the commentary prepared by the International Law Commission (ILC Commentary) to the ASR of 2001,

> The article speaks of 'lawful measures' rather than 'countermeasures' so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.[27]

According to the ILC Commentary on Article 54:

> (3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts).[28]
>
> . . .
>
> (6) . . . the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.[29]

Thus, whether 'a State other than an injured State', as stated in Article 48, can resort to countermeasures depends on the development of international law and state practice in this area. Although state practice can be interpreted as increasingly supportive of the state's position on imposing countermeasures, some states, such as Russia and China, continue to express concerns about the imposition of unilateral sanctions.[30] Thereby, in such circumstances, given the obvious abuse of the right to veto by the permanent members of the UN Security Council, this right should be removed altogether.

Countermeasures within the EU are called 'restrictive measures', and their imposition is implemented within the legal framework of the EU's Common Foreign and Security Policy (CFSP). EU sanctions are now regularly reviewed

27 UN ILC (n 14).
28 ibid.
29 ibid.
30 Masahiko (n 4) 17.

(judicial reviews before the EU General Court and on appeal before the Court of Justice of the EU [CJEU]) to assess their impact and effectiveness. This applies equally to measures taken in the pursuance of UN Security Council resolutions under Chapter VII of the UN Charter and to 'autonomous' EU measures, as was clearly demonstrated in the famous *Kadi case*.[31] At the same time, the Council of the EU emphasised that

> the introduction and implementation of restrictive measures must always be in accordance with international law. They must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy. The measures imposed must always be proportionate to their objective.[32]

Thus, the EU sanctions against the Russian state, Russian companies and private individuals are part of the decentralised reaction from separate parts of the international community to the violation of the ban on the use of force.[33] The EU's political goal is to 'reduce the Kremlin's ability to finance the war, impose clear economic and political costs on Russia's political elite, and diminish Russia's economic base'.[34] The EU applies a comprehensive approach to sanctions, which includes, in particular, sanctions on individuals, companies and organisations, visa measures, import and export bans, financial and business service measures, sanctions on energy, sanctions on transport, sanctions on dual-use goods, asset recovery and confiscation, and measures that make sanctions effective.[35]

Nevertheless, it seems obvious nowadays that Russia's unjustified aggression against Ukraine is a threat to the whole world, since it affects global interests, encroaches on the global system of security and values, is a challenge to the system of international law and is a test (exam) for its sustainability and ability to effectively and promptly counter modern threats. This is a struggle between two civilisations and regimes: democratic and anti-democratic. And, undoubtedly, based on the fundamental principle of rationality, the UN Statute and the very structure of the UN itself need to be changed, reformed and adapted to meet modern needs, since it is absurd when Russia, which has committed and continues to commit an

31 Dupont (n 7) 49–50; *See* also Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2008] ECR 2008 I-06351.

32 Guidelines on the implementation and evaluation of restrictive measures (sanctions) in the framework of the EU common foreign and security policy (updated on 4 May 2018), adopted by the Council of the EU, para 9 <https://data.consilium.europa.eu/doc/document/ST-5664–2018-INIT/en/pdf> accessed 20 April 2024.

33 Felix Lange, *Der russische Angriffskrieg gegen die Ukraine und das Völkerrecht* [The Russian War of Aggression Against Ukraine and International Law] (De Gruyter 2023) 22 <https://doi.org/10.1515/9783111203478>.

34 European Commission, 'EU Sanctions Against Russia Following the Invasion of Ukraine' <https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en> accessed 20 April 2024.

35 ibid.

act of aggression, simultaneously continues to be a member of the UN Security Council and take part in voting against itself, as 'the Security Council can never act against the interests of one of the five permanent members or their allies'.[36] Of course, this causes cognitive dissonance for everyone – not only for lawyers – even for minimally intelligent individuals, and contradicts the key principle of Roman law: no one can be a judge in his own case. Why, in the more than three years since the 2022 full-scale invasion, has the UN been unable to do at least this obvious and bare minimum? The same applies to the principle of the inevitability of punishment and responsibility (accountability) for gross violations of all possible principles and norms of international law. Accountability is being pursued following the creation of the Special International Tribunal on the Crime of Aggression and the initiation of investigations of war crimes by each UN Member State.

This challenge must be resolved not only at the level of international/European organisations, but each individual state must also realise its personal institutional responsibility in the common struggle for democracy and peace. Of course, this requires a search for appropriate legal models and the development of mechanisms to counteract, reform and adopt the necessary legislation at the national level. In this case, one cannot be passive; legal values must prevail over political interests, political expediency and political ambitions, as well as over the economic interests of each individual country, because peace and security are key prerequisites for further development and prosperity.

In conditions of constant turbulence and instability, law should be a stabilising factor, not a destructive one. Europe and the world as a whole must be proactive in this process. Unfortunately, at the moment, there is a threat of the conflict freezing and the system of sanctions is not developing as required to stop the aggression. We need to remember history and not repeat mistakes from the past.

The task of the legal community is to discuss and develop the necessary mechanisms to counter and stop aggression. At the same time, political will is certainly needed to implement specific measures, and diplomatic negotiations could be furthered to convince the entire world democratic community to unite in the face of a common threat and temporarily set aside national interests for the sake of peace and security.

Great Britain

When discussing how the UK has entered the fight against Russia over its violations of international legal norms, it should be noted that British sanctions against Russia, particularly in response to actions such as the annexation of Crimea and involvement in the conflict in Ukraine, are concretised within the robust legal framework established by the Sanctions and Anti-Money Laundering Act 2018 (SAMLA). SAMLA serves as the cornerstone of the UK's sanctions regime,

36 Philippe Achilleas, 'United Nations and Sanctions' in Asada Masakiho (ed), *Economic Sanctions in International Law and Practice* (Routledge 2020) 27.

providing the government with the legal authority to impose a range of sanctions measures, including asset freezes, through secondary legislation.[37]

Following the large-scale invasion of Ukraine in February 2022, Britain expanded the scope of its sanctions against Russia.

Under SAMLA, the UK government can swiftly respond to international crises and threats to national security by enacting targeted sanctions against individuals, entities and countries engaged in activities contrary to UK interests or international law. This flexibility allows for the adaptation of sanctions measures to evolving circumstances and emerging threats, ensuring that the UK remains agile in its response to destabilising actions by Russia, and by other aggressors (e.g. Iran).

Asset freezes are a key component of British sanctions against Russia, enabling the government to restrict access to funds and assets held by designated individuals and entities involved in illicit activities or violations of international law. By freezing assets, the UK government can disrupt illicit financial flows, impose economic costs on perpetrators and deter further aggression or destabilisation efforts by Russia.

The government has refrained from officially disclosing the total value of Russian assets held in the UK. However, estimations suggest that approximately £125 billion worth of individual assets have been frozen thus far, alongside approximately £26 billion worth of Russian Central Bank assets in the UK. While this figure is substantial, it pales in comparison to the EUR 260 billion in Russian Central Bank assets held in the EU.[38]

Nevertheless, there is a crucial distinction between freezing assets and seizing them, as emphasised by policy experts. Freezing assets is considered legally proportionate, as it represents a temporary measure. Although authorities may utilise the profits generated by investing the frozen funds, as agreed upon by the EU, the assets themselves are theoretically subject to return at some point. This distinction underscores the importance of adhering to legal frameworks and principles in implementing sanctions measures.

The implementation of asset freezes under SAMLA is supported by comprehensive guidance provided by the UK Office of Financial Sanctions Implementation (OFSI). OFSI offers detailed instructions on the identification of designated individuals and entities, compliance with sanctions obligations and reporting requirements for financial institutions and other relevant entities. This guidance ensures

37 Reeds Solicitors LLP, 'A Quick Guide to the Sanctions and Anti-Money Laundering Act 2018' <https://www.legislation.gov.uk/ukpga/2018/13/contents> accessed 20 April 2024; *See* also Hugo D. Lodge, 'Statutory Instruments 2018 No 1213 (C 85) Sanctions the Sanctions and Anti-Money Laundering Act 2018 (Commencement 1) Regulations 2018' in *Blackstone's Guide to The Sanctions and Anti-Money Laundering Act* (OUP 2020) <https://doi.org/10.1093/oso/9780198844778.005.0003>.

38 Eleanor Myers, 'Londongrad Forever? Why the UK May Never Seize Russian Assets' *Politico* (Washington, 15 April 2024) <https://www.politico.eu/article/londongrad-forever-uk-never-seize-russia-assets-ukraine-war-sanctions/> accessed 20 April 2024.

that asset freezes are effectively enforced and that UK entities are aware of their legal obligations under sanctions law.[39]

In the context of Russian sanctions, asset freezes have been imposed on individuals and entities involved in activities, such as the annexation of Crimea, support for separatist forces in Eastern Ukraine and human rights abuses. These measures send a clear signal of condemnation of Russia's actions and demonstrate the UK's commitment to upholding international norms and supporting Ukraine's sovereignty and territorial integrity. For example, accounts belonging to Russian officials or entities involved in the annexation of Crimea or the war in Ukraine have been frozen.

Overall, British sanctions against Russia, concretised within the legal framework of SAMLA, enable the government to impose asset freezes and other measures swiftly and effectively in response to threats to national security and international stability. By targeting individuals and entities involved in illicit activities or violations of international law, these sanctions aim to impose costs on perpetrators, deter further aggression and support the rule of law and democratic principles.

Financial restrictions under SAMLA may involve prohibiting transactions with designated individuals or entities and restricting access to UK financial markets for Russian entities implicated in illicit activities or violations of international law.

By imposing asset freezes on Russian individuals and entities involved in the annexation of Crimea and the war in Ukraine, the UK government demonstrated its commitment to upholding international law and promoting peace and stability in Europe. These sanctions were enacted through secondary legislation under SAMLA, which provided the necessary legal basis and procedural framework for their implementation.

Furthermore, SAMLA ensures that the UK's sanctions regime is transparent, accountable and compliant with international legal standards. The act requires the UK government to publish guidance on sanctions measures, including asset freezes, and to provide mechanisms for individuals and entities subject to sanctions to challenge their designation. This ensures that sanctions are targeted, proportionate and subject to appropriate due process safeguards.[40]

In response to a parliamentary question dated 5 July 2022, the UK government expressed its intention to thoroughly explore the potential of seized assets to aid in Ukraine's post-war reconstruction efforts. The statement emphasised the government's commitment to assessing all available options regarding these seized assets and their possible contribution to Ukraine's reconstruction endeavours.[41]

On 22 February 2024, just ahead of the second anniversary of Russia's invasion of Ukraine, the UK government released its inaugural sanctions strategy (referred

39 OFSI, 'UK Financial Sanctions General Guidance' (*gov.uk*, 13 February 2024) <https://www.gov.uk/government/publications/financial-sanctions-general-guidance/uk-financial-sanctions-general-guidance> accessed 20 April 2024.

40 Reeds Solicitors LLP (n 37).

41 UK Parliament, 'Written Question/Answer' (*parliament.uk*, 5 July 2022) <https://www.parliament.uk/business/news/2022/july-2022/coming-up-in-the-commons-4-8-july/> accessed 20 April 2024.

to as the 'Strategy'). This document outlines the UK's approach to utilising and executing sanctions as a foreign policy and security instrument, providing insights into the government's anticipated areas of emphasis moving forward.[42]

The release of the Strategy coincided with the UK's announcement of designations targeting 52 individuals and entities under the Russia and Belarus regimes. These new designations primarily focused on entities involved in supplying munitions to Russia, as well as key sources of Russian revenue, including sectors related to metals, diamonds and the energy trade. These designations complemented the broader UK regime of sanctions pertaining to Russia, which significantly curtailed trade with Russia and restricted its revenue from specific sectors and commodities. The UK government estimates that international sanctions have effectively reduced potential funding for Russia in its conflict with Ukraine by approximately $400 billion.

The Strategy further also declares the UK government's sustained attention to Russia's endeavours to circumvent sanctions, as well as its scrutiny of third-party countries and networks implicated in supplying and aiding Russia. The UK is actively collaborating with third-party nations to mitigate circumvention risks and has issued numerous warnings and guidelines to the UK's financial and business sectors to enhance their capacity to recognise common circumvention tactics.

Sectoral sanctions may include restrictions on trade or investment in specific industries or sectors of the Russian economy, such as energy, defence or technology. These measures aim to impose broader economic costs on Russia for its aggressive behaviour.

This declaration signifies a proactive approach by the government, indicating its willingness to harness seized assets for the greater good of Ukraine's recovery process. Seized assets typically encompass funds or properties confiscated or frozen due to involvement in illicit activities, such as corruption or violations of international law. In the context of Ukraine, these assets could include resources linked to individuals or entities implicated in the conflict or related offences.[43]

The government's pledge to 'consider all options' suggests a comprehensive evaluation process aimed at maximising the utility of these assets. Rather than allowing seized resources to remain dormant or simply returning them to their original owners, the government is poised to explore innovative strategies for repurposing them to support Ukraine's reconstruction.

Potential avenues for leveraging seized assets may include direct financial contributions to reconstruction projects, investment in humanitarian aid programmes, capacity-building initiatives, victim assistance and reparations, and investment in

42 HM Government, 'Written Statement by British Ambassador to the USA on the Inaugural UK-US Strategic Sanctions Dialogue' (*gov.uk*, 2023) <https://www.gov.uk/government/speeches/statement-on-the-inaugural-uk-us-strategic-sanctions-dialogue> accessed 20 April 2024.

43 HM Government, 'Deter, Disrupt and Demonstrate: UK Sanctions in a Contested World. UK Sanctions Strategy' (*gov.uk*, 2024) <https://assets.publishing.service.gov.uk/media/65d720cd188d770011038890/Deter-disrupt-and-demonstrate-UK-sanctions-in-a-contested-world.pdf> accessed 9 May 2024.

economic recovery efforts. By tapping into these seized resources, the government aims to bolster Ukraine's rebuilding endeavours and foster stability and prosperity in the region.

Overall, the government's commitment to exploring the potential contribution of seized assets to Ukraine's reconstruction underscores its dedication to supporting Ukraine's recovery process. Through careful consideration and the strategic utilisation of these assets, the government seeks to play a meaningful role in facilitating Ukraine's journey towards peace, stability and prosperity in the aftermath of the conflict.

Germany

In response to Russia's invasion of Ukraine, Germany, along with other EU Member States, has implemented a series of national sanctions aimed at exerting pressure on Russia, promoting peace and stability in Ukraine and upholding international law. These sanctions, enforced through both EU regulations and German national legislation, encompass various measures targeting individuals, entities and sectors associated with destabilising actions in the region. This chapter delves into the broader regulatory framework underpinning German national sanctions against Russia, their implementation mechanisms and their wider implications for Germany, the EU and the international community.

The regulatory framework governing German national sanctions against Russia is primarily rooted in EU regulations supplemented by German national legislation. EU regulations serve as the cornerstone of the sanctions regime, providing a common legal framework to which all Member States adhere. Key EU regulations relevant to German sanctions against Russia include Council Regulation (EC) No 428/2009, which establishes controls on the exports of dual-use items, and Council Regulation (EU) No 833/2014, which imposes restrictive measures in response to Russia's actions in Ukraine. Additionally, Council Decision 2014/512/CFSP outlines further restrictive measures in response to the illegal annexation of Crimea and Sevastopol.

At the national level, German legislation, such as the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz* [AWG])[44] and the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung* [AWV]),[45] provides the legal basis for implementing sanctions-related measures. The AWG authorises the federal government to regulate foreign trade and payments, enabling the implementation of export controls and other trade-related measures. The AWV specifies the details of these measures, including restrictions on exports to countries subject to international sanctions. Additionally, the War Weapons Control Act (*Kriegswaffenkontrollgesetz*

44 2013 Außenwirtschaftsgesetz (AWG) [Foreign Trade and Payments Act] <https://www.gesetze-im-internet.de/englisch_awg/englisch_awg.html> accessed 20 April 2024.

45 2013 Außenwirtschaftsverordnung (AWV) [Foreign Trade and Payments Ordinance] <https://www.gesetze-im-internet.de/awv_2013/BJNR286500013.html> accessed 20 April 2024.

[KrWaffKontrG])[46] regulates the export, transit and brokering of war weapons and military equipment, supporting the enforcement of arms embargoes against Russia.

In terms of implementation, the Federal Ministry of Economics and Energy (BMWi) plays a central role in coordinating and enforcing sanctions-related measures. The BMWi issues decisions and administrative orders to implement and enforce export controls and other trade-related measures, ensuring compliance with EU regulations and national legislation. Additionally, the Financial Intelligence Unit monitors financial transactions to detect and investigate potential violations of sanctions regulations and collaborates with law enforcement agencies to enforce financial sanctions and combat illicit financial activities. Customs authorities also play a crucial role in enforcing export controls, monitoring trade flows and preventing the unauthorised export of controlled goods and technologies to Russia.[47]

The implications of German national sanctions against Russia are wide-ranging and multifaceted. Economically, restrictions on exports and financial transactions with Russia may impact German businesses involved in trade with Russia, particularly those in sectors subject to sanctions. Disruptions in trade flows and investment patterns could have repercussions for economic growth and employment in Germany and the EU. Diplomatically, German national sanctions against Russia reflect Germany's commitment to upholding international law and supporting diplomatic efforts to address the conflict in Ukraine. Sanctions enforcement contributes to EU solidarity and cooperation in condemning Russia's actions and promoting a peaceful resolution to the conflict.

Legally, German businesses must ensure compliance with export controls and sanctions regulations to avoid legal consequences and reputational damage. Compliance requires a thorough understanding of regulatory requirements, diligent monitoring of sanctions developments and the implementation of robust compliance programmes. As Germany continues to navigate the complexities of sanctions enforcement, cooperation with EU partners and the international community will be crucial in achieving the objectives of promoting peace and stability in the region.

Since 24 February 2022, the German government has undergone a significant shift in its approach to Russia. The decision to supply weapons to Ukraine signalled a fundamental re-evaluation of Berlin's previous assumptions about Russian intentions and Germany's role in security matters. Germany has maintained stringent sanctions, restricted most imports and exports to and from Russia (particularly fossil fuels) and terminated numerous channels for political and societal dialogue with the Russian Federation. This demonstrates the German leadership's ability to respond to major events with substantial foreign policy changes. Additionally, there has been a notable reprioritisation, with Berlin committing to allocating

46 Kriegswaffenkontrollgesetz (KrWaffKontrG) [War Weapons Control Act] <http://ruestungsexport-info.de/en/arms-trade-law/war-weapons-control-act.html> accessed 9 May 2024.

47 Bundesministerium für Wirtschaft und Klimaschutz: BMWK. Fragen und Antworten zu Russland-Sanktionen [Federal Ministry for Economic Affairs and Climate Action: FMEC. Questions and Answers About Russia Sanctions]. Last updated on 4 October 2023 <https://www.bmwk.de/Redaktion/DE/FAQ/Sanktionen-Russland/faq-russland-sanktionen.html> accessed 20 April 2024.

significantly more resources to security and defence and completely realigning its energy policy.

These measures were primarily prompted by Russia's aggressive war against Ukraine, rather than stemming from a comprehensive strategic approach based on an analysis of European and international developments. An essential next step would be to consolidate the measures already taken into a comprehensive Russia policy that corrects previous misconceptions about Russia, considers trade-offs across policy areas, offers a medium- to long-term perspective and signals both internally and externally that there will be no return to Germany's previous Russia policy.

The actions of the Russian regime have demonstrated that the concept of rapprochement through interdependence was misguided. The sanctions imposed have been extensive, aiming to isolate Russia economically and target those responsible for the invasion and war crimes, as well as those who aided Russia in violating Ukraine's territorial integrity prior to the February 2022 attack. Previous sanctions have indeed reduced Russia's military effectiveness in Ukraine.

Dedicating significantly more resources to identifying and halting the circumvention of sanctions promptly and punishing those involved if their actions are deliberate are equally important.

German officials have expressed increasingly progressive ideas about imposing sanctions on Russia and using its frozen resources.

Thus, at the end of 2023 Germany's top federal prosecutor announced a motion to confiscate about EUR 720 million held by a Russian financial institution in a Frankfurt bank account: 'We will not allow Russian funds used to finance the illegal war of aggression against Ukraine to be held unchallenged in German accounts', Justice Minister Marco Buschmann wrote on X, adding, 'Liberal democracy defends itself on the side of the attacked and opposes violence with the law'.[48]

The motion signified an escalation in Germany's efforts to impose sanctions on Russia. Until the end of 2023, Germany had only taken steps to freeze funds belonging to sanctioned Russian entities and individuals. The EUR 720 million in question, reportedly held by a subsidiary of the Moscow Stock Exchange, was frozen following the EU's decision in June 2022 to include the institution in sanctions imposed due to Russia's invasion of Ukraine. The seizure of frozen Russian funds is not unprecedented in international law. In May 2024, US Attorney General Merrick Garland announced the first transfer of forfeited Russian assets for use in Ukraine. In the same month, the European Commission unveiled a plan to utilise Russian assets frozen in the EU to aid in the reconstruction of Ukraine.

48 Hans von der Burchard, 'Germany Aims to Seize €720M of Frozen Russian Money' *Politico* (Washington, 20 December 2023) <https://www.politico.eu/article/germany-to-seize-720-million-euros-russian-assets-budget-crisis/> accessed 20 April 2024.

Poland

The scope and nature of sanctions against Russia are changing dynamically.

Polish provisions introducing sanctions against Russia and Belarus in connection with the armed conflict in Ukraine include two main legal acts:

1 Act on Special Solutions for Counteracting Support for Aggression Against Ukraine and for Protecting National Security from 13 April 2022.[49]
2 Act Amending the Act on Special Solutions for Counteracting Support for Aggression Against Ukraine and for the Protection of National Security and the Act on the National Tax Administration from 5 August 2022.

Overall, sanctions against the Russian Federation in Poland are based on EU sanctions (on July 18, 2025, the 18th package of sanctions against Russia was adopted by the EU) and largely refer to key EU documents, in particular:

- Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus.[50]
- Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.[51]

According to Article 2,

- All funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I shall be frozen.
- No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I.[52] [Annex I includes the list of natural and legal persons, entities and bodies referred to in Article 2].

Article 9 also stipulates that 'it shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Article 2'.[53]

49 Polish Act on Counteracting Support for Aggression Against Ukraine of 13 April 2022, Dz U 2022 poz 835 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220000835/T/D20220835L.pdf> accessed 20 April 2024.

50 Council Regulation (EC) 765/2006 of 18 May 2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus [2006] OJ L 134 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R0765> accessed 20 April 2024.

51 Council Regulation (EU) 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine OJ L 78 [2014] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0269> accessed 20 April 2024.

52 ibid.

53 ibid.

Hence, Poland has imposed listed sanctions and also supplemented this list with exclusions from a public procurement procedure or a competition conducted on the basis of the Public Procurement Law, and has also included specific persons and subjects in the list of foreigners whose stay on the territory of the Republic of Poland is undesirable, as specified in Article 434 of the Aliens Act.[54]

According to Article 2 of this law, the list of persons and organisations in relation to whom the specified measures provided for in Article 1 is maintained by the Minister of the Interior and is published in the Public Information Bulletin on the website of the Minister of the Interior. The list contains the designation of an individual or legal entity in respect of whom the measures are provided for in Article 1, as well as a decision on which of these measures applies to them. The scope of measures applicable to natural and legal persons included in the list cannot duplicate the scope of measures provided for these natural and legal persons in the lists specified in Regulation 765/2006 or Regulation 269/2014.[55]

> The decision on entry on the list is issued against persons and entities having financial resources, funds and economic resources within the meaning of Regulation 765/2006 or Regulation 269/2014, directly or indirectly supporting:
>
> - the aggression of the Russian Federation against Ukraine launched on February 24, 2022; or
> - serious violations of human rights or repression against civil society and the democratic opposition or whose activities constitute another serious threat to democracy or the rule of law in the Russian Federation or in Belarus; or
> - directly related to such persons or entities, in particular due to connections of a personal, organizational, economic or financial nature, or which are likely to have their funds or economic resources available to them for that purpose.[56]
>
> Taking into account the threat to national security, it is prohibited to enter the territory of Poland, to move: between two countries through the territory of Poland, which begins and ends outside this territory; from the territory of an EU Member State of another than Poland in the territory of Poland of goods, in particular, of coal, originating from the territory of Russia or Belarus.[57]

54 Polish Law on Counteracting Support for Aggression Against Ukraine of April 13, 2022, Dz U 2022 poz 835 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220000835/T/D20220835L.pdf> accessed 20 April 2024.

55 ibid.

56 ibid art 3.

57 ibid art 8.

An entrepreneur who imports or transports coal into the territory of the Republic of Poland, regardless of the country of origin of the coal, is obliged to have and provide, at the request of the voivodeship inspector of the Trade Inspectorate and the head of the customs and tax authority, documents confirming the country of origin of the coal, the date of import or movement of the coal into the territory of the Republic of Poland, and in the case of coal, if the country of origin is Ukraine, also the coal mining region. Such information shall be prepared in the form of a declaration that may be accompanied by copies of documents confirming the accuracy of the coal data contained in the declaration. The declaration is submitted under the pain of criminal liability for making false declarations. A financial fine for violation of these requirements is levied by the voivodeship inspector of the Trade Inspectorate in a decision of up to PLN 10,000,000 (approximately USD 2,532,039). Herewith, the group of authorised entities, the amount and the procedure for determining compensation for actual damage incurred in connection with the entry into force of the ban regarding coal originating from the territory of the Russian Federation or Belarus shall be determined by a separate law. In the event of committing the prohibited act, the court may order the forfeiture of the goods constituting the subject of the prohibited act, even if they were not the property of the perpetrator.[58]

The use or promotion of symbols or names that support the aggression of the Russian Federation against Ukraine is also prohibited. Anyone who violates this prohibition is punishable by a fine, restriction of freedom or imprisonment for up to 2 years.[59]

From 26 April 2022, the Ministry of the Interior and Administration of Poland has maintained a sanctions list (last updated on 24 July 2025);[60] that is, a list of persons and entities subject to sanctions. Sanctions are mainly targeted (personal/individual in nature); that is, the list consists of separate individuals and legal entities who are subject to sanctions of a predominantly economic nature.

> The decision on entry on the list is made by the Minister of Interior and Administration. The decision may be made towards people directly or indirectly supporting:
>
> - aggression of the Russian Federation against Ukraine launched on February 24, 2022;
> - serious violation of human rights;
> - repression of civil society and democratic position;
> - activities that constitute another serious threat to democracy or the rule of law in the Russian Federation or Belarus.[61]

58 ibid.

59 ibid.

60 Ministry of Internal Affairs and Administration, 'List of Persons and Entities Subject to Sanctions' (*gov.pl)* <https://www.gov.pl/web/mswia/lista-osob-i-podmiotow-objetych-sankcjami> accessed 24 July 2025.

61 Government of Poland, 'Sanctions of the European Union and Poland Imposed on Russia in Connection with the Armed Conflict in Ukraine' (*gov.pl*) <https://www.biznes.gov.pl/pl/portal/001568> accessed 20 April 2024.

The decision on entry may also apply to persons and entities directly related to the above-mentioned persons or entities, in particular due to personal, organizational, economic or financial connections, or who are likely to use their financial resources, funds or economic resources for this purpose. To the persons and entities included in the sanctions list the following measures could be applied:

- freezing all funds and economic resources owned, held or under their control. Such a freezing encompasses securities and debt securities in public or private trading, including shares, securities certificates, bonds, bills of exchange, warrants, debentures, derivative contracts; interest, dividends on shares, other income from assets and values accrued from or generated by assets;
- limiting the exercise of rights attached to shares and other securities;
- prohibition on making funds or economic resources available directly or indirectly;
- prohibition of intentional and conscious participation in activities aimed at circumventing prohibitions;
- entry into the list of foreigners whose stay on the territory of the Republic of Poland is undesirable.[62]

Those excluded from the public procurement procedure (conducted pursuant to the Public Procurement Law Act of September 11, 2019) are:

- contractors and competition participants appearing on the European Union's sanctions lists adopted against Russia and Belarus (Regulation 765/2006 and Regulation 269/2014);
- contractors and participants of competitions appearing on the sanction list of the Ministry of Interior and Administration;
- contractors and participants of competitions whose real beneficiary is a person appearing on one of these sanction lists;
- contractors and competition participants whose parent company is an entity appearing on one of these sanction lists.[63]

The Polish coal embargo includes a ban on the import of coal and coke from the territory of the Russian Federation or Belarus into the territory of the Republic of Poland, a prohibition on the movement of coal and coke originating from the territory of the Russian Federation or Belarus between two countries through the territory of the Republic of Poland, and a ban on transferring coal and coke originating

62 Ministry of Internal Affairs and Administration (n 60).
63 Government of Poland (n 61).

from the territory of the Russian Federation or Belarus from the territory of another EU Member State to the territory of the Republic of Poland.[64]

> The ban is checked by the head of the customs and tax office. If the head finds a violation, he seizes the goods and requests its forfeiture to the State Treasury. A person or entity violating the above prohibition is subject to a fine of up to PLN 20 million, imposed by the Head of the National Administration. Entities prohibited from importing or transiting coal into the territory of the Republic of Poland will be entitled to compensation for actual damages.[65]
>
> Sanctions relating to the financial sector:
>
> - limited access of some Russian banks and companies to EU primary and secondary capital markets;
> - prohibition of direct or indirect purchase, sale or provision of investment services or assistance in issuing and other activities in relation to transferable securities and money market instruments in relation to, among others, [the] government of Russia and the Central Bank of Russia, legal persons, entities and bodies acting on their behalf, as well as entities indicated in Annex V and VI of EU Regulation 833/2014;[66]
> - expanding financial restrictions, in particular on access of some Russian entities to capital markets;
> - a ban on admitting shares of Russian state entities to exchange trading in EU trading systems and providing related services;
> - a complete ban on providing services in the field of maintaining a wallet, accounts or storing crypto-assets to citizens and residents of Russia, regardless of the total value of these crypto-assets;
> - a ban on all transactions with certain Russian state-owned enterprises from various sectors that make up the Kremlin's military–industrial complex: including: OPK Oboronprom, United Aircraft Corporation, Uralvagonzavod, Rosneft, Transneft, Gazpromneft, Almaz-Antey, KAMAZ, ROSTEC (Russian Technologies State Corporation), JSC PO Sevmash, Sovcomflot, United Shipbuilding Corporation (full list in Annex XIX of the Council Regulation (EU) No 833/2014),[67] and is also prohibited from holding positions in the management bodies of any legal person, entity or body from the list of enterprises indicated above;

64 ibid.

65 ibid.

66 Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Current consolidated version of 24 February 2024 OJ L 229 1–11 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0833> accessed 20 April 2024.

67 ibid.

- prohibition on accepting deposits from Russian nationals or residents, from legal persons, entities or bodies established in Russia or from legal persons, entities or bodies established outside the Union and for which more than 50% of the ownership rights are held directly or indirectly by Russian nationals or natural persons residing in Russia, if the total value of deposits of this natural or legal person, entity or body on a credit institution exceeds EUR 100,000;
- a ban on keeping accounts of Russian clients through EU central securities depositories and on selling securities denominated in EUR to Russian clients;
- prohibition of public financing or financial assistance for trade with Russia or investments in Russia (subject to the possibility of completing contracts concluded before February 26, 2022 or excluding specific cases regarding trade in food products, agricultural, medical or humanitarian purposes, EU programmes for small and medium-sized enterprises – up to a certain amount);
- prohibition of transactions related to the management of reserves and assets of the Central Bank of Russia and bodies, entities or persons acting on behalf or under the direction of the Central Bank of Russia (for example, the National Welfare Fund) and the Regional Development Bank;
- ban on the provision of specialised financial messaging services used for the exchange of financial data (SWIFT) to certain banks and subsidiaries: Bank Otkrytie, Novikombank, Promsvyazbank, Bank Rossiya, Sovcombank, Vnesheconombank (VEB), VTB Bank, Sberbank, Credit Bank of Moscow, Joint Stock Company Russian Agricultural Bank (list in Annex XIV of Council Regulation (EU) No 833/2014);[68]
- ban on investing in projects co-financed by the Russian Direct Investment Fund (RFIB), as well as participating in projects or making other contributions to these projects (derogations are strictly defined and apply to contracts concluded before March 2, 2022);
- ban on the participation of Russian contractors in public procurement and concessions granted in European Union Member States;
- ban on the delivery of EURO banknotes to Russia (exceptions include funds necessary for personal use of travelers to Russia or official purposes of diplomatic, consular missions, international organizations).[69]

Sanctions regarding weapons and dual-use goods include:

- ban on the export and import of weapons;
- prohibition of the sale, supply, transfer or export, directly or indirectly, of dual-use goods and technology, whether or not originating in the Union, to any natural or legal person, entity or body in Russia or for use in Russia;

68 ibid.
69 Government of Poland (n 61).

- ban on the export of ammunition, military vehicles and paramilitary equipment;
- ban on the export of drone engines;
- ban on the export of goods and technologies that could contribute to strengthening Russia's military and technological potential or developing the defense and security sector;
- further restrictions on the export of dual-use goods and technologies and the provision of related services, as well as restrictions on the export of certain goods and technologies that could contribute to the technological strengthening of Russia's defense and security sector;
- ban on the transit of dual-use goods, technologies and weapons exported from the EU through the territory of Russia.[70]

Thus, the goods and technologies that can strengthen Russia's military and technological potential include:

- electronics (including electronic devices and components, electronic assemblies, specialised data processing devices, devices for the production of components or materials, control devices, photoresist materials, software and technologies, electronic integrated circuits, electronic components used in weapon systems, e.g. drones, rockets, helicopters);
- computers – excluding those intended for the use of natural persons (including software and technologies);
- telecommunications – excluding those intended for use by natural persons (including devices, preforms, software, technologies);
- information protection (including devices, software, technologies);
- sensors and lasers (including thermal imaging cameras, optical devices, radar systems, optical materials, software, technologies);
- navigation and avionics (including on-board communication devices, software, technologies);
- ship devices – vessels (including software and technologies);
- space, aeronautics and propulsion (including diesel engines, wheeled tractors, gas turbine engines, gas turbine aircraft engines, other devices, software and technologies);
- rare earth metals and chemical compounds.[71]

The list of goods and technologies that may enhance Russia's military and technological potential is set out in Annex II of Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.[72]

70 ibid.

71 ibid.

72 Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in

A ban was also introduced on the export of products and technologies that could contribute, in particular, to increasing Russia's industrial potential and could be easily redirected for use in support of Russian military operations. The above products include, among others:

- vehicles such as trucks (and their spare parts), semi-trailers and special vehicles (for example, snowmobiles);
- goods that can be used for military purposes, including: power generators, binoculars, antennas, radars, compasses;
- construction sector products: structures and construction parts such as bridges, towers, forklifts, cranes;
- goods crucial for the functioning and development of Russian industry (electronics, machine parts, pumps, metal processing machines, etc.); complete industrial plants, electronics production equipment, crystal extractors, furnaces, machine tools, electrodes;
- chemical compounds, including fentanyl and its derivatives, chemical precursors of substances acting on the central nervous system, vaccines, immunotoxins, certain medical products, diagnostic and food testing kits;
- goods used in the aerospace industry (for instance, turbojet and turboprop engines).[73]

The list of goods and technologies that could contribute in particular to increasing Russia's industrial potential, covered by the prohibition of sale, supply, transfer or export, directly or indirectly, includes:

- Annex XXIII of Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine,[74] and
- Annex VII of Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.[75]

Key sanctions in the energy sector include the following:

- A price ceiling has been introduced for the sea transport of crude oil and petroleum products – a price per barrel has been established at which or below which the purchase of petroleum products from Russia will not be subject to a ban on the provision of the following related services: sea transport of such products to

Ukraine ST/6372/2023/INIT [2023] OJ L 59I 6–274 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R0427> accessed 20 April 2024.

73 Government of Poland (n 61).

74 Council Regulation (EU) 833/2014 (n 66).

75 Council Regulation (EU) 2023/427 (n 72).

third countries and technical assistance, intermediation services or financing or financial assistance relating to the maritime transport of such products to third countries.
- Ban on coal imports from Russia.
- Ban on imports of crude oil from Russia with limited exceptions.
- Limiting Russia's access to certain strategically valuable technologies and services that can be used for the production and extraction of oil.
- Ban on the sale, supply, transfer or export to Russia of certain goods and technologies used in the refining of crude oil, together with restrictions on the provision of related services.
- Ban on new investments in the Russian energy and mining sector and comprehensive export restrictions on equipment, technologies and services for Russia's energy industry – with specific exceptions for the civil nuclear industry and the (downstream) energy transport sector.
- Ban on making gas storage potential available to Russian citizens (except for parts of LNG installations).[76]

Sanctions in the transport sector include the following:

- A ban on the export of goods and technologies suitable for use in the aviation, space and maritime industries, including a ban on the export, sale, supply and transfer to Russia of all airplanes and other aircraft and their parts and equipment.
- Prohibition on the provision of insurance, reinsurance and maintenance services in respect of goods and technology suitable for use in the aerospace industry.
- Prohibition on the provision of technical assistance and other related services, as well as financing and financial assistance in relation to goods and technologies suitable for use in the aerospace industry (aircraft, spacecraft and parts thereof).
- Prohibition of landing on the territory of the European Union, taking off from the territory of the European Union and flying over the territory of the European Union of Russian air carriers, aircraft registered in Russia and owned, chartered or controlled by Russian legal and natural persons.
- Closing European Union ports to Russian ships (exceptions apply to the transport of medical supplies, food, energy resources and humanitarian aid).
- Ban on sea transport of Russian crude oil to third countries (if purchased at a price above the price ceiling).
- Entry ban to the European Union for Russian road carriers (exceptions include essential services such as transport of agricultural and food products, humanitarian aid and energy resources).

In justified and predetermined cases, derogations from these prohibitions are possible, including for the completion of contracts concluded before a specific

76 Government of Poland (n 61).

date, humanitarian purposes, counteracting health threats, human and environmental safety, medical purposes, cybersecurity.[77]

Sanctions in the raw materials and other goods sector include a ban on imports of iron and steel products, a ban on the import of wood, cement, bitumen and related materials, such as asphalt and soot, and a ban on the import of paper, synthetic rubber and plastic.[78]

> The list of items subject to the import or import ban is contained in Annexes XVII, XXI, XXII of Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine,[79] and Annex VI of Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.[80]

Sanctions on luxury goods include a ban on the sale, delivery, transfer or export of luxury goods – valued at more than EUR 300 per item or above the amounts indicated in certain commodity groups – and a ban on the import of, among others, gold, including jewellery, seafood, alcohol, cigarettes and cosmetics.[81]

> The list of luxury goods subject to sanctions is included in Annex XVIII of Council Regulation (EU) No 833/2014 concerning restrictive measures in connection with Russia's actions destabilising the situation in Ukraine.[82]

With respect to sanctions in the services sector, a ban has been introduced on the provision of certain services to Russia, persons in Russia and Russian entities, in particular:

- Prohibition on providing services of maintaining crypto-asset wallets or accounts and storing crypto-assets.
- Prohibition on providing architectural and engineering services.
- Ban on providing IT consulting and legal advisory services.
- Prohibition on the provision of certain services related – directly or indirectly – to business activities, such as accounting, auditing, statutory audits, accounting services and tax advisory services.
- Ban on the provision of advertising services and market and public opinion research.

77 ibid.
78 Council Regulation (EU) 833/2014 (n 66).
79 ibid.
80 Council Regulation (EU) 2023/427 (n 72).
81 Council Regulation (EU) 833/2014 (n 66).
82 ibid.

- Prohibition on the provision of technical assistance, intermediation services, financing or financial assistance – with respect to the transport of Russian crude oil by sea.
- Prohibition on the provision of credit rating services and a prohibition on access to any subscription services related to credit rating activities to Russian customers.[83]

Among other sanctions, such as diplomatic, visa and media sanctions, the following apply:

- A ban on Russian citizens holding any positions in the management bodies of critical infrastructure enterprises of the EU Member States.
- A ban on broadcasting and assistance in broadcasting and suspension of all licenses and permits in this respect in relation to Russian media: RT – Russia Today and its subsidiaries, Sputnik and its subsidiaries, Rossiya RTR/RTR Planeta, Rossiya 24/Russia 24, Rossiya 1, TV Center International, NTW/NTV Mir, REN TW, Pierwyj Kanal.[84]

In terms of diplomatic sanctions, all talks and negotiations with Russia were suspended and steps were taken by international financial institutions to suspend the financing of new operations or programmes with Russia. Bilateral and regional cooperation programmes with Russia were also suspended and

> a decision was made to completely suspend the visa facilitation agreement between the EU and Russia, including the application of simplified entry documentation and the issuance of multiple visas for specific groups of people from Russia (including: official delegations, entrepreneurs, representatives of the administration and parliament). Therefore, the general provisions of the Visa Code will apply to Russian citizens.[85]

Some restrictions on Ukrainian territories temporarily outside its jurisdiction have also been imposed. In particular, in Crimea and Sevastopol, the sanctions include the following:

- A ban on [the] import of goods from Crimea and Sevastopol.
- Trade and investment restrictions in certain economic sectors and infrastructure projects (including, among others: transport, telecommunications, energy, oil, gas and mineral extraction).
- Ban on providing tourist services in Crimea or Sevastopol.
- Ban on the export of certain goods and technologies.[86]

83 Government of Poland (n 61).
84 ibid.
85 ibid.
86 ibid.

In the Donetsk, Luhansk, Zaporizhia and Kherson regions, sanctions provide for:

- Ban on the import of goods from non-government-controlled areas of Ukraine in the Donetsk, Luhansk, Zaporizhia, and Kherson regions.
- Trade and investment restrictions, including a ban on purchasing shares, real estate, granting loans, creating joint ventures, exporting goods and technologies related to transport, telecommunications, energy, exploration and extraction of oil, gas and mineral resources (a wide list of goods prohibited for export has been prepared, including mineral products, chemicals and chemical products, metallurgical products, tools, machinery and equipment).
- Ban on technical assistance, including infrastructure-related services, in non-government-controlled areas of Ukraine's Donetsk, Luhansk, Zaporizhia, and Kherson regions.
- Ban on the provision of certain advisory and consultancy services.
- Ban on the provision of tourist services in non-government-controlled areas of Ukraine's Donetsk, Luhansk, Zaporizhia and Kherson regions.[87]

The penalties for failure to comply with sanctions include those persons or entities that, among others:

- Do not fulfill the obligation to freeze funds or economic resources.
- Do not fulfill the obligation to immediately provide information required by the provisions of EU regulations.
- Do not comply with the prohibition of conscious and intentional participation in activities the purpose or effect of which is to circumvent the application of measures specified in the provisions of EU regulations.

Failure to comply results in a financial penalty imposed by the Head of the National Tax Administration by way of a decision in the amount of up to PLN 20 million (approximately USD 5,064,078).[88]

Final remarks

One of the key problems related to the effectiveness of sanctions, besides circumventing them through the use and increasing trade turnover with third countries, is, of course, the absence of a mechanism not just for freezing Russian assets, but for seizing and transferring them to the Ukrainian economy, in particular for its recovery. This would help to support the economy and would be ethically fair. In this regard, it seems advisable to create an International Fund for the Restoration of Ukraine, where all frozen assets could be transferred by separate states that have imposed sanctions at the national level against Russia. Developing a legal

87 ibid.
88 ibid.

basis for the functioning of this mechanism is a key task today. In addition, the mutual exchange of successful experiences of different countries, in particular, the established mechanisms of Poland, Germany, Great Britain and the Baltic countries (Estonia, Lithuania and Latvia, which occupy one of the leading positions in Europe in terms of the volume of assistance to Ukraine and the reduction of trade ties with Russia), could become a good example for other states, as well as for the EU, the Council of Europe and the UN, and which could also become successful, but for this to happen, it will be necessary to undertake reforms, in particular, when it comes to the UN, and to adopt the appropriate legislative framework for the prompt implementation of these mechanisms.

Under conditions of war, the speed of decision-making must be simplified as much as possible so that it is possible to quickly – and in a timely manner – respond to threats and negative consequences. This requires the consolidation and political will of democratic leaders in most countries. At the same time, it is obvious that delaying this process and expecting that the problem will resolve itself is careless and irresponsible in terms of the values of democracy, the rule of law and human rights. Unfortunately, threats to the democratic liberal legal order have become a reality. We have reached a point of no return and this requires urgent decisions and decisive actions, reactions and an unambiguous assessment on the part of each individual state and the international community as a whole. After all, the procrastination is killing more and more people in Ukraine and it is destroying the hope we hold for the victory of democratic values, resulting only in more and more questions rather than answers.

When it comes to the legal justification of sanctions, the central problem in imposing sanctions on the property of individuals is the special, almost absolute protection of private property rights, which is recognised as the fundamental right of an individual in almost all jurisdictions. Thus, some sanctions relating to the limitation and confiscation of private property could be recognised, from a purely legal point of view, as a violation of the right to property. According to Article 17 of the Charter of Fundamental Rights of the EU,

> everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. *No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss* [emphasis added].[89]

Thus, we make a distinction between the restriction of use and the withdrawal of ownership, to which increased justification requirements are applied. This can be deduced from the case law of the CJEU, which defines how the threshold for

89 Charter of Fundamental Rights of the European Union (2012) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> accessed 20 April 2024.

withdrawal is exceeded only when the owner is excluded from all relevant use and disposal.[90]

Thus, personal sanctions do not deprive those affected by ownership of the assets. Rather, they restrict the authority to dispose of and use the property temporarily and to a limited extent. Accordingly, the CJEU, in its *Kadi* decision,[91] decided on listing, in the context of combating terrorism, that 'freezing' assets did not constitute confiscation.[92] According to the CJEU's established case law, mere restrictions on the use of property are lawful if they 'actually correspond to objectives of the Union that serve the common good and do not represent a disproportionate, intolerable interference with regard to the objectives pursued, which would affect the essence of the rights thus guaranteed'.[93]

Therefore, we find ourselves in a situation in which sanctions are legitimate (approved by the international community and following on from the spirit of the key principles of international law), fair and reasonable, and are also minimally necessary when compared in proportion to the damage caused (which certainly will not be proportionate and sufficient, since we cannot measure the deaths of thousands of Ukrainians), but not legal. However, they can become legal if each individual EU Member State adopts special legislation at the national level, and/or makes changes to existing acts regarding the legality of not just restrictions on use, but also confiscation of property and, most importantly, its transfer to the Ukrainian economy as a trust fund for restoration, development and overcoming the negative consequences and the colossal damage that Russia has caused to Ukraine. Unfortunately, at the moment, we do not see enough actions on the part of individual states. In particular, there were attempts by Great Britain to do so in 2024; however, they were unsuccessful.

This example clearly demonstrates that the initiative of individual states is necessary here, since at the EU level, it is extremely difficult to make such decisions, and from a practical point of view (i.e. from the point of view of implementing this mechanism in practice), it is impossible. Accordingly, with respect to the principle of subsidiarity, these actions could be more effectively carried out by using the competence of individual EU countries with the necessary assistance from the EU.

Regarding the imposition of personal sanctions on specific natural persons not related directly to the oligarchs or Russian state authorities, we face problems with proper and sufficient justification. For instance, in March 2023, the CJEU decided that the listing of the mother of Wagner boss Prigozhin was unlawful.[94] It was not proven that she had economic connections to the Wagner boss, and family

90 Lange (n 33).

91 Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2008] ECR 2008 I-06351 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0402> accessed 20 April 2024.

92 Lange (n 33).

93 ibid.

94 Case T-212/22 *Prigozhina v Council* [2023] ECR 2023 <https://curia.europa.eu/juris/documents.jsf?num=T-212/22> accessed 20 April 2024.

relationships alone were not sufficient for the listing. Thus, on the one hand, it is a good thing for the EU legal system if human rights obligations are taken seriously, even when it comes to EU sanctions, but on the other hand, while examining the proportionality of the sanctions, we cannot ignore their context: 'The decentralized sanctions represent an important pillar of the response to the Russian war of aggression and the violation of the ban on the use of force'.[95]

On the other hand, Poland, Germany and other countries are also increasing trade turnover. In the fourth quarter of 2022, Polish exports to Russia amounted to EUR 1.2 billion. This was 44% less than a year earlier, but at the same time, it was a better result than in the second or third quarters of 2022. Throughout 2022, exports from Poland to Russia amounted to almost EUR 4.7 billion. This was 40% less than the year before. In particular, Poland was third among EU suppliers to the Russian market, ahead of Germany, whose sales to Russia amounted to EUR 14.1 billion (44% less than a year earlier), and Italy, which recorded a decline of only 23% to EUR 5.8 billion. Poland achieved greater success in reducing imports from Russia in 2023 than in reducing exports. In the fourth quarter of 2022, it amounted to EUR 2.3 billion and was 61% less than the previous year. All this was achieved despite the increase in the prices of energy raw materials, which were the main component of Polish imports from Russia. As a result, Poland dropped to seventh place on the list of the largest EU recipients from Russia. In 2021, Poland was still in second place. Germany has remained the leader, having received deliveries from Russia worth EUR 4.1 billion in the fourth quarter of 2022. However, that was 49% less than a year earlier. Taking into account the entire year of 2022, Poland was one of the few countries that managed to limit imports from Russia. In its case, imports decreased by 9% to EUR 15.1 billion. Finland reduced imports from Russia by 38% to EUR 5.2 billion, and Lithuania by 43% to EUR 2.4 billion. In Germany, there was an increase of 6%, up to EUR 29.9 billion. Energy resources play a major role in this. For instance, imports from Russia to Germany amounted to EUR 18.4 billion.[96]

The value of imports from Russia to Poland in 2023 decreased by over 6.5 times, mainly due to the cessation of importing energy raw materials from Russia. The value of imported vegetables increased. For the first time since 1991, Poland recorded a positive trade balance with Russia, in which the surplus amounted to over PLN 5.5 billion.

However, imports of plant products have been increasing for three years, including cereals, vegetables and fruits. Thus, in 2021, Poland imported these types of products worth PLN 325 million. In 2022, it bought them for PLN 459 million, and in 2023, they were imported to the tune of PLN 486 million. For comparison,

95 Lange (n 33) 26.

96 Łukasz Wilkowicz, 'Eksport z Polski do Rosji zamiast dalej spadać, zaczął rosnąć' [DANE EUROSTATU] [Instead of Falling Further, Exports from Poland to Russia Started to Grow (EUROSTAT DATA)] (*Forsal.pl*, 19 March 2023) <https://forsal.pl/biznes/handel/artykuly/8683839,eurostat-eksport-z-polski-do-rosji-zamiast-dalej-spadac-zaczal-rosnac.html> accessed 20 April 2024.

imports of plant products from Ukraine in 2022 amounted to PLN 6 billion, while in 2023, Poland imported these types of products in the amount of PLN 2.3 billion. In 2021, the value of plant product imports amounted to PLN 1.1 billion.

