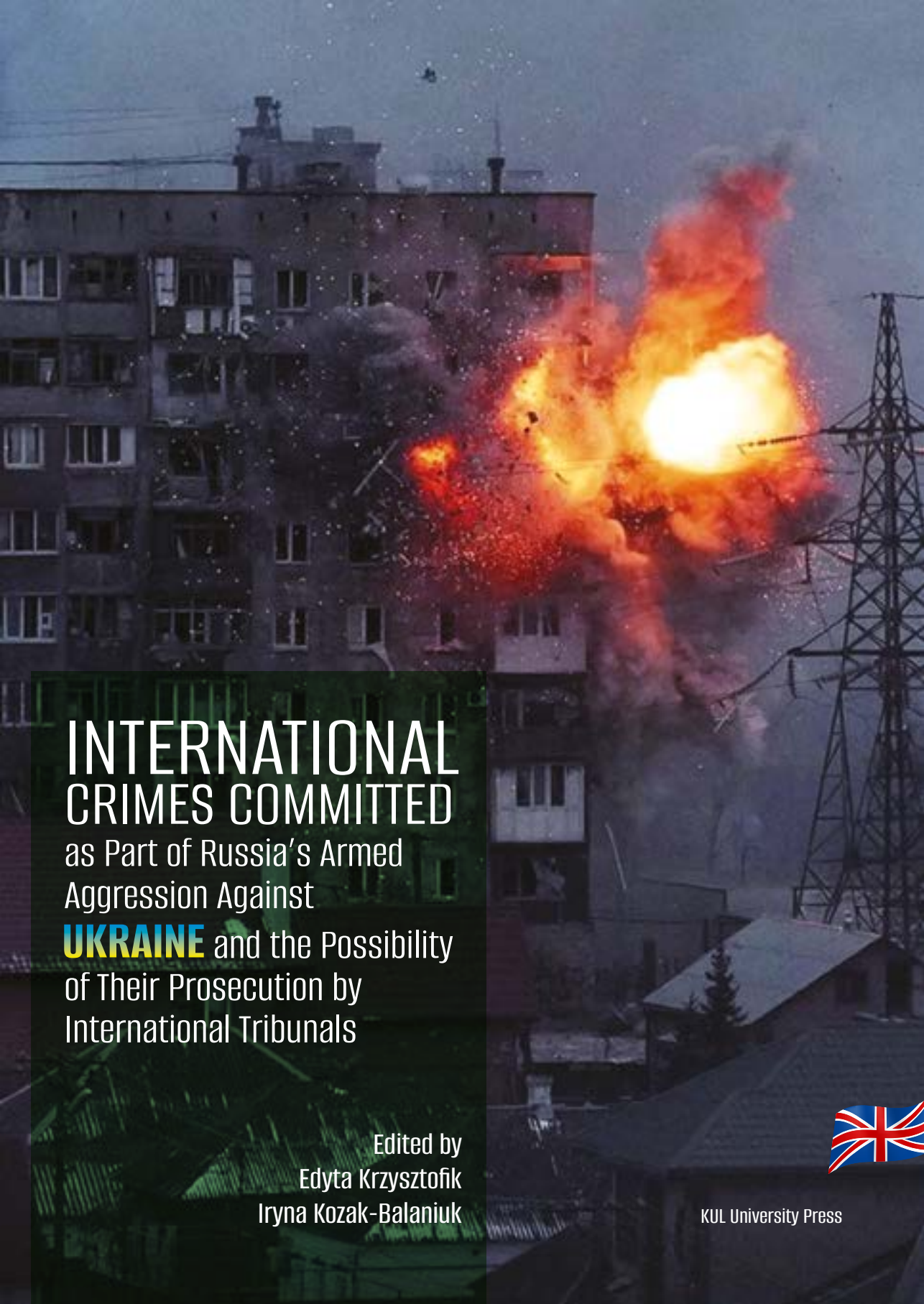

INTERNATIONAL CRIMES COMMITTED as Part of Russia's Armed Aggression Against UKRAINE and the Possibility of Their Prosecution by International Tribunals

Edited by
Edyta Krzysztofik
Iryna Kozak-Balaniuk

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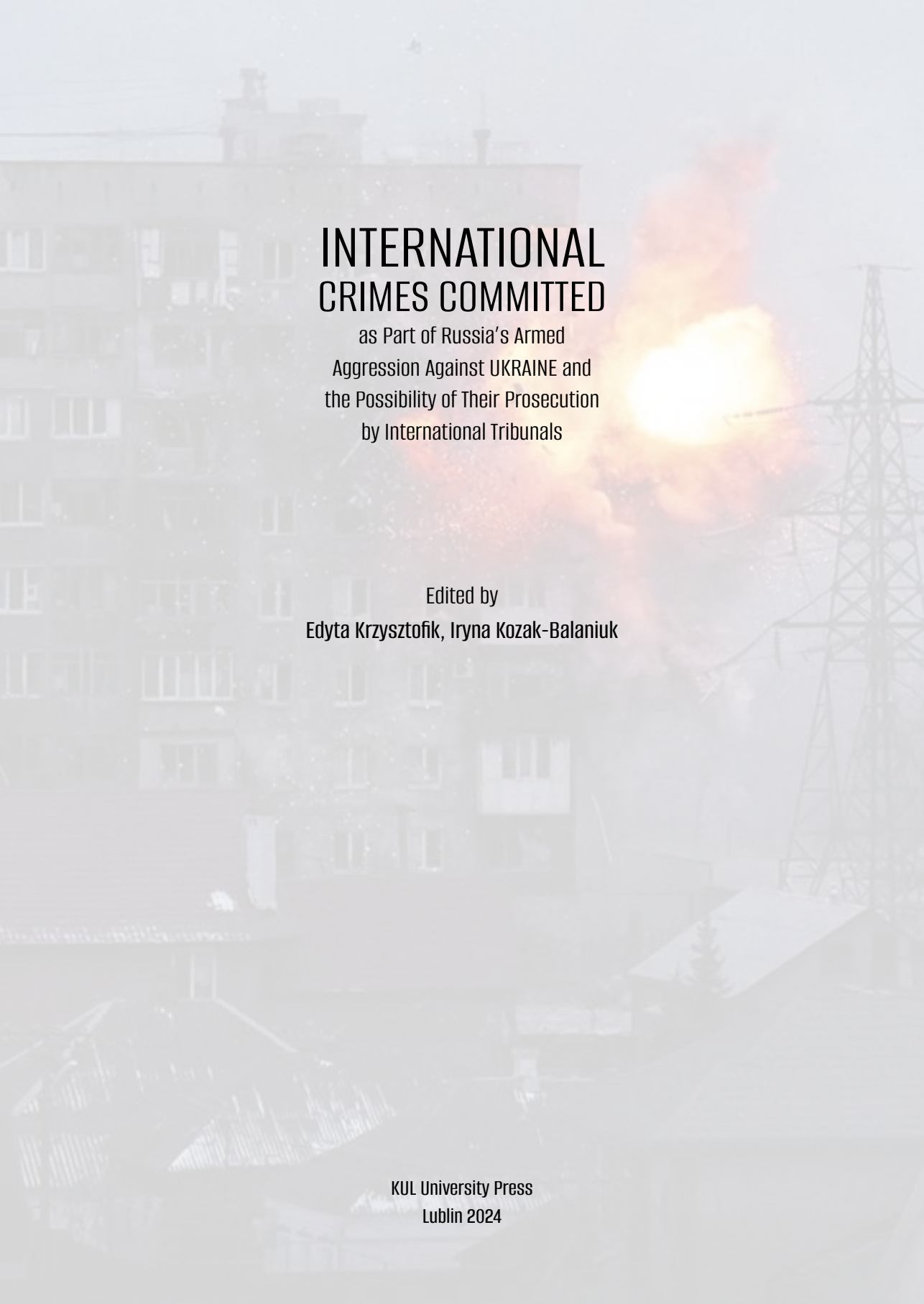
The John Paul II
Catholic University of Lublin