The value of exports from Poland to Russia also decreased in 2023, but not as dramatically as imports. In 2023, Poland exported goods worth nearly PLN 17 billion (EUR 3.65 billion). This was 26% less than in 2022, when the export value amounted to PLN 22.3 billion (EUR 4.78 billion). For comparison, exports to Russia in 2021, before the full-scale invasion, amounted to PLN 36.5 billion (EUR 8 billion).

In 2023, Poland mainly exported chemical industry products to Russia: pharmaceutical products, medicines and cosmetic products, including perfume. The export value of these goods amounted to PLN 4.5 billion. In second place, worth PLN 3 billion, were goods from the 'Machinery and mechanical devices' sector. These include centrifuges, washing machines, agricultural machines, harvesting machines, forestry machines, fans, pumps, etc. And, in third place, worth PLN 2 billion, were ready-made food products, alcohol and nicotine products. Thus, for the first time in modern history (since the fall of the USSR), Poland recorded a positive foreign trade balance with Russia, amounting to approximately PLN 5.5 billion.[97]

However, some trade is camouflaged because sanctions are circumvented through trading with companies from third countries. The analysts of the Polish Economic Institute drew attention to attempts to bypass sanctions. In particular, in the first 11 months of 2022, exports to Turkey increased by 45%, to Kazakhstan by 35%, to Uzbekistan by 74%, to Georgia by 40% and to Armenia by as much as 344%. At the same time, sales to Russia from these countries increased. Trade data suggest that, in many cases, these were goods produced elsewhere and that countries maintaining close trade relations with Russia served as a way to avoid sanctions.

Since 5 December 2022, there has been a ban on importing oil from Russia by sea, combined with a price limit of $60 per barrel. Also, on 5 February 2022, an embargo on the import of finished fuels from Russia came into force.[98]

Iwona Wiśniewska from the Center for Eastern Studies commented that, to date, Russian oil companies have not fully felt the Western restrictions aimed at them. First, the EU embargo on oil imports still excludes deliveries via pipelines (flowing to Poland, the Czech Republic, Slovakia and Hungary) and by sea to Bulgaria (due to difficulties in alternative supplies to this country). Moreover, due to the high

97 Mariusz Marszałkowski, 'Polska pierwszy raz z dodatnim bilansem w handlu z Rosją' [Poland Has a Positive Trade Balance with Russia for the First Time] (*Polon.pl*, 21 February 2024) <https://www.polon.pl/gospodarka/polska-pierwszy-raz-z-dodatnim-bilansem-w-handlu-z-rosja/> accessed 20 April 2024.

98 Polski eksport do Rosji, 'PIE: Jego wartość spadła o blisko 40 procent' [Polish Export to Russia. PIE: Its Value Decreased by Almost 40 percent] (*Polskie Radio 24.pl*, 10 February 2023) <https://polskieradio24.pl/artykul/3117342,polski-eksport-do-rosji-pie-jego-wartosc-spadla-o-blisko-40-procent> accessed 9 May 2024.

prices of raw materials in the first half of 2022, companies obtained a significant income, which compensated for its lower value at the end of the year.[99] Russia is currently maintaining high oil production rates (in 2022, it even increased by 2% to 535 million tonnes). Raw oil was redirected, especially to India, China and Turkey. In turn, until 5 February 2022, petroleum products (mainly diesel oil) were still delivered in large quantities to EU countries that were stockpiling them before the introduction of sanctions. Moreover, Russian companies were increasing their supplies to African countries and Turkey.[100]

German *Bild* reports that exports of certain categories of goods from Germany to the Commonwealth of Independent States (CIS) countries (Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan) have at least doubled since Russia's invasion of Ukraine. Data from the German Federal Statistical Office confirm this assertion. The International Special Envoy for the Implementation of EU Sanctions, David O'Sullivan, has also noted that Germany is increasingly supplying goods to CIS countries. Supplies of German goods to Tajikistan increased by 150% in 2022, to Belarus by 77%, and to Kyrgyzstan by as much as 994%. According to the German Eastern Business Association, in 2022, exports of cars and car parts from Germany to Kazakhstan increased by 507% and to Armenia by 761%. Exports of chemical products to Kazakhstan increased by 129% and to Armenia by 110%. Exports of electrical equipment increased by 344% to Armenia and by 105% to Uzbekistan. The supply of metal products to Kazakhstan increased by 137% and clothing by 88%.[101]

The German government believes that these goods may ultimately reach Russia, bypassing applicable sanctions through the so-called parallel import process. In 2023, EU exports to Kyrgyzstan exploded. As calculated by Robin Brooks, chief economist and managing director of the Institute of International Finance, Polish exports in the first five months of 2023 compared to the first five months of 2019 increased by 1,990%, German exports increased by 1,300% and Czech exports by 1,300%. Hungarian exports increased by only 485% because it continues to trade with Russia directly. In the case of Germany, the surge is broad-based, with large increases in clothing, beverages, metal products, etc. The largest single increase has been, not surprisingly, in motor vehicles and parts.[102]

Therefore, despite the introduction of numerous sanctions, in practice, they are not effective enough and the results of sanctions for the Russian Federation are

99 Iwona Wiśniewska, 'Dalsze ograniczenia w eksporcie rosyjskiej ropy' [Further Restrictions on the Export of Russian Oil] (*Centre for Eastern Studies*, 7 February 2023) <https://www.osw.waw.pl/pl/publikacje/analizy/2023-02-07/dalsze-ograniczenia-w-eksporcie-rosyjskiej-ropy?utm_source=bankier.pl&utm_medium=content&utm_campaign=article> accessed 20 April 2024.

100 ibid.

101 Przemysław Szubański, 'Europejskie towary trafiają do Rosji przez pośredników' [European Goods Come to Russia Through Intermediaries] (*Parkiet.com*, 8 August 2023) <https://www.parkiet.com/gospodarka-swiatowa/art38919631-europejskie-towary-trafiaja-do-rosji-przez-posrednikow> accessed 20 April 2024.

102 ibid.

very slow, since it finds ways to circumvent them with the help of third countries. Thus, despite the reduction in direct imports to EU countries from Russia, there has been an increase in the exports of some goods to it. In addition, it is still possible to import some goods from Russia through third countries. It should also be noted that individuals and legal entities in EU countries themselves find ways to circumvent sanctions. It is obvious that such unsatisfactory indicators will not lead to a sharp decline in the Russian economy, which could stop the war, since Russia has managed to adapt and look for new schemes to circumvent sanctions. This is influenced by both objective and subjective factors. In particular, it should be noted that most EU countries still continue to depend on Russian raw materials, and there is a reluctance around individuals, legal entities and businesses losing their incomes and the huge Russian markets.

Law always objectively lags behind the development of social relations. It is obvious that the ability to adapt, flexibility and quick mechanisms for circumventing sanctions have led to an unsatisfactory effect from their existence after more than three years. Therefore, the international community must think two or even three steps ahead. Unfortunately, the packages of sanctions that have been adopted are increasingly lagging behind in time and delaying the effect of sanctions for years, while Ukraine is losing human resources much faster and economic indicators due to the war are falling, despite financial assistance and support from partner countries and organisations. For a long time, economists have argued that the effect of sanctions cannot be immediate and will be felt in a few years; however, the ability of Russia to diversify its markets and find ways to circumvent sanctions has clearly neutralised the impact of sanctions and this postpones their negative effect for an even longer time. It is obvious that the real losses in Ukraine are much larger and disproportionate to the negative effect of sanctions for the Russian Federation, and this gap has been growing exponentially over time, which indicates the ineffectiveness of sanctions and the need to improve their mechanisms and for the international and European community to react more rapidly and with more flexibility, not just to threats but to the real destruction to the values of democracy, which is happening in the 21st century in the centre of Europe. Democracy is the common heritage of all humanity; therefore, in order not to repeat the mistakes of the past, it will be necessary to unite and fight against authoritarian regimes. Only the consolidated and decisive position of all civilised democratic countries can preserve security and the prospects for the sustainable development of mankind. We cannot allow a precedent to be created by Russia to essentially nullify all the efforts and sacrifices that were made to win our values of the rule of law and human rights.

Of course, sanctions have a multi-vector impact and operate in different areas, but it is the economy, in the broad sense of the word, which is the key link in this mechanism. Therefore, the international community, particularly the UN, needs to immediately make changes to its statutes and develop more effective mechanisms to counter Russian aggression. To date, the international community's response has been inadequate and disproportionate to the harm already caused and to potential future losses. Unfortunately, we can see that politics is stronger than law. Economic business interests, in practice, have turned out to be more important than human

lives and the declarations, principles and values of law. The power of law must defeat the law of power; otherwise, in the future, everything that has already been achieved will be destroyed and nullified. What is happening now only delays this time bomb.

On the other hand, it should also be recognised that, in some situations, even when politicians want to tighten sanctions, unfortunately, practice and real life quickly adapt to the prevailing circumstances and the law is sometimes unable to effectively resolve such challenges, since there are still opportunities for legal abuse, and those protection mechanisms that the law has already created block quick and effective methods of achieving the expected results. Thus, in practice, legal mechanisms that were created for the legitimate purpose of protecting human rights and freedoms are used by the same subjects who violate the essence and original purposes of their realisation, formally acting within the framework of the law, which, however, is essentially its abuse. This is how, for example, mechanisms for circumventing sanctions with the help of third countries work. For such abuse, there is not always legal liability or real mechanisms for effective counteraction. In addition, entities that finance terrorism circumvent sanctions and then 'hide behind' the human rights banner, which, in practice, is much more successful than proving the abuse of law or the circumvention of sanctions by these individuals, since from a formal point of view, such entities operate within the legal framework. And it turns out to be a vicious circle, a labyrinth, from which it is difficult to find a quick way out.

This is why this war has highlighted and shown the challenges that the law is unable to resolve and resist at the moment. It is certainly a wake-up call, and postponing the search for a solution to the problem does not mean its disappearance, but only its growth and complication. Accordingly, it is necessary to create an international commission for the global reform of public international law. The basis for this could be the Peace Plan developed by Ukraine (Zelenskyy's Peace Formula),[103] which can serve as an effective tool not only for Ukraine, but also for other countries in the event of potential conflicts.

Based on this, we believe that it is necessary to make the Russian Federation a pariah country in the international arena, to isolate it and stop all trade ties with it, and to impose sanctions not only on individuals and legal entities, but also on all citizens of the Russian Federation, in particular, with a ban on issuing all types of visas, including tourist and work visas, by blocking all foreign bank accounts, excluding all Russian athletes from participating in all sports competitions, and excluding all Russian citizens from scientific projects and art events. There surely seems to be so much fear about provoking Russia, especially as they threaten 'going nuclear'. Nevertheless, there should be no double standards or half-measures.

It is also very important to expand the list of sanctions to the third countries that participate in and contribute towards circumventing sanctions.

103 'What Is Zelenskyy's 10-Point Peace Plan?' (*war.Ukraine.ua*, 11 August 2023) <https://war.ukraine.ua/faq/zelenskyys-10-point-peace-plan/> accessed 20 April 2024.

A more decisive reaction is also needed from individual EU Member States, which, at the national level, can make appropriate changes to legislation and also investigate war crimes, impose sanctions at the national level against all citizens of Russia and, most importantly, not only freeze, but also create legal mechanisms for the transfer of frozen Russian assets to Ukraine.

Moreover, it is necessary to immediately create a Special Tribunal for the Crime of Aggression in order to legally assess the highest military–political leadership of the Russian Federation.

We also believe that, for Ukraine, the most effective guarantee of security would be immediate membership in NATO and the sending of NATO troops to Ukraine for joint combat operations. First, it concerns the countries that signed the Budapest Memorandum, which guaranteed our security. Moreover, instead of empty declarations, we need real help in practice. For example, some EU countries have not helped Ukraine enough. For example, France, which has the greatest military potential in the EU in terms of the actual volume of assistance to Ukraine, is not even among the top ten countries.[104]

The consolidation of European democracies during the attack on Israel on 19 April 2024, particularly France and Great Britain, demonstrated that Europe could unite and prevent mass loss of life. However, why does Europe not want to protect Ukraine and its citizens? Is it really possible to weigh up and evaluate people's lives? European politicians commented that there were French and British military bases on Israeli territory and they therefore defended their national interests in this way. Consequently, the question is: Why are there still no such bases in Ukraine? Probably because Europe still, unfortunately, identifies Ukraine as being in Russia's sphere of influence and therefore does not want to interfere with and violate the invisible world spheres of political influence, thus drawing a clear line and applying double standards, declaring that Ukraine is part of civilised democratic countries, but, in practice, hypocritically refraining from the slightest reason to 'anger' Russia and somehow provoke it in order to avoid an escalation of the conflict. But what kind of escalation are we talking about, and how can this conflict escalate further when people and children die every day in Ukraine? For more than three years now, there has not been an escalation, but a full-scale war. In this case, it is precisely inaction and impunity that has led to escalation. After all, we are not talking about entering into a conflict, and there is no need to distort and juggle words, because it is all about the basic protection of ordinary people first and foremost. Therefore, these kinds of comments and explanations look cynical, especially for Ukrainians. Why do Ukrainian citizens not deserve such protection from Europe? Why is the principle of equal treatment being violated?

Throughout the entire war in Ukraine, we have observed how Europe has been arming itself since the beginning of the war. NATO countries have been increasing their military potential, while simultaneously observing how people are dying

104 'Ukraine Support Tracker: A Database of Military, Financial and Humanitarian Aid to Ukraine' (*IfW Kiel*) <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/> accessed 20 April 2024.

every day in Ukraine. The volumes and supply of assistance are insufficient and very slow for a radical advantage for Ukraine, which is essentially a slow death for the country. Moreover, currently, in 2025, there has been a backslide in aid and even its blocking in the US, which generally raises the question of our existence and survival. Fortunately, in the end of April 2024, the US finally managed, after a long period of blocking aid to Ukraine, to make the necessary decision and passed a $95 billion legislative package providing security aid to Ukraine, Israel and Taiwan,[105] but we lost a lot of time and people's lives, and the delivery of this aid will also take time. At the same time, NATO, unlike the EU, has not put forward any concrete plans for Ukraine's membership, again so as not to anger Russia, which, for Ukraine, is the most realistic guarantee of security.

After all, Ukraine, having renounced nuclear weapons and signed the Budapest Memorandum, was counting on real security and guarantees of territorial integrity. So, what is happening now? Where are our security guarantees declared in the Budapest Memorandum? Unfortunately, it is not discussed often enough, this issue is sought to be hushed up and often avoided. And when some politicians and experts argue that the Budapest Memorandum is a source of 'soft law', just a declaration, then this certainly contradicts common sense, given what was at stake and what Ukraine gave up in exchange for the completely justified expectations of its security. It is impossible to interpret legal norms formally or when divorced from a given context. History is full of cases when the 'letter of the law' took precedence over the 'spirit of the law', and we know what this led to. Therefore, the entire European and international community, especially the signatory countries of the Budapest Memorandum, in particular the USA and Great Britain (as well as France and China, who gave weaker individual assurances in separate documents),[106] which acted as direct guarantors of Ukraine's security and territorial integrity, must take real and effective actions in practice to protect not only Ukraine, but democracy in general in the broad understanding of this word. The waiting strategy must change to a strategy of prevention and a proportional response to the damage caused. Policies must change and the initiative must come from the leading countries of the free world, which must demonstrate, in practice, their commitment to the rule of law, so that the 'law in books' does not turn into empty declarations, pronunciations and truly 'dead law', which is, unfortunately, already happening in reality. However, before it is too late, there is a chance for change and for the global reform of public international law and a more active policy in each separate state at the national level. At the same time, a mutual exchange of experience and constant contact could create more effective mechanisms for countering and preventing global security threats. Thus, the discussion is open and must be continued.

105 Anthony Zurcher, 'War in Ukraine: US to Send New Aid Right Away, Biden Says' *BBC News* (Washington, 24 April 2024) <https://www.bbc.com/news/world-us-canada-68885868> accessed 9 May 2024.

106 Volodymyr Vasylenko, 'On Assurances Without Guarantees in a "Shelved Document"' *The Day* (15 December 2009) <https://web.archive.org/web/20210821102247/https://day.kyiv.ua/en/article/close/assurances-without-guarantees-shelved-document> accessed 20 April 2024.

5 Accountability for international crimes in Ukraine

A view from The Hague

Iva Vukušić

Introduction

The full-scale invasion of Ukraine in February 2022 led to a surge in debate in professional and academic circles – legal and otherwise – and a revitalisation of interest in international justice by broad sections of the public, especially in Europe.[1] In many ways, the period of about 18 months after 24 February 2022 was remarkable in how central accountability was in the many responses to Russia's actions. In academia and policy circles, days were filled with panels, public debates and lectures on international law, and special issues of journals were being published. Articles dissected aspects of international law and how it applied to the war that was (and is) unfolding with great brutality. While civilians suffered painful, soul-shattering losses, the field of international justice was being infused with renewed energy and purpose.

International law and international institutions were at the centre of this surging engagement, both those addressing state and individual responsibility for alleged crimes. There was no conference or public event dedicated to international justice that did not centre on Ukraine.[2] Ukrainian lawyers, diplomats and academics were driving much of this mobilisation. This unprecedented level of engagement was accompanied by minute-per-minute reporting about the war in media outlets. The killings, destruction and suffering of civilians was a topic no one in The Hague could escape. The purpose of this chapter is thus to explore how these accountability efforts were both shaped in, and observed from, The Hague – a city which brands itself as the "city of peace and justice".

This chapter will focus on criminal accountability at the International Criminal Court (ICC) as well as the domestic-level investigations and prosecutions in Ukraine, as the two are inextricably linked. Second, it will briefly take stock

1 Julia Geneuss and Florian Jeßberger, 'Russian Aggression and the War in Ukraine: An Introduction' [24 November 2022] *Journal of International Criminal Justice* mqac055 <https://doi.org/10.1093/jicj/mqac055>.

2 International justice is understood here broadly, as the multiple legal frameworks (e.g. Geneva Conventions, Genocide Convention, Rome Statute), policies, practices and institutions dedicated to adjudicating cases relating to war crimes, crimes against humanity, genocide and aggression.

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of where the establishment of a Special Tribunal for the Crime of Aggression currently stands, as that has been one of the defining features of a surge in advocacy for international justice. The drive to establish an entirely new institution to prosecute aggression, absent internationally since Nuremberg, has garnered exceptional attention and led to passionate debates on international relations, politics and law. If established, this court would be another turning point in the history of international justice, alongside the early ad hoc tribunals and the ICC.

Due to space limitations, this chapter will not address state responsibility cases – and there are two at the International Court of Justice dealing with the situation in Ukraine.[3] It also will not discuss the recently established Register of Damage for Ukraine.[4] This new body, set up within the Council of Europe, is also based in The Hague and is now part of the collage of institutional responses to mass violence Ukrainians are being subjected to. Given that it has just started operating recently, the analysis of its performance will have to be left for another time.[5]

The purpose here is not a detailed legal analysis across different cases and legal proceedings, bodies of law and institutions, but an attempt to succinctly present where efforts to achieve justice for international crimes in Ukraine currently stand, as seen from The Hague. Because much of the discussions on policy when it comes to accountability were a result of the full-scale invasion, the focus is on post-February 2022 accountability efforts. That, however, is not to be understood as minimising what happened before the full-scale invasion; the illegal seizing of territory and annexation; and the detentions, beatings, murder, torture and rape that began in 2014.

As time passes and new crises unfold, such as the brutal attacks of 7 October 2023 in Israel and the relentless campaign in Gaza costing thousands of lives and ruining many more, Ukraine and the attacks its people endure has slipped out of the global publics' focus. Only the occasional high-casualty attack, or one where innocents are so clearly targeted, such as the Ohmatdyt Children's Hospital in Kyiv in July 2024, brings it back to the front pages.[6] This chapter will also attempt to capture that dynamic, of what happens when topics dominate scholarly and practitioners' debates and then inevitably leave the limelight, to be overshadowed by some other unfolding catastrophe.

3 One of these two ICJ cases goes beyond genocide, war crimes, crimes against humanity and war crimes, and deals with terrorism and racial discrimination, thus putting it largely outside the scope of this chapter. See: 'Application of the International Convention for the Suppression of the Financing of Terrorism and of the Inter' <https://www.icj-cij.org/case/166> accessed 15 April 2024.

4 'Homepage – Register of Damage for Ukraine – Register of Damages Instance' Register of Damage for Ukraine <https://rd4u.coe.int/en/> accessed 12 July 2024.

5 'Timeline – Register of Damage for Ukraine – Register of Damages Instance' Register of Damage for Ukraine <https://rd4u.coe.int/en/timeline> accessed 12 July 2024.

6 'Children's Hospital Hit as Russian Strikes Kill Dozens in Ukraine' <https://www.bbc.com/news/articles/cl4y1pjk2dzo> accessed 11 July 2024.

Individual criminal responsibility and developments at the ICC

In any contemporary situation where mass atrocities appear to be widespread, attention immediately turns to the ICC Prosecutor, as the Court is expected to, and was built for, intervening if and when states are unwilling or unable to investigate and prosecute. Its ability to act depends on the Court having jurisdiction, as defined in the Rome Statute.[7] Neither the Russian Federation nor Ukraine was a member of the ICC at the start of the full-scale invasion (Ukraine only joined on 1 January 2025),[8] but the latter has accepted the Court's jurisdiction twice (in 2014 and 2015), based on Article 12(3) of the Statute. On the morning of 24 February 2022, all eyes turned to the then newly appointed Prosecutor, British barrister Karim Khan. On Ukraine, Khan gave numerous statements in late February and early March, including one where he announced he was opening an investigation, issued just four days after the full-scale invasion.[9] It was clear from day one that the Office of the Prosecutor (OTP) would be actively involved, and expected to act, on alleged crimes in Ukraine.

The investigation, formally started on 2 March, was bolstered by the fact that over 40 States Parties referred the situation to the Court within a month of the full-scale attack. Ukrainian civil society was consistently pushing for action, too, including demands for Ukraine to join the Rome Statute (which it recently did).[10] There was an immediate flurry of activity: from the ICC Prosecutor's visits to Kyiv and crime scenes such as Bucha as well as investigators deploying to the field, to the Court opening an office there. Staff was seconded by different states to assist in investigations, and funds were sent to the OTP to support it.

Not surprisingly, additional funding for this situation by states such as the UK, Canada, and France, has resulted in critiques of states effectively "buying" investigations they are interested in, and thus fast-tracking them. Millions of euros were made available for accountability efforts, at the ICC and in Ukraine. To many observing from the sidelines, especially in countries long troubled by violence and crimes (and maybe themselves subject to slow-moving ICC investigations), it appeared that Ukraine was receiving special treatment because pursuing accountability for crimes there aligned with the political interests of wealthy, powerful (donor) states.

7 'Rome Statute of the International Criminal Court' (1998) <https://legal.un.org/icc/statute/99_corr/cstatute.htm> accessed 15 April 2024.

8 'ICC Welcomes Ukraine as a New State Party | International Criminal Court' <https://www.icc-cpi.int/news/icc-welcomes-ukraine-new-state-party> accessed 6 January 2025.

9 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I Have Decided to Proceed with Opening an Investigation" | International Criminal Court' <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> accessed 16 March 2024.

10 'Shared Guiding Principles on Accountability for Grave Crimes Committed in Ukraine' (*Rights Justice Peace Blog*, 11 July 2023) <https://rights-justice-peace.in.ua/en/shared-guidelines-on-responsibility-for-international-crimes-committed-in-ukraine/>.

The OTP, being flush with resources for Ukraine while other situations languish, was a subject of considerable critique, mainly as an example of a double standard.[11] Critical voices were amplified as support was provided by non-members such as the US, which had spent years distant from if not outrightly sabotaging the Court.[12] While Khan had publicly claimed that funds were not "earmarked" (i.e. not directed *only* to the Ukraine investigation), the voluntary contributions by states have created problems which could easily have been avoided by generously funding the proposed budget through regular funding streams, and accepting increases, which many States Parties have resisted in the past.[13] Some increases to the ICC budget for 2025 have been made, but they seem unlikely to have dramatic effects on the Court's operations.[14] On support and funding, as rightly argued by Vasiliev, the opportunity should now be seized to "remedy rather than perpetuate existing enforcement asymmetries".[15] After all, Ukraine showed that significant resources can be raised to support the ICC if the investigations sit comfortably with important foreign policy goals of major donors.

Cooperation between states on investigating alleged crimes in Ukraine has also been unprecedented, and much of it was taking place in The Hague. Eurojust's Genocide Network served as a basis for the growing collaboration, as the EU's agency for Criminal Justice Cooperation has been the place for coordinating, especially on the Crime of Aggression, discussed later in this chapter. This level of mobilisation and cooperation on investigating the three core crimes in the ICC's jurisdiction (war crimes, crimes against humanity and genocide) was described as unprecedented by many in The Hague. These efforts included setting up a database enabling better exchange of information and establishing a Joint Investigation Team bringing together those states highly interested in criminal prosecutions, with the ICC OTP also joining.[16] This push in international cooperation on justice and

11 'Putin Arrest Warrant: International Law and Perceptions of Double Standards' (*Opinio Juris Blog*, 27 March 2023) <https://opiniojuris.org/2023/03/27/putin-arrest-warrant-international-law-and-perceptions-of-double-standards/>.

12 Laura Dickinson, 'US Cooperation with the ICC to Investigate and Prosecute Atrocities in Ukraine: Possibilities and Challenges' (*Just Security*, 20 June 2023) <https://www.justsecurity.org/86959/us-cooperation-with-the-icc-to-investigate-and-prosecute-atrocities-in-ukraine-possibilities-and-challenges/>.

13 Chuka Arinze-Onyia, 'The 2023 Budget – The True Test of State Parties' Support for the ICC' (*Amnesty HRIJ*, 19 October 2022) <https://hrij.amnesty.nl/the-2023-budget-the-true-test-of-state-parties-support-for-the-icc/>.

14 'Budget | International Criminal Court' <https://asp.icc-cpi.int/bureau/WorkingGroups/budget> accessed 6 January 2025.

15 Sergey Vasiliev, 'Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice' (1 September 2022) 20(4) *Journal of International Criminal Justice* 893–909 <https://doi.org/10.1093/jicj/mqac044>.

16 'Eurojust and the War in Ukraine | Eurojust | European Union Agency for Criminal Justice Cooperation' <https://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine> accessed 10 December 2022.

accountability in Ukraine moved even the most ICC-sceptical states to provide more support.[17]

At the time of writing, the ICC appears to have three "cases" (i.e. three sets of arrest warrants) relating to Ukraine.[18] There may be more coming, or even already in existence, without the information being publicly available. The first includes the President of the Russian Federation, Vladimir Putin, and Maria Lvova-Belova, the Commissioner for Children's Rights. Both individuals are subject to arrest warrants issued in March 2023, the details of which are not public, so beyond the basics, there is little information available. What is known is that the Court holds that "there are reasonable grounds to believe" that they are responsible for the unlawful deportation and transfer of children from Ukraine to the Russian Federation.[19] An investigation by researchers at Yale found that the number of children affected could be over 2,000, while the Ukrainian government claims that the numbers are even higher.[20] While neither Putin nor Lvova-Belova have travelled to The Hague to face these charges, the latter has spoken to the press, maintaining that her actions were humanitarian in nature and that she was helping abandoned children.[21]

It is hard to overstate the impact that the arrest warrant naming Putin had in The Hague. The move by the Court's judges immediately generated breaking news across the world. He is a sitting head of state – one which is a nuclear power and a permanent member of the UN Security Council. While it was understood that a trial in the near- or mid-term was unlikely, the news galvanised public attention and interest in international justice. There was a sense in town that horizons were expanding and that international justice institutions were breaking new ground. Russian officials have consistently dismissed ICC arrest warrants as "legally insignificant".[22]

Approximately a year later, the Court issued two more warrants of arrest, and this time the individuals were from the Russian Armed Forces and the Russian Navy, respectively. Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov

17 'US Congress Helps Boost Justice in Ukraine | Human Rights Watch' (31 January 2023) <https://www.hrw.org/news/2023/01/31/us-congress-helps-boost-justice-ukraine>.

18 We do not know if and when any of the investigative work will result in any trials at the ICC, so for the moment, a "case" is understood here broadly to refer to a distinct incident, or groups of incidents, that share a legal qualification or dominant focus (e.g. abductions of children). A case can also be one that brings together suspects belonging to the same organisation (e.g. military leadership).

19 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova | International Criminal Court' <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> accessed 15 April 2024.

20 'More Than 2,400 Ukrainian Children Taken to Belarus, a Yale Study Finds' *AP News* (17November2023)<https://apnews.com/article/russia-ukraine-war-belarus-children-bf1a509d53de7b467ebb4ba53c371fed>.

21 Valerie Hopkins, 'The Children's Rights Advocate Accused of Russian War Crimes' *The New York Times* (2 April 2023) sec. World <https://www.nytimes.com/2023/04/02/world/europe/maria-lvova-belova-russia.html>.

22 Guy Faulconbridge, 'Russia Dismisses ICC Warrants as Meaningless Provocation' *Reuters* (6March2024)sec.World<https://www.reuters.com/world/russia-dismisses-icc-warrants-meaningless-provocation-2024-03-06/>.

are suspected to be responsible for alleged crimes which took place between late 2022 and early 2023, and included attacks on civilian objects. The missile strikes, claimed the prosecution, were illegal, and the two men are responsible for targeting electrical power plants on which numerous civilians depended. Again, the details are "secret".[23]

Most recently, in June 2024, there were two other high-profile arrest warrants issued – again against military leaders at the highest levels. Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov are now also sought by the Court. The former was the Minister of Defense of the Russian Federation at the time of the alleged violations, while the latter was the Chief of the General Staff of the Armed Forces. The Prosecution alleged, and the judges agreed, that there are "reasonable grounds to believe" that the two "bear responsibility for missile strikes carried out by the Russian armed forces against the Ukrainian electric infrastructure" between late 2022 and early 2023.[24] The list of arrest warrants thus grows with considerable speed, unseen in other ICC situations in the past two decades.

Given that the Russian Federation is not cooperating and that the individuals subject to arrest warrants are unlikely to travel to places where they would risk arrest, such as ICC Member States, the prospects for trials are currently low. However, the warrants are having an impact, if in no other way, making the worlds of these individuals much smaller. Putin, possibly nervous about prospects for his arrest when visiting ICC member South Africa, decided to join one important international meeting virtually.[25] Readers will remember that South Africa already had a run-in with the Court when it allowed former Sudanese President al-Bashir, sought by the Court on charges of genocide and other crimes in Darfur, to leave the country after a visit in 2015, causing a heated legal battle.[26] Furthermore, experts stress that arrest warrants damage the reputation of leaders, at least among some audiences.[27] However, much of the non-Western world remained fairly silent on the warrants or greeted the news with a collective shrug.[28]

23 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov | International Criminal Court' <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and> accessed 15 April 2024.

24 'Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov | International Criminal Court' <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-kuzhugetovich-shoigu-and> accessed 11 July 2024.

25 'Putin Was Meant to Be at a Summit in South Africa This Week. Why Was He Asked to Stay Away?' *AP News* (21 August 2023) <https://apnews.com/article/brics-xi-jinping-putin-china-russia-963108da4d389f8e1e7775c9e002b5f9>.

26 'South Africa Defends Decision to Ignore ICC's Bashir Arrest Warrant' *Reuters* <https://www.reuters.com/article/idUSKBN1791FQ/> accessed 15 April 2024.

27 Amanda Taub, 'The I.C.C.'s Arrest Warrant for Putin Is More Than "Just Symbolic"' *The New York Times* (22 March 2023) sec. World <https://www.nytimes.com/2023/03/22/world/icc-arrest-warrant-putin.html>.

28 'Tracking State Reactions to the ICC's Arrest Warrant Against Vladimir Putin' (*Opinio Juris Blog*, 29 March 2023) <https://opiniojuris.org/2023/03/29/tracking-state-reactions-to-the-iccs-arrest-warrant-against-vladimir-putin/>.

More could be coming from the ICC's Prosecutor. After all, much of the criminal investigative process takes place behind the scenes, and for good reason. Individuals and states are often uncooperative, and sensitive work needs to be done discreetly until a case is ready to be made public. One topic that observers and commentators discussed around The Hague about ICC investigations is the possibility that the Prosecutor launches a case focusing on attacks that caused widespread environmental damage, such as the destruction of the Kakhovka Dam in 2023.[29]

The dam could be a case of prosecuting crimes which some advocates would like to see added to the Rome Statute as ecocide.[30] However, much remains unknown, as prosecuting crimes against the environment in its own right, at the international level, represents stepping onto new ground.[31] This and other investigations will progress at their own pace, and the results of this extensive work remain to be seen. However, one thing is certain: the Prosecutor and the Court have been busy and responsive in Ukraine, they received substantial support from states and civil society, and they are moving considerably faster than in most other situations the court has jurisdiction in.

Domestic investigations and prosecutions in Ukraine

At present, the number of registered alleged cases of war crimes stands at over 120,000.[32] It is not really clear yet what constitutes a "case", but this number seems to refer to individual events that are possible international crimes and include shelling incidents (of protected objects, such as schools and hospitals), arbitrary detention, murder, torture, sexual and gender-based violence, the abduction and removal of children from Ukraine to Russia and so on. All of these should be investigated according to the Ukrainian Criminal Code and its Criminal Procedure Code.[33] Domestic investigations proceed while contacts with the ICC OTP continue, in the spirit of complementarity which designates states as the primary actors in providing justice for atrocity crimes.

29 'A Disaster in Photos: Nova Kakhovka Dam Breach in Ukraine – European Commission' <https://civil-protection-humanitarian-aid.ec.europa.eu/news-stories/stories/disaster-photos-nova-kakhovka-dam-breach-ukraine_en> accessed 15 April 2024.

30 Kate Mackintosh Oldring Lisa, 'Watch This Space: Momentum Toward an International Crime of Ecocide' (*Just Security*, 5 December 2022) <https://www.justsecurity.org/84367/watch-this-space-momentum-toward-an-international-crime-of-ecocide/>.

31 Matthew Gillett, 'The Kakhovka Dam and Ecocide' (*Verfassungsblog*, 3 July 2023) <https://doi.org/10.17176/20230703-231049-0>.

32 As of September 2024: 'Ukraine Investigating Over 120,000 Alleged Russia War Crimes' (24 February 2024) <https://www.jurist.org/news/2024/02/ukraine-investigating-over-120000-alleged-russia-war-crimes/>.Seealso<https://www.reuters.com/world/europe/ukraine-probing-over-122000-suspected-war-crimes-says-prosecutor-2024-02-23/>.

33 Details regarding the legal framework in Ukraine for investigations and prosecutions are beyond the scope of this chapter, but it is worth noting that advocates and practitioners have identified aspects which should be improved to maximise positive outcomes and make survivor interactions with the judiciary constructive and based on rights and dignity.

As many states before it, burdened with thousands of potential international crimes, such as Bosnia and Herzegovina (BiH) was in the early 2000s (and arguably remains today), Ukraine struggles and will continue to struggle to meet the demand for justice. No judicial system can impartially and successfully investigate and prosecute thousands upon thousands of cases. That is simply not feasible if what we envisage are trials similar to those we have witnessed in the last 30 years, since the first international criminal tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993. After all, it is worth remembering that in the former Yugoslavia, with its own special UN tribunal and domestic courts in Croatia, BiH, Serbia and Kosovo, around 1,000 individuals were prosecuted for war-related crimes. That number should put things into perspective and allow for a more grounded, realistic set of expectations for Ukraine.

No state, not even the wealthiest one, has the capacity and resources – the staff, expertise, space and funds – for thousands of investigations lasting decades. To temper expectations, lessons from other places like BiH are instructive.[34] Conversations about priorities in case selection and the criteria of determining them, as well as methods of managing coordination across different state agencies, must take centre stage to maximise results. If over 100,000 cases need to be processed in any structured manner, a strategy is paramount and should be broader than focusing just on punishment.[35] Apparently, many of these useful lessons go unlearned, hindering prospects for justice.[36]

Ukraine has received, and continues to receive,[37] a lot of support from states such as the US, UK, the Netherlands and others, to equip and train its judiciary to successfully cope with the pressures of such a huge caseload.[38] International criminal law and international humanitarian law expertise, as well as the specialist knowledge needed to exhume mass graves, analyse craters made by rockets or sort through vast volumes of digital material, are not something states have in abundance. Partners and allies therefore stepped in to train investigators, prosecutors

34 'After the Conflict Before the Peace: Legal, Military and Humanitarian Issues During the Transition' (*International Institute of Humanitarian Law Blog*) <https://iihl.org/after-the-conflict-before-the-peace-legal-military-and-humanitarian-issues-during-the-transition/> accessed 11 May 2024. In particular, the chapter "Some lessons on accountability for war crimes and other international crimes: from Bosnia to Ukraine", starting on page 68, is illuminating.

35 Kateryna Busol Hamilton Rebecca, 'Transitional Justice in Ukraine: Guidance to Policymakers' (*Just Security*, 2 June 2022) <https://www.justsecurity.org/81719/transitional-justice-in-ukraine-guidance-to-policymakers/>.

36 Denis Dzidic, 'In Race for Justice, Ukraine Repeats Bosnia's Mistakes' (*Balkan Insight Blog*, 22February2024)<https://balkaninsight.com/2024/02/22/in-race-for-justice-ukraine-repeats-bosnias-mistakes/>.

37 After Trump took office in the US for the second time, American support now remains uncertain.

38 Ministerie van Buitenlandse Zaken, 'Minister Bruins Slot Pledges €17 Million in Justice Funding During Visit to Ukraine: "War Crimes Against the Ukrainian People Must Not Go Unpunished" – News Item – Government.nl' (*Nieuwsbericht (Ministerie van Algemene Zaken)*, 5 December 2023) <https://www.government.nl/latest/news/2023/12/05/minister-bruins-slot-pledges-17-million-euro-in-justice-funding-during-visit-to-ukraine>.

and judges – as well as, eventually, defense counsel – to build the needed capacity.[39] Trainings included best practices in investigating sexual and gender-based violence.[40] Some of that work preceded the full-scale invasion, but February 2022 was a turning point in this investment in capacity. Anecdotal evidence of progress, such as empowered prosecutors and more confident judges, as well as increased technical capacity, is already emerging. However, assessing capacity in investigating and prosecuting international crimes is never easy.

Only time will tell what the results of all these investments will be. It is also worth reminding that Ukraine remains a country at war, which suffers daily attacks across its towns and villages, where communication is difficult and power is cut for hours on end. Conditions are hard, and the war is far from over. Those difficulties slow down investigations. Trials proceed, but the numbers are still low, so it is hard to make broader conclusive claims about how the local judiciary is doing.[41] There will be pressure to conduct investigations and trials quickly; many may say "justice delayed is justice denied", but those pressures must be resisted. We know from other contexts that passing time is not always a problem and can, in fact, be an opportunity to calmly collect evidence and test it in court in lower-stakes trials before potentially going after leaders.[42]

The ability of the domestic judicial system to respond to the demand for accountability impartially and according to fair trial standards is an open question. Judicial staff are citizens too, whose towns and villages are being destroyed, and some certainly have family members on the front lines. By now, many have likely experienced personal loss. As we have witnessed in the former Yugoslavia, domestic judiciaries struggle with these complex proceedings also because of the politics which inevitably surround it.[43]

Challenges go beyond the number of cases and available resources in Ukraine. They include two more issues which stand at odds with one another: conducting fair proceedings and in absentia trials, which are a procedural possibility in the country. The enthusiasm – an understandable one – to prosecute Russians, both high-level and low-level perpetrators, can be a threat to fair proceedings. Proceedings where the presence of the accused is not necessary, such as in Croatia, have

39 'Helping Ukraine to Bring the War Criminals to Account | EEAS' <https://www.eeas.europa.eu/eeas/helping-ukraine-bring-war-criminals-account_en> accessed 11 July 2024.

40 'Training Ukrainian Lawyers, Judges and Prosecutors to Better Handle Cases of Violence Against Women – Council of Europe Office in Ukraine' Council of Europe Office in Ukraine <https://www.coe.int/en/web/kyiv/-/training-ukrainian-lawyers-judges-and-prosecutors-to-better-handle-cases-of-violence-against-women> accessed 11 July 2024.

41 Justice Info, 'Map of War Crimes Trials in Ukraine' (*JusticeInfo.Net Blog*, 6 December 2022) <https://www.justiceinfo.net/en/109654-map-of-war-crimes-trials-in-ukraine.html>.

42 Iva Vukušić, 'Later Rather Than Sooner: Time and Its Effects on the Karadžić and Mladić Trials' (2022) 22(1–2) *International Criminal Law Review* <https://brill-com.proxy.library.uu.nl/view/journals/icla/22/1-2/article-p189_189.xml> accessed 30 January 2024.

43 'Report on War Crimes Trials in Serbia During 2022 – Fond Za Humanitarno Pravo/Humanitarian Law Center/Fondi Për Të Drejtën Humanitare' <http://www.hlc-rdc.org/?p=38828&lang=de> accessed 11 July 2024.

been consistently shown to be lacking.[44] If the defendant is not there, a robust defense cannot be presented, thus putting the fairness of proceedings in question. Other states, such as Kosovo, are being warned not to repeat Croatia's mistakes.[45] Ukraine would be wise to heed to this warning, too.

Like elsewhere – and the former Yugoslavia is a good example – prosecuting members of one's own forces is difficult. The public finds it hard to swallow when "their boys" are pursued while thousands of enemies whom they see as invaders and killers walk free, outside the reach of the judiciary. This challenge in pursuing accountability is not new, as states consistently struggle to prosecute suspects on their own "side". Ukraine must show that its judiciary can handle cases where the suspects are Ukrainians and that all the investments have resulted in a robust independent judiciary capable of proceeding with politically unpopular cases. A recent example, reported on in the *New York Times*, of Ukrainians allegedly killing Russian POWs could be a test case.[46]

Finally, neither the ICC nor the Ukrainian judiciary are the only ones with the ability to act in pursuing accountability for alleged crimes in Ukraine. Domestic jurisdictions of states which allow such investigations can, and do, contribute. One recent case is in Argentina.[47] Universal jurisdiction is a path some civil society organisations encourage, seeking ways forward around the world.[48] States like Germany, Poland, Lithuania, Sweden, Spain, Canada, and France have also been supporting accountability efforts in Ukraine, some of them opening so-called structural investigations. Those "allow amassing and systematizing evidence pending the identification of suspects to enable future prosecutions, wherever they may be held".[49] As seen from The Hague, it is clear that the bulk of the work of investigating and prosecuting will have to be done by Ukraine, but with the ICC and other states playing important supporting roles.

Trying to prosecute aggression internationally

The Crime of Aggression was, for the first 18 months after the full-scale invasion, what dominated many conversations in The Hague. More specifically, it was

44 Vuk Tesija, 'Croatian Trials in Absentia for War Crimes "Cause Concerns"' (*Balkan Insight Blog*, 27 July 2023) <https://balkaninsight.com/2023/07/27/croatian-trials-in-absentia-for-war-crimes-cause-concerns/>.

45 Xhorxhina Bami and Vuk Tesija, 'Kosovo Must Learn from Croatia's Mistakes in War Crimes Trials in Absentia' (*Balkan Insight Blog*, 20 May 2024) <https://balkaninsight.com/2024/05/20/kosovo-must-learn-from-croatias-mistakes-in-war-crimes-trials-in-absentia/>.

46 Thomas Gibbons-Neff, 'In Ukraine, Killings of Surrendering Russians Divide an American-Led Unit' *The New York Times* (6 July 2024) sec. World <https://www.nytimes.com/2024/07/06/world/europe/ukraine-surrendering-russians-killed.html>.

47 'Exclusive: Ukraine Man's Torture Case Against Russians Seeks Justice in Argentina' *Reuters* <https://www.reuters.com/world/ukraine-mans-torture-case-against-russians-seeks-justice-argentina-2024-04-16/> accessed 11 July 2024.

48 'Justice Beyond Borders: A Global Mapping Tool' <https://justicebeyondborders.com/> accessed 11 July 2024.

49 Vasiliev (n 15).

about the possibility of establishing a special tribunal for prosecuting it. As readers will know, the very restricted jurisdictional regime for aggression, a newly introduced crime in the Rome Statute, means that the Court cannot act to address it in Ukraine. Without getting into the details of how and why these limitations were introduced at the Review Conference in Kampala in 2010, it is worth noting that some of the states which support Ukraine now are the same ones that torpedoed a broader jurisdiction during negotiations.[50] Therefore, this crime currently has no home internationally, and cannot be prosecuted in Ukraine, and many experts in The Hague agree that amending the Rome Statute to broaden the jurisdiction is, at this moment, unlikely.

Ukraine and its civil society and legal community demand this crime be prosecuted internationally; they call aggression the "mother of all crimes" and the root from which all other crimes emerged.[51] The story about how advocacy and discussions were developing is long, complicated, and politically entangled, and it cannot be retold in detail here. Some steps forward have been made, such as the creation of the International Centre for the Prosecution of the Crime of Aggression against Ukraine, headquartered in The Hague, within Eurojust, but no court has been established yet.[52]

The core question is what kind of institution should prosecute this crime, and how. The biggest obstacle is that, in international law, sitting state leaders (Head of State, Head of Government, Minister of Foreign Affairs) enjoy immunities from prosecution by other states, both criminal and civil.[53] The purpose is to protect leaders from one-sided, frivolous, or politicised persecutions. Therefore, any court with the legal authority to investigate and prosecute a Head of State must be international. The core legal question here is, thus, what "international" means.[54]

Ukraine and some allied states want the court to be fully international, with legitimacy conferred through a vote in the UN General Assembly. That would be an ideal route, as that would remove the immunities obstacle and would enjoy, through widespread international support, clear legitimacy. However, as many

50 Jennifer Trahan, 'The Need to Reexamine the Crime of Aggression's Jurisdictional Regime' (*Just Security* 4 April 2022) <https://www.justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/>.

51 'For Russia to Be Held to Account for Aggression, a Special Tribunal Is Needed, and We Are Doing Everything to Create It – Address by the President of Ukraine' (*Official Website of the President of Ukraine*) <https://www.president.gov.ua/en/news/shob-bula-vidpovidalnist-rosiyi-za-agresiyu-potriben-special-79537> accessed 24 December 2022.

52 Website of the Centre <https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine> accessed 25 February 2024.

53 Justice Initiatives, 'Immunities and a Special Tribunal for the Crime of Aggression Against Ukraine' (February 2023) <https://www.justiceinitiative.org/uploads/eb4acc44-b7f3-4026-8c68-3f677a2c4b24/immunities-and-a-special-tribunal-for-ukraine-en-02012023.pdf> accessed 26 February 2024.

54 Astrid Reisinger Coracini, 'The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II)' (*Just Security*, 23 September 2022) <https://www.justsecurity.org/83201/tribunal-crime-of-aggression-part-two/>.

observers have noted, the enthusiasm for prosecuting acts of aggression is not universally held.[55] So, there is fear that such a vote would fail or that the number of supporting states would not be robust (with implications for the legitimacy and perceptions of impartiality). There is also resistance to this "international" model by states, the US among them, who fear the establishment of a precedent by which such institutions can be created in the future to pursue similar allegations. With a new Trump administration in Washington, DC, having taken over, it is likely that whatever support the US was providing to the establishment of this new court will cease.

The other option is to establish a hybrid tribunal. They are, very briefly, established through an agreement between the government of the concerned state (e.g. Ukraine) and some international institution, such as the United Nations, Council of Europe or the European Union. The Extraordinary Chambers of the Courts of Cambodia is an example of a hybrid tribunal (applying a mix of international and domestic law, and employing local and international staff).[56] Ukrainians resist this hybrid solution, as they claim that the act of aggression is a violation of the international legal order as such, and not only an act against Ukraine, and that a strong message must to be sent to perpetrators, which a hybrid institution does not do. Critics also point out that a hybrid court, set up between Ukraine and the EU for example, or a few other states will not be able to surmount the immunities barrier and will not possess broad legitimacy in the eyes of the rest of the world. It will be seen as a partisan effort, and not a truly global one. The issue of prosecuting in absentia is also a question to be resolved, again, raising the question of legitimacy and the right to a fair trial.

This is basically where things were in 2024.[57] There was the obstacle of how to resolve the immunities issue, and intense conversations and negotiations have been ongoing since the fall of 2023. Paths forward include amending the Rome Statute to harmonise jurisdiction across the four crimes – war crimes, crimes against humanity, genocide and aggression – and working on a model for a special tribunal

55 Patryk I. Labuda, 'Making Counter-Hegemonic International Law: Should A Special Tribunal for Aggression Be International or Hybrid?' (*Just Security*, 19 September 2023) <https://www.justsecurity.org/88373/making-counter-hegemonic-international-law-should-a-special-tribunal-for-aggression-be-international-or-hybrid/>.

56 Here are some key questions on the ECCC answered <https://www.eccc.gov.kh/en/about-eccc/faq> accessed 26 February 2024.

57 Ambassador Christian Wenaweser, the Permanent Representative of Liechtenstein to the United Nations, was the chief negotiator of for the Kampala Amendments regarding the Crime of Aggression, and served as the President of the Assembly of States Parties to the ICC. Here he is at a panel at Princeton University, in February 2024, updating the audience on where the discussions are: <https://princeton.zoom.us/rec/play/ren557PICoBij5pdVoZlQb9b99Nnj7MhtQD_9IlxvUmbIg37gjLUOoMTwbDwkf5XjmcAHNVokFPEoMP8.85hZZVtNOxD03iK2?canPlayFromShare=true&from=share_recording_detail&continueMode=true&componentName=rec-play&originRequestUrl=https%3A%2F%2Fprinceton.zoom.us%2Frec%2Fshare%2F8Snm7wbN9dEOhZZv1uj6DXR4M9Y20oaStN_eSr-py20zZ2KdoPxQmAn5xP-tVg9p.6qscvD1zwwS-2ohG> accessed 25 February 2024.

for aggression which is "international enough" to bypass the immunity hurdle and ensure legitimacy.[58] However, in early 2025, Israel and Palestine still dominate the international justice debates the way Ukraine once did; Sudan is nowhere to be found in these discussions, and the special tribunal for aggression initiatives have, by all accounts, hit a wall.

Conclusion

The purpose of this chapter was to review justice and accountability efforts in the aftermath of the full-scale invasion, with an emphasis on individual criminal responsibility, as seen from The Hague. As it has been shown, massive mobilisation has followed the full-scale invasion, with significant effort and investment into the pursuit of justice. Numerous actors have spent money, time and political capital in advancing justice for alleged crimes. The question now is, what will it all lead to? Will the results be satisfactory? What constitutes "satisfactory" here? Will Ukrainian citizens consider accountability efforts as adequate? In the aftermath of that forceful mobilisation by many well-meaning actors, would it not be wise to spend more time considering what could be realistic goals to work towards? What do we want to see in 2030, and 2035 in terms of accountability? What would constitute success?

The difficulty of planning to achieve measurable success is that it will depend on politics in ways which are hard to contemplate. How will Ukraine manage against continuing Russian attacks, and will it receive the support it needs to defend itself? Will President Zelenskyy stay on, or will another administration come in and think differently about prosecutions? Will a peace settlement process begin, and how will it address accountability? Will Ukraine liberate its territory? Will Putin's regime last? As supportive states go through elections, their priorities might change, and support for accountability, both in The Hague and in Ukraine, might wane and with it, funding streams. The UK and the Netherlands already held elections, as did the US, resulting in an administration which has little faith in multilateralism and even less in justice and accountability. All those factors influence the prospects for justice in Ukraine, and it remains to be seen what it will lead to.

Looking back over the last two years, we see that the ICC has sprung into action and issued several arrest warrants (with more possibly coming). It seems to have been easy to mobilise support and funds to investigate and prosecute a man who many Western leaders see as an antagonist, an aggressor and a dictator. The speed and breadth of support caused some unease in non-Western states, who voiced critiques about it, citing the apparent different treatment situations at the ICC were receiving. It is important to keep paying attention to resource allocation and pressures to adequately fund the work of the Court beyond Ukraine.

Domestic authorities, in cooperation and with support from donors as well as institutions in The Hague have made significant steps forward in building capacity

58 Gaiane Nuridzhanian, 'International Enough? A Council of Europe Special Tribunal for the Crime of Aggression' (*Just Security*, 3 June 2024) <https://www.justsecurity.org/96320/council-of-europe-ukraine-tribunal/>.

to address the huge caseload. Hopefully, that will have an effect in securing impartial and independent investigations and prosecutions. We must remember that even in the best of circumstances, the ICC or other states can only ever do a handful of cases, so it is vital that Ukraine is supported in doing what it can to advance justice for survivors of mass atrocities. Learning from other contexts and having realistic expectations about what can be done is imperative.

A big open question remains the Special Tribunal for the Crimes of Aggression and if it will ever be established. What institutional design will it implement; will it have the possibility of prosecuting defendants in absentia? No one can predict the future, but finding a way to prosecute aggression fairly and impartially would be a lasting positive contribution to the field of international justice, and it would inevitably assert that aggression is a crime and, if pursued, it will be punished.

Much of the progress on the establishment of a potential tribunal for the Crime of Aggression was due to the tireless efforts of Ukrainian civil society, which has grown in the past decade and is now a formidable force in international discussions about accountability. They set the bar high for advocates in other contexts, especially by demanding to be part of the conversation and asserting the right to a seat at the table when options for justice were being discussed. When the first tribunals were being established in the 1990s, no one asked the Yugoslavs or the Rwandans what they wanted. Those times of imposing accountability models on the communities they concern without their input are over, and that is good.

The momentum built up in the aftermath of the full-scale invasion has dissipated. Dozens of blog posts and announcements of panels analysing ways to pursue accountability in Ukraine are no longer appearing on a weekly basis. The unfolding horror in the aftermath of 7 October 2023 has captured public attention and generated a new surge in advocacy, and for good reason. Now, over a year later, the war in Gaza is also slipping out of conversations. What remains, then, in this post-limelight moment? How can progress be made on prosecuting the crime of aggression? After all, as often heard in conversations in The Hague, if this is not aggression, and if this is not prosecuted, then what message does that send? What is the point of having aggression in the Rome Statute if such obvious cases cannot be pursued?

Going forward, it is vital lessons from other contexts are considered when determining realistic goals for accountability efforts in Ukraine. After all, at best, prosecutions of international crimes provide some justice, to some victims, some of the time. We have seen that elsewhere. Expectations should be tempered and other complementary mechanisms embraced, such as reparations, finding missing persons, and providing psychosocial support to survivors. The conversations about approaches for pursuing justice should not only be about punishment.

Crimes in Ukraine, and more recently in Israel and Palestine, have brought new urgency to discussions about international law and accountability. There has been much attention, and friction, as well as harsh critique against institutions in The Hague, and especially the ICC. To provide some justice for unimaginable horrors, this institution, as well as the judiciary in Ukraine, can develop and strengthen – and possibly, dare we hope, they can act as a deterrent in the future.

6 International legal cooperation in the investigation of war crimes

Challenges, gaps and directions for improvement

Iryna Krytska and Kateryna Latysh[1]

Introduction

The well-known Latin aphorism "*Si vis pacem, para bellum*" ("If you want peace, prepare for war"), usually attributed to either the Roman historian Cornelius Nepos or the military writer Flavius Vegetius, is traditionally interpreted as a call to always be ready for military action, to train your soldiers and so on. However, if we consider this expression from a broader perspective, is it possible to provide for the readiness of all spheres of public life for a possible future armed conflict? Can the economy of a non-belligerent state, in particular, be structured in such a way that in the event of a potential military threat, it can immediately adapt to the conditions of armed conflict? Or is it still reasonable and feasible to reform the justice system in a way that ensures its proper and effective functioning during active hostilities?

Ukraine's national criminal justice system is constantly faced with new challenges, especially in times of war. Ongoing hostilities and the possibility of their global expansion, combined with disregard for international humanitarian law by one of the parties to the conflict, lead to a steady increase in the number of war crimes. Given that more than two years have passed since the beginning of the full-scale invasion of Ukraine, responses to these questions are unlikely to have a significant impact on the current situation with the Ukrainian justice system. This is evidenced by the statistics of the General Prosecutor's Office of Ukraine, which shows a significant increase in registered crimes from 2022 to 2024, including war crimes.

Nevertheless, analysing this problem through the prism of the most optimal prognostic approach may be useful for other states that have the opportunity to make their own conclusions based on the Ukrainian experience. Moreover, it should be noted that despite the existence of an international armed conflict in Ukraine since 2014, Ukrainian procedural legislation, including criminal procedure, has not been substantially adapted to the challenges of hostilities for almost 8 years, which can be partly explained by the localisation of military operations in

1 K. Latysh's research had received funding through the MSCA Ukraine project, which is funded by the European Union.

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a limited area and, accordingly, the lack of need to introduce global reforms. Under these circumstances, inter-state and international cooperation at various levels and in different areas, such as providing advice; training investigators, prosecutors and judges; functioning joint investigation teams; and establishing international tribunals, plays a special role in the detection of war crimes.

Moreover, the nature of the battlefield has shifted from physical ground to digital space, giving rise to the phenomenon of hybrid warfare and threats (e.g., the Russian Federation uses sophisticated hybrid strategies, including political interference and malicious cyber activities).[2] This shift was particularly marked by the cyberattacks on Estonia, which led to the development of the Tallinn Manuals in two editions, providing guidance on the application of international law to cyber conflicts.

As conflicts move closer to European borders, there has been a significant increase in the number of refugees and migrants fleeing these areas and seeking asylum in Europe, the UK, and other countries. In some cases, these displaced populations have been manipulated as a weapon of political strategy, as in the case of Belarus, which facilitated the mass movement of refugees into European countries.[3]

These developments pose significant challenges to international law as it struggles to keep pace with the rapid evolution of modern conflict. Most international legal conventions were established in the immediate aftermath of the Second World War, more than 60 years ago. As a result, these frameworks often fail to address the realities of contemporary conflict and the increasingly complex nature of international cooperation.

A clear example is cyberwarfare, which has been recognised as a problem since at least 2007, but still lacks comprehensive normative regulation. The Ljubljana–The Hague Convention on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity, war crimes and other international crimes[4] (the Ljubljana-The Hague Convention) represents a positive step toward addressing some of these regulatory challenges and demonstrates that international cooperation can evolve to address new threats. However, significant gaps remain, particularly in the cyber domain, where international cooperation lacks clear regulatory guidance.

In addition, the involvement of new actors, such as civil society organisations, NGOs, and private open-source intelligence (OSINT) companies in conflict zones also poses regulatory challenges. These actors play a crucial role in the collection and analysis of evidence but operate in a largely unregulated space, complicating

2 'Countering Hybrid Threats' <https://www.nato.int/cps/en/natohq/topics_156338.htm?selectedLocale=en>.

3 M. Forti, 'Belarus-Sponsored Migration Movements and Response by Lithuania, Latvia, and Poland: A Critical Appraisal' (2023) 8(1) *European Papers* (European Forum, Insight of 11 July 2023) 227–38. ISSN 2499–8249 <https://doi.org/10.15166/2499–8249/648>.

4 The Ljubljana–The Hague Convention on International cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity, war crimes and other international crimes <https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention.pdfv>.

efforts to ensure accountability and effective legal oversight in modern conflicts. It remains unclear how information collected by these new actors could be used by law enforcement in judicial proceedings.

Establishing an adequate evidentiary basis for future regulatory proceedings involves not only traditional forms of international cooperation but also cooperation with the International Criminal Court (ICC), even if the country is not a party to the Rome Statute but may be involved in certain cases.

At the same time, from our perspective, "justice delayed is justice denied", and one way to help bridge the evidence-gathering gap is through intergovernmental cooperation. The Joint Investigative Team (JIT) serves as an example tool for these purposes. In the context of Eurojust, a JIT is a cooperative legal agreement between competent judicial authorities from two or more countries, facilitated and supported by Eurojust, designed to conduct coordinated criminal investigations across national borders.

Crime is increasingly transnational in nature, as it can occur in several states simultaneously: a crime may begin in one country, move to another, and end in a third. This requires interaction with law enforcement agencies in other countries. Such interaction may take the form of joint investigative team forms, forensic examinations, or simply multi-legal requests for certain documents.

An effective legal framework for interstate cooperation in war crimes investigations is of great importance to national and international jurisdictions, particularly with respect to the process of exchanging evidence. Each national jurisdiction has its own requirements and standards for evidence, so the process of collecting and subsequently exchanging such evidence within joint investigative teams must be somewhat universal and meet admissibility criteria.

Challenges in international legal cooperation in the investigation of war crimes: Ukrainian case study

Over time, new challenges to international legal cooperation in war crimes investigations have emerged. Legal frameworks are based on outdated rules, as most international legal frameworks were created shortly after World War II and have not kept pace with the evolving nature of modern times.

New types of war crimes, such as cyber war crimes, have been showing up due to the fact that conflicts now extend into digital space, as exemplified by cyberattacks such as the one against Estonia in 2007 and since 2014 in Ukraine.

Although indiscriminate attacks on civilian targets are illegal, several cases of Russian cyberattacks on civilian critical infrastructure in Ukraine have been referred to the ICC by a Human Rights Centre at the University of California, Berkeley, School of Law that believes they should be investigated for possible war crimes. Cyberweapons can cause massive economic, political and psychological damage, particularly on civilian populations.[5] These include attacks on Ukraine's

5 L. Freeman, A. Ghahremani and S. Lombardo, 'The Gravity of Russia's Cyberwar Against Ukraine' (*Opinio Juris*) <http://opiniojuris.org/2023/04/19/the-gravity-of-russias-cyberwar-against-ukraine/>.

power grid (December 2015 and 2016, April 2022), the NotPetya software attack (2017, more than 60 countries attacked, damage exceeded $10 billion), and an attack on Ukraine's Viasat satellite modem network (February 2022), with consequences manifested in Europe.[6]

The emergence of cyber battlefields can be observed as follows. Although cyberwarfare has been recognised as an important issue since 2007, a comprehensive legal framework for cyberwarfare is still lacking. Huge cyberattacks against Ukrainian digital critical infrastructure before the full-scale war started in 2022 may potentially "fulfill the elements of many core international crimes as already defined",7 such as war crimes, crimes against humanity, genocide and the crime of aggression. Cyberattacks in Estonia opened doors for discussions and led to the emergence of the Tallinn Manual. Perhaps the cyberattacks against Ukraine will open a new era of international law when it is not necessary to create a new law to regulate but will be enough to reconsider the existing one and create a new interpretation of it by judicial interpretation of the existing digital landscape.

Technological advances, such as the integration of drones and digital systems, have been overlaid with the ambiguity and vagueness of existing legal norms, creating new "grey zones" in international law.

New types of actors are emerging in international cooperation architecture. When the state fails, the public sector comes to the rescue. The documentation of war crimes by civil society organisations (CSOs) before World War II marked an important chapter in the history of human rights and international law. The active involvement of CSOs in the collection of evidence, particularly in the context of human rights and environmental crimes, has developed significantly since at least the Second World War and continues in a modernised form to the present day. The number and quality of such organisations is changing, and even private companies are joining them, using technological tools of digital forensics, which significantly speed up and optimise the investigation process. So, the UN fact-finding missions, non-governmental organisations (NGOs), civil society organisations, and private OSINT companies are now playing key roles in the collecting of evidence of war and other crimes. It was very well shown in the MH-17 verdict by the Office of the Prosecutor of the ICC.

However, when it comes to cooperation in the framework of criminal proceedings, there is a significant need to determine the procedure for interaction with many entities, in particular:

- Legal status (rights, duties and responsibilities).
- The procedure of involvement and further interaction.
- The procedure and possibility of submitting evidence, in particular digital ones, including data from open sources.

6 Y. Verbruggen, 'Cyberattacks as War Crimes' (*International Bar Association*, 10 January 2024) <https://www.ibanet.org/Cyberattacks-as-war-crimes>.

7 A. A. Karim, 'Khan KC Technology Will Not Exceed Our Humanity' (*Digital Front Lines*) <https://digitalfrontlines.io/2023/08/20/technology-will-not-exceed-our-humanity/>.

No domestic law enforcement agency has had such experience and results in documenting war crimes and other crimes in conflict zones as UN fact-finding missions and NGOs have over the past years. This is invaluable experience that cannot be gained or learned overnight. For that reason, such cooperation is necessary, especially since there is a theory that the future of international criminal law will rely much more on national jurisdictions than on some international mechanisms, such as the ICC and other international adjudication mechanisms, for reasons of cost and time efficiency. Indeed, if the factual numbers are looked at through the prism of the number of years of existence of these mechanisms, the number of cases considered and the resources involved, it seems reasonable to have a more domestic approach through the mechanism of universal jurisdiction.

The current trend of foreign countries' involvement increasing through universal jurisdiction, which began to appear in the Syrian conflict, tends to rise in the Ukrainian conflict as well. According to the General Prosecutor's Office of Ukraine, as of early 2024, at least 24 countries have launched investigations under universal jurisdiction for war crimes and other crimes in the case of Ukraine. These include at least 24 countries, some of which are part of a JIT for crimes committed in Ukraine (see Figure 6.1).

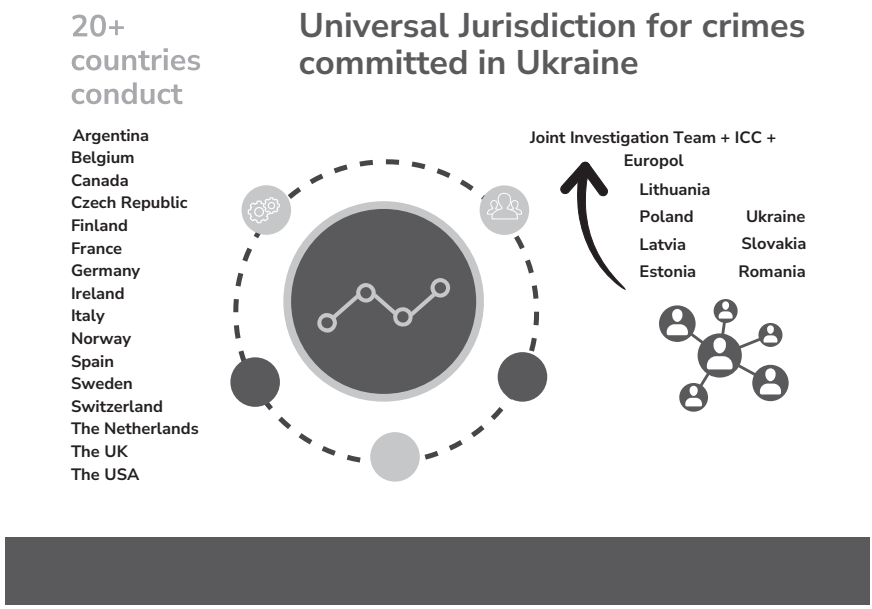

Figure 6.1 Countries that conduct Universal Jurisdiction Investigations for crimes committed in Ukraine (2022–23).[8]

8 Data collected and visualised by authors.

This means that these countries need to learn from other countries how to organise the investigative system to be truly effective (e.g., establishing a specialised unit dedicated to this type of investigation), training in OSINT techniques and other types of remote investigations. Since the physical access to the territory could be limited for various reasons due to occupation or security reasons, as well as the cost of travel, it is necessary to train people as they most likely do not have experience in war crimes investigations and to provide them with defensive measures if they are present on the ground. In addition, there are differences and peculiarities in the way these types of crimes are investigated. Thus, there could be two situations when the investigation team comes to the territory to collect evidence or stays in the country and sends requests for mutual assistance in accordance with the treaty (if there is one) or as part of the JIT. Anyway, in both situations, effective international cooperation is needed for the collection of evidence in the presence or at a distance of various subjects, both governmental and non-governmental.

In response to the need for cooperation, the Ljubljana–The Hague Convention was adopted in Ljubljana, Slovenia, on 26 May 2023, marking a significant development in international investigative cooperation. This Convention requires States Parties to take the necessary measures to assert their jurisdiction over the above-mentioned serious crimes when the accused is found on their territory and cannot be extradited to another State or surrendered to an international criminal court or tribunal. This newly adopted Convention does not establish "pure" universal jurisdiction. Instead, it introduces a form of extraterritorial jurisdiction based on the presence of the alleged offender on the territory of a State Party. This jurisdiction is exercised regardless of the nationality of the offender or the victims, focusing instead on the physical location of the accused. This approach represents a nuanced evolution in international legal mechanisms to address serious international crimes.

With regard to Ukraine, the Ljubljana–The Hague Convention would allow Ukraine to enhance its cooperation with other countries and international bodies in the investigation and prosecution of serious international crimes. This Convention facilitates the exchange of information, evidence and resources, thereby improving the efficiency and effectiveness of investigations and prosecutions. It helps overcome jurisdictional and logistical challenges and ensures that those responsible for such serious crimes are held accountable, even if they are located outside Ukraine. However, there are neither words about using advanced tools, such as digital forensics and OSINT, nor cooperation between forensic science experts. All of it is critical for the collection of evidence, particularly in conflict zones. This international cooperation is essential to combat impunity and bring justice to the victims of these heinous crimes.

Also, when new actors are being talked about, in the case of Ukraine, a number of international expert groups have been established that have not been created or involved in this way before. Their role is to support with advice or collect evidence. But there is a question raised on what basis and in which form do investigators and prosecutors have the right to receive this information from these expert groups, NGOs or other similar subjects and use it in the investigation so that later, because

of the fruit of the poisoned tree theory,[9] all other evidence collected by the prosecution is not declared inadmissible by the court. This is a problem in the investigations conducted by Ukraine under domestic law and may also be a potential problem for other judicial mechanisms.

Another challenge is that the refugee and migrant crisis is gaining momentum, often with a degree of political manipulation, as mentioned above, about types of hybrid warfare. Mass refugee movements, sometimes facilitated as a political strategy, increase pressure on host countries and complicate the international response, as seen in Belarus's actions towards Europe. In such situations, the country under attack may need assistance through active international cooperation. Still, again, the form of this cooperation is not defined at the legislative or any other level.

In addition, new types of actors are emerging in conflicts whose actions remain largely unregulated. For example, private military companies are emerging to provide military services, and their emergence complicates accountability as these organisations often operate in multiple conflict zones.

What other problems can there be at the international level for cooperation? The main one is the lack of comprehensive legislation that facilitates such cooperation, but even when it is fully in place, some countries are still reluctant to cooperate, especially in the investigation and extradition process, ignoring it altogether or refusing, sometimes, on very formalistic grounds. A notable example is the current situation involving Ukraine, where over 700 extradition arrest warrants[10] have been issued by Ukrainian courts. Many of these warrants have been declined by other countries, citing the ongoing war and the substandard detention conditions in Ukraine, which fail to meet the European Convention on Human Rights standards. This reluctance is not unique to the Ukrainian context. For instance, there have been instances where courts in one country have ruled against extradition to another due to ongoing broader legal proceedings. An illustrative case is the refusal to extradite individuals to Lithuania because of concurrent judicial processes in Poland.[11] These challenges underscore the complexity of international legal cooperation, highlighting the need for not only robust legislative frameworks but also mutual trust and alignment with international human rights standards.

It should be noted that some measures have been taken to solve existing problems, but they can only be called preventive (i.e. they are clearly insufficient). For example, while the Tallinn Manuals (both editions) provide some guidance on the application of international law to cyber conflicts, comprehensive, binding rules are still lacking. The Ljubljana–The Hague Convention is a positive step but does

9 The "fruit of the poisoned tree" theory is a legal principle that excludes evidence obtained through illegal means, preventing its use in court, much like a poisoned tree yields tainted fruit.

10 'Ukraine Presses EU to Allow Extradition of War Criminals' *The Guardian* (5 March 2024) <https://www.theguardian.com/world/2024/mar/05/ukraine-presses-eu-to-allow-extradition-of-war-criminals-wagner-group>.

11 'Poland Won't Send Man Accused of Attacking Navalny Aide to Lithuania, Court Rules' *Reuters* (13 June 2024) <https://www.reuters.com/world/europe/poland-wont-send-man-accused-attacking-navalny-aide-lithuania-court-rules-2024-06-13/>.

not fully address the complexities of cooperation in cyberspace and so on. Modern technologies such as OSINT and other digital information are perhaps the most important but still underdeveloped. There is an ongoing need for clear international guidelines on the operations of private military companies to ensure accountability and legal oversight. The role of NGOs in gathering evidence, especially in cyberspace, and sharing it with law enforcement agencies requires better regulation to maintain accountability and integrity in conflict zones.

Legal frameworks for the exchange of evidence leave much to be desired due to their inconsistencies, which can hinder the effectiveness of international joint investigation teams. There is a lack of a standardised, universal approach to evidence collection and exchange that meets the admissibility criteria of different national jurisdictions. Law enforcement agencies, particularly those such as the Security Service of Ukraine, often have limited resources and lack the capacity to handle the significant volume of war crimes cases. This includes inadequate staffing and logistical support, and as war crimes investigations in active conflict zones are challenging due to threats (shelling, lack of electricity, and unreliable communications infrastructure), this has a significant impact on the timely collection and preservation of data.

Initially, investigators, prosecutors and judges suffered from a significant lack of experience in dealing with war crimes, which led to an inappropriate application of international humanitarian and criminal law. This situation is gradually changing. Jurisdictional and procedural conflicts sometimes arise because current criminal procedure laws may not be properly adapted to the realities of war crimes, with issues such as the exclusive jurisdiction of the Security Service of Ukraine over certain crimes, which can lead to bottlenecks and inefficiencies. Many war crimes suspects are inaccessible due to their location in hostile or occupied territory, and traditional extradition mechanisms are ineffective. This leaves in absentia proceedings as the primary, albeit imperfect, solution. Rapid, unsystematic legislative changes and adaptations in response to the urgent needs of wartime conditions can lead to legal inconsistencies and challenges in the long run.

Challenges for the Ukrainian national criminal justice system caused by the full-scale armed conflict

Since the beginning of the full-scale invasion in February 2022, however, there has been an urgent need to change criminal procedure legislation without delay, and therefore, unfortunately, sometimes unsystematically and disproportionately. Therefore, first of all, it is necessary to identify the challenges in the criminal justice system that Ukraine has faced and that could potentially arise for any other state with the outbreak of full-scale armed aggression. Following this, we will also review possible solutions to the relevant problems in the sphere of international cooperation in the investigation of war crimes, as well as outline progressive practices in terms of ensuring cooperation between different actors in the investigation of crimes in the context of an ongoing armed conflict, which are already being used in Ukraine and can be applied as a positive experience by other states.

A permanent increase in the number of war crimes

Apparently, in the context of unabated hostilities, the expansion of which may become more global, and given that one of the parties to an international armed conflict may significantly disregard the principles and norms of international humanitarian law, the quantity of war crimes has been steadily increasing since the beginning of the conflict, acquiring a snowball effect. This can be vividly illustrated by comparing the statistics of the Office of the Prosecutor General of Ukraine for the period of 2022 and 2023. Thus, in 2022, a total of 362,636 criminal offences were registered (i.e. entered into the Unified Register of Pre-trial Investigations). Among them, the number of criminal offences against peace, human security and international law and order was 62,128 (including war crimes under Article 438 of the Criminal Code of Ukraine). It should also be emphasised that the number of so-called military criminal offences (i.e. offences against the order of military service) was also significant, at 13,766. It is essential to highlight that out of 62,128 criminal offences against peace, human security, and international law and order, only 666 were brought to court in 2022. The above statistical information is comparable to similar figures for 2023. Specifically, the total number of registered criminal offences amounted to 475,595, of which the proportion of criminal offences against peace, human security and international law and order remained approximately at the level of 2022 – namely 62,667, of which only 963 criminal proceedings were brought to court. Unfortunately, the number of criminal offences against the order of military service has also increased and in 2023 reached 28,666.[12]

It is obviously complicated to prevent this negative trend of increasing the number of crimes, including those directly related to the international armed conflict in its active phase, by reforming the criminal justice system. Meanwhile, these circumstances should be taken into consideration in terms of responding to this challenge by optimising the structure and functioning of law enforcement agencies and courts, as discussed below.

Jurisdiction and unpreparedness of the law enforcement system to investigate a specific category of criminal offences

In addition, it should be stressed that, according to the criminal procedure legislation of Ukraine, the investigation of criminal offences against peace, human security, and international law and order, as well as crimes against national security (the number of which has also increased rapidly since the start of the full-scale invasion) falls within the competence of investigators of the Security Service of Ukraine, whose personnel is clearly not proportional to the number of crimes they are supposed to investigate based on the rules of jurisdiction. However, an approach

12 Ukraine, Office of the Prosecutor General, 'On Registered Criminal Offences and Results of their Pre-trial Investigation: Statistics' (*Official Website of the Office of the Prosecutor General*) <https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2>.

has now been developed in Ukraine whereby investigators of the National Police of Ukraine are actively involved in the investigation of war crimes.[13] On the one hand, this is determined by the rationale for dividing the workload between different law enforcement agencies conducting investigations, and on the other hand, by the specifics of Ukrainian criminal law. Thus, currently, the majority of war crimes are constituted by the offence enshrined in Article 438 of the Criminal Code of Ukraine ("Violation of the laws and customs of war"). The objective aspect of this crime covers "cruel treatment of prisoners of war or civilians, expulsion of civilians for forced labour, looting of national property in the occupied territory, use of means of warfare prohibited by international law, other violations of the laws and customs of war provided for by international treaties". Thus, Ukrainian national legislation, unlike, for example, Articles 7 and 8 of the Rome Statute, does not contain a differentiated approach to possible crimes that may be committed in the context of an international armed conflict. For this reason, in situations of investigation of crimes under Article 438 of the Criminal Code of Ukraine, when it involves causing death, bodily harm, torture, sexual violence and so forth against civilians, investigators of the National Police of Ukraine, who traditionally investigate similar offences in peacetime, could be more effective in these matters. In view of the above, the approach of establishing universal jurisdiction in the investigation of this group of crimes would be beneficial, provided that the prosecutor's offices responsible for procedural guidance of pre-trial investigations in Ukraine are empowered to determine the competent authority in a particular criminal proceeding and resolve jurisdictional disputes.

The need to investigate and record traces of crimes in the conditions of the threat of shelling, lack of electricity, and mobile or Internet connection

The emergence of this challenge is stipulated by several factors: first, as mentioned above, a significant number of criminal offences directly related to the context of the international armed conflict, which is constantly rising, obliges law enforcement agencies and the judiciary not to "postpone" the investigation and trial until "better times", but rather to try to act promptly, taking into account the available opportunities. Second, in order to prevent the loss of evidence, often close to the area of active hostilities, it is clearly necessary to conduct pre-trial investigation of crimes conditionally "in hot pursuit". Third, the current stage of hostilities, unfortunately, indicates that waiting for the end of the active phase of the armed conflict as the starting point for investigation and trial may be completely inappropriate given the unpredictability and unforeseeability of possible military events.

Countering this challenge in today's circumstances is made possible by the proactive introduction and application of modern advanced technologies to assist in

13 Y. Belousov, 'A Year of War Crimes Investigations' (*Justtalk*, 2 March 2023) <https://justtalk.com.ua/post/rik-rozsliduvannya-voennih-zlochiniv-intervyu-z-yuriem-belousovim-nachalnikom-departamentu-vijni-ogp-tekstova-versiya>.

the investigation. This includes, in particular, the use of open-source data (OSINT), satellite imagery to document war crimes, the involvement of non-governmental organisations and the information they have to assist in the collection of factual data, the use of drones to remotely conduct and record the process, and results of certain investigative actions. In addition, the active use of videoconferencing technologies for remote interrogation of witnesses and victims is becoming increasingly valuable. It should be noted that for several years, until the spring of 2024, there were no amendments to the Criminal Procedure Code of Ukraine that would allow the use of technical means of video conferencing available to any person and their use for communication not only in court or law enforcement agencies. Meanwhile, such explanations were provided at the beginning of the full-scale invasion in the letter of the Chief Justice of the Supreme Court "On Certain Issues of Criminal Proceedings under Martial Law" of 3 March 2022, No. 2/0/2–22.[14] More details on some of the above methods of obtaining evidentiary information are provided in the following section of this chapter.

Lack of significant experience in the investigation and trial of war crimes

To begin with, it should be noted that this problem was acutely relevant in the initial stages of the full-scale invasion, as the necessary practices in law enforcement have already been developed, and some investigators, prosecutors and judges have been trained in the basics of applying the provisions of international humanitarian law, international criminal law and applied aspects of investigating and prosecuting crimes committed in the context of international armed conflict. However, at the initial stages, even despite the previous 8 years of armed conflict, the experience of law enforcement and judicial representatives and relevant knowledge in specific areas of law was apparently insufficient to correctly apply the substantive and procedural law.

It is worth noting that the irrelevant application of the provisions of international humanitarian and criminal law is due, first, to the defects in national criminal legislation, as discussed above and, second, to the imperfection and lack of a unified approach in law enforcement practice (representatives of the prosecution and the court when formulating the charge and deciding on its merits).

In particular, on the one hand, due to the controversial approach to the assessment of the armed conflict in the Donetsk and Luhansk regions before the events of 24 February 2022 – namely, the anti-terrorist operation (ATO) and the joint forces operation (JFO) instead of the introduction of martial law – a significant number of criminal offences committed in the context of the armed conflict were incorrectly qualified. For example, many criminal offences were treated as terrorist acts, and even more illustrative is the existence of three guilty verdicts (Dzerzhynsk City

14 Letter of the Chief Justice of the Supreme Court of 3 March 2022, 'On Certain Issues of Criminal Proceedings under Martial Law', No 2/0/2–22 <https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/war/Inform_lyst_2022_03_03.pdf>.

Court of Donetsk Region in 2015[15] and 2016,[16] and the Krasnoarmiyskiy City District Court of Donetsk Oblast in 2017)[17] under Article 437 of the Criminal Code of Ukraine "Planning, Preparation, Initiation and Waging of an Aggressive War" (the so-called crime of aggression) against ordinary soldiers of the so-called DPR, although traditionally this crime is considered a crime of "top officials" – representatives of the political leadership and military command.

As noted above, this problem has now been partially resolved, which was facilitated, among other things, not only by the training of some investigators, prosecutors and judges, but also by the introduction of a method of investigation through the creation of interagency and international investigation teams, with the involvement of international experts – specialists in war crimes investigation from other countries. Nevertheless, the problem of reforming the judicial system, namely, the establishment of military courts and specialised war crimes courts, remains relevant.

Several publications offer valuable insights into the challenges and potential solutions for prosecuting war crimes within national judicial systems. Specifically, Kaplina, Kravtsov and Leyba[18] examine the resurgence of military justice in Ukraine during wartime, emphasising the need for specialised expertise in these complex cases. Burtnyk and Hryshko[19] provide a comparative analysis of different models for trying war crimes, highlighting the pros and cons of each approach and considering relevant foreign experience. They particularly emphasise the importance of aligning national procedures with international human rights standards. Further, Hryshko and Prokopenko[20] delve into global mechanisms for prosecuting war crimes, drawing upon the experiences of various nations and contextualising them for the Ukrainian situation. Notably, these studies collectively underscore the significance of the European Court of Human Rights (ECtHR) jurisprudence in ensuring fair trials and protecting fundamental rights. Based on these analyses, it is argued that, in the immediate term, the most pragmatic and effective strategy is to implement specialised judicial training and designation for war crimes cases.

Based on the conclusions drawn in these works, we should agree with the opinion that in the short term, the most appropriate and optimal approach is to

15 Judgement of the Dzerzhynsk City Court of Donetsk region of 25 September 2015, Case No 225/5523/15-к <https://reyestr.court.gov.ua/Review/51687905>.

16 Judgement of the Dzerzhynsk City Court of Donetsk Region of 04 July 2016, Case No 225/6623/15-к <https://reyestr.court.gov.ua/Review/58821642>.

17 Judgement of the Krasnoarmiiskyi City District Court of Donetsk region of 27 January 2017, Case No 235/9919/15-к <https://reyestr.court.gov.ua/Review/64316400>.

18 Kaplina, Kravtsov and Leyba, 'Military Justice in Ukraine: Renaissance During Wartime' (2022) 3(15) *Access to Justice in Eastern Europe* <https://doi.org/10.33327/AJEE-18–5.2-n000323>.

19 Burtnyk and Hryshko, 'Models for Trying War Crimes and Other Significant Human Rights Violations within the National Judicial System' (*Democracy Justice Reforms*, 2023) <https://en.dejure.foundation/models_for_trying_war_crimes>.

20 Hryshko and Prokopenko, 'Mechanisms for Trying War Crimes: Global Experience' (*Democracy Justice Reforms*, 2022) <https://dejure.foundation/mexanizmy_sudovogo_rozglyadu_sprav_pro_voyenni_zlochyny_dosvid_inozemnyx_krayin>.

introduce at the legislative level the specialisation of judges in war crimes cases (to prevent unsystematic division of court cases or even their non-application). Such an approach, on the one hand, would be a logical extension of the existing specialisation at the level of prosecutors and pre-trial investigators, and on the other hand, would require determining at the state level, first, the range of courts in which judges need to specialise, and second, the qualifications for such judges (e.g., the need to undergo training and pass an exam in international humanitarian and international criminal law, as well as confirmation of high-level English language proficiency).

Lack of physical access to the majority of potential suspects and inability to use international cooperation mechanisms to ensure their extradition

It is apparent that the majority of persons suspected of war crimes on the territory of Ukraine are citizens and military personnel of the Russian Federation. This means that most of them are located on the territory of Russia or in the temporarily occupied territories of Ukraine, which are currently under Russia's effective control. Consequently, Ukrainian law enforcement agencies are currently deprived of legal instruments to gain physical access to these individuals. Any international cooperation with the Russian authorities is also obviously beyond the realm of possibility. In addition, it is unlikely that these persons will leave for the territory of other states that could ensure their extradition to Ukraine. That is why the main mechanism currently available to the pre-trial investigation authorities, the prosecutor's office and the courts of Ukraine, is the institution of special pre-trial investigation and special court proceedings (i.e., proceedings in the absence of the suspect or accused – in absentia). In particular, serving such persons with a notice of suspicion in absentia is an important prerequisite for putting them on the international wanted list and ensuring at least a hypothetical possibility of their extradition to Ukraine.

Moreover, despite the fact that the use of the relevant mechanism constitutes an interference with the full enjoyment of the right to a fair trial, as regulated by Article 6 of the European Convention on Human Rights, provided that the key guarantees set out in a number of ECtHR judgements are observed (in particular, it concerns the person's awareness of the criminal proceedings against him/her as a precondition for consideration of the case in absentia, ensuring the right to effective legal assistance from the chosen or appointed defence counsel, guaranteeing the right to retrial in the person's direct presence, etc.), the proceedings in the absence of the accused are not per se incompatible with Article 6 ECHR, and therefore do not automatically constitute a violation of the fundamental right to a fair trial.[21]

- *The destruction of law enforcement premises and court buildings, as well as the shortage of judges* (especially at the beginning of the full-scale invasion).

21 See, for example, *Colozza v Italy* (App no 9024/80) ECtHR 12 February 1985; *Lena Atanasova v Bulgaria* (App no 52009/07) ECtHR 27 January 2017; *Krombach v France* (App no 29731/96) ECtHR 13 February 2001.

> The key way to overcome this challenge was to change the investigative jurisdiction and court jurisdiction in cases where it is objectively impossible to conduct pre-trial investigation and/or trial in accordance with the rules originally regulated by the criminal procedure legislation. At the initial stages, this approach was envisaged in the letter of the Chief Justice of the Supreme Court "On Certain Issues of Criminal Proceedings under Martial Law" of 3 March 2022, No. 2/0/2–22.[22] Subsequently, this possibility was legislated in Articles 36 and 615 of the Criminal Procedure Code of Ukraine.

A closer examination of the Ukrainian national court system in late 2022 reveals significant operational difficulties. The judiciary faces a significant shortage of judges, with 52% of judicial posts vacant. In addition, 9% of courts are located in occupied territories, severely limiting their functionality. In addition, 11% of courts have suffered from destroyed facilities, further hampering their ability to administer justice.[23]

These statistics highlight the immense strain placed on the Ukrainian judicial system by the ongoing conflict and underscore the challenges of ensuring the investigation of atrocity crimes in war-torn regions.

Directions for the improvement of international legal cooperation in the investigation of war crimes

The first and most important thing for improving international cooperation seems to be updating the legal frameworks by revising and modernising the post-World War II frameworks that have worked so far; that is, adapting them to today's conflict realities (including hybrid warfare and new technologies) and developing comprehensive international cyberlaws that clearly define norms and responsibilities in cyberwarfare and other digital conflicts. At the same time, this is very complicated due to the tough procedure and the current geopolitical landscape, so it is necessary to find another solution. There is a chance that the Russian-Ukraine War will open a new page of international law when instead of creating a new law for regulation, it might be enough to reconsider the existing one through the court's interpretation of it in accordance with the current digital landscape.

It is important to note that many principles and rules of international law are not bound by technology and can be applied to cyber operations just as they are to kinetic warfare. For instance, there is a widespread agreement that the laws of war are equally applicable to cyber operations during armed conflict. The existing international legal framework, including the Rome Statute, may not explicitly

22 Letter of the Chief Justice of the Supreme Court of 3 March 2022, 'On Certain Issues of Criminal Proceedings under Martial Law', No 2/0/2–22 <https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/war/Inform_lyst_2022_03_03.pdf>.

23 K. Latyshand M. Rogers, 'Universal Jurisdiction: Current Situation Analysis in Lithuania' (January 2023) <https://data.kurklt.lt/wp-content/uploads/2023/05/ANALYSIS-OF-CURRENT-SITUATION-JUSTICE−1.pdf>.

mention cyber war crimes, primarily because these laws were formulated before the emergence of cyberwarfare. However, the adaptability of international law to cyber operations, similar to traditional means of warfare, is a testament to its resilience and relevance in the face of evolving threats (Kubo Mačák).[24]

At the same time, it should be considered whether it is possible to extend to the digital space the interpretations of the scope of international humanitarian law (IHL) already used by judicial practice and key international actors, and whether such law enforcement rather than the rule-making method can be used to fill existing gaps in international regulation.

The International Court of Justice (ICJ, 1996) declared that IHL "applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future",[25] which prohibits the targeting of civilians and civilian objects, indiscriminate attacks, and grants protection to medical services and personnel, including in new means of warfare such as cyber operations.

Regarding the applicable law, a lot depends on the "effects" of cyber operations: if they are similar to those caused by traditional warfare, such as bombs or missiles, such actions could initiate an international armed conflict.[26]

The ICC and other courts should be able to interpret and develop law enforcement practices in their decisions. While interpreting existing laws and how they apply to cybercrime can be regarded as very complicated, it is a better alternative to creating new laws because existing precedents and interpretations can help with prosecution. Moreover, "the geopolitical situation is hardly such that new international treaties would be possible" (Katrin Nyman-Metcalf).[27]

The next direction involves creating international regulations and oversight mechanisms for private military companies to govern their operations and ensure compliance with international law.

Other actors, such as forensic experts, civil society organisations, NGOs, and OSINT actors must also be provided with guidelines on their roles and responsibilities in conflict zones to ensure effective legal cooperation with law enforcement and other key actors.

Another concern is the strengthening of international cooperation: multilateral agreements and new international arrangements that address modern conflict dynamics and ensure collective accountability must be welcomed and the capacity of international institutions to adapt to the rapid evolution of conflict and technology must be strengthened.

Something else to consider is standardising evidence-sharing protocols, especially in relation to digital evidence, in the framework of standards for cooperation between law-enforcement bodies and non-governmental subjects to share this kind of digital information. Conversely, establishing laws could take more time and effort than the creation of these kinds of standards. In this case, the Ljubljana–The

24 Verbruggen (n 6).
25 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (ICJ) [1996] ICJ Rep 226.
26 'Digital Technologies and War' (2020) 102(913) *International Review of the Red Cross* 287–334.
27 Verbruggen (n 6).

Hague Convention could be a good illustration, when the UN was reluctant to adopt it as it was not the first priority for them, but a core group of countries did a very good job as over 80 countries immediately joined it. The same could happen in this case, where some active members could unite their efforts – for example participants of JIT, which was established at the beginning of 2022 – and develop the previously mentioned standards for evidence and proof.

The use of modern technologies that assist in the timely and accurate collection of evidence, such as OSINT, satellite imagery, drones and videoconferencing, should be expanded to overcome the logistical challenges of conflict. A universal framework for the collection and exchange of evidence that is consistent with international admissibility standards and enhances the effectiveness of international cooperation must be developed and implemented.

Legislative reforms should be introduced to provide for more flexible and efficient jurisdictional rules, to involve a wider range of law enforcement agencies in war crimes investigations and to empower prosecutors to allocate cases based on capacity and expertise. Law reform must be systematic to ensure that legislative changes are well thought out and proportionate. A framework should be established for continuous assessment and adaptation of laws to the evolving nature of conflicts and justice needs.

The legal framework for trials in absentia needs to be strengthened to ensure that they meet international human rights standards, including guaranteeing the right to a fair trial and ensuring that suspects are informed and represented.

Priority should be given to the reconstruction of judicial and law enforcement infrastructure damaged during conflicts, and strategies should be implemented to protect and maintain these facilities in future conflicts.

Greater international cooperation and assistance from experienced countries and organisations must be sought, including the formation of more joint investigative teams, the sharing of best practices, and the provision of technical and financial assistance.

The need to investigate and document crimes amid threats such as shelling, power outages, and communications disruptions requires rapid and adaptive action. Modern technologies such as OSINT, satellite imagery, drones, and videoconferencing have become critical to overcoming these challenges and ensuring timely evidence collection.

Lack of experience in prosecuting war crimes

Initially, the lack of experience in investigating and prosecuting war crimes was a significant problem. Despite eight years of conflict in Ukraine, law enforcement and the judiciary lacked sufficient expertise in the application of international humanitarian and criminal law. Comprehensive international humanitarian and criminal law training programs should be established for investigators, prosecutors and judges; continuing education and practical training in dealing with war crimes are essential. Training and international cooperation have since improved this situation, but creating specialised military courts and war crimes tribunals remains necessary to ensure a more structured and effective judicial process. Most war crimes suspects are Russian citizens or military personnel, who are largely beyond

the reach of Ukrainian authorities due to their location in Russia or occupied territories. Traditional international cooperation mechanisms such as extradition are ineffective in this context. The use of absentia proceedings, while controversial, provides a means of issuing international arrest warrants and preserving the possibility of future extradition. The destruction of law enforcement facilities and court buildings and a significant shortage of judicial personnel, particularly at the beginning of the invasion, have hindered the criminal justice process. Legislative amendments allowing for changes in jurisdiction and competence in cases where standard procedures are impractical have been critical in addressing these challenges.

Peculiarities of assessment and use of evidence obtained in the course of international cooperation in the investigation of war crimes

Following on from the issue of modern approaches to methods and techniques of investigation in the context of the ongoing international armed conflict on the example of Ukraine, as well as ways and means of obtaining evidence of international crimes, there is the matter of determining the characteristics which such information should have, the requirements which must be met to ensure the admissibility of relevant evidence in court, and other aspects of evidence assessment, such as some peculiarities of the subject matter of proof in this category of crimes. This range of issues seems to be particularly urgent in view of a number of factors:

1 The multiplicity of possible future judicial institutions that may be subjects of consideration of cases concerning international crimes. This includes, for instance, the consideration of cases at the level of national judicial systems (both of Ukraine and other states, given the universal jurisdiction of international crimes), the establishment of special tribunals (international, hybrid), and the transfer of some proceedings to the International Criminal Court. This circumstance is the basis for another important factor – the existence of different, sometimes significantly dissimilar, approaches to the admissibility of evidence and its assessment by judicial institutions.
2 The lack of clearly defined rules enshrined in law, as well as unified judicial practice in the assessment of evidence, its admissibility not only in situations where it comes to the establishment of future special tribunals for international crimes (which is quite logical, since one can only predict the approaches they may adopt in the future by analysing and extrapolating from the practice and experience of the tribunals that have functioned before (e.g. the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda). Nevertheless, even the previous practice of the International Criminal Court, as well as the existing Rules of Procedure and Evidence of this body,[28] do not provide a comprehensive guide to the above aspects, as they contain both gaps and discrepancies in law enforcement.

28 Assembly of States Parties to the Rome Statute of the International Criminal Court, *Rules of Procedure and Evidence* (1st Session, ICC-ASP/1/3 and Corr.1 3–10 September 2002), part II.A <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>.

3 The involvement of various actors in the evidence collection procedure (e.g. national investigators from various pre-trial investigation bodies and prosecutors, joint investigation teams [including international ones], international experts, the ICC Prosecutor and his field office staff, non-governmental organisations). In the process of forming the evidence base for future trials, all of them may be guided by regulatory requirements that are more familiar to them. Obviously, this may further complicate the procedure for assessing the relevant collected materials, and create preconditions for excluding certain information that could potentially be of evidentiary value on formal grounds.
4 A significant percentage of digital evidence of war crimes in the total body of evidence. This includes, in general, data from open sources, information from smartphones, including metadata, photographs, videos from personal gadgets and outdoor surveillance cameras and so on. Obviously, certain specific features inherent in this type of evidence (e.g., the transmissibility of such information, its ability to exist simultaneously on several media without losing its evidentiary qualities, the lack of a permanent solid connection with the material medium of such information) necessitate the transformation of approaches to assessing the admissibility of this group of evidence.
5 Inconsistencies between certain aspects of the subject matter of proof in relation to certain categories of crimes (e.g., the crime of aggression, violation of the laws and customs of war, and some others) at the level of, in particular, the national criminal legislation of Ukraine, on the one hand, and the provisions of international criminal law, on the other. This aspect has already been discussed in the first part of our work.

An attempt will be made to combine the first three factors and consider them from the perspective of what characteristics of evidence should be primarily focused on when forming it. In this regard, it is important to emphasise that such formulation of these general guidelines is possible on the basis of the analysis of the approaches that have been previously applied by international military tribunals, international ad hoc tribunals, and the currently functioning body – the International Criminal Court. Analysis of a number of scientific studies,[29,30,31,32] as well as the normative sources regulating the evaluation of evidence in the context of

29 Bartłomiej Krzan, 'Admissibility of Evidence and International Criminal Justice' (2021) 7(1) *Revista Brasileira de Direito Processual Penal* <https://doi.org/10.22197/rbdpp.v7i1.492>.
30 Michele Caianiello, 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models' (2011) 36 *North Carolina Journal of International Law & Commercial Regulation* <https://www.researchgate.net/publication/228150788_Law_of_Evidence_at_the_International_Criminal_Court_Blending_Accusatorial_and_Inquisitorial_Models>.
31 Sean Doherty, 'Evidence in International Criminal Tribunals: Contrast between Domestic and International Trials' (2013) 26(4) *Leiden Journal of International Law* 937.
32 O. Kaluzhna and K. Shunevych, 'Evidence in the International Criminal Court – the Role of Forensic Experts: The Ukrainian Context' (2022) 5(4–2) *Special Issue Access to Justice in Eastern Europe* 52–65 <https://doi.org/10.33327/AJEE-18–5.4-a000435>.

international criminal justice (e.g., the Rome Statute, Article 69),[33] Rules of Procedure and Evidence of the International Criminal Court (e.g., rules 63–64),[34] Statute of the International Criminal Tribunal for the Former Yugoslavia (inter alia, Article 15),[35] Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (rule 89),[36] Statute of the International Criminal Tribunal for Rwanda (in particular, Article 14),[37] Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (rule 89)[38] allows us to draw several important conclusions from this perspective:

- The functioning of the above-mentioned judicial institutions is mainly a harmonious combination of the traditions of the judicial systems of common law countries and Romano-Germanic law, which involves taking into account both the requirement to ensure a fair trial and the need to comply with due process. In view of this, certain violations of technical and formal rules during the collection of evidence may not be of fundamental importance. Instead, the admissibility of evidence may be affected if such information can potentially cause serious damage to the objectivity and fairness of the proceedings, as well as if the evidence was obtained through a violation of human rights (it is important to stress the seriousness of such a violation, which should threaten the reliability of the relevant evidence).
- The characteristics of evidence that affect its admissibility and weight in the international criminal justice system are its relevance (i.e., the extent to which it is relevant and can confirm or refute something about the circumstances of the case), its probative value (i.e., the degree and level to which the relevant evidence can prove something in the case, suitable for use in establishing the circumstances that are the subject of proof), as well as the weight of the evidence (a qualitative feature that indicates the importance of the evidence and its place in the system of other evidence – it follows from how reliable, trustworthy, authentic, clear and accurate the evidence is). Drawing a distinction between the second and third of these characteristics, the ICC itself notes that the weight of

33 *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

34 Assembly of States Parties to the Rome Statute of the International Criminal Court (n 28).

35 'Statute of the International Criminal Tribunal for the Former Yugoslavia'. The Hague. Adopted on 25 May 1993 by Resolution 827 with amendments <https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>.

36 'Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia'. The Hague. Adopted on 11 February 1994 with amendments <https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf>.

37 'Statute of the International Criminal Tribunal for the Rwanda'. United Nations Security Council. Adopted on 8 November 1994 with amendments <https://ihl-databases.icrc.org/assets/treaties/565-IHL-90-EN.pdf>.

38 'Rules of Procedure and Evidence of the International Criminal Tribunal for the Rwanda'. Adopted on 29 July 1995 with amendments <https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.