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Part II
Crimes Committed on the Territory of Ukraine as Part of Russian Armed Aggression

Introduction

The Russian military aggression is undoubtedly the most flagrant violation of Article 2(4) of the United Nations Charter[1] since World War II. It constitutes an act of aggression as defined in Article 8 bis of the Rome Statute of the International Criminal Court.[2] Various organizations and research centres have been collecting data and information on the actions and crimes committed by Russian armed forces as part of this military aggression. However, no comprehensive attempt has been made to address the legal aspects of Russia's armed aggression in an extensive manner. This publication is the result of research conducted in one of the areas pursued at the John Paul II Catholic University of Lublin, as part of a project funded by the Ministry of Science and Higher Education titled: „Legal analysis of Russia's actions in Ukraine since 2014 in terms of aggression, war crimes, and genocide, as well as the legal measures of Ukraine's neighbouring countries regarding the status of Ukrainian citizens." The research within this project was divided into three areas. The first area concerns the status of Russian crimes from the perspective of international criminal law and the possibilities for prosecution. The second area involves investigating violations of the human rights of Ukrainian citizens and the potential for filing complaints with the European Court of Human Rights. The third area focuses on the legal status of Ukrainian citizens who were forced to flee the Russian military aggression and seek refuge in neighbouring countries. A team of several dozen experts was assembled from

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1 Charter of the United Nations, Statute of the International Court of Justice and Agreement Establishing the United Nations Preparatory Commission, Journal of Laws 1947, No. 23, item 90.

2 Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, Journal of Laws of 2003, No. 78, item 708 (hereinafter referred to as the Rome Statute).

the following countries: Poland, Ukraine, Romania, Moldova, Bulgaria, Hungary, Georgia, North Macedonia, and Norway. The group includes both academics and practitioners, enabling a practical application perspective on selected issues of international law. The research presented in this publication pertains to the first area of the project.

The Russian armed aggression against Ukraine, ongoing since 2014, represents a severe breach of international law, including the United Nations Charter, particularly given that the aggressor state is a permanent member of the UN Security Council. On February 24, 2022, Russia initiated a new phase of its aggression through a full-scale land, air, and sea invasion aimed at effectively taking control of the territory of another sovereign state. This action violates not only fundamental international law agreements but also the core principles of the existing legal order. During this military aggression, the aggressor state's army has committed the most heinous crimes against civilians and prisoners of war. In 2022, Europe and the entire world faced a new challenge to the existing international legal order. The actions of Russian military forces, as part of Russia's armed aggression, highlight that an aggressor state cannot be a permanent member of the United Nations and perhaps should not be a member of the Organization at all, given that the Organization brings together civilized nations. Russian troops have unquestionably violated international humanitarian law during armed conflicts, particularly disregarding the provisions of the four Geneva Conventions and their two Additional Protocols. The Russian military conducts almost daily precision missile and drone attacks on Ukrainian cities. These attacks often target civilian structures or critical infrastructure (such as energy systems), essential for the survival of the civilian population. On numerous occasions, Russian forces have carried out indiscriminate attacks. The killings of civilians by Russian troops in occupied cities and towns, such as Bucha, Irpin, and Izyum, have been witnessed globally thanks to modern technology. However, not all civilized countries appear willing to condemn these acts or join international initiatives to establish a special criminal tribunal for Russia's crime of aggression. The most common and brutal crimes committed by Russian forces on Ukrainian territory, including occupied areas, include imprisonment, forced disappearances, torture, rape, execution of prisoners of war, deportation, and the forced transfer of children (Ukrainian citizens). These crimes have been analysed in this publication. Additionally, Russian troops have caused some of the largest environmental crimes seen in Europe, and cyberattacks have become a common element of hybrid warfare, targeting not only Ukraine's IT systems but also those of countries supporting Ukraine, including Poland.