> evidence means the relative importance attached to it when deciding whether a particular issue is proved or not. As the ICC pointed out in the case of Germain Katanga and Mathieu Ngudjolo Chui (situation in the Democratic Republic of the Congo), this feature depends on the intrinsic quality and characteristics of the evidence, as well as the quantity and quality of other available evidence on the same issue. Thus, unlike probative value, the weight of evidence is assessed at the end of the trial, when the Chamber has heard all other evidence admitted into the case.[39]

Therefore, contrary to the initial provisions of national, in particular Ukrainian, evidence law, at the international level, the key emphasis is placed on the weight of the relevant evidence, its relevance to the case, and this primarily affects whether the evidence will be accepted by the court. Instead, in accordance with the provisions of the criminal procedure legislation of Ukraine, the admissibility of evidence is reduced to assessing compliance with the formal requirements for obtaining evidence, since evidence obtained in accordance with the procedure established by law is considered admissible (i.e. the emphasis is shifted to the external form rather than the content). In this context, the following conclusions are important:

- When deciding whether the relevant evidence is admissible, preference is given to the rules enshrined at the international level, as well as their interpretation in the case law of international tribunals and the ICC, since these judicial institutions are not obliged to apply national legislation, as well as to assess actions to form the evidence base for compliance with it. Specifically, this is stated in the first paragraph of Rule 89 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia and Rwanda, which is similar in content,[40] and Article 69 of the Rome Statute states that the ICC "shall not rule on the application of the State's national law" at the stage of assessing the relevance and admissibility of relevant evidence.[41]
- On the one hand, it is a free assessment of evidence by judges of international criminal and military tribunals, as well as the ICC, their non-binding by national rules for obtaining evidence, taking into account, first of all, the importance and relevance of the relevant evidence for establishing and proving the circumstances of the case (at the same time, whether such evidence can significantly adversely affect the fairness of the trial). However, the standard of proving the guilt of a person prosecuted for an international crime remains unchanged: proof "beyond a reasonable doubt".

39 *Prosecutor v Katanga and Chui* (Situation in the Democratic Republic of Congo) (Decision on the Prosecutor's Bar Table Motions) (ICC-01/04–01/07) (ICC 17 December 2010).

40 'Rules of Procedure and Evidence of the International Criminal Tribunal for the Rwanda'. Adopted on 29 July 1995 with amendments <https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.

41 'Rome Statute of the International Criminal Court' (17 July 1998) <https://legal.un.org/icc/STATUTE/99_corr/cstatute.htm>

Meanwhile, in his publication devoted to the aspects of the ICC's application of the standard of proof in resolving cases brought before it, Utkarsh Krishna draws attention to a number of cases where the court demonstrated inconsistency in this matter, particularly, to the opinion of the ICC Prosecutor, who, instead of applying the standard of proof beyond reasonable doubt, "actually required to prove the relevant facts to the degree of absolute certainty (i.e. beyond any doubt)".[42] In our opinion, the latently expressed requirement of the ICC that all hypotheses with evidentiary support point to the guilt of the accused may potentially pose a threat to the achievement of the goals of justice and the prosecution of perpetrators of international crimes. It is important to recognise that the key idea behind the standard of proof beyond a reasonable doubt is that such doubts that prevent a person from being convicted must be reasonable, real, and not imaginary or speculative.

Returning to the fourth aspect of the above regarding special approaches to the assessment of digital evidence, we would like to point out that the main role for its weight is played by the provision of technical guarantees for verifying the authenticity of information provided to international judicial institutions. It is essential that the identification and authentication of digital information, verification of its integrity and immutability are technical tasks, which significantly reduces the risk of subjective factors. The relevant verification, inter alia, may be based on the principles developed by the International Organization on Digital Evidence.[43] The so-called chain of custody plays a special role in the authentication and verification of digital information. The essence of this principle is the staged registration of all information about the identification properties, production, storage and movement of a file from user to user, up to the examination in court – and, if necessary, demonstration of this to the participants in the process. Thus, it is a step-by-step documentation of the file's identifying properties from the moment of its registration, broadcast, storage and transfer from one medium to another.

The position of the ICC set out in the above-mentioned Katanga case seems to be interesting in this context. More specifically, in paragraph 24, the Chamber made a number of general observations on certain categories of documentary evidence that have special characteristics. For instance, when it comes to providing information from open sources (e.g., the Internet), a person must provide reliable information about where the evidence can be obtained (if the evidence is no longer publicly available, the person must clearly indicate this, as well as the date and place of its receipt). The same paragraph also analyses the peculiarities of evaluating video and photographic evidence: it is important to confirm its originality and

42 U Krishna, 'ICC's Struggle with the Evidentiary Standard of Proof Beyond Reasonable Doubt' (*Cambridge International Law Journal* (Blog Post), 22 Fenruary 2021) <https://cilj.co.uk/2021/02/22/iccs-struggle-with-the-evidentiary-standard-of-proof-beyond-reasonable-doubt/>.

43 'Digital Evidence: Standards and Principles' (2000) (2/2) *Scientific Working Group on Digital Evidence (SWGDE) International Organization on Digital Evidence (IOCE), Forensic Science Communications* <https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/april2000/swgde.htm#IOCEInternationalPrinciples>.

integrity, as well as provide information about the date and place of recording.[44] Consequently, it is extremely important to ensure that metadata is preserved and attached to such evidence, which can be achieved through the use of specially designed software (e.g., CameraV and InformaCam system developed by the Guardian and WITNESS).[45]

Conclusions

The famous saying "*Silent enim leges inter arma*" (In times of war, the law is silent), attributed to the Roman philosopher and orator Marcus Tullius Cicero, is often used to justify postponing the pursuit of justice until after war. With the advent of international joint investigation teams, however, it is possible to do so simultaneously: if a country engaged in active combat is unable to investigate war crimes, other countries will assist through the mechanism of universal jurisdiction and through various forms of international cooperation (e.g. JITs). The example of Ukraine in relation to the JIT.

The research conducted in this chapter has allowed us to identify, using Ukraine as an example, the main challenges that a state that remains in a state of international armed conflict may face in the investigation and trial of war crimes. It attempts, inter alia, to identify the reasons for possible obstacles, to highlight inconsistencies between national norms and international legal instruments, and to identify directions and ways to increase the level of effectiveness of war crimes investigations and to ensure that perpetrators are brought to justice while ensuring compliance with fair trial standards. Furthermore, it is noted that comprehensive intergovernmental and international cooperation, which should take various forms, is of key importance in the investigation and trial of the category of crimes under consideration.

Effective intergovernmental cooperation is essential for the exchange of evidence between national and international jurisdictions. Given the different evidentiary standards of national jurisdictions, a universal approach that meets admissibility criteria is essential.

The formation of joint investigation teams, such as the Franco-German JIT, is an example of successful cooperation that facilitates the collection and exchange of evidence. Ukrainian criminal procedural law has undergone unsystematic and disproportionate changes due to the urgent need for adaptation, highlighting the need for structured reforms to ensure effective functioning in times of war. States should consider preventive legal and institutional reforms based on the Ukrainian experience to better prepare for potential future conflicts and ensure preparedness across all sectors of society.

44 *Prosecutor* (n 39).

45 Centre for Law and Democracy, 'Manual for Journalists on Collecting and Preserving Information About International Crimes' (September 2023) <https://www.law-democracy.org/live/wp-content/uploads/2023/09/Manual.War-Crimes.Final_−1.pdf>.

In sum, the dynamic nature of contemporary conflicts requires comprehensive and adaptable legal frameworks for effective interstate cooperation in war crimes investigations. By learning from Ukraine's experience and implementing systematic reforms, national and international jurisdictions can better address the complexities of modern warfare and ensure that justice is served even in the midst of ongoing conflicts.

Special attention is paid to the issue of obtaining, using and evaluating evidence to establish the circumstances of war crimes and to hold the perpetrators criminally responsible. The authors approach this problem through the prism of the correlation between domestic legislation (using Ukraine as an example) and international documents (in particular, the Statute and Rules of Procedure and Evidence of the International Criminal Court and International Tribunals). In this way, it was possible to identify certain discrepancies at the national and international levels and, at the same time, to formulate recommendations for overcoming these contradictions, which may play an important role in the further trial of war crimes committed on the territory of Ukraine. In conclusion, the dynamic nature of contemporary conflict requires a corresponding evolution of international legal frameworks and cooperation mechanisms. Without these updates, international law will struggle to effectively govern the increasingly complex landscape of global conflict.

7 Corporate criminal accountability for international crimes in the context of Russian aggression against Ukraine

Kateryna Buriakovska

Russian aggression against Ukraine: background

The Russian invasion was recognised as a violation of the UN Charter, expressed in Resolutions of condemnation of the full-scale aggression,[1] and has received responses from various international mechanisms, including adjudicating bodies, and triggered national investigations.

Almost immediately in February 2022, the movement for the advanced corporate responsibility of large corporations operating or trading with the Russian market was activated,[2] also calling big businesses to withdraw from the Russian market. In addition, steps were taken to weaken Russia's economic capacity to wage war and exert pressure on it through economic sanctions – from foreign governments, the European Union and the United Nations.

So far, businesses have been mostly targeted under different sanctions regimes and heightened human rights due diligence, while corporate criminal liability appears to be less of a focus of various discussions and designing accountability and compensation mechanisms.

Why does addressing corporate complicity in the context of Russian aggression against Ukraine matter?

This chapter argues that accountability mechanism related to prosecuting international crimes committed in Ukraine will not be comprehensive without addressing businesses involvement. There are at least four characteristics of this war which support this argument.

1 'Aggression Against Ukraine: Resolution, United Nations General Assembly' (28 February 2014) <https://digitallibrary.un.org/record/3959039> accessed 9 October 2024.

2 Business and Human Rights Resource Center, 'Ukraine: Global Outrage Over Russian Invasion Leads to Sanctions, Demands for Businesses to Divest' <https://www.business-humanrights.org/en/latest-news/ukraine-global-outrage-over-russian-invasion-leads-to-sanctions-demands-for-businesses-to-divest/> accessed 9 September 2024.

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First, this is the employed war tactic of significant airstrikes with multiple types of aerial weapons. Some commentators highlight that Russian aggression marked 'the emerging nature of drone warfare in the early 21st century'.[3] Since 2024, air-launched explosive weapons have caused 17% (3,795) civilian casualties in Ukraine;[4] for the period August 2022 to August 2023, there were 1,956 Iranian drones (Shaheds) reported to have attacked Ukraine – hitting infrastructure and strategically important locations around the country and terrorising the civilian population.[5] The production of missiles and drones for such a long time is impossible without relying on technologies produced commercially in Russia but also in foreign jurisdictions.[6] A separate and solid piece of discussion and investigation is Russia's use of Shahed-type drones produced in Iran by Iranian governmental enterprises, which, in its turn, also contained a dozen US and Western companies, particularly in the remnants of drones downed in Ukraine in autumn 2022.[7] There are also investigations about companies which took part in training and supplying services.[8]

To acquire necessary components and details, Russia and Russian companies under state-owned companies use different ways to circumvent sanctions, mostly re-export and parallel export: Brazilian or Dubai companies sell components, which travel closer to Russia and Kazakhstan; from Kazakhstan, they go either legally as re-exports or as contraband across the border closer to Russian plants.[9] Thus, the aspect of supplies of weapons and components necessary for their producing by Russia should be a mainstreaming element in case-building around incidents or patterns of documented international crimes committed by Russia, which employ airstrikes. Apparently, expertise on sanctions regime norms and the framework of business and human rights will be sufficient for such investigations.

3 Tomas Hamilton, 'Corporate Accountability and Iranian Drones in the Ukraine War: Could Sanctions Lead to Prosecutions for International Crimes?' (*EJIL Talk!*, 2022) <https://www.ejiltalk.org/corporate-accountability-and-iranian-drones-in-the-ukraine-war-could-sanctions-lead-to-prosecutions-for-international-crimes/> accessed 9 October 2024.

4 Action on Armed Violence, 'Ukraine: AOAV Explosive Violence Data on Harm to Civilians' <https://aoav.org.uk/2024/ukraine-casualty-monitor/> accessed 9 October 2024.

5 'Reported Shahed Drone Launches in Ukraine' (August 2022–Septemebr 2023) <https://airwars.org/research/shahed-map/> accessed 9 October 2024.

6 'Type of Missile that Struck Kyiv's Children Hospital Uses Western Components' *Financial Times* (9 July 2024) <https://www.ft.com/content/ef463ac9-4804-4ad7-b9a2-c113590f2f96> accessed 9 October 2024.

7 'CNN Exclusive: A Single Iranian Attack Drone Found to Contain Parts from More Than a Dozen US Companies' (*CNN Politics*, 4 January 2023) <https://edition.cnn.com/2023/01/04/politics/iranian-drone-parts-13-us-companies-ukraine-russia/index.html> accessed 9 October 2024.

8 'Latest Company Involved In Iran's Drone Program Revealed' (*Iran International*, 29 June 2023) <https://www.iranintl.com/en/202306290504> accessed 9 October 2024.

9 'Crack in Western Shield: How Russia Circumvents Sanctions and What Could Stop it' (*RBC Ukraine*, 19 April 2024) <https://newsukraine.rbc.ua/analytics/crack-in-western-shield-how-russia-circumvents−1713513922.html> accessed 9 October 2024.

Second, the authoritarian regime in Russia should be another angle to assess economic actors' contribution to the aggressive war, and it is predominantly about Russian state-owned enterprises (SOEs). Since 2000, the Russian government's role in the economy has grown significantly, mainly to the emergence of a new ownership structure: state corporations, which are not independent corporate entities but instruments of the state policy, with a great share of state interference (in fact, control). The state-ownership framework in Russia is failing to comply with the relevant standards, for example Guidelines on Corporate Governance of State-Owned Enterprises. The SOEs have monopolised key economic sectors, which appear to be crucial for launching and waging the war – oil, gas, electricity, banks, defense industries and transportation.[10] The contributions of these entities to the aggressive war of the Russian government range from supplying Russian military with all the necessary equipment,[11] being distanced from Ukrainian territory, to participation in torture practices against workers of the Zaporizhya nuclear power plant in the occupied city of Enerhodar.[12] Efforts to hold Russia accountable for the war would then be fully-fledged when, along with the political and military leadership, businessmen from the state sector will be also scrutinised by investigators.

Third, this chapter touches upon Ukrainian national companies, which have allegedly supplied components to Russia and have investigation proceedings lodged against them. The economic and political expansion of Russia over Ukraine, exercised during and in the aftermath of the Soviet Union, resulted in well-established economic and political ties between Ukrainian entrepreneurs and Russian business and politicians, leading to a sufficient dependency of the Ukrainian economy (especially, in energy and defense sectors). Some of these ties were utilised by Russia in so-called unconventional warfare and followed its systematic and persistent preparation to the invasion in Ukraine since 2014.[13] However, the ongoing investigations also reveal cases when these Ukrainian companies directly fuel Russia's war efforts. Thus, criminal accountability of national Ukrainian companies for abetting the aggressor state is important not only to combat impunity, but also in the broader context of transitional justice and the 'root and causes of the war'

10 Roza Nurgozhayeva, 'Corporate Governance in Russian State-Owned Enterprises: Real or Surreal?' (2022) 17(1) *Asian Journal of Comparative Law* 24–50 <https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/corporate-governance-in-russian-stateowned-enterprises-real-or-surreal/2F4F08667E5F13A390BADBA0F9164A51> accessed 9 October 2024.

11 'Russia's Latest Space Agency Mission: Raising a Militia for the War in Ukraine' *Financial Times* (15 June 2023) <https://www.ft.com/content/c194cb2d-3aa0-4195-9be5-e78c1d2fd183> accessed 9 October 2024.

12 Truth Hounds, 'How Rosatom Turned Europe's Biggest Nuclear Power Plant into a Torture Chamber and How the World Can Stop This' <https://truth-hounds.org/en/cases/how-rosatom-turned-europes-biggest-nuclear-power-plant-into-a-torture-chamber-and-how-the-world-can-stop-this/> accessed 9 October 2024.

13 Rulac, 'Military Occupation of Ukraine' <https://www.rulac.org/browse/conflicts/military-ccupation-of-ukraine#collapse2accord> accessed 9 October 2024.

framework – addressing complicity of these companies to the aggression will be also an effort to deal with the past, eliminating dependence on Russia, combatting corruption and promoting the rule of law.

On the fourth point, the Russian war is followed by annexation and occupation of Ukrainian sovereign territories.[14] In the latest report of the UN, evidence of the most common violations of human rights and international humanitarian law committed by Russian occupying forces are provided – widespread killings, torture, rape, illegal detention, and deportation, and persecution of non-loyal individuals[15] – which severely violate norms of international humanitarian law and human rights obligations of an occupying power. Private and public resource, particularly energy, mineral, and agricultural assets, has been reported to be grabbed and transported from the occupied territories; Crimea has become a grey zone for the export of Ukrainian grain from the occupied South.[16] International organisations have extensively documented forcible deportation of Ukrainian children displaced by Russian authorities within occupied territories or to Russia. In March 2023, the International Criminal Court issued arrest warrants for President Putin and Maria Lvova-Belova, the Russian Commissioner for Children's Rights. Both have been charged with the unlawful deportation of children and the unlawful transfer of children from occupied areas of Ukraine to Russia. Deportation can be classified as a war crime, a crime against humanity and – under certain circumstances – as genocide.[17]

In situations of occupation and armed conflict, multinational companies (MNCs) and foreign national companies should exercise heightened human rights due diligence to avoid causing, contributing to, or being directly linked to human rights violations committed by States or occupying power. For example, businesses might be found complicit to crimes by providing security technology, services, or equipment that the occupying power uses to control the population or suppress dissent. For example, German press investigations allege that two German construction companies – WKB Systems (registered in Germany but owned by a Russian oligarch) and Khauff (registered in Germany with ten subsidiaries in Russia) – were complicit in providing materials for construction of the city

14 RUSI, 'Preliminary Lessons from Russia's Unconventional Operations During the Russo-Ukrainian War, February 2022–February 2023'<https://static.rusi.org/202303-SR-Unconventional-Operations-Russo-Ukrainian-War-web-final.pdf.pdf> accessed 9 October 2024.

15 'Report of the Secretary-General (A/HRC/56/69)' <https://reliefweb.int/report/ukraine/situation-human-rights-temporarily-occupied-territories-ukraine-including-autonomous-republic-crimea-and-city-sevastopol-report-secretary-general-ahrc5669-advance-unedited-version> accessed 9 October 2024.

16 'Stolen Grain: How and Where Russians Export Ukrainian Grain' (*NGL Media*, 29 March 2024) <https://ngl.media/2024/03/29/ukradene-zbizhzhya> accessed 9 October 2024.

17 Kharkiv Human Rights Protection Group, 'Article 15 Communication to the OTP ICC: The Forcible Transfer of Children from Ukraine to Russia: A Genocide' <https://library.khpg.org/index.php?id=1702047873> accessed 9 October 2024.

of Mariupol, which fell to Russian forces and was further occupied by it after a two-month siege in 2022.[18]

There are almost no reported evidence of corporate involvement in this grave crime; however, taking into account the known details of the execution of this alleged crime – transportation, placement of deported children in educational centres, the Russian state could not help but enlist the support of businesses to organise the commission of this crime. For example, according to some reports, many children from the Kherson region were forcibly moved to a rehabilitation centre in Penza 'Qurtal Lui' after the establishment of the occupation.[19] It is reported that the Quarter is supported by representatives of the authorities and businessmen close to the Kremlin, so the main trustees of it are the Presidential Grants Fund and the Russian Orthodox Church. The construction of one of the complexes in the area cost more than 208 million rubles; the money was donated by the state and businessmen, including Sberbank, Roman Abramoych, Vladimir Potanin, the funds of Konstantin Malofeev and Gennady Timchenko, as well as presidential grants.[20]

In all these examples, establishing material and subjective elements of the crimes will suffice; especially strong links between corporate actions or omissions and exact incidents or pattern of crimes will be demanded. To date, the lack of access to the occupied territories prevents comprehensive investigation of crimes allegedly committed by Russia against the local civilian population and infrastructure. The occupation in many territories is already counted as prolonged which heightens the risk of MNCs to enter these markets, through Russia, in case they are not sanctioned. There may be certain clues when analysing information about the initiative founded by children's ombudsman Lvova-Belova. 'Into the Hands of Children' operates within the framework of the organisation 'Russian Humanitarian Mission', and uses their bank account to receive donations, has two hubs in Moscow and Rostov-on-Don; according to legal data, 'Russian Humanitarian Mission' is a non-profit organisation engaged in charity.[21]

Corporate involvement in international crimes

Under the United Nations Guidelines on Business and Human Rights (UNGPs), businesses should avoid causing an adverse impact on human rights and avoid contributing to or being directly linked to adverse human rights impacts caused by

18 'Report: German Firms Help Rebuild Russian Occupied Mariupol' (*France24*, 04 April 2024) <https://www.france24.com/en/live-news/20240404-german-firms-help-rebuild-russian-occupied-mariupol-report> accessed 9 October 2024.

19 'Russia's Children's Rights Commissioner Builds "Boarding House" for Disabled Ukrainians, Claims 75% of Their Pensions' *The Insider* (27 April 2024) <https://theins.ru/en/news/271173> accessed 9 October 2024.

20 Квартал Луи (in Russian) (Wikipedia) <https://ru.wikipedia.org/wiki/Квартал_Луи#cite_note-:72–4> last accessed 9 October 2024.

21 To children's hands, Commissioner for Children's Rights under the President of the Russian Federation (in Russian) <https://deti.gov.ru/Detyam-v-ruki> accessed 9 October 2024.

other parties; otherwise the issue of legal responsibility, including for complicity, would arise. This responsibility is even more heightened in situations of armed conflict when additional economic entities are required to follow international humanitarian law and be aware of the international criminal law regime (see Principles 17 and 23). Such an approach considers business responsibilities to respect human rights as independent from the state duty to protect people from abuses of private actors; it is especially important when a state is weak or unwilling to fulfil its obligations in the sphere of human rights.

Involvement of private actors, such as businesses, in human rights violations and international crimes usually is considered within the theory of secondary liability, which means aiding or abetting to the main (or principal) perpetrator or acting with the latter in joint enterprise. These modes of involvement are quite often covered by the term of 'complicity'. Complicity can be both applied to individual legal responsibility but also to the responsibility of legal entities, which is relevant in cases of corporate involvement in crimes. This chapter will cover both cases against corporations as legal entities and against individuals, when it comes to prosecution for international crimes in the context of Russian aggression against Ukraine.

Corporate accountability for complicity in international crimes in the context of Russian aggression

There are currently several paths of investigating and prosecuting human rights violations committed in the context of Russian aggression. Each suggests different options for addressing corporate complicity in these violations.

Ukrainian national justice system

The Criminal Code of Ukraine contains articles on crimes which are related to or have proved to be applied in the context of armed conflict. They might be distributed into several groups. First are war crimes (art. 438); crime of planning, preparation and waging of an aggressive war (art. 437); genocide and public incitement to it (art. 442); ecocide (art. 441); and others. Though these articles tend to cover international crimes, they are not yet fully harmonised with international criminal law, which creates the problem of its compatibility with international criminal law and the Rome Statute, which is widely ratified in the world.[22] However in recent months significant developments have emerged. The Ukrainian parliament ratified the Rome Statute in August 2024 and the law on ratification came into force on 1 January 2025. In October 2024 the Ukrainian Parliament also adopted the Law (№ 11484), which brings the Criminal Code of Ukraine into compliance with the norms of the Rome Statute of the International Criminal Court.

22 Ukrainian Legal Advisory Group, 'Needs Assessment of Ukraine's Justice System: Delivering Meaningful Justice to the Victims and Survivors of the Armed Conflict' (2024) <https://ulag.org.ua/reports-and-materials/needs-assessment-ukraines-justice-system> accessed 9 October 2024.

Secondly, there is a separate and special category of cases that emerged after February 2022 which are cases of collaboration under Article 111[1] and aiding to the aggressor state Article 111[2], investigating Ukrainian citizens' acts, aimed at aiding Russia in war efforts and cooperation with occupying administrations in Ukrainian territories seized by Russia.

Except for that, articles criminalising participation in terrorist organisations and its financing have been applied to armed conflict prior to 2022. This is because since 2014 Ukraine formally introduced an anti-terrorist operation in response to the separatist movement launched by Russian-backed armed groups, forming the so-called people's republics in the East of Ukraine. Actions of the representatives of the so-called people's republics were scrutinised under anti-terrorism articles.

In all that cases, only individuals can be held liable for the direct commission of a crime, as well as for complicity, and for the commission of a crime(s) by a group of persons (Arts. 27, 28 of the Criminal Code). Legal entities (corporations, companies) can be subject to 'criminal law measures', which is usually called a quasi-criminal sanction, and it is not actually a criminal punishment for legal entities. These measures can be imposed on legal entities – liquidation, fines, or confiscation of property – if its representative(s) commit a crime, acting on behalf of the company and/or its benefit (see Art. 96–3). The practice of application of these provisions, including in the context of prosecution for international crimes, is limited. Nor is there a clear investigation or prosecutorial strategy in Ukraine regarding business complicity in crimes which related to the armed conflict. However, some examples of emerging cases are worth elaborating in more detail; they are all related to criminal liability of natural persons, except for one single case, which will be described below.

1 (a) Under Article 438, war crimes, Ukrainian officials are investigating the theft of grain from the occupied territory in Zaporizhzhia region, committed by the founders of 'State Grain Operator' operating as the 'state company', registered in the territory of occupied Melitopol and managed by the occupation authorities.[23] NGOs report that the stolen grain was transported for sale to foreign companies, some of which withdrew from the contracts immediately after learning about the origin of the grain, while others did not.[24] This case potentially entails on the one hand, the issue of accountability of foreign companies for trading operations with occupying powers (and with that allegedly being complicit to war crimes), but also accountability of so called 'state companies' and their representatives operating in the occupied territory.

23 'Stolen Grain: How and Where Russians Export Ukrainian Grain' (*NGL Media*, 29 March 2024) <https://ngl.media/2024/03/29/ukradene-zbizhzhya> accessed 9 October 2024.

24 Global Rights Compliance, 'Agriculture Weaponized: The Illegal Seizure and Extraction of Ukrainian Grain by Russia' (2023) <https://globalrightscompliance.com/wp-content/uploads/2023/11/20231115-Grain-Report-External.pdf?fbclid=IwAR1yCmES7NXvC8qLOkXgN5RqtgtNS275JVjosaDzEPkYdMErOHEiJ5EHolo> accessed 9 October 2024.

(b) Investigating aggression as a crime is also a separate track in Ukraine. Article 437 of the Ukraine Criminal Code prohibits the planning, preparation or waging of an aggressive war. This article, unlike the Rome Statute, does not present this crime of aggression as a purely leadership crime. Culpable persons under this article may also include 'other persons who, although not holding formal positions, but are able to really influence military and political processes', in particular, to define strategic tasks for the economy and industry (including those aimed at serving military purposes); to provide funding for military measures; to manage the logistics of the implementation of these measures. Theoretically, this means that national Ukrainian investigation system can investigate corporate complicity in the crime of aggression, including against persons beyond formal positions, who are not subjects to jurisdictional immunities.

Currently, the Prosecutor General's Office is in charge of the 'main case' or structural investigation, where evidence is being collected against suspects in the launch of an aggressive war against Ukraine:[25] there are about 700, among them Russia's political and military leadership, members of parliament, government members, and propagandists, but there is no one from the business sector or Russian state-owned companies. Given the authoritarian form of government in Russia, reported corruption practices among public officials, their prosecution could bring charges against commercial entities.

2 As was mentioned earlier, there are cases when Ukrainian national companies are seen to aiding to Russia. One of the emblematic ones is the Motor Sich case. Motor Sich, a major Ukrainian aircraft engine manufacturer, supplied engines and spare parts to Russia even after the full-scale invasion, which were used in Russian attack helicopters. The company's head, Vyacheslav Boguslaev, cooperated with Russia's state-owned Rostec and obstructed the delivery of a helicopter to Ukraine's military. He also worked with a company under control of unrecognised republics in eastern Ukraine, paying over 290 million rubles in taxes to Russia; the investigation is ongoing, and Boguslaev is in custody. Criminal accountability of Ukrainian companies for aiding the aggressor state is crucial not only to combat impunity but also as part of transitional justice; addressing their complicity helps to reconcile the past, reduce dependence on Russia, combat corruption, and promote the rule of law.

3 Several investigations involve economic complicity in terrorism (prior to 2022), particularly Ukrainian entrepreneurs cooperating with separatists by paying taxes and conducting illegal trade after their businesses were seized. After 2022 such cases started to be investigated under the article on collaborative activities.

25 Prosecutor General's Office in Ukraine, 'Main Case "February 24"' <https://gp.gov.ua/detectable> accessed 9 October 2024.

International Criminal Court

The Office of the Prosecutor (OTP) of the ICC investigates situations in Ukraine, which encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards.

Under the Rome Statute (Art. 25), individuals can be held liable and the responsibility for international crimes may be attributed on the ground of direct perpetrating (1), ordering, soliciting or inducing the commission of the crime (2), in order to facilitate the crime – aiding, abetting or otherwise assisting in the commission of the crime, including providing means for its commission (3), or in other ways intentionally contributing to the commission of the crime (4). In addition (Art. 28), military commanders and other superiors may be held accountable if they failed to prevent or repress the commission of the international crimes (5). Corporate complicity as a form of contribution to the crimes committed directly by the perpetrator, can be scrutinised under the modes of aiding, abetting or otherwise assisting in commission of the crime – Article 25(3)(c) and 25(3)(d) of the Rome Statute; no jurisdiction of the ICC over legal entities is prescribed.

Currently, there are six suspects in the situation of Ukraine: President Putin; Maria Lvova-Belova, the Russian Commissioner for Children's Rights for deportation of children; and four suspects for attacks on the critical infrastructure, including the former Minister of Defence and the Chief of the General Staff of the Armed Forces.[26] Unpacking corporate complicity in airstrikes against the civilian population and deportation of children might fall into the interest and criteria of the OTP, at least, considering the growing amount of evidence (mostly presented by NGOs and journalists), showing how violations of sanctions and arms trade rules enable air attacks.[27]

The ICC is not exercising jurisdiction over the crime of aggression of Russia due to restrictions of Arts. 15*bis* and 15*ter* of the Rome Statute,[28] which became even more visible in the light of Russian aggression. Currently, there are two tracks to challenge the situation: advocating for the reform of the Rome Statute and advocating for creating the Special Tribunal for the Crime of Aggression against Ukraine.

Nevertheless, some considerations need to be highlighted here. Under Article 8*bis* of the Rome Statute, the crime of aggression means the planning, preparation, initiation or execution of an *act of aggression*[29] which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. Without

26 International Criminal Court, 'Situation in Ukraine' <https://www.icc-cpi.int/situations/ukraine> accessed 9 October 2024.

27 Hamilton (n 3).

28 I. Haßfurther, 'Accountability for the Crime of Aggression Against Ukraine' (*Verfassungsblog*, 2024) <https://verfassungsblog.de/aggression-ukraine/> accessed 9 October 2024.

29 The meaning of an act of aggression is described in para 1 of article 8*bis*.

going into details, one should mention that the critical characteristic of this crime is that only a person in a 'position effectively to exercise control over or to direct the political or military action of a State' is culpable for the crime of aggression under the Rome Statute, which brands it as a 'leadership crime'.[30] This 'leadership' clause apparently restricts prosecuting other persons for their complicity in international crimes, for example businessmen, who are not in a position to control or direct war efforts.[31]

Though most of the defendants (indictment were not against the company but against its representatives) were acquitted these trials elaborated the standard, which appears to be less strict, than the one enshrined in the Rome Statue – perpetrators and accomplices should have enjoyed the requirement to 'shape and influence' the war policy, which included others beyond political and military leadership.

Filling these gaps to prevent anyone except the president or government officials from being prosecuted for initiating and fuelling the war against Ukraine is extremely important. Given the fact that preparations for a large-scale invasion lasted for years before the first act of violation of the territorial integrity of Ukraine in 2014, ignoring the contributions of representatives of the Russian economic sector, especially from the state business sector, is crucial. Today, among experts and investigators, there are accusations of the participation of the Wagner Group,[32] the Russian company Rosatom, which has expanded its reach into other sectors, allowing the Russian government to tighten state control over companies, that can help circumvent restrictions, mainly to obtain weapon components; according to another approach as soon as military conscription might be qualified as an act constituting aggression, and then corporate assistance to the mobilisation will constitute aiding and abetting crime of aggression.[33] Apparently, each of these statements should be thoroughly assessed from the legal point of view with credible evidence and establishing all the necessary elements of the crime of aggression.

Addressing corporate complicity in the crime of aggression against Ukraine might be a subject to the treaty or decision underlying creation of the Special tribunal for the Crime of Aggression against Ukraine.

30 Article 8*bis* does not define who exactly is punishable for this crime. However, discussions over prosecuting the crime of aggression are often followed by questions about immunities of those who are to be investigated; it is established by now that so called troika: the head of state, head of government, and minister of foreign affairs enjoy immunities from jurisdiction in other States, both civil and criminal. (*Democratic Republic of the Congo v Belgium* (Case Concerning the Arrest Warrant) [2000] International ICJ, para 51).

31 *The United States of America v Carl Krauch et al.* [2024], US Military Tribunal Nuremberg, par 1297 <http://werle.rewi.hu-berlin.de/IGFarbenCase.pdf> accessed 9 October 2024.

32 'Russia's Rosatom Fuels Putin's War Machine' (*Foreign Policy*, 9 April 2024) <https://foreignpolicy.com/2024/04/09/russia-rosatom-nuclear-uranium-sanctions-war-putin-ukraine/> accessed 9 October 2024.

33 Neil Boister, 'Conscription to Fight a War of Aggression under International Criminal Law' (2024) 21(2) *Journal of International Criminal Justice*.

Extraterritorial jurisdiction

For the last two decades there has been a gradual growing tendency in national criminal jurisdictions to hold corporations and their executives accountable for international crimes, including under universal jurisdiction rules; it was enabled by the efforts of the States to introduce international criminal law into legislation but also, strategic litigation of human rights organisations has played a crucial role in bringing such cases before the courts of law. These cases in general address complicity of European corporations for international crimes committed in armed conflicts overseas; however, there are also efforts to hold domestic companies accountable for their involvement in atrocities against their co-citizens (for example in Colombia and Argentina).[34]

In case of Ukraine, two potential avenues seem to be operational: joint investigation teams and universal jurisdiction.

Under the principle of universal jurisdiction, theoretically any state which has relevant legal provisions can exercise legal authority over serious crimes against international law, even if those crimes were committed outside its territory and neither the victim nor the perpetrator is a national. Thus, the gravity of crimes which fall into the universal jurisdiction framework plays a crucial role to justify this exception from territorial jurisdiction. This area – universal jurisdiction in criminal cases – is gaining its popularity. According to the Amnesty International Report, it appears that 145 out of 193 states (approximately 75%) have provided for universal jurisdiction over one or more of these crimes;[35] however, different states have different restrictions and limitations in their rules and practices.

According to the publicly available information, over 25 states opened investigations regarding international crimes happening in Ukraine. Among them are France, Germany, Sweden and the Netherlands, which are very experienced in exercising universal jurisdiction; they have established developed state practice, dedicated methodology and elaborated prosecutorial strategies along with case law related to war crimes charges, crimes against humanity and even genocide. Collecting evidence in many countries is conducted both focused on the evidence regarding crimes or patterns but potential perpetrators have not yet been definitively identified. Some countries have an experience of holding businesses actors for complicity in international crimes, which can serve a sufficient rationale for trying corporate actors in these jurisdictions. It should also be noted about several examples of triggering universal jurisdiction in the context of corporate complicity.

34 Corporate Accountability Lab, 'Comprehensive Transitional Justice: The Role of Economic Actors in the Colombian Armed Conflict and a Restorative Justice to Colombia's Special Jurisdiction for Peace' <https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/63598deda6daf021400a2c1b/1666814512235/JEP+2+Press+Release.pdf> accessed 9 October 2024.

35 Amnesty International, 'Universal Jurisdiction, a Preliminary Survey of Legislation Around the World' <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530042011en.pdf> accessed 9 October 2024.

In 2022 the French and Ukrainian NGOs filed a complaint accusing French TotalEnergies of owning a stake in a firm which exploits a Russian natural gas field supplying products that are eventually refined into jet fuel. Claimants pointed to TotalEnergies holding until the middle of last year a 49% share in Terneftegaz, a company that extracts gas from the Termokarstovoye field in northern Russia and allegedly used to fuel aircrafts which attack civilians in Ukraine. France's anti-terrorism department closed the claim procedure with no further action after an 'exhaustive legal and factual analysis of all the elements submitted by the complainants and, at its own initiative, TotalEnergies'. TotalEnergies contested the allegations, saying all the gas condensates had been exported abroad. After 1 year the NGOs reached out to the French investigators again; this time the complaint includes a civil action, which makes it possible to obtain the appointment of an investigating judge almost automatically, this believed to ensure more thorough examination of the evidence.[36]

In the middle of July 2024, the German court in Stuttgart sentenced a German businessman to prison for producing materials and components used for military purposes and their delivery to Russia, which took place while ignoring the European embargo, through third countries such as Turkey, China and the UAE. Although this case is not directly related to the international crimes, it reflects the work of NGOs (which allegedly triggered these proceedings) and law-enforcement bodies to track sanctions violations in the context of Russian aggression.

On 26 March 2022, the Prosecutors General of Ukraine, Poland, and Lithuania signed an agreement to establish a joint investigation team (JIT) to investigate alleged war crimes and crimes against humanity on the territory of Ukraine. Usually, joint investigation teams are one of the forms of cooperation between states in criminal proceedings. In the case of Ukraine, its focus is on the collection (mainly from Ukrainian refugees), secure storage and rapid exchange of information and evidence of war crimes collected during investigations in the territory of the participating countries, as well as criminal intelligence. Currently there are seven Member States in this team; the OTP ICC has also joined this team. The JIT is functioning under the auspices of the Genocide Network,[37] but each member of the JIT uses own national procedural rules documentation. Although it is not possible to assess how effective the work of this track is due to the lack of publicly available information and lack of clear vision of strategies and priorities, criminal intelligence as one of the working instruments of JIT might be a sufficient tool to uncover corporate complicity in international crimes committed in Ukraine.

36 Business and Human Rights Resource Center, 'France: Two NGOs File New Lawsuit Against TotalEnergies for Alleged Complicity in Russia's War Crimes in Ukraine' <https://www.business-humanrights.org/en/latest-news/france-two-ngos-file-new-complaint-to-court-against-totalenergies-which-they-accuse-of-complicity-in-russian-war-crimes-in-ukraine/> accessed 9 October 2024.

37 The full title: European Network for Investigation and Prosecution of Genocide, crimes against humanity and war crimes.

Conclusions

While legal response to the full-scale invasion of Russia against Ukraine, has been multifaceted, it has overlooked addressing issues of the involvement of businesses in enabling and fueling Russia's war efforts. Businesses have been mostly targeted under different sanctions regimes, which constitute significant preventive political and economic mechanisms; however criminal accountability also suffices because it addresses exact violations with individualised harm and victims; besides, it can also serve as a deterrence tool by punishing and declaring company or its executive as an accomplice to atrocities, based on the criminal verdict. In addition, taking the specific context, corporate accountability can serve different goals beyond penalising; for example, criminal records may serve as a tool for assessing corporate responsibility of companies willing to enter reconstruction and recovery projects in Ukraine; thus, recovery discourse and potential corporate accountability should be taken together.

The latter highlights how important the further research on interaction between international criminal law and business, and human rights framework ~~is important~~: investigating how norms on corporate responsibility are helpful for criminal investigations into business complicity, and vice versa – what insights can such investigations produce for business and human rights. Interestingly, there is now momentum when mechanisms of criminal prosecution for international crimes and the idea of corporate responsibility in situations of armed conflicts are being developed simultaneously.

8 Urgent interim reparations in Ukraine

Addressing conflict-related sexual violence

Yulia Ioffe

Introduction

The ongoing armed conflict in Ukraine, which intensified significantly in 2022, has led to a humanitarian crisis marked by widespread violence, displacement, and severe human rights violations. Among the most egregious of these is the prevalence of conflict-related sexual violence (CRSV), particularly perpetrated by the Russian army, disproportionately affecting women and marginalised groups during wartime. These acts are often used as weapons of war to humiliate, dominate, and terrorise communities.[1] United Nations Security Council Resolution 1820 (2008) explicitly acknowledges that sexual violence can exacerbate armed conflicts and hinder peace processes, requiring a multifaceted approach to address both the root causes and consequences of such violence.[2]

The United Nations and various human rights organisations have documented alarming cases of sexual violence in the armed conflict,[3] underscoring the urgent need for a comprehensive response to address both the immediate and long-term effects of such violations. However, it is important to note that CRSV in Ukraine began in 2014 but was largely overlooked in reporting.[4]

1 Pramila Patten, 'Promoting Implementation of Security Council Resolutions on Conflict-Related Sexual Violence' (15 June 2023) UN Doc S/2023/413, para 2.

2 United Nations Security Council Resolution 1820 (19 June 2008) UN Doc S/RES/1820, para 1.

3 United Nations Human Rights Monitoring Mission in Ukraine, 'Ukraine: Survivors Speak Out About Conflict-Related Sexual Violence' (25 November 2024) <https://ukraine.un.org/en/284398-ukraine-survivors-speak-out-about-conflict-related-sexual-violence> accessed 5 February 2025. Human Rights Watch, 'Ukraine: Apparent War Crimes in Russia-Controlled Areas' (3April2022)<https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas> accessed 5 February 2025.

4 Amal Nassar, Kateryna Busol and Anastasiya Sydor-Czartorysky, *Ukraine Study on the Status of and Opportunities for Reparations for Survivors of Conflict-Related Sexual Violence* (Global Survivors Fund May 2022) 6.

DOI: 10.4324/9781032684635-8

In response, Ukraine has taken unprecedented steps to provide urgent interim reparations to survivors[5] of sexual violence, even as the conflict continues.[6] This chapter analyses Ukraine's approach to implementing interim reparations for CRSV survivors as a critical step toward justice, healing, and societal recovery. The urgency of interim reparations in Ukraine is highlighted by the immediate needs of CRSV survivors,[7] who often endure not only physical and psychological trauma but also socioeconomic challenges such as stigma, unemployment, and loss of family support.[8] The absence of timely and effective reparations can exacerbate these issues, perpetuating cycles of violence and marginalisation. Thus, implementing interim reparations is essential not only to address past injustices but also to build resilience and promote social cohesion in a divided society.[9]

While the principle of reparations is well established in international law,[10] its application in the context of CRSV remains fraught with challenges, particularly in post-conflict settings where state structures are often weakened or absent. The question of reparations during ongoing conflict, as in Ukraine, is even more complex. The chapter begins by examining the CRSV in Ukraine. The next main section analyses the obligation to provide reparations for CRSV under international law. The chapter then examines Ukraine's domestic initiatives for reparations, focusing on administrative mechanisms for CRSV survivors, particularly the Urgent Interim Reparation Programme. Finally, the chapter contextualises Ukraine's response to CRSV by drawing parallels to historical reparative efforts in other states, including Sierra Leone, Timor-Leste, and Liberia.

CRSV in Ukraine

CRSV refers to acts of sexual violence committed by armed groups during armed conflict. These groups include both State actors, such as military, police, and paramilitary organisations operating under State authority, and non-State actors, such as rebel and militia groups. The term 'sexual violence' is used as defined in the Rome Statute of the International Criminal Court (ICC), encompassing '[r]ape,

5 In this chapter, the terms *survivor* and *victim* will be used interchangeably. While *victim* carries a specific legal definition, the term *survivor* is often considered more empowering and reflective of a sense of autonomy.

6 Olga Golovina, 'Survivors of Sexual Violence Need Immediate Support' (*Institute for War and Peace Reporting*, 11 June 2024)<https://iwpr.net/global-voices/survivors-sexual-violence-need-immediate-support> accessed 5 February 2025.

7 Global Survivors Fund, 'Ukraine' <https://www.globalsurvivorsfund.org/our-work/ukraine/> accessed 5 February 2025.

8 Nassar, Busol and Sydor-Czartorysky (n 4) 14.

9 Global Survivors Fund, 'Act in the Interim' <https://www.globalsurvivorsfund.org/how-we-work/act-in-the-interim/> accessed 6 February 2025.

10 International Law Commission (ILC), 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/10, art 31.

sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity'.[11]

While CRSV is a significant issue in many conflicts, it is not a universal characteristic of warfare.[12] Some armed groups exercise restraint, but others, such as the Russian army, perpetrate widespread sexual violence. Since the beginning of the armed conflict between Russia and Ukraine in 2014, numerous reports have documented CRSV perpetrated by Russian forces against Ukrainian civilians of all ages and genders.[13] Women, in particular, have endured horrific abuses, including gang rapes, sexual assaults in front of their families, branding by soldiers, being held as sexual slaves, and rape intended to force pregnancies.[14]

Reports reveal that Russian soldiers have committed CRSV with extreme brutality, often involving coercion, torture, and threats of violence. Victims have ranged from as young as 4 to as old as 80, with women, men, children, and elderly subjected to these atrocities.[15] These findings underscore the systematic nature of CRSV in Ukraine, suggesting a deliberate military strategy rather than isolated incidents.[16] Sexual violence has occurred during house-to-house searches, in detention facilities, and at checkpoints, often involving extreme brutality such as beatings, strangulation, and threats to kill victims or their families.[17] Family members, including children, have sometimes been forced to witness the assaults, further compounding the trauma.[18] CRSV has also been widely reported as a method of torture in Russian-controlled detention facilities.[19] Detainees often lack access to

11 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9, art 7(1)(g). See also Art. 8(2)(b)(xxii) and Art. 8(2)(e)(vi).

12 Elisabeth Jean Wood, 'Conflict-Related Sexual Violence and the Policy Implications of Resent Research' (2014) 96(884) *International Review of the Red Cross* 457, 459; Dara Kay Cohen, 'Explaining Rape during Civil War: Cross-National Evidence (1980–2009)' (2013) 107(3) *American Political Science Review* 461, 467.

13 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) 25(3–4) *Journal of Genocide Research* 279, 279.

14 New Lines Institute, 'Conflict-Related Sexual Violence in Ukraine: Lessons from Bosnia' (September 2023) 1, 6 <https://newlinesinstitute.org/wp-content/uploads/Sept2023-Policy-Report-CRSV-in-Ukraine-Lessons-from-Bosnia-NLISAP.pdf> accessed 6 February 2025.

15 UN Human Rights Monitoring Mission in Ukraine, 'Update on the Human Rights Situation in Ukraine' (02 December 2022) <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-12-02/HRMMUUpdate2022-12-02EN.pdf> accessed 6 February 2025; UN Independent International Commission of Inquiry on Ukraine, 'Report of the Independent International Commission of Inquiry on Ukraine' (18 October 2022) UN Doc A/77/533, paras 88–98.

16 UN Human Rights Monitoring Mission in Ukraine (n 15); United States Department of State, '2021 Country Reports on Human Rights Practices: Ukraine' (2022) <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/ukraine/> accessed 6 February 2025.

17 UN Independent International Commission of Inquiry on Ukraine, 'Report of the Independent International Commission of Inquiry on Ukraine' (16 March 2023) UN Doc A/HRC/52/62, para 78; Nassar, Busol and Sydor-Czartorysky (n 4) 6.

18 Commission of Inquiry on Ukraine (n 17) para 80.

19 UN Independent International Commission of Inquiry on Ukraine (25 October 2024) UN Doc A/79/549, para 33.

medical assistance, and testimonies from 41 detention facilities document acts of sexual violence amounting to torture. These acts were carried out under conditions of extreme duress, including forced nudity and repeated assaults.[20]

Feminist scholars note that rape in war can serve as a tool for building social cohesion among militaries, particularly those with low unity or forced recruits.[21] The Russian military, which relies heavily on conscripts, forced recruits, foreign fighters, and mercenaries, is particularly susceptible to such behaviour.[22] Gang rape, in particular – which has been documented as committed by Russian troops – serves to create bonds among soldiers from diverse backgrounds or with weak allegiances to the war effort, often driven by social pressure and the performative nature of participation.[23] Research indicates that armed groups frequently use sexual violence as a means of exerting power and control over populations, instilling fear, and punishing perceived enemies.[24] In the context of Ukraine, CRSV is deeply tied to broader patterns of militarised masculinity and the dehumanisation of the enemy.[25] These strategies inflict immediate physical harm while creating profound long-term sociocultural repercussions, fracturing communities, subjugating survivors, and perpetuating cycles of violence and trauma.[26] CRSV has been identified as a deliberate tactic and weapon of war used by Russian forces in Ukraine.[27] This underscores the urgent need for global attention and action to combat these grave human rights violations and to provide justice and support for survivors.

Reparations in cases of the CRSV

The obligation to provide reparations under international law

The obligation to provide reparations arises from multiple legal sources and establishes responsibility at two levels.[28] The first component, inter-state reparations – such

20 ibid, para 47.

21 Dara Kay Cohen, 'Explaining Rape During Civil War: Cross-National Evidence (1980–2009)' (2013) 107(3) *American Political Science Review* 461, 462; Elisabeth Jean Wood, 'Rape as a Practice of War: Toward a Typology of Political Violence' (2018) 46(4) *Politics & Society* 513,

22 New Lines Institute (n 14) 7.

23 ibid. See also Cohen (n 21) 463–65; Kimberly Theidon, 'Gender in Transition: Common Sense, Women, and War' (2007) 6(4) *Journal of Human Rights* 453, 471.

24 United Nations Security Council Resolution 1820 (19 June 2008) UN Doc S/RES/1820, para 1. See also Megan Bastick, Karin Grimm and Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (Geneva Centre for the Democratic Control of Armed Forces 2007) 9.

25 Busol (n 13) 279.

26 Bastick, Grimm and Kunz (n 24) 10.

27 United Nations Security Council, 'Briefing on Ukraine: Reports of Conflict-Related Sexual Violence' (6 June 2022) UN Doc SC/14926 <https://press.un.org/en/2022/sc14926.doc.htm> accessed 6 February 2025; Office of the Prosecutor General of Ukraine, 'Report on CRSV Cases Documented Since February 2022' (2023) <https://example-ukrainianlink.com> accessed 6 February 2025.

28 See Yulia Ioffe, 'Reparation for Human Rights Violations' in Christina Binder and others (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing 2022).

as those relevant in the context of armed conflicts like the one in Ukraine – aims to restore state infrastructure and institutions, compensate for economic disruptions like loss of production and restricted trade, and address other systemic damages caused by war or atrocities. Specifically, international law supports Ukraine's right to receive reparations from Russia for its aggression, which violated Ukraine's territorial integrity through the use of force, as prohibited by the UN Charter, and for the resulting damage under the law of state responsibility.[29] The second component focuses on individual reparations, which are granted to victims or affected groups who have suffered severe human rights violations.[30]

With regard to the second component, victims of human rights violations have the right to an effective remedy, including reparations, from the state responsible for these violations.[31] This applies to violations of international human rights law (IHRL) and international humanitarian law (IHL), including acts of torture and CRSV.[32]

The right to an effective remedy is firmly established in IHRL, including through treaties to which both Russia and Ukraine are parties.[33] IHRL imposes obligations on states toward all individuals under their jurisdiction, granting corresponding rights to those individuals, and continues to apply during armed conflict.[34] Victims of human rights violations committed by an occupying state, such as Russia in this case, have the right to a remedy.[35]

29 See e.g. UN General Assembly Resolution ES-11/5 (14 November 2022) para 2.

30 Kateryna Busol, 'Reparations for Atrocity Victims in Ukraine: Survivors' Aspirations and the Emerging Legal Framework' (2024) 1(1) *Cambridge Journal of Law, Politics and Art* 199.