An international team of experts tasked with examining this issue faced significant challenges in comprehensively addressing the legal aspects of Russia's armed aggression. Two specific topics were chosen for analysis, which could make a valuable contribution not only to Polish academic literature but also internationally, as this monograph is being translated and disseminated by the experts across their academic and research institutions. Furthermore, these selected studies (expert reports) could be crucial for ongoing research at various institutions. The two main topics examined in the first area of the task were the legal status of Russian crimes in Ukraine and the justification for establishing a special criminal tribunal for Russia's crime of aggression. The conducted research resulted in separate reports covering:

- genocide, crimes against humanity, and war crimes committed by Russian forces on Ukrainian territory,
- the crime of aggression,
- environmental crimes (so-called ecocide),
- cyberattacks,
- the International Criminal Court's (ICC) actions against Russian armed aggression,
- economic losses resulting from Russian armed aggression.

The most attention was given to the deportation and forced transfer of Ukrainian children. Firstly, recently, parties to armed conflicts have rarely resorted to such atrocities on this scale. In the case of Russia's armed aggression, there is evidence of children being transferred within occupied Ukrainian territory and across borders, i.e., deported from Ukraine to Russia. Secondly, such actions indicate an intent to partially destroy the Ukrainian nation in those areas under Russian control (occupation). The erasure of Ukrainian children's identities and further Russification, confirmed by witness testimonies and the victims who managed to return home, is not currently addressed in the Rome Statute. Nonetheless, there is a need for discussion on whether the forced alteration of identity and „patriotic education" by an aggressor state in an international armed conflict should be included under the jurisdiction of the ICC.

The primary objective of the conducted research was to comprehensively analyse the crimes committed by both high-ranking Russian state officials and Russian soldiers during the armed aggression, including its first phase (2014–2022). Based on the definitions in the Rome Statute, the expert team attempted to classify specific acts into appropriate categories of crimes under ICC jurisdiction. The findings related to the crime of aggression by senior Russian state and military officials enabled considerations on the justification for establishing a special

criminal tribunal for Russia's crime of aggression, as well as defining key aspects of its establishment and functioning, including its jurisdiction. The research team, comprising scholars and practitioners from various countries, including Ukraine, provided diverse perspectives and drew upon different experiences. An additional aim of the research and securing funding for it was to disseminate the findings—primarily through a monograph containing expert reports and their analyses, and creating a website with further project-related analyses. The international research team's publication of the monograph in Polish, Ukrainian, and English is expected to promote the findings and facilitate ongoing international collaboration in gathering legal analyses supporting the prosecution of Russian armed aggression and other severe international crimes committed during the invasion.

This monograph consists of three parts. The first part includes a collection of expert opinions by the research team regarding the ICC's actions against Russian crimes in Ukraine, evidence proceedings before the ICC, universal jurisdiction in international law, and the justification for establishing a special tribunal for Russia's crime of aggression. The second part contains expert opinions on specific international crimes and other actions by the aggressor state that violate international obligations. The third and final part provides a synthesis of the expert opinions and their summaries, which serve to draw conclusions presented at the end of the monograph. The research conducted as part of the first area of the commissioned task was completed by the end of September 2024.

Part I

The International Criminal Court for Russian Armed Aggression and the Justification for Establishing a Special Tribunal for the Russian Crime of Aggression

Iryna Kozak-Balaniuk

International Criminal Court Towards Russian Crimes in Ukraine Committed After 24 February 2022

Introduction

"I am heartbroken [...] it pains me to see that we have learnt so little from the Holocaust,"[1] Benjamin Ferencz, the last living Nuremberg prosecutor, said in an interview for CNN on 15 April 2022, where he commented on Russian military aggression against Ukraine and emerging evidence of crimes committed by Russian soldiers.

The armed attack of the Russian Federation on Ukraine, with partial occupation of individual regions of the sovereign territory of Ukraine, constitutes a crime of aggression under international law. This is defined in the UN General Assembly Resolution (1974)[2] and the Statute of the International Criminal Court (hereinafter referred to as the ICC), which provides a binding definition of the crime of aggression.[3] The aggression of the Russian Federation and the shelling of the territory of Ukraine from the air, land and sea marked the beginning of an open international armed conflict between the two states, in which international humanitarian law of armed conflicts[4] should apply, in particular the four Geneva

1 Excerpts from the interview are available at: https://www.youtube.com/ watch?v= 6UBlHLVIgeI (accessed: 13.10.2023).

2 United Nations General Assembly Resolution 3314 (XXIX), 1974, Annex.

3 Statute of the International Criminal Court, done at Rome on 17 July 1998, Journal of Laws of 2003, No. 78, item 708 (hereinafter referred to as the Rome Statute).

4 International humanitarian law of armed conflict comprises the law against war (*jus contra bellum*), the law of war (*jus in bello*) and humanitarian law, i.e., norms of international law

Conventions of 1949[5] relative to the protection of victims in armed conflicts. The armed attack of the Russian Federation launched on 24 February 2022 is only another stage of the armed aggression waged by this state against Ukraine to date,[6] i.e., the stage of formally declared military operations of the Russian Federation against Ukraine.[7]

The open armed attack of the Russian Federation on another sovereign state, Ukraine, which is called a "special military operation"[8] by the aggressor state, clearly meets the criteria for the crime of aggression. However, it should be emphasized that the ICC has no jurisdiction over the crime of aggression committed against Ukraine, as neither Ukraine nor the Russian Federation is a party to the Rome Statute. Ukraine's declaration of acceptance of the jurisdiction of the ICC does not equate to being a party to the Rome Statute. The ICC therefore remains competent to prosecute those responsible for committing the other crimes within the jurisdiction of the Court, namely the crimes of genocide, crimes against humanity and war crimes committed by Russian soldiers in Ukraine. However, it is still an open question whether the ICC, which to some extent owes its establishment to the work and experience of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda,[9] can effectively

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seeking to prevent armed conflicts, restrict the arbitrariness of belligerents in choosing the means and methods of warfare, and protect victims of armed conflict.

5 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva on 12 August 1949, Journal of Laws of 1956, No. 38, item 171, Annex; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, done at Geneva on 12 August 1949, Journal of Laws of 1956, No. 56, item 171, Annex; Geneva Convention relative to the Treatment of Prisoners of War, done at Geneva on 12 August 1949, Journal of Laws of 1956, No. 38, item 171, Annex; Geneva Convention relative to the Protection of Civilian Persons in Time of War, done at Geneva on 12 August 1949, Journal of Laws of 1956, No. 38, item 171, Annex; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, done at Geneva on 8 June 1977, Journal of Laws of 1992, No. 41, item 175, Annex.

6 O. Shubalyi, A. Gordiichuk, *The Socio-Economic consequences of war in Ukraine: the national, regional and global dimensions*, "Barometr Regionalny" 2022, vol. 18, no. 1, p. 20.

7 Noteworthy, the actual armed aggression of the Russian Federation against sovereign Ukraine and its territorial integrity began back in 2014 and ultimately led to the illegal annexation of the Crimean Peninsula and military operations in the territory of the eastern oblasts of Ukraine.

8 A. Lanoszka, J. Becker, *The art of partial commitment: the politics of military assistance to Ukraine*, "Post-Soviet Affairs" 2023, vol. 39, no. 3, p. 173.