31 There is some debate over whether providing adequate redress for victims is a legally binding obligation for states. See Christian Tomuschat, 'Darfur – Compensation for the Victims' (2005) 3(3) *Journal of International Criminal Justice* 582, 582–87.

32 See Article 8 of the Universal Declaration of Human Rights (UDHR); Article 2 of the International Covenant on Civil and Political Rights (ICCPR); Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED); Article 75 of the Rome Statute of the International Criminal Court (Rome Statute); Article 91 of Additional Protocol I to the Geneva Conventions; and Rule 150 of ICRC Customary International Humanitarian Law.

33 ibid.

34 Committee Against Torture, 'Conclusions and Recommendations of the Committee Against Torture in relation to the United States' (25 July 2006) CAT/C/USA/CO/2, paras 14–15; Inter-American Court of Human Rights, *Case of the Serrano-Cruz Sisters v El Salvador*, Merits, Reparations and Costs, Judgment of 1 March 2005, Serie C No 118, paras 112, 115–16.

35 International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para 111; European Court of Human Rights (ECtHR), *Al-Skeini v United Kingdom*, App No 55721/07 (7 July 2011), paras 133–37, 142; ECtHR, *Georgia v Russia (II)*, App No 38263/08 (21 January 2021); ECtHR, *Ukraine and The Netherlands v Russia*, App Nos 8019/16, 43800/14 and 28525/20 (30 November 2022), para 558; UN Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 10.

The obligation to provide reparations for violations of IHL is a well-established principle of customary international law.[36] States must make full reparation for such violations. According to Additional Protocol I to the Geneva Conventions, ratified by both Ukraine and Russia, parties to an armed conflict are required to provide compensation for breaches of IHL.[37] While IHL does not explicitly specify the beneficiaries of reparations, it acknowledges that parties to international armed conflicts are liable for compensation.[38] Furthermore, the continued application of IHRL during armed conflicts ensures that individuals and groups retain the right to an effective remedy.[39] Where Ukraine guarantees this right to victims of human rights violations attributable to Russia, it retains the right to recover the costs of those reparations from Russia.

Under the Rome Statute of the ICC, individuals who have suffered from international crimes – such as crimes against humanity, war crimes, genocide, and aggression – have the right to reparation.[40] However, at the ICC, it is the convicted perpetrators rather than states or armed groups who bear responsibility for reparations. This distinction highlights the limitations of international criminal justice in securing reparations from states.

Forms and principles of reparations under international law

According to Article 34 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), inter-state reparations may take the form of restitution, compensation, and satisfaction, either individually or in combination.[41] The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles)

36 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 91; International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, Rule 150; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277, art 3; Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358.

37 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 75; Additional Protocol I (n 36) art 91; International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, Rule 150.

38 Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 529, 532.

39 See Belfast Guidelines on Reparations in Post-Conflict Societies (*Transitional Justice Institute* 2012), Principle 1.

40 Rome Statute, Article 75 (2).

41 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10, art 34.

expand these forms to include rehabilitation and guarantees of non-repetition.[42] The UN Secretary-General's Guidance Note on Reparations for CRSV emphasises that adequate reparations should incorporate a combination of these measures, ensuring survivors have access to them through both judicial and administrative mechanisms.[43]

The core obligation outlined in the Basic Principles is to respect, ensure respect for, and implement IHRL and IHL, which *inter alia* includes provision of access to justice for the victims irrespective of who the perpetrator might be and provision of effective remedies, including reparations, to the victims.[44] A state's obligation to provide adequate reparations requires the adoption of legislative and administrative measures that ensure fair, effective, and timely access to both criminal and civil remedies. A critical aspect of a gender-sensitive reparations programme is addressing cultural, procedural, legal, and economic barriers that victims may face when attempting to access reparations measures designed for their redress.[45] The UN Special Rapporteur on Violence against Women has highlighted that procedural hurdles often pose greater obstacles to reparations than the content of the reparative measures themselves.[46]

Central to the right to reparations is the principle of effective victim participation. Principle 6(a) of the Declaration of Justice for Victims states that victims should be informed about their role, as well as the scope, timing, and progress of proceedings, and the resolution of their cases, particularly in cases involving serious crimes, when they have requested such information.[47] Notably, the Inter-American Court of Human Rights (IACtHR) first granted victims standing during the reparations phase, underscoring their critical role.[48]

42 UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res 60/147 (16 December 2005), paras 18–23. See Ioffe (n 28) 138.

43 United Nations, 'Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence' (June 2014) Guiding Principles 1 and 2 <www.ohchr. org/sites/default/files/Documents/Press/GuidanceNoteReparationsJune−2014.pdf> accessed 6 February 2025.

44 UN General Assembly (n 42) paras 4–5.

45 Women Organising for Change in Syria and Bosnia and Herzegovina, *Concept and Framework for the Development of a Gender-Sensitive Reparations Program for Civilian Victims of War in Bosnia and Herzegovina* (2015) 30.

46 See also Rashida Manjoo, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development* (UNGA, Human Rights Council 23 April 2010) UN Doc A/HRC/14/22.

47 UN General Assembly, 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (29 November 1985) A/RES/40/34, Principle 6(a).

48 Octavio Amezcua-Noriega, *Briefing Paper 1: Reparation Principles under International Law and Their Possible Application by the International Criminal Court: Some Reflections* (2011) 6–7; Clara Sandoval, 'The Concepts of "Injured Party" and "Victim" of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on Their Implications for Reparations' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for*

Additionally, closely related to the principle of ensuring effective participation is the principle of considering the victim's circumstances in every case. The Basic Principles highlight that victims should be treated with humanity and respect for their dignity and human rights.[49] They also call for the implementation of appropriate measures to ensure the safety, physical and psychological well-being, and privacy of victims and their families.[50]

Several landmark decisions have reinforced the right to reparations for CRSV. In 2021, the ICC issued its first reparations order for CRSV victims in the *Ntaganda* case, setting a precedent.[51] Similarly, in February 2022, the International Court of Justice (ICJ) addressed reparations for rape and sexual violence in the *Uganda v Congo* case.[52] Human rights treaty bodies, including the CEDAW Committee, have emphasised states' obligations to provide reparations to CRSV survivors.[53] They stress that reparative measures must address structural inequalities, meet survivors' needs, and aim to prevent future violations.

Reparations in Ukraine: domestic initiatives

Under international law, the primary responsibility for providing reparations rests with Russia. However, in certain cases, this obligation may also extend to assisting states, Ukraine, and individual convicted perpetrators.[54] Crucially, in the context of the Russia-Ukraine armed conflict (and other cases of mass atrocities), the inability of a perpetrator to provide immediate reparations should not delay the reparations process.[55] The increasing humanisation of international law and

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Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making (Brill 2009) 243–82.

49 UN General Assembly (n 42) para 10.

50 ibid. See also Octavio Amezcua-Noriega, *Briefing Paper 1: Reparation Principles under International Law and Their Possible Application by the International Criminal Court: Some Reflections* (August 2011) 7.

51 *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04–02/06–2659 (8 March 2021) paras 1, 2, 5. See also Global Survivors Fund, 'Landmark Order of the International Criminal Court on Reparations for Survivors of Conflict-Related Sexual Violence in the Ntaganda Case' (*Global Survivors Fund*, 8 March 2021) <https://www.globalsurvivorsfund.org/latest/articles/landmark-order-of-the-international-criminal-court-on-reparations-for-survivors-of-conflict-related-sexual-violence-in-the-ntaganda-case/> accessed 6 February 2025.

52 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Reparations, Judgment of 9 February 2022, [2022] ICJ Rep, paras 135–66. See also Francesse Philippe, 'Towards Victim-Centred Reparations for Conflict-Related Sexual Violence Survivors' (*Human Rights Pulse*, 14 September 2022) <https://www.humanrightspulse.com/mastercontentblog/towards-victim-centred-reparations-for-conflict-related-sexual-violence-survivors> accessed 6 February 2025.

53 Committee on the Elimination of Discrimination against Women, *General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations* (18 October 2013) UN Doc CEDAW/C/GC/30, paras 77–78.

54 Ukrainian CSOs, *Position Paper: Compensatory Mechanisms and Compensation for Damages* (2023) 2; REDRESS, *The Delivery of Reparation for Ukraine* (November 2023) 5.

55 UN General Assembly (n 42) paras 15–16.

the survivor-centred approach in redress and broader transitional justice measures require that states establish national reparation and assistance programmes without delay, seeking compensation from the responsible party at a later stage.[56]

To uphold victims' rights, Ukraine and the international community are actively involved in various initiatives and discussions to secure both interim and full reparations.[57] At the domestic level, Ukraine's ongoing and planned reparation initiatives can be categorised into judicial and administrative mechanisms, with my analysis centred on the latter.

Ukraine has taken significant steps to establish domestic mechanisms for reparations. While a comprehensive administrative reparation programme has yet to be created, Ukraine had mechanisms in place before 2022 for compensating property damage and offered reparative measures (classified as 'assistance') to victims of human rights violations in detention.[58]

Development of a CRSV-specific reparation framework

Regarding CRSV, a key initiative was the Action Plan introduced by the Ukrainian government in September 2022 and further developed into early 2023.[59] This plan aimed to implement the Framework of Cooperation on the Prevention and Response to CRSV (the Framework), established between the Office of the United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict and the Ukrainian government, in collaboration with UN Women and other UN agencies.

The Framework builds upon Ukraine's National Action Plan (NAP)[60] for UN Security Council Resolution 1325 on Women, Peace, and Security, which outlines national objectives for ensuring access to justice and comprehensive support for CRSV survivors. Specifically, the NAP focuses on the identification of 'appropriate mechanisms for documenting, assessing and compensating victims of conflict-related violence, taking into account the gender perspective and bringing the perpetrators to justice'.[61]

A key component of the Framework is the development of reparation programmes for survivors. In July 2022, the Ukrainian government signed a Memorandum of Understanding with the Dr. Denis Mukwege Foundation and the Global

56 Busol (n 30) 200.

57 REDRESS, *Reparations for Survivors of Human Rights Violations in Ukraine* (April 2024) 2.

58 Decree of the Cabinet of Ministers of Ukraine No 947 of 18 December 2013, as amended on 11 March 2022.

59 Government of Ukraine and United Nations, *Framework of Cooperation on the Prevention and Response to Conflict-Related Sexual Violence: Summary Document on the Outcomes of Implementation* (2022–March 2023) 4–5.

60 Government of Ukraine, *National Action Plan for the Implementation of UN Security Council Resolution 1325 on Women, Peace, and Security* (2020–2025), as amended by the Order of the Cabinet of Ministers of Ukraine No 1150-r dated 16 December 2022.

61 ibid, 9. See also Nassar, Busol and Sydor-Czartorysky (n 4) 61.

Survivors Fund (GSF) to establish an Urgent Interim Reparation Programme.[62] This memorandum outlines the creation of a victims' registry, the establishment of a reparations fund, and the exploration of innovative financing mechanisms, such as repurposing assets. It also emphasises the provision of holistic care and rehabilitation for survivors.[63]

The urgent interim reparation programme

The Urgent Interim Reparation Programme is designed to offer immediate support to survivors while they await comprehensive reparations. Its primary focus is to prioritise compensation, rehabilitation, and holistic care, ensuring that both the immediate and long-term consequences of harm are addressed in a timely manner.[64]

While the Ukrainian Parliament has been approving legislation on reparations for survivors of CRSV, a pilot project for urgent interim reparations was launched with the support of the Ukrainian government. This initiative initially targeted a core group of 500 CRSV survivors from 2014 onwards. The project aimed to provide immediate assistance while also generating valuable evidence for key stakeholders in Ukraine on how such a programme could and should operate.[65]

On 20 November 2024, the Ukrainian Parliament adopted the Law on Legal and Social Protection of the Rights of Victims of Sexual Violence Related to the Aggression of the Russian Federation against Ukraine and Urgent Interim Reparations (No. 10132). This law formally recognises CRSV survivors as victims and establishes a concrete mechanism to ensure they receive timely reparations.[66] The law came into force on 18 June 2025, guaranteeing access to urgent interim reparations, including psychological support, medical care, and financial compensation.[67] With this legislation, Ukraine has become the first country to implement urgent reparations for CRSV survivors during an ongoing conflict.[68]

This law aims to provide immediate relief and long-term legal protections for survivors of CRSV in Ukraine. Integrating social and economic support into national legislation is essential to establishing a sustainable state response. The new mechanism and legislation will ensure that individuals receive comprehensive

62 REDRESS (n 54) 10.

63 ibid.

64 ibid.

65 ibid, 11.

66 Law of Ukraine on Legal and Social Protection of the Rights of Victims of Sexual Violence Related to the Aggression of the Russian Federation against Ukraine and Urgent Interim Reparations, No 10132, adopted 20 July 2023 <https://zakon.rada.gov.ua/laws/show/4067-IX#Text> accessed 10 February 2025.

67 ibid, arts 7–8.

68 Global Survivors Fund, 'Ukraine Adopts Law to Recognise and Provide Reparations to Survivors of Conflict-Related Sexual Violence' (*Global Survivors Fund*, 20 July 2023) <https://www.globalsurvivorsfund.org/latest/articles/ukraine-adopts-law-to-recognise-and-provide-reparations-to-survivors-of-conflict-related-sexual-violence/> accessed 6 February 2025.

assistance, in contrast to the current system, which requires survivors to navigate multiple organisations and government bodies to access support.[69]

Although the law provides monetary compensation, healthcare, and legal support, its effectiveness will rely on proper implementation, sufficient funding, and a survivor-centred approach. It explicitly states that receiving interim reparations does not waive a survivor's right to full reparations.[70] The law also sets out key principles of protection and reparation, including gender equality – acknowledging that CRSV disproportionately affects women and girls – a survivor-centred approach that prioritises individual rights and interests at every stage, the prevention of re-traumatisation, confidentiality, and guaranteed access to legal support.[71]

The law also establishes a commission responsible for processing applications and determining eligibility for reparation benefits.[72] Survivors' rights include access to free rehabilitation services, such as medical, psychosocial, and social support, urgent monetary compensation, legal assistance, temporary shelter, and free social services, while ensuring confidentiality in all legal and administrative proceedings.[73] Receiving reparations is not conditional on participation in criminal investigations or the prosecution of perpetrators.[74]

For urgent interim reparations and funding, the Ukrainian government will provide financial assistance to survivors, with the funds sourced from international organisations, financial institutions, and donor contributions.[75] The law sets out criteria for recognising CRSV survivors[76] and outlines grounds for denying this status, which would also prevent access to support and reparations.[77] One such ground is if the applicant has been convicted by a final judgment of a Ukrainian court or an international tribunal recognised by Ukraine for crimes against national security, public safety, or international law, particularly in connection with Russia's armed aggression against Ukraine.[78] Additionally, if an applicant is under investigation for such crimes, their application for CRSV survivor status will be temporarily suspended until the case is resolved.[79]

The suspension and denial of reparations on national security and public safety grounds raise concerns from both a human rights and transitional justice perspective. As discussed in section 2, international law upholds the right of victims of human rights violations to receive reparations, regardless of their background.

69 Kseniya Kvitka, 'Ukraine Parliament Adopts Bill on Legal Status of CRSV Survivors' (*Human Rights Watch*, 12 December 2024) <https://www.hrw.org/news/2024/12/12/ukraine-parliament-adopts-bill-legal-status-crsv-survivors> accessed 10 February 2025.

70 Law of Ukraine (n 66) art 2.

71 ibid.

72 ibid, art 3.

73 ibid, arts 6–7.

74 ibid, art 7.

75 ibid, art 8.

76 ibid, art 5 (7).

77 ibid, art 5 (8).

78 ibid, art 5 (8).

79 ibid, art 5 (9).

The Basic Principles affirm that *all* victims are entitled to redress and reparations.[80] Additionally, the principle of non-discrimination in IHRL states that reparations should not be denied on grounds unrelated to the harm suffered.[81] Suspending reparations based on an *ongoing* investigation rather than a final conviction may also undermine the presumption of innocence, potentially depriving victims of their rights unfairly.[82] Furthermore, concerns arise regarding who defines and determines what constitutes crimes against national security and public safety. Without clear definitions and safeguards, there is a risk that authorities could misuse security-related criteria to deny reparations to individuals or groups for political reasons. There is also the possibility of 'guilt by association', where individuals may be denied reparations solely because of their regional, ethnic, or political background, which could be seen as a form of collective punishment.[83]

From a transitional justice perspective, this approach may also be inconsistent with global practices, as many truth and reconciliation processes have prioritised reparations as a fundamental right without linking them to national security and public safety considerations. For instance, Sierra Leone, discussed in the following section, did not make reparations contingent on national security concerns or political affiliation. In contrast, Bosnia and Rwanda have faced criticism for selectively granting reparations, which has been seen as reinforcing divisions rather than promoting justice.[84] Finally, many CRSV survivors have already endured severe trauma and social stigmatisation. Tying reparations to national security concerns could impose an additional layer of punishment and exclusion, particularly if the allegations are politically motivated. Instead of blanket suspensions or denials, a more balanced approach could involve implementing safeguards to ensure reparations are not misused, such as preventing payments from directly funding criminal activity rather than outright refusals. Independent oversight could also help maintain fairness and transparency. While the Ukrainian government has a legitimate interest in national security, a more nuanced, rights-based approach may be necessary to balance security needs with the fundamental principle that all victims deserve justice and reparations.

80 UN General Assembly (n 42) para 11.

81 ibid, para 25.

82 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 14(2); Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III), art 11(1).

83 See e.g. International Centre for Transitional Justice, *Morocco: Gender and the Transitional Justice Process* (2009) <https://www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf> accessed 10 February 2025.

84 Alma Begicevic, 'Law, Political Economy and War Reparation: The Case of Bosnia and Herzegovina' (2024) 46 *Law & Policy* 170, 173; Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts* (31 May 2011) 119 <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts> accessed 10 February 2025.

Implementation of the pilot project for urgent interim reparations

As part of the pilot project, a one-time compensation of up to USD 3,000 is provided to a maximum of 500 Ukrainian CRSV survivors.[85] By late 2024, 432 survivors had received interim reparations out of 648 applicants.[86]

The initiative adopted a personalised approach, incorporating survivors' input into the process to ensure their needs are met while minimising the risk of re-traumatisation. In addition to financial compensation, it also offered psychosocial and medical support to aid survivors in their recovery.[87] Survivors have reported that the reparations process has helped acknowledge the harm they suffered and provided a sense of justice and recognition.[88] The project is a joint effort involving the Ukrainian government, local civil society organisations, the GSF, and international partners. Lessons learned from this pilot are expected to inform a broader administrative reparations programme.[89]

The project has faced logistical difficulties due to ongoing war conditions, including identifying victims and ensuring access for those in occupied territories.[90] Limited resources mean reparations are interim and cannot yet address long-term needs comprehensively. However, the pilot has demonstrated how interim reparations can serve as a bridge toward comprehensive state-led programmes.[91] A key challenge for both interim and full reparations remains funding, with growing international momentum toward repurposing Russia's frozen assets to address this need.[92]

The Ukrainian local civil society organisations while supporting this initiative, highlight the challenges CRSV survivors continue to face within the domestic justice system. These include repeated re-traumatising interviews, limited access to legal services, and the lack of a trauma-informed approach by law enforcement.

85 Olena Zelenska, 'Immediate Reparations to Victims of Sexual Violence by the Occupiers is a Step Towards Restoring Justice' (*Official Website of the President of Ukraine*, 4 March 2024) <https://www.president.gov.ua/en/news/olena-zelenska-nevidkladni-reparaciyi-postrazhdalim-vid-seks-89513> accessed 10 February 2025.

86 Ukrainian National News (UNN), '648 Victims Applied for Reparations for Sexual Violence by the Occupiers' (*UNN*, 16 January 2025) <https://unn.ua/en/news/648-victims-applied-for-reparations-for-sexual-violence-by-the-occupiers> accessed 10 February 2025.

87 'Ukraine Adopts Law to Recognise and Provide Reparations to Survivors of Conflict-Related Sexual Violence' (*ReliefWeb*, 21 November 2024) <https://reliefweb.int/report/ukraine/ukraine-adopts-law-recognise-and-provide-reparations-survivors-conflict-related-sexual-violence> accessed 10 February 2025; 'Ukraine Adopts Law to Recognise and Provide Reparations to Survivors of Conflict-Related Sexual Violence' (*Global Survivors Fund*, 21 November 2024) <https://www.globalsurvivorsfund.org/latest/articles/ukraine-adopts-law-to-recognise-and-provide-reparations-to-survivors-of-conflict-related-sexual-violence/> accessed 10 February 2025.

88 'Ukraine Adopts Law to Recognise and Provide Reparations to Survivors of Conflict-Related Sexual Violence' (n 87).

89 ibid. Zelenska (n 85).

90 See Busol (n 30) 203–4.

91 'Ukraine Adopts Law to Recognise and Provide Reparations' (n 87).

92 Busol (n 30) 204.

To address these issues, there are calls for new legislation allowing the police to investigate CRSV crimes and ensuring the confidentiality of survivors' data throughout the legal process.[93]

Nonetheless, this pilot project establishes a global precedent by delivering urgent reparations during an active conflict while also laying the foundation for a more comprehensive reparative framework in Ukraine.

Parallels to historical reparative efforts in other nations, including Sierra Leone, Timor-Leste, and South Africa

Ukraine's response to CRSV should be contextualised by drawing parallels to historical reparative efforts in other nations, including Sierra Leone, Timor-Leste, and Liberia.

Reparations to victims of CRSV

Reparations for CRSV vary across countries but generally include medical, psychological, economic, and social support for survivors. Truth and reconciliation commissions (TRCs) have played a crucial role in recommending reparations, but implementation remains inconsistent.

The final report of the Liberian Truth and Reconciliation Commission emphasised the need to prioritise reparations based on vulnerability and need. The TRC recommended free medical services and trauma counselling for women who experienced sexual or physical violence. It also proposed scholarships for their children and economic empowerment programmes, particularly for rural women, through microeconomic initiatives and lending schemes.[94] However, actual implementation has been limited.[95]

Sierra Leone's Truth and Reconciliation Commission prioritised reparations based on the vulnerability of victims rather than the harm or suffering they endured. The TRC prioritised inter alia victims of sexual violence, including forced marriage, and provided them with specialised healthcare, including treatment for HIV and fistula surgery. War widows were also recognised as indirect victims and

93 Kvitka (n 69).

94 Truth and Reconciliation Commission of Liberia, 'Final Report' (2009) vol 2, 355–56. See also James West, 'Rethinking Representation of Sexual and Gender-Based Violence: A Case Study of the Liberian Truth and Reconciliation Commission' (2013) 14(4) *Journal of International Women's Studies* 109; UN Women, 'Making Transitional Justice Work for Women' (2010) 15–16; Paola Limón and Julia von Normann, 'Prioritising Victims to Award Reparations: Relevant Experiences' (*Essex Transitional Justice Network*, 2011) <https://www.corteidh.or.cr/tablas/r26683.pdf> accessed 10 February 2025.

95 Conciliation Resources, 'Supporting Women's Advocacy for Truth and Reconciliation as Part of Building Lasting Peace' (March 2022) <https://www.c-r.org/news-and-insight/supporting-womens-advocacy-truth-and-reconciliation-part-building-lasting-peace> accessed 9 February 2025.

eligible for reparations.[96] However, many survivors still struggled to access these benefits due to funding and administrative barriers.[97]

In Timor-Leste, the Commission for Reception, Truth, and Reconciliation (CAVR) recommended that 50% of reparations programmes benefit women, acknowledging their disproportionate suffering from sexual violence. Immediate support included urgent needs payments, participation in healing workshops, and collective reparations projects in affected communities.[98] Bringing survivors together also aimed to alleviate their feelings of isolation.

However, the CAVR's urgent reparations scheme was not able to provide support to a significant number of women victims.[99]

The recognition of CRSV survivors in TRC recommendations has significantly improved over time. Many TRCs have prioritised healthcare and psychological support to address the immediate needs of survivors. Additionally, economic initiatives, such as scholarships, microfinance initiatives, and livelihood programmes, are frequently proposed; however, they are not always implemented effectively. Despite these advancements, funding constraints and a lack of political will remain major barriers to the full and successful implementation of reparations programmes.[100]

Urgent interim reparations

In terms of urgent interim reparations, Timor-Leste implemented urgent interim reparations through the CAVR. Specifically, CAVR provided one-time financial assistance of USD 200 to 712 victims identified as particularly vulnerable. These measures aimed to provide immediate relief to the most vulnerable victims while the broader reparations programme was still being developed. The healing workshops aimed to provide psychosocial support and acknowledge victims' experiences as part of reconciliation efforts. CAVR launched pilot projects in communities that were severely affected by the conflict. These projects focused on

96 Truth and Reconciliation Commission of Sierra Leone, 'Final Report' (2004) vol 2, ch 4, paras 19–21. See also Jessica Anania, 'Transitional Justice and the Ongoing Exclusion of Sexual Exploitation and Abuse by International Intervenors' (2022) 98(3) *International Affairs* 893, 908.

97 Amnesty International, 'Sierra Leone: Getting Reparations Right for Survivors of Sexual Violence' (16 October 2007) AFR 51/005/2007, 4.

98 Commission for Reception, Truth and Reconciliation, 'Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste' (2005) part 11, Recommendations, section 12.6.

99 Galuh Wandita, Karen Campbell-Nelson and Manuela Leong Pereira, 'Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims' in Ruth Rubio-Marín (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (Social Science Research Council 2006) 317–18.

100 See UN Women, 'A Way Forward for Addressing the Needs of Conflict-Related Sexual Violence Victims/Survivors and Their Children' (2017) 5–6 <https://asiapacific.unwomen.org/sites/default/files/Field%20Office%20ESEAsia/Docs/Publications/2017/06/02-Practical-cultural-and-political-roadblocks.pdf> accessed 9 February 2025.

collective measures, such as rebuilding social structures, memorialisation efforts, and improving local services.[101] While some progress has been made, long-term economic and social reintegration remains a challenge.[102]

Despite these interim measures, Timor-Leste has struggled to implement a comprehensive, long-term reparations programme. Key challenges included limited government resources and political will, the unequal distribution of benefits – where veterans have been prioritised over victims of human rights violations – and the lack of gender-sensitive approaches, as survivors of sexual violence often did not receive adequate recognition or support. Although Timor-Leste introduced urgent interim reparations, including pensions, healthcare, education, and community-based support, these efforts were often fragmented and insufficient to fully address the needs of all victims. A comprehensive national reparations programme, as recommended by the CAVR, has yet to be fully realised.[103]

In Sierra Leone, to provide immediate relief, an interim reparations programme was implemented, offering a one-time payment of USD 100 to registered victims. This payment aimed to bridge the gap until more comprehensive reparations could be delivered. However, that broader initiative never materialised. The government soon shifted its focus entirely to individual compensation, leading to a reparations programme characterised by incoherent *ad hoc* measures, largely dependent on international donor funding.[104] Despite these efforts, the programme struggled due to limited resources, resulting in only partial implementation of the TRC's recommendations. As a result, many victims continue to await the full reparations initially envisioned.[105]

In Liberia, the TRC Act empowered the Commission to declare missing persons deceased and recommend the issuance of certificates as a form of immediate relief and reparation for survivors and relatives of victims.[106] However, specific urgent interim reparations during the TRC's tenure were not introduced.

101 CAVR, 'Chega! Report' (n 98) part 11, Recommendations, section 12.4. See also Global Survivors Fund, *Timor-Leste Reparation Study* (December 2023) <https://www.globalsurvivorsfund.org/fileadmin/uploads/gsf/Documents/Resources/Global_Reparation_Studies/Report_Timor-Leste_Dec2023_EN_Web.pdf> accessed 8 February 2025.

102 Asia Justice and Rights (AJAR), 'Timor-Leste Case Study' (2017) 6 <https://asia-ajar.org/wp-content/uploads/2020/09/English-Timor-Leste-Case-Study.pdf> accessed 8 February 2025.

103 Leigh-Ashley Lipscomb, 'Beyond the Truth: Can Reparations Move Peace and Justice Forward in Timor-Leste?' (2010) 93 *East-West Center Analysis* 1, 5–6.

104 Fin-Jasper Langmack, 'Reparations in Sierra Leone: News from the Periphery of Transitional Justice' (*JusticeInfo*, 3 February 2020) <https://www.justiceinfo.net/en/43710-reparations-in-sierra-leone-news-from-the-periphery-of-transitional-justice.html> accessed 10 February 2025.

105 Eva Ottendörfer, 'The Fortunate Ones and the Ones Still Waiting: Reparations for War Victims in Sierra Leone' (PRIF Report No 129, Peace Research Institute Frankfurt 2014) 19–20 <https://www.prif.org/fileadmin/Daten/Publikationen/Prif_Reports/2014/prif129.pdf> accessed 10 February 2025.

106 Truth and Reconciliation Commission of Liberia, 'An Act to Establish the Truth and Reconciliation Commission of Liberia' (2005) s 29 <https://www.trcofliberia.org/resources/documents/trc-act.pdf> accessed 9 February 2025.

Conclusion

The ongoing conflict in Ukraine has once again highlighted the urgent and complex challenges associated with CRSV. As described in this chapter, the prevalence of CRSV, particularly perpetrated by Russian forces, has resulted in significant physical, psychological, and socioeconomic harm to countless individuals, including women, men, children, and elderly. The systematic nature of these crimes underscores the necessity of a robust response that not only addresses survivors' immediate needs but also supports long-term healing and societal recovery. This chapter has critically analysed Ukraine's approach to CRSV, with a particular focus on interim reparations, while drawing comparisons with historical reparative efforts in other conflict-affected states.

The introduction of interim reparations for CRSV survivors in Ukraine marks a significant and unprecedented step, particularly given the ongoing nature of the conflict. The establishment of the Urgent Interim Reparation Programme and the recent legislation aimed at providing immediate support to survivors demonstrate a strong commitment to addressing the needs of those most affected by the violence. By prioritising psychological support, medical care, and financial compensation, Ukraine is making substantial progress in recognising the harm suffered by victims and facilitating their recovery. This initiative not only mitigates the immediate effects of CRSV but also empowers survivors, helping them regain control over their lives in the aftermath of trauma.

While the interim reparations framework in Ukraine is commendable, it is essential to recognise the broader context in which these measures are being implemented. The challenges of delivering reparations during an ongoing conflict are substantial, and the effectiveness of these initiatives will depend on several factors, including adequate funding, the establishment of transparent administrative processes, and a survivor-centred approach. However, the pilot project for interim reparations has demonstrated that even in such challenging circumstances, meaningful support can be provided to survivors.

Moreover, the experiences of other states, such as Sierra Leone, Timor-Leste, and Liberia, offer valuable lessons for Ukraine as it continues to develop its reparative framework. Historical reparative efforts in these countries reveal common pitfalls, including inadequate funding, lack of political will, and the need for a comprehensive approach that addresses the diverse needs of survivors. The lessons learned from these contexts underscore the importance of implementing reparations in a manner that is not only effective but also inclusive. The need for a gender-sensitive approach that acknowledges the specific vulnerabilities faced by women and marginalised groups is paramount. The Ukrainian government's commitment to incorporating survivors' input into the reparations process is a positive step, but ongoing efforts are necessary to ensure that their voices are heard and that their needs are adequately addressed.

Furthermore, the challenges associated with national security considerations in the context of reparations must be navigated carefully. The potential for the denial of reparations based on security-related grounds raises human rights concerns and

could further marginalise already vulnerable populations. A rights-based approach that prioritises the needs of survivors over political considerations is essential to ensure that reparations are delivered fairly and justly. The experiences of other countries have shown that linking reparations to national security can lead to discriminatory practices and exacerbate existing inequalities. Therefore, it is crucial for Ukraine to adopt a nuanced approach that balances legitimate security concerns with the fundamental principle that all victims deserve justice and reparations.

Finally, the international community has a crucial role to play in supporting Ukraine's reparative efforts. The potential for repurposing Russia's frozen assets to fund reparations for CRSV survivors represents a significant opportunity to provide the necessary resources for effective implementation. However, this initiative must be approached with caution, ensuring that the funds are used transparently and effectively to support survivors. Furthermore, ongoing international advocacy and support for Ukraine's reparative initiatives will be essential to ensure that the needs of survivors are met and that the principles of justice and accountability are upheld.

9 Double standards in international criminal law after the 'Ukraine Moment'

Is the glass half full or half empty?

Patryk I. Labuda[1]

Introduction

The Russian Federation's full-scale invasion of Ukraine in February 2022 has generated intense debates about double standards among international criminal lawyers. Some have welcomed efforts to provide accountability for international crimes in Ukraine, including through a new ad hoc aggression tribunal, the International Criminal Court (ICC)'s prosecutions of high-level Russian suspects, domestic trials before Ukrainian courts, and transnational cooperation on universal jurisdiction cases. Others have pointed to the double-edged nature of Ukraine-centric mobilisation to emphasise the inequities of international criminal law enforcement. As Reed Brody observes, while the 'Ukraine moment' has 'given the ICC a golden opportunity to demonstrate its relevance . . . it has also exposed the political calculations and double standards which have plagued both the ICC and the international justice system more generally'.[2]

While the ICC has arguably been in 'permanent crisis' since its establishment in 2002,[3] allegations of double standards have become particularly widespread since 2022. Critics worry if and how Western states' enthusiasm for Ukraine-related accountability may unduly influence the ICC's independence and priorities.[4] Others suggest the Special Tribunal for the Crime of Aggression against Ukraine (STAU) will amplify double standards, given the absence of aggression trials for other invasions, notably Iraq in 2003. Yet others argue that conflicts in other parts

1 The author would like to thank Geoofrey Lugano and Sergey Vasiliev for their comments on earlier drafts.

2 R. Brody, 'The ICC at 20: Elusive Success, Double Standards and the "Ukraine Moment"' (*JusticeInfo*, 30 June 2022) <justiceinfo.net/en/102866-icc-20-elusive-success-double-standards-ukraine-moment.html>.

3 Powderly, 'International Criminal Justice in an Age of Perpetual Crisis' (2019) 32 *Leiden Journal of International Law* 1.

4 In this chapter, 'West' includes Australia and North American and European states, with the caveat that Eastern European states like Ukraine, which remain a separate grouping at the United Nations corresponding to the former 'Second World' (un.org/en/model-united-nations/groups-member-states), occupy a liminal 'semi-peripheral' status as neither fully Western nor fully Global South. *See* Labuda, 'Countering Imperialism in International Law: Examining the Special Tribunal for Aggression against Ukraine through a Post-Colonial Eastern European Lens' (2024) 49 *Yale Journal of International Law* 271.

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of the world do not receive the same attention, and that an emphasis on the suffering of white Christian victims exposes systemic racism and a Eurocentric bias at the heart of the international justice project.[5]

The post-2023 war in Gaza has amplified concerns about double standards, including allegations about the ICC's 'preferential' treatment of Ukraine compared to Palestine. Writing for the Munich Security Conference, Sophie Eisentraut notes that

> Western states' responses to Russia's full-scale invasion of Ukraine and to Israels military campaign in Gaza . . . have underscored the impression that Western states value some lives more than others and that they mostly call out violations of international rules committed by geopolitical opponents.[6]

Josep Borrell, Anders Kravik, and other European politicians have increasingly warned of the risks that double standards pose for European foreign policy.[7]

With complaints of double standards also featuring elsewhere in international law commentary, for instance regarding the International Court of Justice or European migration policy,[8] this chapter addresses the critique with respect to international criminal law: are claims of double standards in the wake of the 'Ukraine moment' compelling and, if so, what should be done about it? Drawing on illustrative examples of commentary, the chapter assesses the factual and legal coherence of the main post-2022 narratives, and encourages other researchers to develop a more robust quantitative and qualitative analysis of double standards. It defines double standards as the inconsistent application of a legal rule, with no adequate justification for the differentiated treatment

5 Eurocentrism can be defined as a focus on Europe or the West in the production and legitimation of international law, or assigning a special and superior status to norms originating in the European/Western world.

6 S. Eisentraut, 'Standard Deviation. Views on Western Double Standards and the Value of International Rules' 1/2024 (2024) 8 <securityconference.org/en/publications/munich-security-brief/standard-deviation/>. See also R. Gowan, 'The Double Standards Debate at the UN' (*International Crisis Group*, 7 March 2024) <crisisgroup.org/middle-east-north-africa/east-mediterranean-mena/israelpalestine/double-standards-debate-un>. Dutch Advisory Council, 'Advisory Letter: Towards a New Direction for the Netherlands in the Israeli-Palestinian Conflict' (2024) 18 <advisorycouncilinternationalaffairs.nl/documents/publications/2024/10/23/towards-a-new-direction-for-the-netherlands-in-the-israeli-palestinian-conflict>.

7 Kravik, 'We Must Avoid Double Standards in Foreign Policy' *Al Jazeera* (2024) <aljazeera.com/opinions/2024/4/18/we-must-avoid-double-standards-in-foreign-policy>. Shahid Ahmed, '"Shocking": Dutch Lawmaker Describes Probing Israel's Treatment of International Criminal Court', *Huffington Post* (2024) <huffpost.com/entry/israel-international-criminal-court-espionage_n_667208a8e4b0a1f905ba995e#>.

8 McGonigle Leyh, 'Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes' [2022] *International Journal of Transitional Justice* 363. Marchuk and Wanigasuriya, 'Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ' (2022) 25 *Journal of Genocide Research* 256–78.

of two alike situations.[9] In so doing, double standards are distinguished from selectivity, the latter amounting to a differentiated – but potentially justified – treatment of alike situations.[10]

In evaluating post-2022 double standards critique in international criminal law from a post-colonial Eastern European perspective,[11] the chapter finds some claims of inconsistency compelling, especially in regard to some states' differentiated responses to similar or identical accountability challenges. In particular, powerful Western states like the US, France and Germany have failed to behave consistently on legal issues like immunities for senior government actors or in offering political support for investigations into serious crimes. At the same time, by drawing attention to Ukraine's liminal place within the European and global order – as a country straddling East and West, Global North and South, and inter-imperial rivalries – the chapter questions strident criticisms of the 'Ukraine moment' and some one-dimensional West-centric accusations of double standards, while offering more plausible explanations for perceived patterns of inconsistency in Ukraine-related mobilisation. Notably, Ukraine-related critiques of double standards, when analysed in light of analogous complaints in the decade-long stand-off between the African Union (AU) and the ICC, suffer from internal contradictions and reveal a more complex story of differentiated regional enforcement. Given the inter-state nature of Russia's aggression as a possible justification for differentiated responses to the war in Ukraine, the article questions some critiques of the STAU's illegitimacy, identifies their West-centric assumptions, and shows that analogously selective ad hoc tribunals in Africa and Asia do not occasion as much introspection and anti-Western critique.

Echoing Michelle Burgis-Kasthala and Barrie Sander's appeal for a 'post-critical' engagement with international criminal law,[12] this chapter proceeds on the premise

9 This definition draws on the author's ongoing work on the 'Double Standards and International Law' project (hls.harvard.edu/wp-content/uploads/2024/09/Geneva_Double_Standards_CfP.pdf). This chapter reprises and develops themes set out originally in: Labuda, 'Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law's Selectivity in the Wake of the 2022 Ukraine Invasion' (2023) 36 *Leiden Journal of International Law* 1096.

10 For this distinction, see Andreas Schüller, 'Some Reflections on Recent Developments on Double Standards and Selectivity in International Criminal Law' (*Afronomicslaw*, 25 March 2025) <afronomicslaw.org/category/analysis/some-reflections-recent-developments-double-standards-and-selectivity>. There is a rich literature on selectivity, focused primarily on prosecutorial discretion. Double standards feature in passing, except W. Kaleck, 'Double Standards in International Criminal Justice: A Long Road Ahead Towards Universal Justice' (2015) <toaep.org/pbs-pdf/37-kaleck>. Ambos, 'Ukraine and the Double Standards of the West' (2022) 20 *Journal of International Criminal Justice* 875. Goldston, 'International Crimes and Double Standards' (2024) 22 *Journal of International Criminal Justice* 241. On selectivity, see R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005); Kotecha, 'The International Criminal Court's Selectivity and Procedural Justice' (2020) 18 *Journal of International Criminal Justice* 107. Hafetz, 'Fairness, Legitimacy and Selection Decisions in International Criminal Law' (2017) 50 *Vanderbilt Journal of Transnational Law* 1133. Fyfe, 'The Office of the Prosecutor: Seeking Justice or Serving Global Imperialism?' (2018) 18 *International Criminal Law Review* 988.

11 On Eastern Europe and post-colonialism, see Labuda (n 3).

12 Burgis-Kasthala and Sander, 'Contemporary International Criminal Law After Critique' (2024) 22 *Journal of International Criminal Justice* 127.

that critique has long performed a useful function in unveiling international criminal law's biases. It concludes, however, that concerns about an invidious 'Ukraine effect' suffer from selective amnesia, reductionism, and cherry-picking of data.[13] With many commentators imputing bias or discrimination to the ICC Prosecutor's actions, a growing challenge in the post-2022 debate has been *perceived* double standards, wherein subjective beliefs about inconsistencies drown out nuanced conversations about the causes and/or existence of discrepancies on the altar of the imperative that 'justice must be seen to be done'. Equally important, while some Palestine-centric critiques of double standards are valid, connections to the Russia-Ukraine War sometimes rely on selective accusations of discrepancies that gloss over complexity in favour of a simple narrative of Western hypocrisy and/or Global South oppression, which can then result in 'competitive victimhood' vis-à-vis Ukrainian victims.

Ultimately, this chapter argues that a decentring of international criminal law's attention to Ukraine should be seen not as a moment of crisis but rather as an opportunity to rebalance the scales of justice in a region that has suffered centuries of unaccountable exploitation and violence. It encourages accountability stakeholders to move beyond one-dimensional denunciations of double standards that unwittingly essentialise Eurocentric assumptions to offer a more enticing vision of anti-impunity standards that challenge crimes committed in both inter- and intra-state wars. While the accountability landscape after Ukraine is better seen as a breakthrough that offers a window of opportunity to address international criminal law's double standards vis-à-vis unaccountable imperial powers like Russia,[14] assessing the promise and limitations of regional enforcement will require greater nuance in the future. In an era of waning Western power and growing multipolarity, selective regional enforcement may become the norm, for better or worse, with unpredictable implications for the fight against impunity.

This chapter proceeds in three parts. First, it describes the Ukraine and Gaza wars through the lens of accountability initiatives and notes some identifiable patterns of behaviour. Second, the chapter introduces the six main critiques of double standards relating to both wars, as regards the allocation of resources for accountability initiatives, the speed of investigations into international crimes, the differentiated treatment of victims, concerns about ad hoc tribunals for some (but not all) conflicts, uneven exercise of prosecutorial discretion, and varying state support for the enforcement of international criminal law. Third, by unveiling implicit assumptions and inconsistencies in how allegations are framed, the chapter confirms, nuances, or debunks Ukraine-related critiques of accountability double standards. In conclusion, it observes that many post-2022 critiques, while accurately emphasising Western powers' inconsistent behaviour, risk legitimising rhetorical denunciations of double standards by some non-Western actors who have little

13 Egeland, 'The "Ukraine Effect" on the World's Poorest and Most Vulnerable' *Al Jazeera* (2022) <aljazeera.com/opinions/2022/4/5/the-ukraine-effect-on-the-worlds-poorest-and-most-vulnerable?sf163008762=1>.

14 A similar exercise could be undertaken for Turkey, the successor to the Ottoman Empire, for its actions in Syria following Bashar al-Assad's fall from power in late 2014.

interest in upholding any standards rather than improving the existing international criminal law system.

'The Ukraine Moment' (and the Gaza War)

The invasion of Ukraine on 24 February 2022 has seen a proliferation of accountability initiatives. Within days, 39 states referred the situation in Ukraine to the Prosecutor, joined later by four other states. Subsequently, more than 20 governments pledged financial contributions and *gratis* personnel to the ICC.[15] In May 2022, the OTP sent 42 investigators and forensics experts to collect evidence in Ukraine, marking its largest ever deployment in a single situation. In March 2023, the Prosecutor announced an arrest warrant against Vladimir Putin, the Russian President, followed by warrants against senior Russian military commanders in 2024.[16]

Accountability initiatives have proliferated at the national level. In addition to thousands of domestic proceedings in the Ukrainian justice system, parallel investigations into crimes against humanity, war crimes, the crime of aggression and genocide have been launched by, among others, Poland, Lithuania, Latvia, Slovakia, Estonia, Germany, France, and others.[17] Transnational cooperation initiatives, such as a Joint Investigation Team and an Atrocity Crimes Advisory Group, have served to streamline evidence collection and sharing, avoid a duplication of proceedings, and prevent resource inefficiencies.[18]

Yet accountability mobilisation for Ukraine was not universal. Echoing ambivalence from some Global South states about the invasion's causes and consequences, as reflected in non-committal UN General Assembly resolutions condemning the Russian invasion, few non-Western states have offered financial or in-kind support for the ICC's or other investigations in Ukraine.[19] Likewise, the Ukrainian government's efforts to hold Russia accountable for false accusations of genocide before the International Court of Justice (ICJ) were joined by dozens of European and Western states, but received little support from other regions.[20]

15 For an overview, *see* K. Muddell and A. M. Roccatello, *Reflections on Victim-Centered Accountability in Ukraine* (ICTJ Briefing 2023) <https://www.ictj.org/resource-library/reflections-victim-centered-accountability-ukraine>.

16 For details, see <icc-cpi.int/situations/ukraine>.

17 Kowalczewska, 'War-Torn Justice: Empirical Analysis of the Impact of Armed Conflict on Fair Trial Guarantees in Ukraine' (2023) 9 *Revista Brasileira de Direito Processual Penal*.

18 EUROJUST, *Estonia, Latvia and Slovakia Become Members of Joint Investigation Team on Alleged Core International Crimes in Ukraine* (31 May 2022) <https://www.eurojust.europa.eu/news/estonia-latvia-and-slovakia-become-members-joint-investigation-team-alleged-core-international>.

19 J.-L. Maurer, 'Avec Le Conflit Russie-Ukraine, Le Renouveau Des Non Alignés?' (*The Conversation*, 15 June 2022) <theconversation.com/avec-le-conflit-russie-ukraine-le-renouveau-des-non-alignes−184295>.

20 I. Marchuk and A. Wanigasuriya, 'The Curious Fate of the False Claim of Genocide' (*Verfassungsblog*, 24 February 2024) <verfassungsblog.de/the-curious-fate-of-the-false-claim-of-genocide/>.

Illuminating fault lines among regional blocs in the global order, aggression trials of Russia's leaders have proven yet more controversial. Due to the ICC's lack of jurisdiction over the crime of aggression in Ukraine, appeals for a special ad hoc tribunal emerged after February 2022. However, despite Eastern European states' advocacy for an international tribunal backed by the UN General Assembly, supported inter alia by the Council of Europe, key Western governments have adopted ambiguous positions.[21] Led by the US, UK, France, and Germany, the G7 have supported an alternative 'hybrid' or 'internationalised' tribunal, grounded on Ukraine's domestic jurisdiction, which would not be able to prosecute Putin.[22] At the time of writing, Western states remain opposed to an international tribunal, while most non-Western states have avoided the diplomatic negotiations altogether, despite Ukraine and Eastern European states' continued push for aggression trials of Russia's leadership.[23]

While the Israel-Palestine conflict has a long and convoluted history, including before the ICC (mirroring Ukraine's fruitless accountability efforts after Russia's 2014 seizure of Crimea, Palestine's 2015 accession to the Rome Statute had yielded no arrest warrants by 7 October 2023),[24] the post-2023 Gaza war has amplified global divisions. Allegations of international crimes committed by both Israeli and Palestinian actors in the wake of 7 October and Israel's subsequent invasion of the Gaza Strip, have generated unprecedented interest among both expert and non-expert audiences. Whereas many European and Western states have invoked Israel's right to self-defence, many non-Western states have applied pressure on Israel to cease military operations and encouraged the ICC to investigate Israeli actions. In November 2023, South Africa, Bangladesh, Bolivia, Comoros, and Djibouti referred the situation in Palestine (with an ICC investigation underway, the referral conveyed mainly symbolic political support).[25] One month later, South Africa initiated litigation before the ICJ accusing Israel of genocide in Gaza, leading to a series of provisional orders against Israel.[26] Following repeated warnings to both conflict parties, the ICC Prosecutor applied for

21 'PACE Calls for the Setting Up of an Ad Hoc International Criminal Tribunal to Hold to Account Perpetrators of the Crime of Aggression Against Ukraine' <https://pace.coe.int/en/news/8699/pace-calls-for-the-setting-up-of-an-ad-hoc-international-criminal-tribunal-to-hold-to-account-perpetrators-of-the-crime-of-aggression-against-ukraine>.

22 For details, see Labuda, *supra* (n 3).

23 T. Leshkovych and Patryk I. Labuda, 'Prosecuting the Crime of Aggression in Ukraine and Beyond: Seizing Opportunities, Confronting Challenges and Avoiding False Dilemmas' (*Just Security*, 2 April 2024) <justsecurity.org/94104/prosecuting-aggression-ukraine-and-beyond/>.

24 Despite Palestine's accession to the Rome Statute and a self-referral in 2015, the Prosecutor had brought no charges against either Israeli officials or Palestinian armed group members by 7 October 2023. On the history of Palestine's accession, see Clancy and Falk, 'The ICC and Palestine: Breakthrough and End of the Road?' (2021) 50 *Journal of Palestine Studies* 56.

25 South Africa, State Party Referral in Accordance with Article 14 of the Rome Statute of the ICC, 17 November 2023.

26 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v Israel*) <icj-cij.org/case/192>.

arrest warrants against three Hamas leaders as well as the Israeli prime minister and minister of defence.[27]

As with Ukraine-related resolutions, states have taken different positions on UN General Assembly initiatives on an 'immediate ceasefire' in Gaza, on ICJ litigation, and on ICC warrant requests. While most non-Western states have supported these accountability efforts, some European states have sought to intervene in both the ICJ and ICC proceedings on Israel's behalf, either to dispute allegations of genocide or prevent warrants against the Israeli leadership. While these divisions do not map neatly onto a binary Global South versus West divide – Slovenia, Spain, Belgium, and Ireland have thrown support behind Palestinian accountability efforts, while India initially resisted ceasefire demands[28] – they have featured widespread accusations of double standards, as examined in the next section.