9 S. Muhammad, B. Holá, A. Dirkzwager, *Reimagining the ICC: Exploring Practitioners' Perspectives on the Effectiveness of the International Criminal Court*, "International Criminal Law Review" 2021, vol. 21, no. 1, pp. 126-127.

prosecute and try those responsible for committing the most serious crimes under international law in the territory of Ukraine as part of the Russian armed aggression? Do the actions taken to date by the ICC Office of the Prosecutor regarding crimes committed in the territory of Ukraine demonstrate that the ICC, working with the Government of Ukraine and the Office of the Prosecutor General of Ukraine, is able to meet the challenge of prosecuting the most serious crimes of concern to the international community during the ongoing armed aggression and, consequently, an international armed conflict?

This expert opinion sets out to determine what actions the ICC Office of the Prosecutor has taken so far against the most serious crimes of concern to the international community committed in the territory of Ukraine by Russian soldiers and to analyse whether the actions taken to date by the ICC are sufficient, given the scale of the crimes committed and the fact that the Russian armed aggression is still ongoing.

1. The Scale of the International Armed Conflict in the Territory of Ukraine as a Result of Russian Armed Aggression

Before any data regarding the scale of the ongoing armed conflict and the crimes committed by Russian soldiers in the territory of Ukraine can be collated and presented, the following circumstances should be taken into account, which render it difficult, and sometimes virtually impossible, to gather evidence and data, and identify victims and perpetrators:

a. the international armed conflict in the territory of Ukraine is still ongoing, and it is impossible to tell the date of the end of hostilities, as the aggressor state is still conducting offensive military operations, is occupying parts of the sovereign territory of Ukraine and is shelling infrastructure and civilian facilities;
b. due to the threat of shelling or other hostilities, some places where international crimes were committed are difficult to access or virtually inaccessible;
c. the aggressor state is occupying parts of the sovereign territory of Ukraine, exercising effective control over the civilian population there, which means that gathering any information and evidence of international crimes committed in these areas will only be possible once the control by the authorities in Kiev has been restored.

On 4 March 2022, the UN Human Rights Council established the Independent International Commission of Inquiry on Ukraine[10] to investigate human rights violations and crimes committed by the Russian army in the territory of Ukraine following the onset of a new stage of armed aggression. As at 10 September 2023, the Office of the United Nations High Commissioner for Human Rights (OHCHR) recorded 27,149 civilian casualties, including 9,614 killed and 17,535 wounded.[11] However, the actual toll is undoubtedly higher because the experts of the Commission of Inquiry had not managed to reach all the locations where gross violations of human rights and crimes against the civilian population were committed in the territory of Ukraine. According to estimates by the United Nations High Commissioner for Human Rights, 6,204,600 people have fled the territory of Ukraine (as at 3 October 2023), while 5,088,000 are internally displaced (as at June 2023).[12]

Estimates by the United Nations Office for the Coordination of Humanitarian Affairs say that 17.6 million people in Ukraine require humanitarian assistance, and humanitarian access to areas affected by hostilities remains significantly hampered.[13] The Commission gathered new evidence of violations of international human rights law and international humanitarian law and crimes committed by Russian soldiers. The Commission investigated unlawful attacks using explosive weapons, including rocket fire and its impact on civilians, torture, sexual and gender-based violence, and the displacement and deportation of Ukrainian children.

It is practically impossible to estimate the size of the territory covered by hostilities. The Russian Federation shells civilian facilities in various cities, towns and villages almost every day, which means that, in the opinion of other countries, the international armed conflict following the Russian armed aggression is spreading to the entire territory of Ukraine and there is a risk of serious harm as a result of the widespread use of violence against civilian population. For example, this argument is used by the Head of the Office for Foreigners in Warsaw in decisions to grant subsidiary protection to Ukrainian citizens where they apply for international protection in Poland. To quote an excerpt from the justification of the decision of the Head of the Office for Foreigners of 29 November 2022, by which

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10 United Nations General Assembly Resolution adopted on 4 March 2022, A/HRC/RES/49/1.