Identifying (claims of) double standards in International Criminal Law

International criminal justice has experienced growth in fits and starts. Following the end of the Cold War, mobilisation around the former Yugoslavia and Rwanda conflicts in the mid-1990s – including the first two ad hoc tribunals – spurred negotiations on the Rome Statute. After mixed experiments with ad hoc hybrid tribunals in the 2000s, the post-2011 Syrian conflict saw unprecedented (at the time) efforts to ensure accountability outside the ICC framework (the ICC was unavailable because Russia and China vetoed Security Council referrals).

Yet Ukraine-related mobilisation is routinely described not just as 'unprecedented' but also criticised for its purported selectivity and/or double standards. Critiques have grown after October 2023, with observers pointing to disparities between the conflicts in Ukraine and Palestine. The general tenor of the double standards allegations is that Ukraine has received some form of 'beneficial' treatment regarding accountability compared to Gaza and other like cases. However, this overarching critique can be broken down into at least six categories. The following section takes stock of the main arguments before turning to implicit assumptions embedded therein.

Uneven allocation of resources

One recurrent allegation of double standards is that Ukraine has benefited disproportionately from financial and other types of resource mobilisation for its efforts

27 ICC Press Release, Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects the State of Israel's Challenges to Jurisdiction and Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant, 21 November 2024.

28 R. Mansour, 'Will the War in Gaza Become a Breaking Point for the Rules-Based International Order?' (*Chatham House*, 26 January 2024) <chathamhouse.org/2024/01/will-war-gaza-become-breaking-point-rules-based-international-order>.

to hold Russian suspects accountable for international crimes. Upon closer inspection, at least three distinct types of concerns can be discerned.

First, some observers question why investigations in Ukraine are not matched by similar financial support for accountability elsewhere. As Jacqueline McAllister observed soon after the 2022 invasion, '[d]ozens of nations, including the United States, have pledged a windfall of support to the ICC, which many of them had not done for other conflicts before the court'.[29] Second, some worry that targeted financial support for Ukraine might unduly influence the ICC's priorities. Amnesty International has argued that '[w]hile the Prosecutor is no doubt taking advantage of a rare opportunity to harness the support of many of the biggest funders . . . that is precisely the concern' as the ICC may 'gravitate towards situations that powerful western states are willing to throw additional resources, voluntary contributions and secondments at'.[30] Third, others worry that contributions from Western states risk entrenching inequitable representation at the ICC.[31]

While such concerns have received more attention in the wake of the Gaza war, with NGOs warning repeatedly of the risks of double standards in how resources are marshalled for investigations into international crimes,[32] some critiques are more persuasive than others. Most compelling is the risk that targeted financial contributions or earmarked delegations of personnel to specific ICC situations could imperil the ICC Prosecutor's independence. States could de facto dictate which crimes are more worthy of attention by not following the standard appropriations process in the annual budget adopted at the Assembly of States Parties, which the Prosecutor allocates based on his own assessment of needs. Although Karim Khan, as Prosecutor, has sought to allay concerns by arguing that ad hoc donations would anyway be distributed according to needs rather than state preferences,[33] reasonable doubts remain, for instance, as to whether personnel delegated to the ICC for specific types of crimes (e.g. the kinds of attacks

29 McAllister, 'It's Still Easy for Great Powers to Avoid International Justice' *Washington Post* (2022) <washingtonpost.com/outlook/2022/04/15/war-crimes-icc-us/>.

30 C. Arinze-Onyia, 'Are There Hidden Costs of the ICC Prosecutor's Campaign for Additional Budget Support, Voluntary Contributions and Secondments?' (*Amnesty International*, 11October2022)<hrij.amnesty.nl/are-there-hidden-costs-of-the-icc-prosecutors-campaign-for-additional-budget-support-voluntary-contributions-and-secondments/>.

31 C. Arinze-Onyia, 'Secondments of Investigators to the OTP – A Second Best Solution to the Court's Capacity Crisis?' (*Amnesty International*, 19 October 2022) <hrij.amnesty.nl/are-there-hidden-costs-of-the-icc-prosecutors-campaign-for-additional-budget-support-voluntary-contributions-and-secondments/>.

32 Amnesty International, 'The ICC at 20: Double Standards Have No Place in International Justice' (1 July 2022) <amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice/>. Human Rights Watch, 'ICC: Combat Double Standards for Justice' (4 December 2023) <hrw.org/news/2023/12/04/icc-combat-double-standards-justice>.

33 ICC-OTP, 'Statement of ICC Prosecutor, Karim A.A. Khan QC: Contributions and Support from States Parties Will Accelerate Action Across Our Investigations' (2022) <icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-contributions-and-support-states-parties-will>.

carried out by Russian ballistic missiles) can be repurposed for investigations in other parts of the world.

Other concerns about potential double standards in resource allocation appear to be less persuasive, for instance as regards the inequitable geographic representation in the ICC's staff. It is to be anticipated that mobilisation for Ukraine-related cases will feature more staff with a local cultural awareness and linguistic abilities. This is to be welcomed in any investigation – it is precisely the absence of local African expertise that had previously garnered criticism.[34] Equally important, Eastern European staff remain underrepresented at the ICC, revealing some critics' unawareness of anti-Eastern European discrimination.[35]

At the time of writing, criticisms of double standards in resource allocation remain relevant. Few traditional ICC donors have pledged money in the wake of the 2023 Gaza war, notwithstanding the Prosecutor's appeals for funding.[36] Only a few Western states, for instance Belgium and Spain, have responded favourably.[37] Nor have Khan's appeals appeased his fiercest critics, some of whom insist the Prosecutor is not committed to accountability for Palestinians (it is alleged investigations risk the wrath of Israel's Western backers on whom Khan relies).[38] In the end, a clear disparity remains in how the ICC's donors have responded to post-2022 Ukraine compared to other investigations. The chapter will return later to states' potential motives for uneven responses, but it bears noting that states from outside the global West have made no significant efforts to plug the gap by providing resources themselves, which may reflect their lesser financial means.

Uneven speed in investigating crimes

Another recurrent concern is that the ICC Prosecutor may be pursuing some investigations more vigorously than others. Following arrest warrants against Putin (and Maria Lvova-Belova) in 2023, many commentators welcomed the ICC's unprecedented decision to confront a permanent member of the UN Security Council.[39]

34 P. Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (CUP 2018).

35 I. D. Kalmar, *White but Not Quite: Central Europe's Illiberal Revolt* (Bristol University Press 2022); J. Panagiotidis and H.-C. Petersen, *Antiosteuropäischer Rassismus in Deutschland: Geschichte und Gegenwart* (Beltz Juventa 2024). On geographical imbalance at the ICC, *see* ASP, Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court, ICC-ASP/20/29, 29 November 2021, paras 15–19.

36 ICC-OTP, 'Statement of ICC Prosecutor Karim A. A. Khan KC from Cairo on the Situation in the State of Palestine and Israel' (30 October 2023).

37 J. H. Anderson, 'Palestine: The ICC Prosecutor under Pressure' (*Justice Info*, 20 November 2023) <justiceinfo.net/en/125008-palestine-icc-prosecutor-under-pressure.html>. Human Rights Watch (n 31).

38 H. Egian and M. Rabbani, 'Is the ICC Prosecutor Karim Khan Fit for Purpose?' (*Passblue*, 28 November 2023) <passblue.com/2023/11/28/is-the-icc-prosecutor-karim-khan-fit-for-purpose/>.

39 J. H. Anderson, 'ICC Arrest Warrants Against Putin: What Do Experts Say?' (*Justice Info*, 21 March 2023) <justiceinfo.net/en/114136-icc-arrest-warrants-against-putin-what-do-experts-say.html>.

However, critics have drawn on this precedent to challenge the Prosecutor for not acting with similar speed in other investigations, many of which have featured no or few (public) arrest warrants.

Especially after 7 October 2023, some critics have pointed to the Putin arrest warrant to suggest a double standard in how the ICC has handled the Ukraine and Palestine investigations. In questioning whether Khan and the ICC can 'survive the West's double standards', Nour Odeh notes that '[i]n contrast to his bullish approach on other cases and the speed with which he got arrest warrants for Russia's Vladimir Putin, Khan was sluggish on Palestine until the unfolding genocide in Gaza made his silence untenable'.[40] International criminal lawyers have made similar allegations, with Triestino Mariniello noting that

> [w]hile it took the Prosecutor only one year to identify concrete cases in the situation in Ukraine, he has not requested any warrants of arrest or summons in relation to Palestine and Israel in the two years and half since he was sworn in on 16 June 2021.[41]

Allegations of double standards in relation to the ICC's purported 'speed' in Ukraine abound in commentary, but they almost always ignore that the examination in Ukraine had languished at the ICC for many years, far longer than in most other countries. In fact, despite superficial claims of 'speed of light' investigations,[42] the ICC had proceeded more sluggishly in Ukraine than in, for instance, the Democratic Republic of the Congo (DRC), Uganda, Libya, Mali, the Central African Republic, or Kenya. If 'investigative speed' is a valid benchmark for double standards comparisons at the ICC, it seems to operate in the opposite direction – Ukrainians waited far longer than most victims for some form of justice from the Court.

A charitable interpretation of Ukraine-centric double standards critiques is that critics emphasise the actions of Khan, who took office as the third ICC prosecutor only in June 2021 and hence only his actions, rather than those of the OTP as such, are scrutinised. While some comparisons distort the facts to emphasise (non-existent) double standards,[43] even a charitable gloss does not excuse factual omissions that allow non-expert audiences to have an incomplete picture of how ICC investigations unfold, and to what extent allegations of double standards are

40 Nour Odeh, 'Can Karim Khan and the ICC survive the West's double standards?' (New Arab, 22 May 2024) <newarab.com/opinion/can-karim-khan-and-icc-survive-wests-double-standards>.

41 T. Mariniello, 'The ICC Prosecutor's Double Standards in the Time of an Unfolding Genocide' (*Opinio Juris*, 3 January 2024) <opiniojuris.org/2024/01/03/the-icc-prosecutors-double-standards-in-the-time-of-an-unfolding-genocide/>. See also C. A. Odinkalu and S. Nakandha, 'Putin Arrest Warrant: International Law and Perceptions of Double Standards' (*Opinio Juris*, 27 March 2023) <opiniojuris.org/2023/03/27/putin-arrest-warrant-international-law-and-perceptions-of-double-standards/>.

42 H. Egian and M. Rabbani, 'Is the ICC Prosecutor Karim Khan Fit for Purpose?' (*Passblue*, 28 November 2023) <passblue.com/2023/11/28/is-the-icc-prosecutor-karim-khan-fit-for-purpose/>.

43 Euro-Med Human Rights Monitor, ICC Prosecutor Shows Clear Double Standard When Dealing with Situation in Palestine, 7 March 2024.

merited. Equally important, a noticeable aspect of the post-2022 double standards critiques is that few critics seem concerned about disparities in the treatment of investigations elsewhere. Emblematic of this disconnect is an interview with Habib Nassar of Impunity Watch, an NGO which had previously denounced the ICC's double standards in relation to Palestine. When asked after the May 2024 applications for arrest warrants if there is 'a real turnaround, or just a partial, even opportunistic one' at the ICC because there may still be 'questions about the Prosecutor's strategy, which has taken just one year to issue spectacular indictments in Ukraine and seven months in Palestine', whereas the same slowness and indecision continues in regard to 'other situations – Nigeria, Sudan, Venezuela, Georgia', Nassar argued:

> Look, when there's a positive development, we have to recognise it. It's not enough, but on the issue of double standards, what's happened today is an important turning point. It's a first step. I wouldn't say we're out of the woods. It remains to be seen how States that could facilitate the implementation of these arrest warrants will react.[44]

As will be examined later, Nassar's point about states' uncertain commitment is fully accurate. However, the lack of self-reflection about the possibility of double standards vis-à-vis other countries is noteworthy. This sentiment seems widespread among ICC critics who denounce *some* cases of differentiated treatment as double standards, but rarely explain the benchmark for such allegations. As a result, while some critics saw arrest warrants for Russian suspects as an opportunity to denounce the ICC's double standards, the same critics rarely seem to leverage the newly 'unprecedented speed' of warrants in Israel-Palestine to denounce the Prosecutor's failure to act equally quickly in other countries (instead, most critics pivoted to critiquing the double standards in how slowly the judges addressed the applications for arrest warrants against the Israeli and Palestinian suspects).[45]

Given the 'unprecedented speed' of applications for arrest warrants in Israel-Palestine after October 2023 and the muted response to this discrepancy, it seems that some inconsistencies are more worthy of attention than others. There seems to be little interest in denouncing Palestinians' 'preferential treatment' relative to, for instance, Sudanese or the Rohingya.[46] It is worth pondering why such inconsistencies do not seem to carry the same weight as allegations of differentiated treatment 'in favour of' Ukrainians, a question this chapter will return to later.

44 T. Cruvellier, 'Israel/Palestine: The Moment of Truth' (*Justice Info*, 21 May 2024) <justiceinfo.net/en/132115-israel-palestine-moment-truth.html>.

45 Many warrants against other suspects had been issued more quickly in the past, yet the Putin warrant served as benchmark for comparisons usually.

46 One of the few exceptions, Cruvellier (n 43).

Uneven treatment of victims

A recurrent allegation of double standards is the uneven treatment of victims of international crimes. Soon after the 2022 invasion, Mark Kersten cited concerns about systemic racism to suggest that it is 'only natural to worry that the overwhelming support offered to the ICC in Ukraine represents another instance in which justice is made available to some people in some places some of the time and not to all'.[47] Responding to the 2023 arrest warrant against Putin, Chidi Odinkalu and Sharon Nakandha concluded in a similar vein that 'Ukraine offers the reality check that . . . when the court dithers on any particular case, it does so because the people or country affected are lesser humans'.[48]

Allegations of preferential treatment for some victims, or discriminatory treatment against other victims, have proliferated in the wake of 7 October 2023. Critics have charged that international criminal justice does not apply equally to either Palestinian or Israeli victims – with each group citing alternatively dehumanising statements by Israeli officials or muted responses to the attacks of 7 October.[49] Critics have also regularly emphasised alleged disparities in treatment between Ukrainian and Palestinian victims to suggest that the former benefit from preferential status on account of their religion, race or geographic origins.[50]

While there have been attempts to take a holistic perspective and escape this kind of 'victimhood competition' – for instance, Nassar has noted that 'what exasperates me a little in this conflict is the inability of many people to denounce the crimes, whoever the perpetrators, and to want to take sides'[51] – Khan has responded to the allegations of double standards by emphasising the humanity of all victims, and a commitment to deliver justice for everyone without distinction. Notably, in October 2023, Khan rejected

> the idea that we're not applying the law equally in all situations, that all life doesn't matter equally, there is a hierarchy in terms of which people, with which passports, from which parts of the world are more worthy of protection.[52]

47 M. Kersten, 'Should the ICC Accept Western Funding for Its Probe in Ukraine?' *Al Jazeera* (7 April 2022) <aljazeera.com/opinions/2022/4/7/should-the-icc-accept-western-funding-for-its-probe-in-ukraine>. *See also* Arinze-Onyia (n 30). E. Evenson and J. O'Donohue, 'States Shouldn't Use ICC Budget to Interfere with Its Work' *Open Democracy* (23 November 2016) <opendemocracy.net/en/openglobalrights-openpage/states-shouldn-t-use-icc-budget-to-interfere-w/>.

48 Odinkalu and Nakandha (n 40).

49 For an extensive overview of double standards critiques in both directions, see Goldston (n 9) 245.

50 Bacevich, 'We Can't Reduce the Ukraine War to a Morality Play' *The Nation* (2023) <thenation.com/article/world/russia-ukraine-war-civilization/>.

51 Cruvellier (n 43).

52 Remarks by ICC Prosecutor Karim A.A. Khan KC at the opening of the 23rd Session of the Assembly of States Parties, 2 December 2024 <https://asp.icc-cpi.int/sites/default/files/asp_docs/ASP-23-STMT-PROS-ENG.pdf>.

Such statements have not assuaged the ICC's critics.

Post-2022 victim-centric allegations of double standards in relation to Ukraine, Palestine, and elsewhere are noteworthy because they come on the heels of the ICC's decade of fraught relations with African states. The AU's appeal for collective withdrawal from the Rome Statute nominally centred on the immunities of heads of state, including the Security Council's double standards,[53] but it also featured accusations that the ICC was 'targeting Africans' as a form of 'judicial neo-colonialism'.[54] (most famously, the Ethiopian Prime Minister argued the ICC was 'race-hunting', while The Gambia labelled it the 'International Caucasian Court').[55] While Khan's post-2022 Ukraine investigation could have allayed criticisms of anti-African bias or racism, some critics have pivoted from perpetrator-centric allegations of bias or discrimination to emphasising the 'preferential treatment' of Ukrainian victims, on account of their whiteness, or the (dubious) Eurocentricity of the global order.[56] The curious post-2022 reversal of focus from perpetrators to victims has facilitated 'victimhood competition' on the premise that the ICC only 'benefits' Ukrainians, whereas its interventions in other contexts are examined in a more multifaceted and nuanced way. Many critics have also downplayed mundane explanations for a united response to Russian crimes in Ukraine, which reflects Eastern Europe's history of Russian imperial rule, as well as the scale, gravity, and inter-state nature of the invasion and associated crimes. Unlike most conflicts in Africa or South America that involve intra-state wars, where external support to one party or another can be denounced as interference in a state's internal affairs, the inter-state dimension of aggression 'has created victims the world recognizes' because 'violence among states is easier to acknowledge than internal brutality'.[57] As Kate Cronin-Furman and Anjali Dayal explain:

> there's something else going on as well that makes Ukrainian victims *more legible* on the international stage than Chechen, Syrian, Tamil, Uyghur, or Rohingya . . . [n]amely, that international institutions and international law

53 Gaeta and Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the Al Bashir and Kenyatta Cases' in I. Bantekas and C. C. Jalloh (eds), *The International Criminal Court and Africa* (OUP 2018) 138.

54 Kirabira, 'NGOs and the Legitimacy of International Criminal Justice: The Case of Uganda' in F. Jeßberger, L. Steinl and K. Mehta (eds), *International Criminal Law – A Counter-Hegemonic Project?* (T.M.C. Asser Press 2023) vol. 31, 153, at 154.

55 'Ethiopian Leader Accuses International Court of Racial Bias' *Reuters* (2013) <reuters.com/article/us-africa-icc-idUSBRE94Q0F620130527>. O'Grady, 'Gambia: The ICC Should Be Called the International Caucasian Court' *Foreign Policy* (2016) <foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/>. On race and the ICC, *see* DeFalco and Mégret, 'The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System' (2019) 7 *London Review of International Law* 55.

56 On Ukraine, whiteness, and 'privilege', *see* Labuda (n 8).

57 Dayal and Cronin-Furman, 'Russia's Invasion Has Created Victims the World Recognizes' *Foreign Policy* (2022) <foreignpolicy.com/2022/04/05/russia-invasion-victims-bucha-ukraine/>.

> are built to protect states from other states, whereas those under attack from their own government have far fewer protections available to them – and far fewer willing allies.[58]

Ad hoc tribunals as regressive or progressive step?

The war in Ukraine has revived interest in prosecuting the crime of aggression, yet an ad hoc tribunal has prompted intense debate over double standards. While few doubt Russia's invasion rises to a 'manifest violation' of Article 2 (4) of the UN Charter, the proposed Special Tribunal for Aggression Against Ukraine (STAU) is denounced because of a lack of accountability for similar cases of aggression, especially the 2003 invasion of Iraq.[59] Critics emphasise that an ad hoc solution would be hypocritical because Western powers – the UK, France, and the US – are responsible for the ICC's inability to exercise jurisdiction over the crime of aggression in Ukraine (the Rome Statute's bifurcated jurisdictional regime prevents Khan from prosecuting aggression, unlike for war crimes, crimes against humanity and genocide).[60] Andreas Schüller concludes that

> the legitimacy of any new court created under international law would likely be fragile at best, if not non-existent . . . [s]uch a court would go down in history as a special court created for one specific situation, and not as one applicable to others . . . when a permanent international criminal court exists.[61]

As explored elsewhere, critiques of the STAU fail to capture what is at stake in enabling a post-colonial state like Ukraine to prosecute its former imperial overlord. Contrary to criticisms focused on Gordon Brown or Philippe Sands,[62] Eastern European states have led the drive for aggression prosecutions through

58 ibid. Emphasis added.

59 Heller, 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis' (2022) 1 *Journal of Genocide Research* 12–15.

60 Drawing on this critique of Western double standards, some scholars suggest that 'Global South' states in particular will be reluctant to support prosecutions of Putin and his entourage. Ambos (n 9); Heller (n 58); L. Moreno-Ocampo, 'Ending Selective Justice for the International Crime of Aggression' (*Just Security*, 31 January 2023) <justsecurity.org/84949/ending-selective-justice-for-the-international-crime-of-aggression/>. Contra, *see* C. Eboe-Osuji, 'Letter to Editor: On So-Called Selectivity and a Tribunal for Aggression Against Ukraine' (*Just Security*, 10 February 2023) <justsecurity.org/85060/letter-to-editor-on-so-called-selectivity-and-a-tribunal-for-aggression-in-ukraine/>.

61 A. Schüller, 'What Can('t) International Criminal Justice Deliver for Ukraine?' (*Völkerrechtsblog*, 24 February 2023) <verfassungsblog.de/justice-ukraine/> (arguing the STAU would lack legitimacy even if the UN General Assembly were to endorse it).

62 *See* Brown, 'We Owe It to the People of Ukraine to Bring Vladimir Putin to Trial for War Crimes' *The Guardian* (2023) <theguardian.com/world/commentisfree/2023/feb/24/people-ukraine-vladimir-putin-trial-war-crimes>. Sands, 'There Can Be No Impunity for the Crime of Aggression against Ukraine' *Financial Times* (2023) <ft.com/content/c26678cb-042c-4b84-bb26–88047046601a>.

an international tribunal, while Western powers have consistently opposed such a robust precedent because it could be used against them in the future.[63] Advocacy for the STAU has also triggered unprecedented momentum to reform the Rome Statute's jurisdictional regime, which should not depend on Western powers, especially the US, being held accountable for interventions in Kosovo or Iraq. Moreover, double standard critiques aimed at the STAU have exhibited a schizophrenic quality. Critics who denounce the ICC for its double standards have embraced the same institution as an idealised solution for aggression prosecutions, whereas the reality is the ICC would face similar allegations of double standards if it could prosecute the crime of aggression in Ukraine.[64] Rather than exacerbating 'Western' double standards, the better view is that Ukraine's quest for justice through an ad hoc tribunal would constitute a pragmatic stopgap, as has been done dozens of times before in other contexts, and a landmark precedent that can be leveraged by other small and weak states, from the Global East(s) and South(s), in the future.

What is most notable about post-2022 criticisms of double standards is that they suffer from selective amnesia. Ad hoc tribunals have proliferated in the last 30 years, catering almost always to victims in the Global South, for instance in Rwanda, Cambodia, Sierra Leone, Chad, the Central African Republic, and Colombia (at the time of writing, ad hocs are under discussion for South Sudan, Liberia, the DRC, and The Gambia).[65] Most striking about STAU critiques is that few critics have applied the same standards of critique to Western-supported ad hoc tribunals in other regions. Hissène Habré's trial materialised in part due to Western states' support and funding.[66] An ad hoc tribunal for the DRC would divert resources and attention from other conflicts in Africa and create selectivity problems.[67] Yet, even though the 'hypocritical' US, while shielding its crimes from scrutiny in Afghanistan, is the main backer of the South Sudanese court, this tribunal is not widely regarded as a case of double standards.[68]

63 Labuda (n 3).

64 A. Reisinger Coracini, 'Is Amending the Rome Statute the Panacea Against Perceived Selectivity and Impunity for the Crime of Aggression Committed Against Ukraine?' (*Just Security*, 21 March 2023) <justsecurity.org/85593/is-amending-the-rome-statute-the-panacea-against-perceived-selectivity-and-impunity-for-the-crime-of-aggression-committed-against-ukraine/>.

65 Open Society Justice Initiative, *Options for Justice. A Handbook for Designing Accountability Mechanisms for Grave Crimes* (2018) <https://www.justiceinitiative.org/publications/options-justice-handbook-designing-accountability-mechanisms-grave-crimes>.

66 Hazan, 'Hissène Habré, the Little Bird on the Branch, and the Challenges of International Criminal Justice' (2020) *The President on Trial* 393.

67 On jurisdictional overlap between the ICC and DRC tribunal, *see* Labuda, 'Applying and "Misapplying" the Rome Statute in the Democratic Republic of Congo' in C. M. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) 408. On the same problems in the Central African Republic, *see* Labuda, 'Institutional Design and Non-Complementarity: Regulating Relations between Hybrid Tribunals and Other Judicial Institutions', in K. Ainley and M. Kersten (eds), *Hybrid Justice: Innovation and Impact in the Prosecution of Atrocity Crimes* (OUP 2025) 103.

68 Gramer and Lynch, 'U.S. Quietly Gives Up on South Sudan War Crimes Court' *Foreign Policy* (2021) <foreignpolicy.com/2021/07/20/south-sudan-war-crimes-court-state-department-africa-biden-human-rights/>.

The selective nature of double standards critiques is best illustrated by two other cases – Syria and Palestine. No comparable critiques of double standards accompanied the West's (then) unprecedented and disproportionate focus – to the exclusion of crises elsewhere, including Ukraine – on crimes in Syria, which included an ad hoc investigative mechanism and proposals for an ad hoc tribunal for atrocity crimes.[69] While an ad hoc tribunal would only be necessary because China and Russia blocked a Security Council referral of Syria to the ICC, few denounced the Chautauqua Blueprint as a case of double standards. Similarly, while a Ukraine-specific tribunal has been widely critiqued, analogous appeals for an ad hoc tribunal for Palestine garner little if, any, criticism. While denouncing double standards vis-à-vis Palestine, Mariniello has pointed to the ICC's inability to prosecute Israeli suspects to justify the idea of an ad hoc tribunal for Palestine.[70] Ultimately, while all international criminal tribunals grapple with selectivity challenges, a special court for Ukraine has prompted uniquely acrimonious debates about double standards, suggesting a certain amount of selective outrage on the part of critics.

Uneven prosecutorial discretion

A longstanding object of study, scholarship on prosecutorial discretion has focused generally on the challenge of selectivity, and – more specifically – the allegiances of defendants, victors' justice, and the choice of situations for investigation by the ICC Prosecutor. Until 2022, ICC-related critiques concentrated on the last issue, especially the question of why the Prosecutor opens investigations in some countries (while leaving others in preliminary examination), as well as the dominance of (African) non-state actors among the defendants.[71] A particular bone of contention has been the ICC Prosecutor's seeming reluctance to investigate or charge suspects from powerful states like the US (in Afghanistan), the UK (in Iraq), Russia (in Georgia or Ukraine), or Israel (in Palestine).[72]

As noted, while selectivity critiques have been a constant feature of scholarship, post-2022 criticisms have increasingly employed the language of double standards to describe at least three areas of ICC prosecutorial practice: (1) (preventative) statements; (2) standards for arrest warrants; and (3) allegiance of suspects. All three issues are connected, albeit in different ways, to allegations that imply preferential treatment of Ukraine relative to other cases and/or discriminatory treatment of Palestine relative to other cases.

Soon after the 2022 invasion, questions emerged about the Prosecutor's repeated press releases about his activities in Ukraine, with critics arguing such statements exceeded the attention dedicated to other ICC situations. After 7 October 2023, the

69 The Chautauqua Blueprint for a Statute for Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes. B. Van Schaack, *Imagining Justice for Syria: Water Always Finds Its Way* (Leiden University 2020) 1–43.

70 Mariniello (n 40).

71 Mégret, 'Is the ICC Focusing Too Much on Non-State Actors?' in M. M. deGuzman and D. M. Amann (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas* (OUP 2018) 173.

72 Ambos (n 9).

Prosecutor's earlier statements on Ukraine and his perceived silence on Palestine invited regular charges of double standards from mainstream and specialist commentators.[73] Even after Khan issued a first warning on Palestine on October 30, some observers insisted a double standard still existed because of a lack of more regular warnings, which were often contrasted with Khan's more frequent statements on Ukraine.[74] Few critiques sought to contextualise the OTP's practice of (preventative) statements, which has fluctuated considerably under the first, second, and third prosecutors. Indeed, while the OTP had issued preventative statements and annual updates on preliminary examinations for over a decade, Khan signalled shortly after taking office that he would depart from his predecessors' practice altogether. While there is still no empirical appraisal of how or why the OTP handles statements on its activities, the most striking aspect of Khan's post-2022 practice has been that, as far as Ukraine *and Palestine* are concerned, these two situations have featured far more warnings from the ICC Prosecutor. It remains unclear why this is the case.

Another set of perceived double standards concerns the Prosecutor's approach to requesting arrest warrants, with some scholars arguing the OTP had adopted a new, more stringent evidentiary standard for warrants in Palestine – a 'realistic threshold' for convictions – relative to applications for warrants elsewhere, especially in Georgia or Ukraine.[75] As Shawan Jabarin and Ahmed Abofoul speculated, the realistic standard 'seems – concerningly – more about pragmatism and realpolitik, rather than about the law itself'.[76] Reflecting on the discrepancy, Shane Darcy noted:

> I haven't seen evidence that's the standard that was applied in applying for arrest warrants in Georgia or [Ukraine] . . . I'm curious as to whether he is setting himself up not to be able to issue an arrest warrant in some ways.[77]

Few critics have applied the same insights to examine OTP practice or to critique the absence of warrants elsewhere, with Ukraine often serving as the sole point of comparison to expose perceived double standards. Equally important, while Khan's

73 Egian and Rabbani (n 39); Mariniello (n 40); S. Jabarin and A. Abofoul, 'We are Witnessing a Genocide Unfolding in Gaza: To Stop it, the ICC Prosecutor Must Apply the Law Without Fear or Favour' (*Opinio Juris*, 24 November 2023) <https://opiniojuris.org/2023/11/24/we-are-witnessing-a-genocide-unfolding-in-gaza-to-stop-it-the-icc-prosecutor-must-apply-the-law-without-fear-or-favour/>.

74 Euro-Med Human Rights Monitor (n 42). For a pre-2023 request for preventative statements (without comparisons to Ukraine), see Open Letter to the Prosecutor of the International Criminal Court: Civil Society Organisations Call on Prosecutor to Investigate and Deter Crimes in Palestine, 23 November 2022 <alhaq.org/cached_uploads/download/2022/11/28/letter-to-icc-prosecutor-mr-karim-a-a-khan-kc-23-november-2022–1669624469.pdf>.

75 Mariniello (n 40).

76 Jabarin and Abofoul (n 5).

77 Anderson (n 38).

separate decision to obtain an external panel of experts to validate his applications for warrants against two Israeli and three Hamas leaders was welcomed by many observers, some critics pointed to the same report to denounce a double standard in that no analogous external validation had taken place for any warrant applications anywhere else.[78]

The third set of critiques relates to the allegiance of suspects targeted for prosecution. While concerns about prosecutions of some parties to a conflict (but not others) is a staple of international criminal law critique, it has featured sporadically in regard to the Ukraine investigation – most observers have accepted the ICC's one-sided case docket due to the grossly disproportionate violations attributable to Russia[79] (interestingly, while denouncing the ICC's double standards, Russia seems to have rarely argued for ICC prosecutions of Ukrainian suspects).[80] Yet, while no commentators seem to have critiqued the OTP for charging only Russian suspects *within* the Ukraine investigation, applications for warrants against Putin and other senior Russian commanders have elicited much debate over double standards relative to alleged crimes committed by other leaders *outside* the Ukraine situation.

Equally important, controversy about the allegiance of suspects *within* a single situation have come back with a vengeance in Palestine. Initially, many critics warned the Prosecutor would only prosecute Hamas, but that no prosecutions of Israeli would be possible.[81] After the Prosecutor's request for warrants against the three Hamas and two Israeli leaders, followed by the issuance of warrants for the two Israeli suspects and one remaining Hamas member, both sides have made allegations of double standards, framed usually as an unjustified 'equivalence of blame'.[82] Whereas Israeli allies have condemned what they perceive as the unjustified equation of allegations against a democratic country's leaders with terrorism,[83] advocates of the Palestinian cause have argued the simultaneous arrest warrants artificially equate the less serious crimes of Hamas with Israel's genocidal violence against Palestine as such.[84] In short, not only do both sides see double standards

78 J. Kern and A. Herzberg, 'The OTP's Expert Panel in the Situation in the State of Palestine: Additional Safeguard or Hostage to Fortune?' (*EJIL:Talk!*, 7 June 2024) <ejiltalk.org/the-otps-expert-panel-in-the-situation-in-the-state-of-palestine-additional-safeguard-or-hostage-to-fortune/>.

79 Kersten, 'It's in Ukraine's Interest to Prosecute Its Own Alleged Crimes' *Al Jazeera* (2022) <aljazeera.com/opinions/2022/6/10/its-in-kyivs-interest-to-investigate-war-crimes-by-ukrainians>.

80 'After Arrest Warrant for Putin, Russia Opens Case Against ICC' *Al Jazeera* (March 20, 2023) <https://perma.cc/8RC6-HFHV>.

81 M. Nashed and Z. Al Tahhan, '"Alarming": Palestinians Accuse ICC Prosector of Bias After Israel Visit' (*Al Jazeera*, 9 December 2023) <https://www.aljazeera.com/features/2023/12/9/alarming-palestinians-accuse-icc-prosecutor-of-bias-after-israel-visit>.

82 J. H. Anderson, 'Behind the Scenes of the ICC's Coup d'Eclat' (*Justice Info*, 21 May 2024) <justiceinfo.net/en/132173-behind-the-scenes-the-icc-prosecutor-coup-declat.html>.

83 Editorial Board, 'The International Criminal Court Is Not the Venue to Hold Israel to Account' *Washington Post* (2024) <washingtonpost.com/opinions/2024/11/24/israel-hamas-gaza-icc-arrest-warrants-international-criminal-court/>.

84 A. Sayed, 'Reading the ICC Prosecutor's Statements on Palestine from the Global South' (*TWAIL-Review*, 24 May 2024)<twailr.com/reading-the-icc-prosecutors-statements-on-palestine-from-the-global-south/>.

in the same act, the very fact of both sides being targeted is said to amount to the double standard of 'bothsides-ism'.

Beyond the widespread allegations of double standards in regard to the ICC's post-2022 prosecutorial practice, some scholars have sought to contextualise Khan's and the ICC's practice and have reached nuanced findings. Adil Haque has argued persuasively that Israel and other states' challenge to the arrest warrant applications in the Palestine situation was without merit.[85] Ward Ferdinandusse suggests the absence of ICC warrants in the pre-2022 phase of the Ukraine inquiry was due to the absence of big fish on the OTP's radar, and that the unavailability of evidence may have influenced the OTP's choices.[86] Kersten concludes persuasively that Khan's earlier decision to de-prioritise certain crimes, namely those of US nationals, within the Afghanistan situation amounts to a double standard.[87] However, probing inquiries into OTP choices have often been sidelined in the post-2022 phase, with many commentators rushing to judgment about real or perceived double standards in the ICC's practice.

Uneven state support for enforcement

The last set of critiques focuses on state behaviour. In addition to uneven financial support for ICC investigations, many states' positions, especially from the West, on accountability for crimes in Ukraine have been scrutinised for inconsistencies. Many critics have emphasised states' uneven political support, including the 2022 mass referral of the situation in Ukraine to the ICC. Especially the US's newfound enthusiasm for the ICC, including cooperation with the Prosecutor's investigations, was critiqued due to its continued non-member status. Others emphasised the Eurocentricity of international criminal law, especially European states' greater interest in the suffering of European victims in Ukraine. Some observers likewise pointed to some states' lack of concern with arrest warrants for Putin, even though the same governments had previously been critical of the ICC's jurisprudence on immunities of heads of states.

A. Spadaro, 'The ICC Arrest Warrants in the Palestine Situation: Double Standards, Limitations and Opportunities' (*NUS Center for International Law*, 11 December 2024) <cil.nus.edu.sg/blogs/the-icc-arrest-warrants-in-the-palestine-situation-double-standards-limitations-and-opportunities/>. See also Karim Khan's response, 'ICC Chief Prosecutor Denies Equating Israel with Hamas' *iTV News* (2024) <i24news.tv/en/news/israel-at-war/artc-icc-chief-prosecutor-denies-equating-israeli-actions-in-gaza-with-hamas>.

85 A. A. Haque, '"With Utmost Urgency": Arrest Warrants and Amicus Observations at the International Criminal Court' (*Just Security*, 9 September 2024) <justsecurity.org/99916/icc-utmost-urgency-arrest-warrants/>.

86 W. Ferdinandusse, 'Kooijmans Lecture 2024: International Criminal Law in Times of Turmoil' (*International Law Blog*, 4 June 2024) <internationallaw.blog/2024/06/04/kooijmans-lecture-2024-international-criminal-law-in-times-of-turmoil/>.

87 M. Kersten, 'Double Standards on Accountability Must Be Called out and Resisted, No Matter Who Pushes Them' (*Justice in Conflict*, 4 December 2023) <justiceinconflict.org/2023/12/04/double-standards-on-accountability-must-be-called-out-and-resisted-no-matter-who-pushes-them/>.

Not all post-2022 allegations of state inconsistency are equally persuasive, as various factors may explain – and potentially justify – certain states' (renewed) interest in international criminal accountability. For instance, many post-2022 critiques ignore that Western states exhibited no pro-Ukraine 'favouritism' after Russia's initial intervention in 2014, even though Russia's violations were the same (an illegal use of force followed by annexation) or similar (allegations of war crimes and crimes against humanity in eastern Ukraine). After 2014, no state referred the situation to the ICC for investigation, which extended Bensouda's preliminary examination (a fact criticised repeatedly by NGOs),[88] and aggression trials at the international level were never mooted. As explained elsewhere, despite allegations of double standards in Ukraine's favour, the factual record between 2014 and 2022 demonstrates that Ukraine benefited from no 'special regime', 'Eurocentric bias', or systemic 'racial preference', and some facts point in the opposite direction, with Bensouda refusing to open an investigation in Ukraine after the legal criteria had been met – contrary to examinations in Georgia or Afghanistan.[89]

Nevertheless, allegations of double standards have come back with a vengeance after October 2023, with most critiques focused on Western states' inconsistent reactions to the Ukraine and Gaza wars. Examples of inconsistency that seem to amount to clear double standards include US threats to sanction the ICC for issuing warrants against the Israeli leadership (while simultaneously supporting investigations against Russian suspects),[90] France's suggestion it must respect Netanyahu's immunity as head of government (while simultaneously arguing the contrary in regard to Putin),[91] and statements by ICC States Parties that implied a lack of commitment to the Rome Statute in light of the Prosecutor's progress in the Palestine situation, including Germany's uncritical defence of Israel as *Staaträson*[92] or Hungary's public announcement it would not enforce the warrant against Netanyahu.[93] There is little information in the public record that could explain and potentially justify the differentiated treatment of identical factual situations – on the contrary, allegations of inconsistent behaviour amounting to double standards seem fully

88 N. Volkova, 'Delays in Initiating an ICC Investigation in Ukraine Leave Victims in Limbo' (*Amnesty International*, 6 August 2021) <hrij.amnesty.nl/delays-in-initiating-an-icc-investigation-in-ukraine-leave-victims-in-limbo/>.

89 Labuda (n 8).

90 Goldston, 'Don't Let Gaza Be Another Example of International Criminal Court Double Standards' *Politico* (2023) <politico.eu/article/dont-let-gaza-conflict-be-another-example-international-criminal-court-icc-double-standards-ukraine/>.

91 C. Eboe-Osuji, 'France's Gravely Mistaken View on Immunity at the International Criminal Court' (*Lawfare*, 5 December 2024) <lawfaremedia.org/article/france-s-gravely-mistaken-view-on-immunity-at-the-international-criminal-court>.

92 K. Ambos and others, 'Without Fear or Favour. For an Effective International Criminal Court' (*Verfassungsblog*, 14 June 2024) <verfassungsblog.de/without-fear-or-favour/>.

93 Henley, 'Hungary Invites Netanyahu to Visit as World Leaders Split over ICC Arrest Warrant' *The Guardian* (2024) <theguardian.com/world/2024/nov/22/hungary-invites-netanyahu-to-visit-as-world-leaders-split-over-icc-arrest-warrant>.

justified in that the US, France, Germany, or Hungary have openly ignored legal standards to rationalise their behaviour.

However, not all critiques levelled against states are equally persuasive. For instance, some states' interventions at the ICC aimed at preventing warrants against Israeli suspects based on dubious jurisdictional grounds have been criticised, but it is less clear whether use of legal processes and unconventional interpretations of norms should always be viewed as a double standard per se. Relatedly, beyond the existence of patent double standards in some Western and European states' positions on Israel-Palestine, critics have paid less attention to the inconsistencies of some non-Western states in responding to Ukraine and Gaza, with South Africa expressing reservations about Putin's arrest warrants but seemingly abandoning the AU's longstanding position on the continued applicability of the troika's immunities at the ICC after the arrest warrant against Netanyahu. As with Western states, some Global South actors seem to have sacrificed legal standards on the altar of political expediency.

Debating double standards: unveiling inconsistencies and irreconcilable assumptions in the search for consistency

The post-2022 accountability landscape has raised important questions about the consistency of justice efforts for serious crimes. Most compelling appear to be concerns about states' unprincipled and opportunistic support for accountability, especially powerful Western governments' ability to influence the ICC's judicial independence and prosecutorial priorities. This risk includes not only coercive measures like US-sponsored sanctions or refusals to enforce lawful arrest warrants, but also softer measures, such as an over-reliance by the Prosecutor on voluntary contributions, for instance by earmarking funding or seconding personnel to specific investigations, which could create a multi-tiered justice system over time.

At the same time, some post-2022 critiques of double standards, especially as regards Ukraine-related accountability initiatives, encounter factual, logical and normative problems when subjected to scrutiny. While many European countries seem to have prioritised accountability for Russia's 2022 invasion, it is not always clear who and what types of behaviours are critiqued, and – to the extent differentiated responses to crimes eventuate – whether disparities amount to double standards. The next section unpacks some implicit assumptions and inconsistent arguments embedded in critiques of inconsistency, which in turn shape conclusions about the existence (or not) of double standards.

Perpetrator- or victim-centric (double) standards?

One would have to go back to the mid-1990s – the creation of the Rwanda and Yugoslav ad hoc tribunals, and the negotiations on the Rome Statute[94] – for

94 Kaleck (n 9) 113.

evidence of similar mobilisation around accountability as in Ukraine (efforts to bring justice to Syria or Myanmar in the 2010s also deserve mention). However, post-2022 critiques, especially calls for more attention to non-European conflicts and victims, are at odds with the previous decade of Africa-centric critiques. During this time, international criminal law was critiqued for its excessive focus on Africa – albeit on different grounds. Geographically, the dominant charge was that international tribunals unduly 'criminalised' Africa and Africans, including accusations of Western 'judicial imperialism'.[95] Yet, after 2022, the ICC purportedly gives too little attention to non-European contexts, reflecting Eurocentric or discriminatory biases about who counts as a victim.

This framing is odd for several reasons. Whereas critics previously emphasised the race of ICC suspects (almost all of whom have been black),[96] and derided attempts to portray Africa-centric investigations as privileging victims of colour,[97] the war in Ukraine has seen a reversal of assumptions as critics suddenly emphasised the race of (European) victims but ignored the identity of future defendants. As will be explained later, this pivot from 'too much Western-dominated ICC in Africa' to 'too little Western support for non-Europeans' epitomises a reductionist Eurocentric worldview of agency in international criminal law; equally important, critique seems to have shifted from exposing the ICC's downsides for conflict-affected societies, including an over-emphasis on carceral logics as a disciplining tool for perpetrators, to uncritically bemoaning the absence of prosecutions outside of Europe. After all, post-2022 justice initiatives in Ukraine come against the backdrop of persistent (and well-founded) critiques of the ICC's performance in African states. While scholars interpret events differently, emphasising African agency vis-à-vis The Hague, the neo-colonial logic of ICC interventions in Africa, or the authoritarian side-effects of domestic accountability efforts, there is general agreement that two decades of 'distant justice' on the African continent are underwhelming.[98] Yet the ICC, which in 2020 went through a holistic independent review on account of its failings, has suddenly re-emerged as an unadulterated good, which disproportionately benefits Ukrainians.[99]

95 T. Murithi, *Judicial Imperialism: Politicisation of the International Criminal Justice in Africa* (Fanele 2019).

96 Although is a tendency to equate African with black, suspects from Libya and Sudan do not map neatly onto a white-black racial binary.

97 Iyi, 'Is International Criminal Justice the Handmaiden of the Contemporary Imperial Project? A TWAIL Perspective on Some Arenas of Contestations' in F. Jeßberger, L. Steinl and K. Mehta (eds), *International Criminal Law – A Counter-Hegemonic Project?* (T.M.C. Asser Press 2023) vol. 31, 13, at 27.

98 For these contrasting narratives, *see* O. Ba, *States of Justice: The Politics of the International Criminal Court* (CUP 2020); K. M. Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press Books 2019). Patryk I. Labuda, *International Criminal Tribunals and Domestic Accountability. In the Court's Shadow* (OUP 2023). Clark (n 33).

99 Final Report, *Independent Expert Review of the ICC and the Rome Statute System* (2020) <https://asp.icc-cpi.int/Review-Court>.

In short, many post-2022 allegations of double standards fail to identify whether they are victim- or perpetrator-centric in nature, which in turn predetermines what evaluative framework will apply to such claims and whether such arguments do, in fact, amount to a double standard in international criminal law. Missing also is a critical stance regarding the benefits and drawbacks of ICC interventions, characteristic of scholarship in the previous decade.

ICC- or state-centric (double) standards?

The pivot from 'too much Western-dominated ICC intervention in Africa' to 'too little Western support for non-European victims' operationalises not just a simplistic victim-perpetrator binary, in which Ukrainians benefit from privilege while non-Europeans inevitably suffer harm; equally important, much post-2022 critique fails to identify who is responsible for the purported double standards in treatment between Ukraine and 'others'. While commentators often critique double standards generally, examination of specific claims reveals important differences, on the one hand, between states, and on the other, the ICC. Governments have indeed, at times, taken inconsistent positions on accountability, some of which amount to double standards, but the same seems less true for the ICC. In fact, few claims about the ICC, including the Prosecutor's, double standards stand up to scrutiny, insofar as double standards are understood as distinct from selectivity.

As noted previously, the Prosecutor must carry out his mandate in conformity with the Rome Statute, which imposes jurisdictional and procedural constraints that prevent the equal treatment of all cases. Equally important, many post-2022 claims of double standards levelled at either the Prosecutor or the ICC's judges fail to identify benchmarks for assessing claims of inconsistent behaviour – to take one example, whereas critics sometimes insist the Prosecutor has 'privileged' Ukraine with 'speedy' investigations relative to his 'slow' progress on Palestine, this purported double standard ignores over 20 years of prosecutorial practice at the ICC, where various other countries, especially in Africa, have 'benefited' from far speedier investigations than either Ukraine or Palestine. There are two problems. First, most post-2022 claims about ICC double standards, which would require the *unjustified* differentiated treatment of alike cases, fail to identify a pool of 'alike cases' beyond superficial comparisons between Ukraine and Palestine.[100] Second, left unaddressed in most post-2022 debates are complex questions of whether the Prosecutor should in fact be required to spend the same amount of time on all investigations and/or arrest warrants, regardless of complex issues of evidentiary thresholds for warrants, which depend to a large extent on the Prosecutor's access to such evidence (here, too, results depend largely on state cooperation).

100 Smeulers, Weerdesteijn and Hola, 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the Otp's Performance' (2015) 15 *International Criminal Law Review* 1. ('We conclude that given the ICC's limited jurisdictional reach, the Prosecutor is generally focusing on the gravest situations where international crimes are supposedly committed').

This brings us to the second set of double standards claims, namely state behaviour in regard to accountability for international crimes. As noted previously, some governments have responded in differentiated ways to accountability demands from Ukraine, Palestine, and elsewhere – in some cases without an adequate justification for the differentiated treatment, amounting to clear double standards. The most striking cases of such double standards are France's claim that the Israeli prime minister enjoys immunity – but the Russian president does not – from arrest pursuant to an ICC warrant, or claims that 'democratic' countries, like Israel, should be held to different standards, which fail to offer any relevant legal justification based on political regime type.[101]

A few additional elements stand out from the above review of post-2022 claims of states' double standards. First, most critiques of double standards fail to differentiate between inconsistent behaviour on the part of ICC States Parties and non–States Parties. Whereas the unjustified inconsistencies of the US are often cited as egregious examples of double standards, it is worth pondering whether non–States Parties' inconsistent behaviour should be considered 'graver' than ICC Member States' inconsistencies. Second, critique has focused on the inconsistencies of so-called Western states, which in turn raises questions about whether selective attention to inconsistencies may amount to a double standard itself.[102] To take one example, while France's immunities flip-flop does amount to a double standard, South Africa's flip-flop on head of state immunity appears very similar yet has received less attention. The most persuasive explanation of these scholarly attention disparities is that critique of double standards is targeted at more powerful actors within the international criminal justice system, on the premise that such actors have more freedom of action to adjust their behaviour to conform with principles. It is worth pondering to what extent this (selective) assumption about the types of double standards that merit scholarly condemnation is persuasive or, alternatively, may amount to a double standard in its own right.

Critique of Eurocentricity or Eurocentric critique?

The dominant critique of post-2022 Ukraine-related accountability, namely the pivot from ICC *qua* anti-African court targeting perpetrators of colour toward a Eurocentric system catering to white victims, suffers from reductionist assumptions. As explained elsewhere, mental maps structuring the discourse around Ukraine *qua* 'European', 'Western', 'privileged', 'white', and 'Global North' misunderstand the context of Ukraine's post-colonial resistance and inadvertently

101 M. Jorgensen, 'A "Democratic Exception" to ICC Jurisdiction: The Law and Politics of Double Standards' (*Verfassungsblog*, 6 December 2024) <verfassungsblog.de/exception-to-icc-jurisdiction/>.

102 Jabarin and Abofoul (n 5). International Crisis Group, 'The Conflicts Competing for Attention at the United Nations' (*ICG*, 31 October 2024) <crisisgroup.org/global/conflicts-competing-attention-united-nations>.

legitimise selective enforcement on the part of non-Western states who view Russian aggression as a 'European problem'.[103] Equally important, such critiques proceed on the (Eurocentric) assumption that that the main obstacle to accountability outside Europe is the lack of sufficient interest from European and Western actors.