11 Report of the Independent International Commission of Inquiry on Ukraine, 19 October 2023, A/78/540, p. 4.

12 Report of the Independent International Commission of Inquiry on Ukraine, 19 October 2023, A/78/540, p. 4.

13 Information available at: https://reports.unocha.org/en/country/ukraine/ (accessed: 4.11.2023).

the Office granted subsidiary protection to a Ukrainian citizen, "there is a real risk that after returning to the country of origin, she will be at risk of a serious and individualized harm to her life or health resulting from the widespread use of violence against civilians in a situation of international armed conflict and, because of this risk, she cannot benefit from the protection of her country of origin."[14] According to estimates, approximately 1/5 (approx. 18%) of Ukraine's territory is either affected by active military operations or under the occupation of the aggressor state.[15] In addition to civilian victims, there are also casualties among the soldiers of the Armed Forces of Ukraine who are forced to defend their territory against the Russian armed attack. As at April 2023, approximately 15.5–17.5 thousand soldiers of the Armed Forces of Ukraine were killed, while

Fig. 1. Map of the territory of Ukraine showing the territories occupied by the Russian Federation and an infographic of active military operations.[16]

14 Decision of the Head of the Office for Foreigners of 29 November 2022 (doc. ref. DPU.420.3130.2022) refusing to grant refugee status and granting subsidiary protection, p. 2.

15 Information available at: https://www.unian.ua/war/rosiyani-cogo-roku-zmogli-okupuvati-teritoriyu-menshu-za-ploshchu-kiyeva-nyt-12408060.html (accessed: 29.10.2023).

16 The map is available on the interactive website (continuously updated): https://liveuamap.com/uk (accessed: 31.10.2023).

approximately 130 thousand were wounded.[17] Perhaps a map, which is updated on an ongoing basis, is the best tool to most accurately reflect the size of the territories occupied (controlled) by the aggressor state. The areas marked in red (darker shade of red) are occupied by the aggressor state. Noteworthy, although the troops of Ukraine and the aggressor state actually engage along the front line (the borderline between the territory of Ukraine controlled by the Government of Ukraine and the territory of Ukraine under the occupation of the Russian Federation), military operations in the form of active fire are not limited only to the front line, but also extend to the frontline areas and further oblasts of Ukraine.

The Office of the Prosecutor General of Ukraine reported that as at 29 September 2023, 108,904 cases of war crimes committed by Russian soldiers were documented since 24 February 2022.[18] Military experts claim that since the beginning of armed aggression, the Russian army has been using (during periods of intensified hostilities) approximately 40-60 thousand projectiles of all types a day, and approximately 24 thousand projectiles a day in times of relative peace.[19] It remains an undisputed fact that the ongoing international armed conflict in the territory of Ukraine following the armed attack of the Russian Federation has been the largest-scale clash between two states in Europe since World War II,[20] as is well illustrated in the chart above (see Fig. 1).

One cannot fail to mention the territory of the Crimean Peninsula, which is still occupied by the Russian Federation following the illegal annexation, along with the city of Sevastopol and other parts of the sovereign territory of Ukraine, namely the unrecognized republics of Luhansk and Donetsk,[21] which territories are currently used by the Russian army as launching grounds for further offensive activities. Ukraine has been perseveringly using international mechanisms

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17 O. Brown, A. Froggatt, N. Gozak, N. Katser-Buchkovska, O. Lutsevych, *The consequences of Russia's war on Ukraine for climate action, food supply, and energy security. Research Paper*, London 2023, p. 4.

18 A.S. Bowen, M.C. Weed, *Congressional Research Service, Report – war crimes in Ukraine*, Washington 2023, p. 1.

19 І. Загороднюк, Д. Вишневський, *Втрати та зміни біорізноманіття в зонах тривалих бойових дій в Україні: теріологічна складова (2014-2022)*, "Вісник Національної академії наук України" 2022, vol. 11, p. 66.

20 D. K. Shahi, *War in Ukraine: a geopolitical analysis*, "International Journal of Research in Social Science" 2022, vol. 12, no. 6, p. 89.