The latter assumption is hard to square with the reality of anti-ICC backlash in Africa and beyond. Non-Western critics have denounced not only the ICC but also European-led universal jurisdiction prosecutions as tools of Western hegemony while simultaneously advocating alternative accountability mechanisms grounded in local cultures.[104] There is no indication that Global South actors, despite their persistent (and sometimes accurate) claims of double standards levelled at European and Western states, view the lack of Western-led accountability as their primary concern. From Myanmar to the AU, many non-Western governments still support immunities for senior officials and criticise non-African exercises of universal jurisdiction.[105]

Going forward, critics should address some facts more honestly: since Ukrainian victims benefited from no favourable protection or disproportionate attention for over eight years after 2014, how does one reconcile pre-2022 Africa-centric critiques with the emerging post-2022 critiques of Eurocentricity and preferential treatment for Europeans? How does critique pivot from the ICC as a form of 'neo-colonial judicial intervention' under the guise of human rights to denunciations of 'attention disparities' and, hence, 'too little intervention' in non-European contexts?[106] Lastly, how should one reconcile (valid) claims of double standards against some Western governments with the muted reactions to similarly inconsistent behaviours from Global South states?[107]

Regionalism as aberration or progress?

Post-2022 critique has also applied a selective and reductive lens to the regional dynamics of international criminal law enforcement. Contrary to recent critiques of European

103 W. J. Mpofu, 'Against War: Africa in the World Disorder' (*Africa Is a Country*, 13 March 2023) <africasacountry.com/2023/03/against-war-africa-in-the-new-world-disorder>. *But see* K. Krishnan, 'Kavita Krishnan on "peace" and Ukrainian Liberation' (*Workers Liberty Blog*, 19 November 2022) <workersliberty.org/story/2022-11-19/kavita-krishnan-peace-and-ukrainian-liberation>.

104 On universal jurisdiction, see TRIAL International, 'Universal Jurisdiction Annual Review 2024' (March 2024) <https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf>. Philip Grant, 'Ukraine is Accelerating a Revival of Universal Jurisdiction' (*Justice Info*, 29 November 2022) <justiceinfo.net/en/109532-philip-grant-ukraine-revival-universal-jurisdiction.html>.

105 'Universal Jurisdiction: Jurisdictional Imperialism or Syria's Only Hope for Justice?' <jtl.columbia.edu/bulletin-blog/universal-jurisdiction-jurisdictional-imperialism-or-syrias-only-hope-for-justice>.

106 Iyi (n 96) 28.

107 In this sense, see Kersten (n 86). Eboe-Osuji (n 90).

mobilisation on behalf of Ukraine,[108] no state – Western or non-Western – mobilised in response to Russia's 2014 intervention in eastern Ukraine, while two other regions had previously adopted selective accountability strategies. In 2018, six South and North American states collectively referred the situation in Venezuela to the ICC to spur proceedings against the Maduro regime (from a perpetrator-centric perspective) and to provide justice to Venezuelans (from a victim-centric perspective).[109] In 2014, African stakeholders adopted the Malabo Protocol for a regional African court with jurisdiction over international crimes, which would cater selectively only to African victims and target primarily African perpetrators.[110]

While the motives for the two regional actions diverged substantially – an embrace of the ICC in the former; rejection of the ICC in the latter case – the collective responses on the part of African and American states can be critiqued. Indeed, some have argued the Malabo Protocol was a fig leaf to contest the ICC's authority on the African continent,[111] and questions arise as to why African states, upset at the ICC's 'African bias', did not advocate ICC investigations elsewhere to ensure an equitable distribution of cases across different continents (African states have still not referred any situation against another African state, despite the 2023 Palestine referral).

Yet, while a track record of selective regional enforcement is present both within and across different regional groupings, African and South American actions are rarely analysed in the same register of double standards as post-2022 critiques of Ukraine-related mobilisation. Lest one embrace the Eurocentric assumption that all Europeans bear special responsibility for addressing crimes not only in their region but also around the world, inadvertently replicating a 'white saviourism' mindset, scholars should reflect on the rationales and dynamics of regional accountability responses, and to what extent regional accountability mechanisms are a double standard worthy of denunciation in all cases.[112]

Selectivity or double standards? Double standards or perceptions thereof?

Commentators should also carefully disaggregate the difference between selectivity and double standards. While these terms are often used interchangeably, including

108 Leyh (n 7).

109 ICC-OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Referral by a Group of Six States Parties Regarding the Situation in Venezuela' (27 September 2018).

110 On the Malabo Protocol, *see* C. C. Jalloh, K. M. Clarke and V. O. Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (CUP 2019).

111 M. Du Plessis, 'A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes' (*EJIL: Talk!*, 27 August 2012) <ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>.

112 For a careful differentiation between legitimate critiques of double standards and legitimate concerns for regional security that outweigh absolute equality of treatment of all conflicts, see Kravik (n 5). Former colonial powers may indeed bear a special responsibility toward their former colonies.

by some NGOs,[113] the ICC Prosecutor's selectivity is inherent to the Rome Statute institutional design and may not always be detrimental to the pursuit of impartial justice (contrary to double standards which imply there is no justification for uneven distributions of accountability).

Another important question is whether actual instances of double standards or mere perceptions of double standards should matter in international criminal law. Given that double standards require the absence of justifications for differentiated treatment of persons, crimes, or states, this implies that potential justifications must be assessed according to some agreed-upon benchmark that allows comparisons between like cases. To the extent this benchmark reflects not empirical realities but rather subjective perceptions of those realities, some post-2022 allegations of double standards may veer into the realm of post-truth identity politics, where 'lived experience' substitutes for factual analyses of (real) disparities in international criminal law that require study.[114]

Conclusion

The debate over double standards in international criminal law is impassioned and contentious. Russia's full-scale invasion of Ukraine has been followed by a proliferation of accountability initiatives, including ad hoc support for the ICC and a special aggression tribunal. Yet the 'Ukraine moment', followed by the Gaza war, has also generated intense debate over double standards. For instance, Josep Borrell, the EU high representative for foreign policy, has acknowledged diplomatic challenges, especially among Global South actors, owing to the 'EU's "double standards" in its inconsistent stance on the wars in Ukraine and Gaza'.[115]

This chapter analyses post-2022 developments and concludes that some states' inconsistent actions on accountability do indeed rise to the threshold of double standards. In particular, powerful actors like the US or Germany have taken blatantly inconsistent positions on issues like immunity or jurisdiction that lack any plausible justification. At the same time, some critiques of double standards in Ukraine and Palestine suffer from unclear benchmarks, selective amnesia, and superficial comparisons. Embedded within reductionist mental maps of Ukrainians *qua* 'European' or 'privileged', post-2022 critique has seen an unpersuasive pivot from the ICC *qua* anti-African court targeting perpetrators of colour to a Eurocentric justice

113 Kaleck (n 9) 7–19, 106–10. (conflating double standards and selectivity'). Amnesty International, 'ICC: Key Recommendations: Twenty-Third Session of the Assembly of States Parties to the Rome Statute: 2nd-7th December 2024' IOR 53/8787/2024 (2024) <amnesty.org/en/documents/ior53/8787/2024/en/>. In the same vein, see Goldston (n 9).

114 For an argument the ICC should engage in distributive justice (and hence address perceptions of affected communities) through its prosecutions, see Hafetz (n 9). Contra see Kotecha (n 10).

115 Bir, 'Europe's Responses to Ukraine, Gaza Wars Often Seen as Showing Double Standard: Borrell' *Anadolu Ajansi* (2024) <aa.com.tr/en/europe/europes-responses-to-ukraine-gaza-wars-often-seen-as-showing-double-standard-borrell/3408999>.

system catering to white victims. Going forward, critics should grapple transparently with the assumptions embedded in such dominant double standards critiques: since Ukrainian victims benefited from no favourable protection after 2014, how does one reconcile pre-2022 Africa-centric perpetrator-focused critiques with the emerging post-2022 allegations of Eurocentricity that posit the ICC as an unadulterated good for conflict-affected societies? How does one pivot from critiquing international criminal law as a form of 'neo-colonial judicial intervention' under the guise of human rights only to denounce 'attention disparities' and, hence, 'too little intervention' in non-European contexts?

These questions will require nuanced and substantiated answers in the evolving world order. Drawing on real and perceived claims of double standards, activists and scholars have pushed Western states to hold themselves to the same standards as they demand of others, lest international criminal law lose legitimacy. Yet, while critique of Western states' inconsistencies is necessary, the newly dominant rhetoric of double standards also raises novel questions about the empirical foundations of certain allegations and their function in a post-hegemonic world. In an era of waning Western power and growing multipolarity, regional enforcement may become the norm, for better or worse. Unlike the universal assumptions underpinning the ICC, regionalised responses are by definition selective, which means that evaluations of the fight against impunity may require a different set of benchmarks than had hitherto been the case.

As a result, international criminal lawyers may need to ask more probing questions about the persuasiveness of some dominant double standard claims, and the inconsistent behaviours of both Western and non-Western states. As Human Rights Watch observed in the lead up to the 2024 Assembly of ICC States Parties, '"[d]ouble standards" have been misused in multilateral fora to justify anti-accountability positions, rather than as a call to ensure accountability, regardless of where crimes are committed or by whom'.[116] With some non-Western states generously invoking the charge of Western double standards – but seemingly unwilling to propose alternative standards to replace the Western ones – it remains to be seen how the 'Ukraine moment' redefines international criminal law.[117]

116 Human Rights Watch, Human Rights Watch Briefing Note for the Twenty-Third Session of the International Criminal Court Assembly of States Parties, 18 November 2024. Compare Human Rights Watch (n 31). On the confluence of Western and Third World critiques of the ICC in Trump's first term, *see* R. DeFalco, 'Is Pompeo Unintentionally Helping Out the International Criminal Court?' (*Just Security*, 25 March 2020) <justsecurity.org/69362/is-pompeo-unintentionally-helping-out-the-international-criminal-court/>.

117 Eisentraut (n 4) 17.

10 Towards resilience, security, and recovery

Reshaping post-war environmental legal frameworks

Ievgeniia Kopytsia

Introduction

In an era marked by multiple active conflicts the intersection of warfare and environmental degradation has become increasingly critical. As of 2024, nearly 1 billion people live in fragile and conflict-affected states, while global military spending has reached unprecedented levels of approximately $2.5 trillion annually. This reality, coupled with record-breaking global temperatures exceeding 1.5°C above pre-industrial levels, presents an urgent imperative to address the complex interplay between armed conflicts and environmental security.

The Russian War against Ukraine has laid bare the vulnerabilities of international systems in addressing the multiple crises of armed conflict, ecological destruction, and climate change. Beyond its geopolitical and humanitarian dimensions, the war has inflicted severe environmental damage, creating cascading impacts that extend far beyond Ukraine's borders. While any armed conflict poses significant environmental challenges, this war has exposed unprecedented gaps in international environmental governance and legal frameworks due to its distinctive combination of industrial-scale risks, climate policy contexts, modern monitoring capabilities, and transboundary impacts. This chapter examines how the war in Ukraine, through its unprecedented scale of documented environmental damage in a highly industrialised, nuclear-powered nation, has revealed critical weaknesses in protecting ecosystems, managing carbon emissions, and ensuring environmental and climate accountability.

While existing international mechanisms provide some environmental protections, they have proved inadequate in addressing the complex environmental consequences of modern warfare. The environmental toll of the conflict – from critical infrastructure destruction to ecosystem contamination – demonstrates the urgent need to modernise legal frameworks and integrate climate considerations into conflict response. Through analysis of Ukraine's green reconstruction efforts, including its commitment to phase out coal by 2035 and achieve climate neutrality by 2050, this chapter evaluates how nations can maintain environmental commitments even during crisis situations. The discussion encompasses emerging international initiatives like the COP28 Declaration on Climate, Relief, Recovery, and Peace, examining their potential to reshape environmental governance in conflict contexts.

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Particular attention is given to how international law must evolve to address the interconnected challenges of environmental damage, climate action, and sustainable post-conflict recovery. By analysing Ukraine's experience with developing climate legal framework and implementing climate policies amid conflict and its efforts to align post-war reconstruction with European Union environmental standards, the chapter provides insights into the practical challenges and opportunities for enhancing environmental resilience in conflict-affected regions.

The analysis demonstrates that modernising international legal frameworks is crucial for both environmental protection and sustainable peacebuilding, highlighting how climate and environmental security have become fundamental to broader peace and security objectives. Building on lessons from Ukraine, the chapter proposes specific legal and institutional innovations that would enhance international capacity to address environmental and climate challenges not only in conflict-affected regions but across all nations, recognising that environmental security and climate resilience are global imperatives that transcend national boundaries and require coordinated international action in an era of interconnected security risks.

The evolution of environmental and climate security paradigms in modern conflicts: shifting theoretical frameworks

The concept of environmental security in armed conflicts has undergone significant transformation over the past century, evolving from basic considerations of environmental damage during warfare to complex assessments of climate impacts and ecosystem resilience.[1]

This section will analyse the evolution of environmental and climate security paradigms in modern conflicts through a comprehensive case study of the Russia-Ukraine War, examining the shifting theoretical frameworks that have shaped our understanding of environmental dimensions in contemporary armed conflicts.

Historical development of environmental protection in armed conflicts

Historically, traditional approaches to environmental protection during armed conflict centred on narrow considerations of property damage and resource preservation.[2] This limited conceptualisation, primarily focused on visible damage to natural resources and agricultural lands, reflected the broader humanitarian law framework of the early 20th century, where environmental concerns were largely incidental to human protection.[3]

1 Report of the International Law Commission, Sixty-third session (2011) UN Doc A/66/10, para 365.

2 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (CUP 2005) 143.

3 Erik V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict* (Hart 2008) 309.

The post–World War II period marked a significant shift in understanding environmental impacts of warfare. The development of nuclear weapons and their devastating environmental consequences led to the first serious considerations of long-term environmental damage in military planning.[4] The Vietnam War, particularly through the widespread deployment of Agent Orange and other defoliants, catalysed the development of specific international legal instruments for environmental protection.[5] This led to the development of the 1976 Environmental Modification Convention (ENMOD), establishing prohibitions on environmental modification techniques as warfare means,[6] and the Additional Protocol I to the Geneva Conventions, which introduced specific provisions (Articles 35 and 55) prohibiting warfare causing "widespread, long-term and severe damage to the natural environment."[7]

The 1990–91 Gulf War further exposed the inadequacies of existing legal frameworks when Iraq's systematic destruction of Kuwait's oil infrastructure caused unprecedented environmental devastation, resulting in environmental damage claims of USD 85 billion.[8] This crisis prompted a pivotal 1992 United Nations General Assembly debate, culminating in Resolution 47/37, which established new parameters for environmental protection during armed conflicts and mandated the integration of environmental provisions into military protocols.[9] In response to these developments, the International Committee of the Red Cross (ICRC) formulated comprehensive guidelines in 1994, codifying existing international rules for environmental protection during armed conflicts.[10] However, subsequent conflicts continued to demonstrate the limitations of existing frameworks. The Kosovo conflict of 1999 revealed the environmental consequences of targeting industrial infrastructure,[11] while the 2006 conflict between Israel and Lebanon, resulting in massive Mediterranean Sea contamination, further illustrated the transboundary nature of environmental warfare impacts.[12]

The conceptualisation of environmental security during armed conflicts has significantly evolved since its formal recognition by the International Law Commission. In 2011, the Commission formally included 'Protection of the environment in relation to armed conflicts' in its long-term programme of work, marking a

4 Report of the Special Rapporteur, Preliminary Report (A/CN.4/674) [2014].

5 Arthur H. Westing, *Ecological Consequences of the Second Indochina War* (Stockholm International Peace Research Institute 1976) 21–39.

6 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151.

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

8 UNCC Governing Council Decision 7 [1991] S/AC.26/1991/7/Rev.1.

9 UNGA Res 47/37 (25 November 1992) UN Doc A/RES/47/37.

10 International Committee of the Red Cross, 'Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict' (1994).

11 UN Environment Programme, 'Environmental Consequences of the Kosovo Conflict' (1999).

12 UN Environment Programme, 'Lebanon: Post-Conflict Environmental Assessment' (2007).

crucial step in codifying environmental protections during conflicts.[13] The appointment of Marie G. Jacobsson as Special Rapporteur in 2013 led to a comprehensive examination of applicable environmental rules and principles,[14] culminating in the 2022 adoption of 27 draft principles on the protection of the environment in relation to armed conflicts (PERAC), providing a framework spanning pre-conflict, conflict, and post-conflict phases.[15]

The emergence of climate security as a military concern represents the most recent evolution in this trajectory. Military planners increasingly recognise climate change as a threat multiplier, capable of exacerbating existing conflicts and creating new security challenges.[16] This has necessitated comprehensive integration of environmental and climate considerations into military planning, particularly regarding infrastructure resilience and operational sustainability.[17]

The Russia-Ukraine War as a paradigm shift

The Russia-Ukraine War represents a fundamental shift in understanding environmental and climate security in modern conflicts, challenging existing legal and institutional frameworks. Unlike historical conflicts predominantly occurring in less industrialised regions, this war is unfolding in a highly sophisticated technological landscape characterised by complex nuclear, chemical, and industrial infrastructure. This context generates environmental risks of unprecedented complexity and scale, extending far beyond traditional military-environmental concerns.[18]

The presence of nuclear power plants in active conflict zones, particularly the Zaporizhzhia nuclear power plant, has created new categories of environmental risk that existing frameworks struggle to address.[19] As documented by the International Atomic Energy Agency, these circumstances have forced a fundamental reevaluation of environmental security protocols and emergency response capabilities in conflict situations.[20] The war's impact on industrial infrastructure has further exposed critical vulnerabilities in environmental protection systems, particularly in regions with complex chemical and manufacturing facilities.[21]

13 UNGA Res 66/98 (9 December 2011).

14 International Law Commission, 'Report of the International Law Commission' (2013) UN Doc A/68/10, para 167.

15 International Law Commission, 'Protection of the Environment in Relation to Armed Conflicts: Text and Titles of the Draft Principles Adopted by the Drafting Committee on Second Reading' (27 May 2022) UN Doc A/CN.4/L.968.

16 US Department of Defense, 'Climate Risk Analysis' (2021).

17 NATO, 'NATO Climate Change and Security Action Plan' (2021).

18 Daniel Hryhorczuk and others, 'The environmental health impacts of Russia's war on Ukraine' (2024) 19 *Journal of Occupational Medicine & Toxicology* 1.

19 IAEA, 'Nuclear Safety, Security and Safeguards in Ukraine' (IAEA) https://www.iaea.org/topics/response/nuclear-safety-security-and-safeguards-in-ukraine accessed 13 December 2024.

20 ibid.

21 Hryhorczuk and others (n 18).

Meanwhile, modern technological capabilities have revolutionised environmental damage monitoring in conflict zones, with Ukraine becoming a proving ground for these advanced monitoring systems.[22] The integration of satellite imagery, remote sensing technologies, and real-time environmental monitoring systems has enabled unprecedented documentation of warfare's ecological impact, suggesting a transformative approach to environmental security in conflict zones.[23] This demonstrated the potential for real-time, comprehensive environmental monitoring that can provide immediate documentation of ecological damages, support potential future legal claims, and create unprecedented levels of transparency in understanding the environmental consequences of military actions. However, current legal mechanisms remain inadequate for effectively utilising this evidence.

Environmental degradation in Ukraine: patterns of modern conflict-related ecological damage

The environmental destruction caused by the war in Ukraine presents a stark reminder of the profound ecological consequences of armed conflict, inflicting both immediate and lasting effects. The contamination of approximately 2.4 million hectares of agricultural land with unexploded ordnance has rendered vast areas unsuitable for cultivation, undermining global food security.[24] The systematic targeting of energy infrastructure has resulted in the destruction of 13 gigawatts of capacity, crippling the nation's energy sector and necessitating costly, resource-intensive rebuilding efforts.[25] Perhaps most emblematic of the war's ecological toll was the deliberate destruction of the Kakhovka Dam in 2023, which caused catastrophic flooding, disrupted wetland ecosystems, and created long-term environmental challenges for the Dnipro River basin.[26]

These direct impacts have triggered cascading effects throughout regional environmental systems, creating complex chains of environmental degradation that

22 Wim Zwijnenburg and Ollie Ballinger, 'Protecting the Environment in Armed Conflict: Leveraging Emerging Technologies to Enable Environmental Monitoring and Accountability in Conflict Zones' (2023) 105(924) *International Review of the Red Cross* 1497.

23 In 2022, the Ukrainian government launched EcoZagroza, a digital platform and mobile application designed to document environmental crimes committed during armed conflict. By monitoring environmental indicators (air quality, water, and soil conditions) and enabling citizens to report environmental incidents such as military equipment burning, forest fires, oil spills, toxic substance leaks, and hazardous air emissions, EcoZagroza aims to facilitate both immediate environmental response and future documentation of environmental damage for post-conflict restoration and reparations. See: Ministry of Environmental Protection and Natural Resources of Ukraine, 'EcoZagroza' <https://ecozagroza.gov.ua/en> accessed 13 December 2024.

24 Peter Alexander and others, 'The Russia–Ukraine War and Global Food Security: A Seven-Week Assessment' (2023) *SSRN Electronic Journal* <https://doi.org/10.2139/ssrn.4387213>.

25 International Energy Agency, 'Ukraine's Energy Security and the Coming Winter' (*IEA*, 2024) <https://www.iea.org/reports/ukraines-energy-security-and-the-coming-winter> accessed 10 January 2024.

26 UNCT Ukraine, 'Potential Long-Term Impact of the Destruction of the Kakhovka Dam' (*UNCT Joint Analytical Note*, 9 June 2023).

transcend national boundaries. Air and water pollution have affected neighboring countries, while irreversible caused to wetlands and protected areas has impacted migratory species and regional biodiversity.[27] Additionally, the war has caused significant strain on water resources, with critical infrastructure such as pipelines and reservoirs targeted during military campaigns. The cross-border implications of the conflict's environmental damage have demonstrated the limitations of nation-centric approaches to environmental protection, highlighting the need for regional approaches to environmental protection during conflicts.

The climate impacts of conflict-related emissions have added another layer of complexity to environmental security assessments. It is estimated that the war in Ukraine has generated at least 175 million tonnes of CO_2 equivalent, representing about 0.5% of the global annual carbon emissions and compared to the annual carbon footprint of generating electricity for about 30 million European homes.[28] These climate impacts demonstrate how modern conflicts can have global environmental consequences that extend far beyond the immediate conflict zone, exacerbating global climate crises and highlighting the critical omission of conflict-related emissions from existing international climate accountability frameworks.

Additionally, as documented by the United Nations Environment Programme (UNEP), indirect conflict-related environmental harm can additionally result from the breakdown of governance systems, undermining recovery efforts.[29] In such circumstances, environmental management becomes a secondary concern, leading to severe long-term regional destabilisation and amplifying climate change risks, potentially seeding future conflicts through resource scarcity and economic instability. This intricate relationship means that environmental degradation during conflicts can have generational impacts, transforming ecological challenges into complex security concerns that persist long after direct hostilities have ceased. The breakdown of environmental protections in fragile contexts not only compromises immediate regional stability but also creates systemic vulnerabilities that can destabilise entire ecosystems and communities for decades, making environmental considerations crucial in conflict resolution and post-conflict recovery strategies.

This evolution of environmental security paradigms, illustrated by the Russia-Ukraine War, necessitates a fundamental reconceptualisation of how international law and institutions approach environmental protection during armed conflicts. The following sections will examine the specific limitations of current

27 Hryhorczuk and others (n 18) 4.

28 The figure includes emissions from direct warfare, the destruction of industrial facilities, and emergency response measures like rerouted transportation networks and the displacement of millions of individuals. See: Leonard de Klerk and others, 'Climate Damage Caused by Russia's War in Ukraine: 24 February 2022–23 February 2024' (Initiative on GHG Accounting of War, 2024) <https://drive.google.com/file/d/1YIHwfyGjRKNDlWClfeGkpZGaDWAHxrZr/view> accessed 10 December 2024.

29 United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (UNEP 2009).

legal frameworks and explore potential pathways for addressing these emerging challenges.

Armed conflict and environmental-climate security: analysis of contemporary legal and normative challenges

The scale of environmental damage witnessed during the war in Ukraine has exposed significant gaps in the international legal architecture designed to protect the environment during armed conflicts. While existing frameworks, discussed above, provide some environmental protections, they have proved inadequate in addressing the complex environmental challenges posed by modern warfare. For instance, current international legal mechanisms operate through multiple, often disconnected channels. The Rome Statute of the International Criminal Court recognises environmental damage as a war crime, but only when it is "clearly excessive" relative to military advantage. Meanwhile, customary international humanitarian law provides general environmental protection principles, though their practical application often proves challenging in modern conflicts. The UN Framework Convention on Climate Change (UNFCCC) and related protocols, were primarily elaborated for the peacetime environmental governance, and lack specific provisions for conflict situations.

This section examines the intersection of international humanitarian law, international environmental law, and human rights law, highlighting both the existing gaps and the potential pathways for strengthening environmental-climate security during and after armed conflicts. Furthermore, it addresses the rising concern over climate security and its implications for conflict and peace.

Existing gaps in international legal frameworks

The International Court of Justice (ICJ) in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* recognised that international environmental law and human rights law remain applicable during armed conflict, complementing international humanitarian law (IHL).[30] However, IHL's primary provisions, such Additional Protocol I to the Geneva Conventions (1977) have significant limitations. Articles 35(3) and 55 of the Protocol mention the prohibition of methods of warfare expected to cause "widespread, long-term and severe damage" to the environment without providing clear definitions for these criteria and introducing the high thresholds required for their activation, making them difficult to enforce in practice.

Additionally, the mechanisms for holding the aggressor state accountable for these damages remain fragmented and underdeveloped. For instance, while UNEP has developed guidelines for the protection of the environment during armed conflict, these are not legally binding and rely heavily on state cooperation.

30 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

The lack of comprehensive accountability mechanisms means that perpetrators of environmental harm during conflicts often escape liability, as seen in cases involving environmental destruction in the Balkans and the Democratic Republic of Congo (DRC).[31]

International criminal law provides another avenue for addressing environmental harms during armed conflicts, exemplified by the prosecution of crimes involving environmental destruction, such as the charges against Omar al-Bashir for genocide linked to resource depletion in Darfur.[32] However, significant gaps remain. For instance, Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court (ICC) prohibits damage to the natural environment during international armed conflicts, if such harm is widespread, long-term, and severe, and the military advantage anticipated from such acts is clearly excessive in relation to the damage inflicted.[33] Meanwhile, the terms "widespread," "long-term," and "severe" remain undefined, leading to ambiguity in their interpretation and lack of practical enforceability.

Additionally, a glaring omission in the Rome Statute is the absence of a recognised crime of ecocide, despite decades of advocacy.[34] The inclusion of ecocide as a crime within the Rome Statute could represent a paradigm shift in international law, embedding environmental protection at the core of global justice initiatives. However, achieving this would require significant legal, institutional, and political reforms to ensure its effective implementation and enforcement.[35]

Jus post bellum *and beyond*

The transition from conflict to peace presents distinct challenges for environmental protection and climate security that extend beyond the immediate cessation of hostilities. The concept of *jus post bellum*, or justice after war, provides a crucial framework for addressing environmental harm while considering long-term resilience in post-conflict societies.[36] It underscores the necessity of integrating environmental and climate considerations into post-conflict recovery and includes not only remediation efforts but also mechanisms to prevent future harm.

31 *Prosecutor v Omar Hassan Ahmad Al-Bashir* (ICC-02/05–01/09).

32 ibid.

33 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

34 Proposals to criminalise ecocide have gained traction in recent years, most notably through the efforts of Vanuatu, Fiji, and Samoa, which submitted an amendment proposal to the UN Secretary-General in September 2024. See: Dominic Bertram, 'Should Ecocide Be an International Crime? It's Time for States to Decide' (*EJIL:Talk!,* 2024) <https://www.ejiltalk.org/should-ecocide-be-an-international-crime-its-time-for-states-to-decide/>.

35 The draft principles also emphasise the need for states to cooperate in the management of shared natural resources and the protection of vulnerable populations. See: Steven Freeland, *Addressing Environmental Destruction through International Criminal Law* (Intersentia 2023).

36 Kirsten Stefanik, *The Environment and Armed Conflict: Employing General Principles to Protect the Environment* (Oxford University Press 2017) 94.

Meanwhile, the current legal framework remains inadequately developed, providing limited guidance on environmental restoration obligations and accountability mechanisms. While general principles of international law suggest state responsibility for environmental restoration, specific obligations for cleanup and rehabilitation lack clear definition.[37] Draft principles of PERAC adopted by the International Law Commission, advocate for preventive measures in peacetime, such as environmental risk assessments and weapons reviews; enhanced protection during conflict, including the prohibition of environmentally harmful methods and means of warfare; and post-conflict obligations, including environmental restoration and reparations.[38] While these principles align with international environmental law core tenets, such as the precautionary principle and intergenerational equity, their non-binding nature limits their practical impact.

Additionally, the complexity of environmental systems presents unique challenges for legal enforcement. Establishing clear causal links between military actions and environmental harm is often difficult, particularly when it manifests over extended periods.[39] As highlighted in the UNEP study, environmental damage may not be immediately apparent but can have severe long-term consequences that are hard to predict or prove in legal proceedings.[40] Scientific uncertainty regarding environmental impacts further complicates the application of legal standards requiring clear proof of damage.

Prevention thus emerges as the most effective approach to minimising environmental and climate-related damage. Under Article 36 of Additional Protocol I, states are obligated to conduct legal reviews of new weapons to ensure compliance with international humanitarian law.[41] However, these reviews often fail to adequately consider environmental risks.[42]

Beyond immediate conflict response, post-conflict frameworks present opportunities for addressing environmental and climate-related harms, yet require significant strengthening. While peace agreements can theoretically include provisions for environmental restoration and climate adaptation, such inclusion remains inconsistent and often lacks enforcement mechanisms.[43] Truth and reconciliation commissions could play a vital role in documenting environmental dimensions of conflict, but their mandates rarely extend to environmental matters.[44]

Contemporary conflicts globally underscore the urgent need for robust post-conflict environmental protection frameworks, with the war in Ukraine providing a compelling recent example. Successful environmental restoration requires not only technical measures, such as establishing protected zones and removing

37 United Nations Environment Programme (n 29).
38 International Law Commission (n 15).
39 United Nations Environment Programme (n 29).
40 ibid.
41 Protocol Additional to the Geneva Conventions (Protocol I) (1977).
42 United Nations Environment Programme (n 29).
43 ibid.
44 Stefanik (n 36).

toxic remnants, but also institutional frameworks that ensure long-term environmental governance.[45]

Civil society organisations play a crucial role in this process, as demonstrated by their extensive work in Ukraine.[46] For instance, Centre of Environmental Initiatives Ecoaction, a Ukrainian environmental NGO, has supported numerous local initiatives focusing on climate resilience, sustainable recovery, and nature-based solutions across Ukraine, from biodiversity conservation in Kharkiv Oblast to green reconstruction in Zaporizhzhia.[47] This demonstrates how civil society engagement can effectively integrate environmental protection, climate adaptation, and sustainable development into post-conflict recovery planning. However, these efforts must be supported by stronger legal frameworks and dedicated financial mechanisms to ensure effective environmental recovery and climate resilience in post-conflict settings.[48]

Climate security: the overlooked dimension in international legal frameworks

The escalating climate crisis has reached unprecedented levels, with 2024 marking a historic and concerning milestone as the first calendar year where global temperatures exceeded 1.5°C above pre-industrial levels.[49] This unprecedented warming is further evidenced by record-breaking sea surface temperatures, unprecedented Antarctic sea ice decline, and surging atmospheric CO_2 levels. These developments, coupled with ongoing armed conflicts globally and nearly 1 billion people living in fragile and conflict-affected states,[50] have intensified concerns over climate security,[51] demonstrating the complex interplay between armed conflict, environmental degradation, and climate vulnerabilities.

45 Conflict and Environment Observatory, 'Ukraine Conflict Environmental Briefing: The Climate Crisis' (2022) <https://ceobs.org/ukraine-conflict-environmental-briefing-the-climate-crisis/>.

46 Ukrainian civil society has been advocating for green and sustainable recovery recognising post-conflict reconstruction as a unique opportunity for environmental transformation. See: WWF, 'Civil Society's Commitment to a Sustainable Recovery of Ukraine: A Joint Statement of the Green CSO Community and Call for Collaboration' (10 June 2024) <https://www.wwf.mg/?14041941/A-Joint-Statement-of-the-green-CSO-community-and-call-for-collaboration> accessed 11 December 2024.

47 Ecoaction, 'Green Reconstruction of Ukrainian Communities' (*Ecoaction*, 2023) <https://en.ecoaction.org.ua/green-reconstruction-of-ukrainian-communities.html> accessed 11 December 2024.

48 International Law Commission (n 15).

49 According to Copernicus Climate Change Service, the average global temperature reached 15.1°C, which is 1.6°C above pre-industrial levels, with July 22, 2024, recording the highest temperature ever documented at 17.16°C. See: Copernicus Climate Change Service (C3S), 'Global Climate Highlights 2024' (*ECMWF*, 2024) <https://climate.copernicus.eu/global-climate-highlights-2024> accessed 11 December 2024.

50 International Monetary Fund, 'Fragile and Conflict-Affected States' (*IMF*, 2024) <https://www.imf.org/en/Topics/fragile-and-conflict-affected-states> accessed 11 December 2024.

51 As defined by the United Nations Development Programme, climate security refers to 'the impacts that climate change has on security, encompassing both human security and national security, with implications at the individual, community, national, regional and international levels.'

While the Intergovernmental Panel on Climate Change (IPCC) has long warned that climate change intensifies resource scarcity, displacement, and competition over natural resources, thereby escalating conflict risks,[52] the Russian war against Ukraine has brought these interconnections into sharp focus. The widespread destruction of industrial sites, energy infrastructure, and agricultural systems in Ukraine has not only amplified significant greenhouse gas (GHG) emissions (as mentioned above) but also fundamentally undermined climate resilience and destabilised local ecosystems.[53] These impacts extended far beyond Ukraine's borders, having substantially impacted regional and global emissions and created ripple effects through global energy and food markets, compromising international climate goals.[54]

The legal framework for environmental remediation remains inadequately equipped to address these climate security challenges. While general principles of international law suggest state responsibility for environmental restoration, specific obligations for climate-resilient reconstruction and rehabilitation lack a clear definition.[55] The International Law Commission's draft principles on PERAC provide limited guidance on this critical issue. They mention climate change only once, and merely in passing, acknowledging that "environmental consequences of armed conflicts may be severe and have the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss."[56] Notably, none of the draft principles specifically addresses climate security concerns or provides concrete guidance for addressing climate vulnerabilities in conflict and post-conflict settings.

Legal accountability mechanisms for climate-related damage in post-conflict settings remain limited. Traditional transitional justice mechanisms, such as criminal tribunals and truth commissions, often lack specific mandates to address

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This understanding has become particularly relevant in post-conflict settings, where environmental degradation often intersects with climate vulnerabilities. See: United Nations Development Programme, 'What is Climate Security and Why is it Important?' (*UNDP Climate Promise*, 8 July 2022) <https://climatepromise.undp.org/news-and-stories/what-climate-security-and-why-it-important> accessed 11 December 2024.

52 IPCC, 'Summary for Policymakers' in H Lee and J Romero (eds), *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2023) <https://doi.org/10.59327/IPCC/AR6–9789291691647.001>.

53 For instance, Ukraine's damaged forests and wetlands, critical for carbon sequestration and biodiversity, now face additional threats due to the war's environmental toll. See: Conflict and Environment Observatory, 'Ukraine Conflict Environmental Briefing: The Climate Crisis' (2023) <https://ceobs.org/ukraine-conflict-environmental-briefing-the-climate-crisis/> accessed 10 December 2024.

54 Agricultural disruptions caused by the war have diminished Ukraine's capacity as a global breadbasket, contributing to rising food insecurity in vulnerable regions worldwide; while the destruction of energy infrastructure has led to increased reliance on coal and other fossil fuels, undermining global efforts to mitigate climate change. See: CEOBS (n 53).

55 United Nations Environment Programme (n 29).

56 International Law Commission (n 15).

environmental harm, let alone its climate implications.[57] The Rome Statute's environmental provisions primarily address harm caused during active hostilities, creating gaps in accountability for post-conflict environmental degradation, particularly emissions or other measurable climate impacts. Peace agreements, while offering potential vehicles for addressing environmental and climate concerns, have yet to fully incorporate climate security considerations. While some agreements include provisions for environmental protection and natural resource management, they fail to adequately address long-term climate resilience and adaptation needs.[58] This structural limitation exposes a profound disconnect between conflict resolution frameworks and emerging environmental security challenges.

The United Nations Framework Convention on Climate Change (UNFCCC), which represents the cornerstone of global climate governance,[59] largely perpetuates this accountability deficit by omitting robust mechanisms for tracking military and conflict-related greenhouse gas emissions. In particular, military emissions, which constitute an estimated 5.5% of global greenhouse gas emissions[60] remain excluded from mandatory national reporting requirements. This exemption, originally established during the 1997 Kyoto Protocol negotiations, under the pretext of national security concerns,[61] continues to create a significant regulatory void. The 2015 Paris Agreement's introduction of voluntary reporting options has proven ineffectual, with military emissions remaining largely unaccounted for in international climate reporting. This accountability gap is further compounded by the absence of established methodologies for calculating wartime emissions or achieving consensus on comprehensive reporting frameworks.[62]

57 Matthew Gillett, 'Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict' (2017) 8 *Journal of International Criminal Justice* 3.

58 United Nations Environment Programme (n 29).

59 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

60 Emissions generated through multiple pathways: direct operational emissions from military vehicles, aircraft, and vessels; infrastructure and facilities maintenance; military-industrial complex manufacturing; supply chain and logistics operations. See: S. Parkinson and L. Cottrell, 'Estimating the Military's Global Greenhouse Gas Emissions' (Scientists for Global Responsibility and Conflict and Environment Observatory, November 2022) <https://ceobs.org/wp-content/uploads/2022/11/SGRCEOBS-Estimating_Global_MIlitary_GHG_Emissions_Nov22_rev.pdf> accessed 12 December 2024.

61 National Security Archive, 'Pentagon Insistence, Lodged Over State Department Concerns, Drove Strong U.S. Push to Exclude Military Operations from Climate Treaty' (*George Washington University*, 20 January 2022) <https://nsarchive.gwu.edu/briefing-book/environmental-diplomacy/2022-01-20/national-security-and-climate-change-behind-us> accessed 10 December 2024.

62 The United Nations Environment Programme's 2023 Emissions Gap Report explicitly acknowledges that military emissions "remain insufficiently accounted under UNFCCC reporting conventions," with governments often citing national security or confidentiality concerns to avoid providing disaggregated data. See: United Nations Environment Programme, 'Emissions Gap Report 2023: Broken Record – Temperatures Hit New Highs, Yet World Fails to Cut Emissions (Again)' (*UNEP*, November 2023) <https://www.unep.org/resources/emissions-gap-report-2023> accessed 12 December 2024.

Despite two decades of international discourse on security-climate interactions, the pathways through which conflicts influence greenhouse gas emissions remain largely unexamined. The groundbreaking work of the Initiative on GHG Accounting of War represents the first systematic attempt to document conflict-related emissions, providing crucial insights through quantitative analysis of emissions from conflicts such as the Israel-Gaza conflict and the Russia-Ukraine War.[63] [64]

Integration of military emissions into the UNFCCC framework is crucial for achieving comprehensive climate action and environmental security, though it would necessitate complex negotiations around sovereignty concerns, national security considerations, and operational secrecy. Implementing such integration would require developing robust guidelines and methodologies for comprehensive measurement and reporting, encompassing both direct and indirect emissions associated with military activities.[65] This includes accounting for emissions from equipment operations, infrastructure damage, and long-term reconstruction needs in conflict zones. The most viable pathway involves incorporating such emissions within the framework of Nationally Determined Contributions, which would allow countries to maintain a degree of flexibility while ensuring accountability within the broader climate regime.

The 'COP28 UAE Declaration on Climate, Relief, Recovery and Peace', launched on December 3, 2023, marked an incremental advancement in acknowledging the climate-security nexus by promoting increased investment and actions in conflict-affected countries and communities experiencing fragility or humanitarian crises.[66] However, its impact remains constrained by multiple structural and operational limitations, including its non-binding legal nature, absence of specific enforcement mechanisms, lack of concrete funding commitments, as well as insufficient institutional coordination frameworks. For instance, significant disparities persist in climate finance allocation, leaving conflict-affected communities with a fraction of needed funds, severely limiting their ability to adapt to climate impacts. Currently, 90% of climate finance targets middle-income, high-emitting countries, while extremely fragile states received merely USD 2.1 per person annually in adaptation financing between 2014 and 2021, compared to USD 161.7 per person

63 Leonnard de Klerk and others, 'Climate Damage Caused by Russia's War in Ukraine: 24 February 2022–23 February 2024' (Initiative on GHG Accounting of War, 2024) <https://drive.google.com/file/d/1YIHwfyGjRKNDlWClfeGkpZGaDWAHxrZr/view> accessed 10 December 2024.

64 Otu-Larbi F and others, 'A Multitemporal Snapshot of Greenhouse Gas Emissions from the Israel-Gaza Conflict' (2024) Working Paper, Queen Mary University of London <https://www.qmul.ac.uk/sbm/media/sbm/documents/Gaza_Carbon_Emissions.pdf> accessed 10 December 2024.

65 Leonnard de Klerk, Mykola Shlapak and Igor Onopchuk, 'Guidance on the Assessment of Conflict-Related GHG Emissions' (Initiative on GHG Accounting of War, November 2024) <https://en.ecoaction.org.ua/wp-content/uploads/2024/11/20241107_Guidance_Conflict_Emissions.pdf> accessed 10 December 2024.

66 'COP28 Declaration on Climate, Relief, Recovery and Peace' (UNFCCC Conference of the Parties, Twenty-eighth session, Dubai, 3 December 2023) FCCC/CP/2023/L.8.

in non-fragile states.[67] Meanwhile, current multilateral climate funds – the Green Climate Fund and Global Environment Facility – demonstrate structural limitations associated with high barriers to access, complex application processes, and donor risk aversion limit funding to conflict-affected regions.[68]

The 29th Conference of the Parties to the UNFCCC in Baku, Azerbaijan (COP29) marked an advancement in recognising the climate-conflict nexus, with a dedicated thematic Day and the launch of the Baku Call on Climate Action for Peace, Relief, and Recovery, and multiple states explicitly drawing connections between armed conflicts and environmental destruction.[69] However, provisions on improving access to climate finance for fragile and conflict-affected states were summarily cut from the final negotiations, demonstrating the resistance at both political and operational levels as well as persistent legal and institutional challenges in ensuring adequate and sustained funding and addressing environmental security in conflict zones.[70] This exclusion reflects a broader pattern of institutional inertia, where conflict-affected states face compounded barriers in accessing climate finance mechanisms. The traditional climate finance architecture, built on assumptions of stable governance and robust fiduciary standards, systematically disadvantages fragile states through rigid accreditation requirements and risk-averse assessment frameworks.

The environmental and climate devastation caused by modern armed conflicts, exemplified by the war in Ukraine, demands urgent reforms to the international legal framework. Strengthening the integration of international humanitarian law, international environmental law, and human rights law, while enhancing the enforceability of existing provisions, is crucial for addressing the complex challenges of environmental-climate security. The development of binding international norms, supported by robust accountability mechanisms, can ensure that environmental

67 Adrianna Hardaway, 'How to Unlock Climate Finance for Fragile States' (*World Economic Forum*, 14 February 2023) <https://www.weforum.org/stories/2023/02/how-to-unlock-climate-finance-for-fragile-states> accessed 13 December 2024.

68 The Green Climate Fund, for instance, primarily finances low-risk projects, while its implementing organisations lack incentives to operate in high-risk areas. See: Nina Schmelzer and others, 'Upscaling Peace-Positive Climate Action and Climate-Informed Peacebuilding: Lessons Learned and Ways Forward' (*Climate Diplomacy*, 19 August 2024) <https://climate-diplomacy.org/magazine/cooperation/upscaling-peace-positive-climate-action-and-climate-informed-peacebuilding> accessed 13 December 2024.

69 In particular, Serbia, Nepal, and Mexico drew stark comparisons between global military spending (approximately $2.5 trillion annually) and insufficient climate action funding, while Mexico offered a concrete example by dedicating 1% of military spending to reforestation, highlighting potential pathways for redirecting resources towards climate mitigation efforts. See: Secretaría de Relaciones Exteriores, 'At COP29, Mexico Reiterates President Sheinbaum's Proposal to Allocate 1% of Military Spending to Reforestation' (Press Release No 029, 24 November 2024) <https://www.gob.mx/sre/prensa/at-cop29-mexico-reiterates-president-sheinbaum-s-proposal-to-allocate-1-of-military-spending-to-reforestation?idiom=en> accessed 13 December 2024.

70 Conflict and Environment Observatory, 'Reflections on COP29: What Price Do We Put on Peace and Security?' (18 December 2024) <https://ceobs.org/reflections-on-cop29-what-price-do-we-put-on-peace-and-security/> accessed 13 December 2024.

and climate protection becomes a central consideration in the conduct and aftermath of armed conflicts. By embedding environmental and climate considerations into peacebuilding, transitional justice, and international criminal law, the global community can take meaningful steps toward safeguarding ecosystems and human livelihoods in the face of modern warfare. International cooperation, preventive measures, and active civil society engagement will be indispensable in achieving these goals.

Towards integrated environmental and climate security: legal and institutional innovations from Ukraine's wartime experience

Despite the ongoing conflict, the Ukrainian government has set legislatively mandated climate targets, including achieving net-zero emissions by 2050 and phasing out coal by 2035, underpinned by significant expansion of renewable energy infrastructure to reduce reliance on fossil fuels and rebuild a resilient energy sector. This section examines the climate legal framework as a key component of the emerging "green reconstruction" framework, which represents one of the first global attempts to systematically integrate climate considerations into post-conflict reconstruction, aligning recovery planning with international climate objectives.

Climate law in post-conflict recovery: Ukraine's green reconstruction blueprint

Ukraine's commitment to sustainability in its reconstruction efforts offers a compelling model for integrating green principles into post-conflict recovery. In July 2022, during the Ukraine Recovery Conference in Lugano, Switzerland, the government of Ukraine presented the initial version of its 10-year national recovery plan, outlining proposed recovery pathways across 15 development vectors, including environmental protection. This was followed by subsequent recovery conferences in London (June 2023) and Berlin (2024), which further refined and expanded the reconstruction framework, highlighting that green, inclusive, low-carbon, and sustainable post-war reconstruction for Ukraine is feasible, while underscoring the urgent need for international financial support.

The evolution of Ukraine's climate legislation reflects the intersection of environmental protection, national security, and post-war reconstruction priorities. Ukraine's climate regulation has developed through since its ratification of the UN Framework Convention on Climate Change in 1996,[71] operating through a fragmented system comprising political-programmatic acts, strategic planning documents, and specific legislative measures. During this period, climate change was primarily addressed within the context of Ukraine's international obligations, while

71 Закон України 'Про ратифікацію Рамкової конвенції ООН про зміну клімату' (Law of Ukraine 'On Ratification of the UN Framework Convention on Climate Change') 1996 No 435/96-VR.

domestic regulation remained fragmented and largely implemented through secondary legislation.[72]

The adoption of Law of Ukraine 'On Basic Principles of State Climate Policy' (unofficially referred to as 'Framework Climate Law') in October 2024[73] established Ukraine's first comprehensive legal framework for climate governance, aligning domestic policy with EU climate objectives.[74] The Law articulates ambitious climate targets, notably setting forth the objective of climate neutrality by 2050, supported by an interim milestone of reducing greenhouse gas emissions by 65% below 1990 levels by 2030.

The Law introduces key concepts and principles that form the foundation of Ukraine's climate governance by stablishing 21 fundamental principles of state climate policy, including the "polluter pays" principle and the principle of sustainable development. The latter aligns with UN sustainable development goals, ensuring balance between environmental, economic, and social aspects. Notably, the Law mandates the integration of climate policy across all economic sectors and public policy domains, including reconstruction efforts.

Furthermore, the Law establishes a comprehensive system of strategic and programme documents operating at multiple governance levels to ensure responsive and adaptable climate governance,[75] implementation mechanisms to combine market-based instruments with fiscal tools and financial support measures, providing for an establishment of emissions trading system (ETS), environmental taxation, and various financial support instruments for business entities transitioning toward low-carbon operations. Notably, it introduces a framework for gradually reducing state support for fossil fuel–related activities while establishing schemes to support green technology development and renewable energy sources.

While there has already been substantial progress through the adoption of key strategic documents foreseen by the provisions of the Law – including the 2050 Long-Term Low-Carbon Development Strategy[76] and the National Energy and Climate Plan[77] – it lays bare that the implementation of this ambitious framework faces multiple interconnected challenges in the post-conflict context.

72 Ievgeniia Kopytsia, 'The Legal Landscape of Climate Change in Ukraine: Challenges and Prospects' in Hasrat Arjjumend (ed), *Advances in Environmental Law* (TGI Books/The Grassroots Institute 2024) 275 <https://doi.org/10.33002/enrlaw-333/c10>.

73 Закон України, 'Про основні засади державної кліматичної політики' (Law of Ukraine 'On Basic Principles of State Climate Policy') 2024 No 3991-IX.

74 ibid.

75 This includes the Long-Term Low-Carbon Development Strategy, the National Energy and Climate Plan, and the Nationally Determined Contribution under the Paris Agreement.

76 Ukrainian Climate Office, 'Ukraine Presents the Main Elements of the Updated Low Carbon Development Strategy until 2050' (Ukrainian Climate Office 18 November 2024) <https://cop.ukrainian-climate-office.org/україна-представила-основні-елемент/> accessed 13 January 2025.

77 Energy Community, 'Ukraine Approves National Energy and Climate Plan as EU Accession Negotiations Begin' (Energy Community 25 June 2024) <https://www.energy-community.org/news/Energy-Community-News/2024/06/25b.html> accessed 13 January 2025.

Experts have noted potential difficulties in implementing market-based instruments like the emissions trading system in an economy undergoing reconstruction,[78] while the gradual reduction of support for fossil fuel–related activities requires careful management to avoid socioeconomic disruption. Furthermore, the cross-sectoral nature of climate governance demands sophisticated coordination across multiple government agencies and administrative levels – a challenge magnified by the ongoing reconstruction efforts. First, the prioritisation of immediate infrastructure rebuilding often conflicts with long-term environmental objectives, potentially compromising the achievement of climate targets.

Despite these potential implementation constraints, Ukraine's legislative advancement in climate governance presents a significant case study in post-conflict environmental regulation. While the Law could be viewed as externally influenced through the EU integration process, it reflects globally accepted climate targets aligned with both UNFCCC Paris Agreement objectives and the European Green Deal framework, the implementation of which in a conflict-affected context offers valuable insights for other jurisdictions. The framework exemplifies how climate law can serve as a stabilising force in conflict-affected settings and illustrates the feasibility of integrating climate objectives into reconstruction planning, contributing to the broader discourse on environmental regulation in transitional contexts and offering empirical evidence of both the challenges and opportunities in establishing climate governance frameworks during reconstruction periods.

Legal frameworks for global environmental and climate security: from theory to implementation

The analysis presented in this chapter points to several key imperatives for strengthening international legal frameworks addressing war-induced environmental and climate harm. The scale and complexity of ecological damage witnessed during the Russia-Ukraine War – spanning ecosystem degradation, massive carbon emissions, infrastructure destruction, and long-term climate impacts – has exposed critical vulnerabilities in existing international legal mechanisms. At the core of these recommendations lies a fundamental recognition: existing frameworks are inadequate to address the interconnected environmental challenges of modern warfare, requiring a multidimensional strategy that integrates legal innovation, institutional accountability, and proactive prevention. Meanwhile, these recommendations can and should extend beyond conflict-affected contexts, providing valuable guidelines to other countries in developing robust environmental security and emissions assessment frameworks.

78 Jacob Kirkegaard, 'Rebuild, Decarbonize, and Integrate: Ukraine, the EU, and the Road to a Net-Zero Energy Sector' (German Marshall Fund 4 June 2024) <https://www.gmfus.org/news/rebuild-decarbonize-and-integrate-ukraine-eu-and-road-net-zero-energy-sector> accessed 13 December 2024.

Expanding legal definitions and accountability mechanisms

A primary imperative emerging from this analysis is a fundamental reconstruction of international environmental protection protocols in conflict zones. This necessitates a comprehensive expansion of existing legal definitions to capture the multidimensional nature of environmental destruction. Traditional narrow interpretations must be replaced with a holistic approach that encompasses ecosystem degradation, conflict-induced greenhouse gas emissions and long-term climate impacts. Critically, this requires explicit amendments to international legal instruments, particularly the Rome Statute, to recognise ecocide as a distinct and prosecutable international criminal offense. The prosecution threshold for environmental destruction must also be strategically lowered, transforming environmental protection from a marginal consideration to a central pillar of international justice.

Institutional innovations for environmental and climate accountability

Establishing robust institutional mechanisms represents a critical imperative for effective environmental protection during armed conflicts. The proposed framework calls for the creation of an International Environmental Damage Tribunal with investigative and punitive powers. This specialised judicial body would possess the authority to conduct independent investigations, impose meaningful financial penalties on aggressor states, and mandate comprehensive environmental restoration. Complementing this approach, a global reconstruction fund specifically designed to support environmental recovery in conflict-affected regions would provide critical financial and institutional support. Furthermore, expanding the UNFCCC, Paris Agreement, in particular, to integrate comprehensive reporting mechanisms for conflict-related greenhouse gas emissions would enhance transparency and accountability. This involves the need to develop and adopt international guidelines for the assessment of conflict-related GHG emissions, establishing standardised methodologies and reporting frameworks that can accurately capture the full scope of environmental impacts in conflict settings. This development would require creating a specialised international body empowered to monitor, verify, and document environmental impacts of military operations, while providing standardised methodologies and technical guidance for countries to voluntarily incorporate these emissions into their national climate accountability frameworks.

Reform of climate finance mechanisms

Reform of climate finance mechanisms demands comprehensive transformation of existing funding structures and processes. This transformation must begin with streamlining accreditation and application procedures to improve access for conflict-affected regions. The establishment of mandatory allocation quotas for fragile regions represents a crucial step toward ensuring equitable distribution of resources. Furthermore, developing flexible, conflict-sensitive funding guidelines

proves essential for addressing the unique challenges faced by nations recovering from armed conflicts.

Enhanced transparency and accountability measures must undergird these reforms, ensuring effective resource utilisation while strengthening local implementation capacity. The United Nations Peacebuilding Fund provides an instructive model in this regard, demonstrating how demand-driven, flexible funding approaches can effectively operate in challenging contexts.[79] Its streamlined approval process and strategic use of smaller grant sizes have proven particularly effective in areas with limited government presence, offering important lessons for broader climate finance reform.

Preventive strategies and implementation frameworks

Anticipatory approaches must replace reactive environmental protection strategies. This requires a fundamental expansion of existing weapons review processes to systematically assess the potential environmental impacts of military technologies. A sophisticated international early warning system, leveraging advanced satellite monitoring, environmental sensing networks, and collaborative data-sharing platforms, would provide critical insights into emerging environmental risks in potential conflict zones. Such a system would enable proactive intervention and mitigation strategies, moving beyond traditional post-conflict assessment approaches. These innovations must be supported by robust capacity building programs to assist conflict-affected states in developing climate-resilient reconstruction frameworks and accessing specialised technical and financial resources for sustainable recovery.

The proposed approach represents more than a series of technical modifications – it is a fundamental reimagining of how the international community and law understands and responds to environmental challenges in conflict settings. By integrating legal, technological, institutional, and collaborative strategies, these recommendations aim to transform the current reactive approach to environmental protection during conflicts into a dynamic, anticipatory system of global environmental governance. The lessons learned from the Russia-Ukraine War provide a critical blueprint for this transformation, demonstrating that environmental resilience is not merely an ecological consideration but a crucial component of international peace, security, and human survival.

Conclusion

The Russia-Ukraine War has exposed the critical inadequacies of existing international legal frameworks in addressing the intertwined challenges of armed conflict, environmental degradation and climate crises. As explored in the sections on

79 'Financing for Peacebuilding Branch' (United Nations Peacebuilding Fund) <https://www.un.org/peacebuilding/fund> accessed 15 December 2024.

historical development of environmental protection, gaps in legal accountability, and the emerging climate security paradigm, traditional approaches are fundamentally ill-equipped to handle modern warfare's complex environmental impacts. The discussion of the PERAC draft principles, the limitations of the Rome Statute, and the absence of comprehensive mechanisms for addressing conflict-related emissions underscore the urgent need for legal innovation.

The chapter reveals an imperative to develop adaptive, forward-looking legal mechanisms that prioritise prevention, accountability, and resilience. This requires a multifaceted approach: strengthening international legal frameworks to rapidly respond to environmental threats, accelerating national climate legislation with robust support from international allies, and establishing clear mechanisms to hold aggressor states accountable for environmental destruction. The principle of "no harm" must evolve from a passive legal concept to an active, enforceable standard of global environmental justice.

As highlighted in the examination of Ukraine's green reconstruction efforts, national laws must be developed at an accelerated pace, supported by international allies, with a focus on integrating climate resilience into post-conflict recovery. Meanwhile, Ukraine emerges as a pivotal case study, demonstrating the potential for aligning post-conflict recovery with ambitious climate goals and offering valuable lessons for addressing similar challenges in other conflict-affected regions.

Critically, law must transcend its current reactive state, becoming a proactive instrument of global security that integrates environmental protection, conflict prevention, and sustainable recovery as interconnected, fundamental human rights. The lessons from Ukraine demonstrate that in an age of global instability, environmental and climate resilience is not just an ecological imperative, but a crucial component of international peace and security.

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11 Executing the right to education during the war

The case of Ukraine

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Right to education in national (Ukrainian) and international legal instruments

The right to education is a fundamental sociocultural human right that ensures the stable development of the young generation and guarantees every person access to education.[1] Therefore, education is recognised as an important part of human personality and its development. This right allows parents to choose the type of education for their children according to their own cultural, religious, moral and other preferences, and gives individuals or legal entities the right to establish their own educational institutions. This right is crucial for formation of the personality, its growth and development, and in the modern world it has almost the same meaning as basic rights such as the right to life.[2] The right to education is tightly connected with both individual progress, progress of nations and progress of the whole mankind.[3]

With regard to the legal regulation of the exercise of the right to education in Ukraine, Article 53 of the Constitution of Ukraine is of the greatest importance in ensuring the realisation and protection of the right to education of a person and a citizen in Ukraine, according to which complete general secondary education is mandatory; citizens have the right to obtain higher education free of charge in state and municipal educational institutions on a competitive basis; citizens belonging to national minorities are guaranteed by law the right to study in their native language or to study their native language in state and communal educational institutions or through national cultural societies; the state ensures the availability and free of

1 See: Articles 28 and 29 of the United Nations Convention on the Rights of the Child (1990); Julia Sloth-Nielson and Ton Liefaard (eds), *The United Nations Convention on the Rights of the Child: Taking Stock After 25 Years and Looking Ahead* (Brill 2016).

2 Education as a fundamental human right is enshrined in the Universal Declaration of Human Rights (1948) and the right to education is guaranteed in at least 48 international legal instruments and 23 soft law instruments, see: UNESCO, *Right to Education Handbook* (UNESCO and Right to Education Initiative 2019) 51.

3 See: UNICEF, 'The Right to Education' <https://www.unicef.org.uk/rights-respecting-schools/the-rrsa/the-right-to-education/#:~:text=The%20Right%20to%20an%20Education,tolerance%2C%20development%20and%20economic%20growth>.

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charge of preschool, full general secondary, vocational and technical, higher education in state and communal educational institutions; development of preschool, full general secondary, extracurricular, vocational, higher and post-graduate education, and various forms of education; and provision of state scholarships and benefits to pupils and students.[4]

The state is the main guarantor of human rights in this direction. This was discussed in the decision of the Constitutional Court of Ukraine in a case based on the constitutional submission of 50 people's deputies of Ukraine on the official interpretation of the provisions of the third part of Article 53 of the Constitution of Ukraine: "the state ensures the availability and free of charge of preschool, full general secondary, vocational and technical, higher education in state and communal educational institutions".[5] According to this decision, the availability of education as a constitutional guarantee of the realisation of the right to education on the principles of equality, defined by Article 24 of the Constitution of Ukraine, means that no one can be denied the right to education, and the state must create opportunities for the realisation of this right.[6]

Also, international legal standards cannot be overlooked in this matter. For the first time, the right to education was described in the Universal Declaration of Human Rights (UDHR) of 1948 and was recognised as a fundamental human right aimed at ensuring the comprehensive development of an individual, community and society as a whole.[7] Subsequently, the right to education was further enshrined and developed in other international treaties, in particular in:

- UNESCO Convention on Combating Discrimination in Education (1960).
- The International Covenant on the Elimination of All Forms of Racial Discrimination (1965).
- International Covenant on Economic, Social and Cultural Rights (1966).
- Convention on the Elimination of All Forms of Discrimination Against Women (1979).
- Convention on the Rights of the Child (1989).
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).
- Convention on the Rights of Persons with Disabilities (2006).
- European Convention on Human Rights (ECHR) (1950).

For example, Article 13 of the International Covenant on Economic, Social and Cultural Rights, which was ratified by Ukraine in 1973, states that it is the state that recognises the right to education for every person, regardless of their gender,

4 Article 53, The Constitution of Ukraine (1996).

5 The Case on Accessibility and Free Education (4 March 2004, Decision No 5-рп/2004) <https://zakon.rada.gov.ua/laws/show/v005p710-04#Text>.

6 ibid. See also the court's decision on free-of-charge use of school textbooks: Decision No 18-rp/2002).

7 The Universal Declaration of Human Rights (UDHR) of 1948, current edition dated 10 December 1948 <https://zakon.rada.gov.ua/laws/show/995_015#Text>.

race, nationality, social and property status state, type and nature of occupations, worldview beliefs, party affiliation, attitude to religion, state of health and other circumstances.[8]

Challenges to implementation in Ukraine

Even before the war, regulatory processes in the educational space of Ukraine at all levels achieved significant results – corresponding positive changes were observed both in school education and in institutions of higher education. In order to activate international ties in the educational environment and streamline Europeanisation, appropriate normative legal acts were adopted in Ukraine, which regulated the procedure for the introduction of innovations in education, which would enable Ukrainian youth to seamlessly integrate into the global educational space, and later, into the professional environment.

Today's unprecedented tragic challenges caused by Russia's war against Ukraine have at the same time exacerbated a number of sociolegal issues. One of these challenges was the proper implementation of the right to education in the conditions of hostilities and the legal regime of martial law, and it consists of a significant number of components. In the conditions of the Russian-Ukraine War, in general, the educational environment can be conventionally divided into several groups, each of which has individual main problems and challenges.

The first problem is related to the fact that the organisation of the educational process is regulated by the current regulatory and legal documents of Ukraine, education standards that are taking into account the principles of the formation of the European Education Area,[9] and internal documents of educational institutions – therefore, the question arose as to how the educational process was to be regulated, in accordance with existing legislation, during martial law.

New approaches to regulating the right to education in the conditions of martial law

In connection with the fact that already from the middle of March 2022, most educational institutions in various regions of Ukraine began to resume training in a

8 Article 13, International Covenant on Economic, Social and Cultural Rights (1966), current edition dated 19 October 1973 <https://zakon.rada.gov.ua/laws/show/995_042#Text>.

9 The EEA is an initiative designed to structure collaboration between EU Member States and stakeholders to build more resilience and inclusive national education systems, see: European Commission, 'European Education Area' <https://education.ec.europa.eu>. See also: 'Reykjavík Declaration: United Around Our Values' (16–17 May 2023) <https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1>, when Heads of State and the Government of the Council of Europe committed to supporting Ukraine in the face of the Russian invasion, including reaffirming their commitment to safeguard the right of education. See also: Council of Europe, 'Access to Education for Children from Ukraine in Europe: Time to Move from Emergency Response to Long-Term Solutions, Says Council of Europe Study' (20 November 2024) <https://www.coe.int/en/web/portal/-/access-to-education-for-children-from-ukraine-in-europe-time-to-move-from-emergency-response-to-long-term-solutions-says-council-of-europe-study>.

distance format, the question arose which legal norms are to be followed when continuing the educational process, taking into account a number of certain nuances that came up as a result of the fact that many institutions providing the educational process ended up under occupation or were located in dangerous places that are close to the front line, whilst some educational institutions were completely or partially damaged or destroyed.

To solve such issues, a number of normative legal acts were adopted, which had an impact on the entire field of education.

By the Decree of the President of Ukraine "On the introduction of martial law in Ukraine" dated 24.02.2022 No. 64/2022 (hereinafter "the Decree") martial law was introduced in Ukraine, which affected all spheres of the state and, of course, did not bypass the sphere of education in general.[10] Article 3 of the Decree introduced temporary restrictions on the rights and legal interests of people and legal entities within the limits and to the extent necessary to ensure the possibility of introducing and implementing measures of the legal regime of martial law.[11] In accordance with this Decree, legislative and by-law acts were adopted, as well as recommendations of the relevant state authorities, which regulate various issues in the field of education during wartime.

One of the first normative legal acts in this direction was the Law of Ukraine "On Amendments to Certain Laws of Ukraine Regarding State Guarantees in Conditions of Martial Law, Emergency Situations or State of Emergency",[12] which entered into force in March 2022 and according to which the Law of Ukraine "On Education" was supplemented with a new Article 57–1 "State guarantees in the conditions of martial law, emergency situations or state of emergency" regarding new additional state guarantees for teaching and scientific and pedagogical workers. This article guarantees subjects of the educational process: the organisation of the educational process in remote form or in any other form that is the safest for its participants; the preservation of the place of work, average salary, payment of stipend and other payments provided for by law; the place of residence (e.g. boarding house, dormitory) and provision of food (if necessary).[13]

In addition, the article regulates that the provision of state guarantees is carried out with the help of executive authorities, military command bodies, military and military-civilian administrations, local self-government bodies, their representatives, officials (managers, heads, chiefs), management bodies (structural divisions) in the field of education; educational institutions, research institutions, their founders; public associations, charitable organisations and individuals who carry out charitable (volunteer) activities.[14]

10 The Decree of the President of Ukraine 'On the Introduction of Martial Law in Ukraine', No 64/2022, dated 24 February 2022 <https://zakon.rada.gov.ua/laws/show/64/2022#Text>.

11 ibid.

12 Law of Ukraine, 'On Amendments to Certain Laws of Ukraine Regarding State Guarantees in Conditions of Martial Law, Emergency Situations or State of Emergency' No.2126-IX, dated 15 March 2022 <https://zakon.rada.gov.ua/laws/show/2126-20#Text>.

13 ibid.

14 Law of Ukraine, 'On Education' No. 2145-VIII, current edition dated 6 October 2024 <https://zakon.rada.gov.ua/laws/show/2145-19#Text>.

For the implementation of this Law and in connection with the operation of the legal regime of martial law, the Ministry of Education and Science of Ukraine, as the central executive body in the field of education and science, is entrusted with the task of implementing regulatory and legal support for the functioning of the education and scientific system and passing orders on issues of creating a safe educational environment, organisation of education, educational process and other issues in the field of education and science not regulated by law in the conditions of martial law, emergency situations or state of emergency (during the special period of war). The term of validity of such orders cannot exceed the term of the special period. Such orders are not regulatory acts and are subject to state registration only if they relate to the rights, freedoms, legal interests and obligations of citizens and legal entities.

Sometime after the beginning of the full-scale invasion of the territory of Ukraine, issues related to admission to higher educational institutions, enrollment in general secondary, vocational and technical and preschool institutions, issues related to passing the State Final Attestation (to transit from the middle school to high school) and External Independent Examination (special state exams after high school that serve as the basis for entering a university for any level – undergraduate or postgraduate) became topical. That is why the Ministry of Education and Science of Ukraine developed and approved several normative legal acts that helped to solve these issues, including:

- Order of the Ministry of Education and Science of March 28, 2022 No. 274 "On some issues of the organization of general secondary education and the educational process in the conditions of martial law in Ukraine".[15]
- Order of the Ministry of Education and Science of May 13, 2022 No. 438 "On some issues of enrollment in general secondary education institutions in the conditions martial law in Ukraine".[16]
- Order of the Ministry of Education and Science No. 290 of April 1, 2022 "On the Approval of Methodological Recommendations on Certain Issues of Completion of the 2021/2022 Academic Year".[17]
- Order of the Ministry of Education and Science No. 232 of February 28, 2022 "On Exemption from Passing State Final Attestation of Pupils Who Complete Primary and Basic of general secondary education, in the 2021/2022 academic year".[18]

15 Order of the Ministry of Education and Science of 28 March 2022 No 274 'On Some Issues of the Organization of General Secondary Education and the Educational Process in the Conditions of Martial Law in Ukraine' <https://zakon.rada.gov.ua/rada/show/v0274729-22#Text>.

16 Order of the Ministry of Education and Science of 13 May 2022 No 438 'On Some Issues of Enrollment in General Secondary Education Institutions in the Conditions Martial Law in Ukraine' <https://zakon.rada.gov.ua/rada/show/v0438729-22#Text>.

17 Order of the Ministry of Education and Science No 290 of 1 April 2022 'On the Approval of Methodological Recommendations on Certain Issues of Completion of the 2021/2022 Academic Year' <https://zakon.rada.gov.ua/rada/show/v0290729-22#Text>.

18 Order of the Ministry of Education and Science No 232 of 28 February 2022 'On Exemption from Passing State Final Attestation of Pupils Who Complete Primary and Basic of General

- Order of the Ministry of Education and Science No. 367 dated 04/16/2018 "On approval of the Procedure for enrolling, withdrawing and transferring students to state and communal educational institutions for obtaining a full general secondary education".[19]

The Ministry of Education and Science of Ukraine (MESU) also provided a number of clarifications and recommendations in official letters:

- MESU letter No. 1/3378–22 dated 07.03.2022 "On the practice of applying labor legislation in the field of education and science during the legal regime of martial law".
- MESU letter No. 1/3371–22 dated 06.03.2022 "On the organization of the educational process".
- MESU letter No. 1/4202–22 dated 04.16.2022 "Regarding enrollment in the 1st class of general secondary education institutions".
- MESU letter dated 02.04.2022 No. 1/3845–22 "On recommendations for employees of institutions of preschool education during the period of martial law in Ukraine" (according to which, clarifications are given to the heads of preschool education institutions, recommendations regarding the provision of educational services using various forms of organization of the educational process in a situation where the educational institution completely or partially ceases its activities in connection with military actions, using various forms of organization of the educational process).

In this context, it is also necessary to mention the Law of Ukraine "On Refugees and Persons in Need of Additional or Temporary Protection", and in particular Article 15 of this Law "Rights of a Person Recognized as a Refugee or a Person in Need of Additional Protection",[20] according to which a person recognised as a refugee or a person in need of additional protection has the same rights to education as citizens of Ukraine. In order to implement this law, the Order of the Ministry of Education and Science No. 274 was issued "On some issues of the organization of general secondary education and the educational process in the conditions of martial law in Ukraine",[21] which regulates the provision and organization of the educational process for persons who were forced to change their place of residence or educational institutions.

Secondary Education, in the 2021/2022 Academic Year' <https://zakon.rada.gov.ua/laws/show/z0283-22#Text>.

19 Order of the Ministry of Education and Science No 367 dated 16 April 2018 'On Approval of the Procedure for Enrolling, Withdrawing and Transferring Students to State and Communal Educational Institutions for Obtaining a Full General Secondary Education' <https://zakon.rada.gov.ua/laws/show/z0564-18#Text>.

20 Law of Ukraine, 'On Refugees and Persons in Need of Additional or Temporary Protection' No 3671-VI dated 3 August 2023, article 15 <https://zakon.rada.gov.ua/laws/show/3671-17#Text>.

21 Order of the Ministry of Education and Science No 274 (n 15).

This order regulates the following educational issues:

- Enrollment of general secondary education students upon application to educational institutions, regardless of their location, who were forced to change their place of study and/or residence.
- Obtaining general secondary education in any form that can be provided by the educational institution.
- Remuneration of employees of educational institutions regardless of their place of stay (residence).
- Providing accommodation for displaced students or pupils in boarding houses, dormitories, as well as meals in case of submission of a corresponding application.
- Employment of employees in case of submission of a corresponding application.
- Keeping separate records and forming registers of education seekers by place of stay, which should contain the following information: surname, first name and patronymic, date of birth, place of residence (stay), place of study (educational institution), previous place of residence, previous place of study, form of education, belonging to the category of persons with special educational needs.[22]

Temporary occupied territories and violating right to education

One of the biggest problems in the sphere of education during war time concerns the temporarily occupied territories (TOT) of Ukraine. In general, during the period of armed conflict and repressive occupation policies, human rights violations are often associated with the possibility of exercising the right to education, which leads to the loss of national identity, human potential and human capital of those territories. These violations cannot be only an indirect consequence of the conflict – they are part of the armed conflict and part of a deliberate and systematic attempt by the aggressor to deprive children and young people of the opportunity to receive education, as well as attempts to legitimise repression and reproduce patterns of brutal behaviour and total militarisation of society.

For example, closing and destroying schools is often used by aggressors as a "weapon of war to destroy the processes of public resistance in the occupied territories" or "as a weapon of cultural repression against the population, depriving them of access to education or using education to destroy identity (language, traditions and cultural values)".[23] In the conditions of the Russian-Ukraine War, the destruction of educational institutions and depriving youth, as much as adults, of

22 ibid.

23 See: Human Rights Watch, 'Education Under Occupation' (20 June 2024) <https://www.hrw.org/report/2024/06/20/education-under-occupation/forced-russification-school-system-occupied-ukrainian>; Council of Europe, Committee on Culture, Science, Education and Media, 'Countering the Erasure of Cultural Identity in War and Peace' (10 June 2024) <https://rm.coe.int/countering-the-erasure-of-cultural-identity-in-war-and-peace/1680b00420>; Kenneth D. Bush and Diana Saltarelli (eds), *The Two Faces of Education in Ethnic Conflict: Towards a Peacebuilding Education for Children* (UNICEF 2000).

the right to education is not an accident, it is part of Putin's criminal "denazification plan".[24] It is therefore not surprising that the issue of preserving education system should be one of the priority tasks of the Ukrainian state, because education plays a crucial role in the formation of society.

Regarding the legal regulations of ensuring and exercising the right to education during armed conflicts, this human right is also recognised in several Conventions of the International Labour Organization, in international humanitarian law, as well as in regional agreements.[25] Each of these international treaties, as well as the practice developed in UN subcommittees and, in particular, UNESCO, formed a separate system of certain rules and values that must be achieved in order to properly implement the right to education. It was this system that was taken into account by the former UN special rapporteur on the right to education, Katarina Tomaševski, who developed the so-called 4As concept, which proposes that to be a meaningful right, education must be "acceptable, available, accessible and adaptable".[26] The 4As concept is optional for implementation, but according to certain criteria, it helps to assess whether the right to education is implemented in accordance with the norms of international law.[27] The UN Secretary-General's note on the impact of armed conflicts on children states that "education is particularly important during armed conflicts. Although everything around may reign in chaos, learning at school should be a normal state".[28]

24 See: Guy Faulconbridge and Vladimir Soldatkin, 'Putin Vows to Fight on in Ukraine Until Russia Achieves Its Goals' *Reuters* (14 December 2023) <https://www.reuters.com/world/europe/putin-tells-russians-war-ukraine-will-go-unless-kyiv-does-deal-2023-12-14/>; Denys Azarov and others, 'Understanding Russia's Actions in Ukraine as the Crime of Genocide' (2023) 21(2) *Journal of International Criminal Justice* 233–64; Amnesty International, 'Ukraine/Russia: New History Textbook Is a Blatant Attempt to Unlawfully Indoctrinate School Children in Russia and Russian-Occupied Ukrainian Territories' (1 September 2023) <https://www.amnesty.org/en/latest/news/2023/09/ukraine-russia-new-history-textbook-is-a-blatant-attempt-to-unlawfully-indoctrinate-school-children-in-russia-and-russian-occupied-ukrainian-territories/>.

25 Such as the International Labour Organisation Convention No 169 which guarantees the right to education of Indigenous and Tribal Peoples in Independent Countries (Articles 7, 21, 22, 26–31) 27 June 1989; the fourth Geneva Convention (Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.); and Article 2, Protocol No1 to the European Convention on Human Rights (1952).

26 Kateryna Tomaševski, 'Annual Report of the Special Rapporteur on the Right to Education' 7 January 2002, E/CN.4/2002/60, at 12–13; Kateryna Tomaševski, *Human Rights Obligations in Education: The 4-A Scheme* (Wolf Legal Publishers 2006).

27 See: Audrey Chapman, 'Development of Indicators for Economic, Social and Cultural Rights: The Rights to Education, Participation in Cultural Life and Access to the Benefits of Science' in Y. Donders and V. Volodin (eds), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (UNESCO Publishing 2007) 111–51; Liliane Foundation, 'Enabling Education: Steps Towards Global Disability-Inclusive Education' (2017) <https://old.lilianefonds.org/uploads/media/5ae9db0eec421/enabling-education-summary.pdf>; J.-J. Friboulet and others, *Measuring the Right to Education* (Translation: Joanna Bourke-Martignoni) (UNESCO/Institute for Lifelong Learning 2006).

28 UN General Assembly, 'Impact of Armed Conflict on Children' UN Doc A/51/306, General Assembly (1996) <https://digitallibrary.un.org/record/223213>.

Developing this opinion and not denying the fact that armed conflict itself poses a serious threat to life and health, the international community has established certain provisions in general international law that ensure the right to education, and in international humanitarian law (IHL) which focuses exclusively on situations of armed conflict. Here it is worth noting that the norms of IHL continue to operate in conditions of armed conflict, as well as all the set of basic human rights that should be safeguarded. Depending on the specific situation, they can act independently along with the norms of IHL, or the latter can act as special norms (*lex specialis*) clarifying the norms of IHL in conditions of armed conflict.[29]

In particular, IHL norms regulate the status of educational institutions as civilian objects that are under protection and cannot be military targets,[30] and also determine the behaviour of the occupying state in relation to educational institutions in the controlled territory. IHL establishes the duty of the state that occupied a certain territory to properly manage and promote the proper operation of educational institutions, and Article 38 of the Convention on the Rights of the Child obliges states to comply with IHL norms regarding children in armed conflict.

According to researchers, Article 43 of the Hague Regulations of 1907, which obliges the parties to the conflict to "restore and ensure, as far as possible, public order and security", also applies to the field of education.[31] This is due to the fact that this article enshrines the basic principle of *status quo ante bellum*, which states the duty of the occupying power to preserve and maintain, as far as possible, the legal status that existed in the territories before their occupation.[32] The provision, in the context of education, was interpreted in Article 50(1) of the fourth Geneva Convention of 1949: "The occupying power shall, in cooperation with state and

29 Advisory opinion of 8 July 1996, 'Legality of the Threat or Use of Nuclear Weapons' The International Court of Justice, 1996; Judgement in the case concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*), The International Court of Justice, 2005; Judgement in the case of *Varnava and Others v Turkey*, The European Court of Human Rights (2009) <https://hudoc.echr.coe.int/fre#{%22sort%22:[%22kpdate%20Descending%22],%22itemid%22:[%22001-94162%22]}>.

30 Geneva Convention IV on the Laws and Customs of War on Land and its Annex: Regulations on the Laws and Customs of War on Land. Document 995_222, valid, current edition dated 10/18/1907. The entry into force of the international agreement for Ukraine took place on 24 August 1991 <https://zakon.rada.gov.ua/laws/show/995_222#Text>; Additional Protocol to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), dated 8 June 1977. Document 995_199, valid, current version dated 12/08/2005 <https://zakon.rada.gov.ua/laws/show/995_199#Text>.

31 Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015).

32 ibid. See: Marco Sassòli, 'The Concept and the Beginning of Occupation' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015); Michael Bothe, 'The Administration of Occupied Territory' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015); Julia Grignon, 'The Geneva Conventions and the End of Occupation' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015).

local authorities, promote the proper functioning of institutions responsible for the care of children and their education".[33]

In the educational process, discrimination is prohibited not only at the level of general norms protecting human and child rights, but also at the level of IHL norms, in particular, such a provision is contained in Article 24 of Geneva Convention IV of 1949:

> the parties to the conflict will take all necessary measures to ensure that children under the age of 15 who have been orphaned or separated from their families as a result of war are not left to fend for themselves, and to facilitate, under all circumstances, their care, performance of rights related to their religion and their education.[34]

If possible, their education should be entrusted to persons with the same cultural traditions. Based on all of the above, first of all, the Russian Federation in the temporarily occupied territories of Ukraine actually ignores the principles of "availability" and "accessibility" of education, because the functioning of Ukrainian educational schools in the occupied territories has been stopped, and accordingly, the opportunity to study according to the Ukrainian educational program does not exist.[35] Secondly, those narratives that propose educational standards and educational materials of the Russian Federation for Ukrainian children who are now located on temporarily occupied Ukrainian territories or deported to the Russian Federation do not meet the mentioned educational criterion of "acceptability".[36]

The key and unacceptable thing is that in matters of education, the Russian Federation treats Russian children and Ukrainian children equally, both those deported to the Russian Federation and those who live in the occupied territories. At the same time, the Russian authorities do not recognise the fact of their occupation of the territories of Ukraine, because of which they refuse to comply with the norms of IHL. As a result, Ukrainian children are forced to learn "irrelevant" educational theses that do not take into account their belonging to the Ukrainian national group.[37] In fact, this is an example of "indirect discrimination", when, despite significant differences, two groups, Russian and Ukrainian, are placed in the same

33 Article 50(1) Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

34 ibid.

35 See: Human Rights Watch, 'Ukraine: Forced Russified Education Under Occupation' (20 June 2024) <https://www.hrw.org/news/2024/06/20/ukraine-forced-russified-education-under-occupation>.

36 See: Gilles Giacca and Ellen Nohle, 'Positive Obligations of the Occupying Power: Economic Social and Cultural Rights in the Occupied Palestinian Territories' (2019) 19(3) *Human Rights Law Review* 491–515.

37 See: Anastasiia Levchenko, 'Secret Classes to Counter Russian Brainwashing in Occupied Ukraine' *BBC News* (16 March 2024) <https://www.bbc.co.uk/news/world-68578822>; Amnesty International, 'Ukraine: Children Under Russian Occupation Forced into Russian Schooling or Face Removal to Orphanages' (Amnesty International UK Press Releases, 11 December 2023) <https://www.amnesty.org.uk/press-releases/ukraine-children-under-russian-occupation-forced-russian-schooling-or-face-removal>.

educational conditions – compulsory study according to Russian standards as a prerequisite for obtaining secondary general education. At the same time, Ukrainian children find themselves in a worse situation, because they are deprived of access to Ukrainian standards, spend most of their childhood under the conditions of "Russian educational influence", which leads to the "blurring" of their own identity and assimilation with the Russian group.[38] This, in turn, violates Articles 8 and 29 of the Convention on the Rights of the Child, which oblige the state to respect the child's right to preserve individuality, to ensure that education is focused on fostering respect for one's own cultural identity, the country of origin.

Since the child does not yet have a formed worldview or is only on the way to its formation, the preservation of individuality largely depends on the content of the educational materials of the educational process. The more purposeful certain educational narratives are, the more vulnerable the child is to their influence. Russian educational policy is designed for such vulnerability of Ukrainian children. In other words, the preservation of Ukrainian individuality in the occupied territories of Ukraine during the implementation of the educational process is a direct obligation of the Russian Federation, which it does not fulfill. This violates the above-mentioned principles and norms of IHL, which regulate the legal regime of the occupied territory, since the Russian Federation considers the occupied territories of Ukraine as its own.[39]

As a result, the Russian Federation ignores the principle of *status quo ante bellum* (the situation as it existed before the war) and the principle of continuity of education and implements its own Russian standards instead of Ukrainian ones. Militarisation and forced assimilation of the population in conditions of occupation cannot comply with Article 50(1) of Geneva Convention IV of 1949. This article reflects the principle of "proper education", which implies not only the need for the formal functioning of educational institutions in the occupied territory, but also the obligation to ensure the rights to preserve identity, cultural identity and the prohibition of militarism propaganda; only then can education be considered "proper". The given interpretation of the principle of "proper education" meets the standards of international human rights law, which continues to operate in conditions of armed conflict.

The right to education is one of the fundamental human rights, because thanks to education, a person is able to become an independent member of society, bring the fruits of their own thinking into it and respond to destructive social factors, including those imposed from the outside. This right is especially important for children, because the consciousness at a young age is subject to any influences and is sensitive to any narratives; how and whether basic human values in the

38 See: Lily Hyde, 'War in Ukraine Has Another Front Line: The Classroom' *Politico* (9 January 2023) <https://www.politico.eu/article/ukraine-war-education-classroom-front-line-russia-occupation/>.

39 See: Makysm Vishchyk, 'Occupation of Minds: IHL Response to Russian Education Policies in the Occupied Ukrainian Territories' (*EJIL:ETalk!* 12 October 2022) <https://www.ejiltalk.org/occupation-of-minds-ihl-response-to-russian-education-policies-in-the-occupied-ukrainian-territories/>.

spirit of respect for human rights will be formed in a child will determine what his individual behaviour will be in adulthood.[40] Russian educational policy towards Ukrainian children violates many fundamental international treaties, including, in particular, the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights as mentioned above. As a result of such actions, the assimilation of Ukrainian children takes place, the cult of war and national enmity spreads in the conditions of armed aggression of the Russian Federation for the potential involvement of children in hostilities against Ukraine. The introduction of educational narratives of the Russian Federation regarding Ukrainian children can serve as evidence of a number of international crimes, in particular, war crimes under Article 8(2)(a)(v) and 8(2)(b)(xv) of the Rome Statute in the form of complicity.[41] In addition, the educational policy of the Russian Federation is a humiliating treatment for Ukrainian children, who are forced to be patriots of the Russian Federation and to recognise the "legitimate" motives of armed aggression.[42] Although some children are still at the stage of forming their own identity, this should arguably not exempt them from responsibility for a war crime under Article 8(2)(b)(xxi) of the Rome Statute.

Same statement can be taken from a different angle: it can also be argued that the Russian Federation committed a crime against humanity – a discriminatory persecution (Article 7(1)(h) of the Rome Statute). The Russian Federation deprives Ukrainian children of the fundamental right to Ukrainian education and the preservation of identity, cultural identity, because Russian education is destructive for them, and Ukrainian education is inaccessible. These very circumstances are evidence of the so-called cultural genocide,[43] which serve as additional evidence of the genocide of the Russian Federation against the Ukrainian national group under Article 6(e) of the Rome Statute – including the deportation and transfer of Ukrainian children to Russian families during the armed aggression of the Russian Federation.

In fact, the occupying power does not comply with Article 50 of the Geneva Convention on the Protection of the Civilian Population in Time of War,[44] because this article directly prohibits the occupying power from interfering in educational activities carried out on the occupied territory and related to the temporary nature

40 On the important influence of early childhood education, see: Ofsted, 'International Perspectives on Early Years' (20 June 2023) <https://www.gov.uk/government/publications/international-perspectives-on-early-years/international-perspectives-on-early-years>.

41 Rome Statute of the International Criminal Court (1998) (last amended 2010).

42 Levchenko (n 37); Hyde (n 38).

43 Azarov and others (n 24); Jade McGlynn, 'Russia Is Committing Cultural Genocide in Ukraine' *Foreign Policy* (23 April 2024) <https://foreignpolicy.com/2024/04/23/russia-ukraine-cultural-genocide-looting-indoctrination-deporatation/>; Council of Europe, 'Destruction of Cultural Heritage in Ukraine' (16 October 2024) <https://www.coe.int/en/web/kyiv/-/destruction-of-cultural-heritage-in-ukraine>; Alla Kravchenko and others, 'Crime Against Memory or Cultural Genocide? On the Destruction of the Cultural Heritage of Ukraine During Russian Aggression in the XXI Century' (2022) 10(2) *European Journal of Transformational Studies*.

44 (n 30).

of the occupation. The Russian Federation, on the contrary, implements its own standards of education in the temporarily occupied territory and forces Ukrainian children to join such schools. Forced transition to the state standards of the occupying country is a violation, which also follows from the rule of *status quo ante bellum* – preservation of the existing order of public life, laws, institutions, and so on.

Special regulations to ensure continuity to the right for education in Ukraine

Despite all the difficulties, Ukraine does not stop working on improving the legal framework to ensure the realisation and protection of the right to education. The Law of Ukraine "On Education" states that the main goal of education is the comprehensive development of a person as an individual and the highest value of society, development of its talents, intellectual, creative and physical abilities, the formation of values and competencies necessary for successful self-realisation, educating responsible citizens who are capable of conscious social choice and directing their activities for the benefit of other people and society enriching on this basis the intellectual, economic, creative, and cultural potential of the Ukrainian people, raising the educational level of citizens in order to ensure the sustainable development of Ukraine and its European choice.[45] Article 5 (State policy in the field of education) of the same law emphasises that "Education is a state priority that ensures innovative socio-economic and cultural development of society. Funding education is an investment in human potential, sustainable development of society and the state".[46]

It is obvious that education is part of national security. Due to the occupation, Ukraine lost the opportunity to fully provide education to children in the temporarily occupied territories but took certain steps to ensure that these children had the opportunity to receive a Ukrainian education. And precisely with the aim of ensuring the unhindered realisation of the right of citizens of Ukraine living in the temporarily occupied territory of Ukraine to continue their education by restoring the mechanism of recognition of the results of such education, on November 21, 2023, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to Certain Laws of Ukraine Regarding the Recognition of Results of Training for Persons Living in the Temporarily Occupied Territory of Ukraine".[47] The adoption of the Law ensured the recognition of the results of education of persons living in the temporarily occupied territory of Ukraine, regardless of the date of commencement of education in the manner determined by the Cabinet of Ministers of

45 Law of Ukraine, 'On Education' (n 14).

46 ibid.

47 Law of Ukraine, 'On Amendments to Certain Laws of Ukraine Regarding the Recognition of Results of Training for Persons Living in the Temporarily Occupied Territory of Ukraine' Document 3482-IX, valid, current edition dated 21 November 2023 <https://zakon.rada.gov.ua/laws/show/3482–20#Text>.

Ukraine. Persons who studied in the temporarily occupied territory of Ukraine can now confirm their knowledge and obtain Ukrainian educational documents. For the level of higher education, it is also envisaged to continue studying according to an individual educational trajectory, which should include the study of the Ukrainian language, the history of Ukraine, passing a special course on the consequences of Russian aggression and countering Russian propaganda, the formation of general cultural and civic competences.

Appropriate changes were made to the regulations on the individual form of obtaining a full general secondary education,[48] which allowed children in the temporarily occupied territory to be enrolled in an external form of education during the entire calendar year and to study remotely in order to obtain Ukrainian educational documents. In addition, an even more simplified procedure was created, which also consists of an externship and is regulated by the Order of the Ministry of Education and Science of Ukraine No. 271 "On approval of the Admission Procedure for obtaining higher, professional pre-higher and professional (vocational and technical) education for persons living in the territories, where it is impossible to ensure the fulfilment of Ukrainian education standards and/or a stable educational process"[49] and has a slightly different specificity. In this context, it is also important to note that any educational documents issued in the temporarily occupied territory are not recognised by Ukraine. According to such documents, it is impossible to continue studying, find a job in Ukraine or Europe, take advantage of various international exchanges or internships, etc. However, if a person still has educational documents issued in the temporarily occupied territory, then there are two ways of obtaining specialised general secondary education in Ukraine for persons staying in the temporarily occupied territories: through an individual form of education (externship) and with the help of Education Centers "Crimea-Ukraine" and "Donbass-Ukraine".[50]

The first way is through an individual form of education (externship) as stated in "The Regulations on an individual form of obtaining a full general secondary

48 Order of the Ministry of Education and Science No 8, 12 January 2016 'On the Approval of the Regulation on the Individual Form of Obtaining a Complete General Secondary Education' <https://zakon.rada.gov.ua/laws/show/z0184-16#Text>.

49 Order of the Ministry of Education and Science of Ukraine No 271, 1 March 2021 'On Approval of the Admission Procedure for Obtaining Higher, Professional Pre-Higher and Professional (Vocational and Technical) Education for Persons Living in the Territories, Where It Is Impossible to Ensure the Fulfillment of Ukrainian Education Standards and/or a Stable Educational Process' <https://zakon.rada.gov.ua/laws/show/z0505-21#Text>.

50 Education Centers Donbass-Ukraine, Crimea-Ukraine of the LSMU <https://www.lsmu.edu.ua/en/for-applicants/donbas-ukraina-en>; Ministry of Education and Science of Ukraine, 'Simplified Entry Through Crimea-Ukraine Centres and Free Online Course – Only Some of the New Opportunities for Students Applying from Crimea' (20 June 2016) <https://mon.gov.ua/news/simplified-entry-through-crimea-ukraine-centres-and-free-online-courses-only-some-of-the-new-opportunities-for-students-applying-from-crimea>.

education".[51] This method can be used at any time and can be done remotely. To do this, a student only needs to find a secondary education institution that provides this form of education, write an appropriate application and send a minimum package of documents.

Subsequently, after enrollment, it is necessary to pass the State Final Attestation in the following subjects: "Ukrainian language", "Ukrainian literature", "History of Ukraine", "Geography", "Fundamentals of legal science" and "Defense of Ukraine" in order to obtain a certificate of basic secondary education (for nine grades), in the event that, for example, the person plans to enter an institution of professional preliminary education (college) in the future. In order to obtain a certificate of complete general secondary education (for 11 grades, which is the complete secondary education and allows to enter university studies), it is necessary to complete an attestation and an annual assessment of all subjects required for study in accordance with the educational program. After that, a person who completes all the stages receives the desired educational documents on obtaining a certain level of education. The second way is through an external study with the help of the Education Centers "Crimea-Ukraine" and "Donbas-Ukraine", which is regulated by the Order of the Ministry of Education and Science of Ukraine No. 271 "On approval of the Admission Procedure for obtaining higher, professional pre-higher and professional (vocational-technical) education of persons, who live in territories where it is impossible to ensure compliance with Ukrainian education standards and/or a stable educational process".[52]

According to this Order of the Ministry of Education and Culture, educational centres are auxiliary "parts" of the admissions committee of higher education institutions, which were created to help applicants from the temporarily occupied territories of Ukraine and territories where active hostilities are taking place. This assistance can consist both in the provision of consultations and assistance in obtaining identity documents. However, the key point in this issue is the above-mentioned Order of the Ministry of Education and Science of Ukraine No. 271 which notes that educational centres

> facilitate the annual assessment and state final assessment of the applicant in the Ukrainian language and history of Ukraine, issuing her/him state-standard documents on basic secondary education or complete general secondary education (provided by an authorized institution of general secondary education).[53]

This means that an authorised institution of general secondary education (i.e. a school) is assigned to each higher education institution on the basis of which educational centres operate. A person who wants to receive documents on obtaining

51 Order of the Ministry of Education and Science of Ukraine No 8, 12 January 2016 (n 48).
52 Order of the Ministry of Education and Science of Ukraine No 271, 1 March 2021 (n 49).
53 ibid.

secondary education of the Ukrainian model can contact the Education Center (which operates from June 1 to September 30), which will redirect them to the authorised secondary education institution, to which one needs to send scans of the application and the necessary documents. After that, a person seeking to obtain Ukrainian education documents needs to take the annual assessment and the state final assessment. It is needed to pass two annual assessments: Ukrainian Language and History of Ukraine. The authorised secondary school will then issue and send a certificate to the Education Center that the individual has completed these annual assessments and order a certificate of full secondary education, which will arrive in due course. It is important to understand that this option is used if there are intentions to obtain higher education in Ukrainian institutions.

Role of international cooperation to ensure the right for education in Ukraine during and after the war

International cooperation has been essential in supporting the resilience of higher education sector, providing the resources and expertise that enable institutions to adapt, persevere, and contribute to Ukraine's rebuilding efforts. One of the most impactful initiatives in upholding Ukrainian higher education during the war has been the UK-Ukraine Twinning Initiative.[54] This project, launched in response to the 2022 invasion, focuses on preserving Ukraine's higher education system, preventing brain drain, and bolstering the resilience of its individual institutions and the whole sector. Through the Twinning project, international institutions offer tailored support to their Ukrainian counterparts, resulting in unique and versatile collaborations. Over the past two years, more than 600 individual projects have been implemented, the direct and indirect help, investments, donations and projects have exceeded GBP 80 million. Focus for the coming years is to ensure the sustainability of these collaborations and to further enhance the resilience and capacity of Ukrainian higher education institutions through international collaborations.

Under the umbrella of the Twinning project the Twinning Dual Degree project has also been developed, supporting ten Ukrainian universities in launching dual degrees with their UK partners.[55] The main aim of the project is to stop brain drain and support Ukrainian students in country and to help students graduate from the best international programmes with the skills relevant and needed for rebuilding the country. The project supports human capital development in Ukraine and rising quality of education to international standards.

54 Universities UK International, 'Responding to International Humanitarian Crises: Lessons from the UK Higher Education Sector Response to the Invasion of Ukraine' (Halpin, UUKI, August 2023) <https://www.universitiesuk.ac.uk/sites/default/files/uploads/UUKi/Ukraine/Halpin%20UUKi%20summary%20report%20Sept%202023.pdf>.

55 Twinning, 'Dual Degree Programme' <https://www.twinningukraine.com/pilot-programme-2023#:~:text=Since%20its%20inception%20in%20March,not%20only%20enhance%20education%20in>.

The Twinning Project has been instrumental in strengthening the resilience of Ukrainian Higher Education Institutions (HEIs) and supporting their ability to contribute to national recovery. Research on the initiative's influence recorded tangible benefits for Ukraine's higher education and broader recovery efforts:[56]

- Educational Continuity: Partnerships allow Ukrainian institutions to access international expertise and financial support, helping them continue offering quality education.
- Preventing brain drain: students get the opportunity to get high-quality education with better employability options without leaving the country.
- Internationalisation of curricula and internationalisation at home: students (especially male) that are not able to travel now get the chance to be exposed to international elements and models in their education.
- Research excellence and rise in research impact: coordination and joint efforts with international partners allow Ukrainian researchers take part in impactful and highly ranked research, deliverables are innovative and relevant to the rebuilding efforts. Ukrainian research is integrated further into global research efforts and is recognised as impactful.
- Human capital development: through internationalised programmes and international cooperation graduates with skills relevant for rebuilding the country according to highest international standards in different sectors are prepared.

Conclusion

The ongoing war in Ukraine has posed unprecedented challenges to the nation, impacting virtually every sector of society, including higher education. Higher education plays a central role in the development of a nation, nurturing the intellectual capital needed for reconstruction and sustainable growth and the resilience of the nation overall. Higher education is essential for national development, particularly in crisis, as it shapes the human capital and innovative research required for national recovery. Legislative changes in Ukraine have enhanced the resilience of the education sector, making it more flexible, accessible, and supportive of mental health and safety. However, the regulatory issues still exist and must be addressed to help the sector to develop more effectively.

Since the onset of the war, Ukraine has enacted several legislative measures to sustain and adapt its higher education system, focusing on flexibility, accessibility, and safety. This chapter has outlined most of the legislative adaptations that ensure accessibility of education for students and pupils from temporarily occupied and

56 Data gathered by the authors from Cormack Consultancy Group based on evaluations of twinning initiatives, see, for example: Twinning, 'UK-Ukraine Twinning Initiative as a Way to Higher Education Resilience in a Conflict Zone' (22 October 2024) <https://www.consultcormack.com/news/uk-ukraine-twinning-initiative-as-a-way-to-higher-education-resilience-in-a-conflict-zone>; Ben Upton, 'UK-Ukraine Dual Degrees to Help Post-War Reconstruction' (10 December 2022) <https://www.timeshighereducation.com/news/uk-ukraine-dual-degrees-help-post-war-reconstruction>.

de-occupied territories, on top of these legal adaptations other measures were introduced to achieve:

1 Flexible learning formats: universities now have the flexibility to operate in online, offline, or hybrid modes, depending on safety conditions. Academic calendars have also been adjusted, with options for shortened semesters and alternative exam schedules to accommodate interruptions.
2 Support for displaced students: admission requirements were modified, and financial support offered to students displaced by the conflict. The National Multidisciplinary Test replaced traditional exams for admission, ensuring displaced students can access education.
3 Mental health and well-being: recognising the trauma of war, higher education institutions now include mandatory mental health services for students and staff, providing psychological support as a key part of the educational environment.
4 Research and innovation: universities have received funding to support research projects related to national recovery, encouraging studies in engineering, health, and technology that address the unique challenges of post-war reconstruction.
5 Safety and infrastructure: legal guidelines require universities to ensure physical safety for students and staff, including the provision of bomb shelters and emergency protocols. These adaptations reinforce the commitment of Ukrainian universities to offer a secure and supportive learning environment amid the conflict.

These legislative changes reflect Ukraine's dedication to maintaining educational continuity and adapting the sector to meet the new demands posed by war and recovery. However, universities collectively face many challenges due to the changes in regulations that are still to be initiated and implemented due to the war and in general for future, more advanced development of the sector.

International cooperation has proven to be a highly valuable tool in sustaining Ukraine's higher education in tackling immediate challenges. Moreover, international cooperation will play a crucial role in the nation's post-war recovery as it already supports long-term rebuilding. The Twinning Initiative exemplifies how international partnerships can safeguard educational quality, retain talent, and create new pathways for research and development. With ongoing support from international and Ukrainian institutions, these initiatives ensure that higher education remains not only resilient but a driving force in Ukraine's path to recovery and growth.

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