21 Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, Report on violations of international humanitarian and human rights law, war crimes and crimes against humanity committed in Ukraine since 24 February 2022, Warsaw 2022, p. 7.

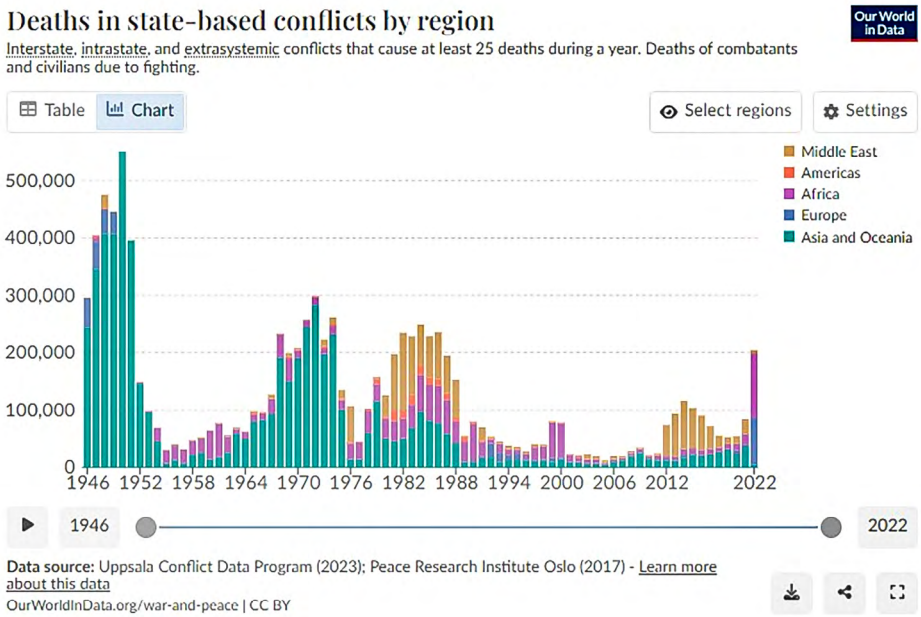

Fig. 2. Chart showing the number of casualties in armed conflicts in the world (both civilians and combatants) by continent[22]

to hold both the Russian Federation as a state and its citizens as individuals to account for all unlawful acts and crimes committed as part of the Russian armed aggression that began back in 2014. The latest attempts include the institution of proceedings before the International Court of Justice regarding the violation by the Russian Federation of the Convention on the Prevention and Punishment of the Crime of Genocide.[23]

The Russian armed aggression, and in particular its new stage that began on 24 February 2022, has triggered an international armed conflict on an unprecedented scale in Europe. The risk of shelling any city or town in the Ukrainian territory remains very high. Perhaps it will not be entirely appropriate to try to compare the international armed conflict caused by the Russian armed aggression

22 The chart is available at: https://ourworldindata.org/grapher/deaths-in-state-based-conflicts-by-region (accessed: 31.10.2023).

23 A summary of the procedural steps taken by the International Court of Justice in the pending proceedings available at: Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 states intervening), International Court of Justice, Report of ICJ – 1 August 2022-31 July 2023, General Assembly Official Records Seventy-eight session, supplement no. 4, A/78/4.

with the armed conflict in the territory of the former Yugoslavia because the circumstances of the latter's outbreak, its characteristics and course were entirely different. The armed conflict in the territory of the former Yugoslavia could be classified differently depending on its specific periods and the parties involved in the hostilities.[24] Nonetheless, it is worth noting that during the armed conflict in the territory of the former Yugoslavia, the international community, through the UN Security Council, established an *ad hoc* international criminal tribunal to prosecute the perpetrators of the most serious crimes of concern to the international community committed during that conflict.[25] Before any options can be discussed for establishing an *ad hoc* international criminal tribunal or any other special tribunal to prosecute the perpetrators of the most serious crimes committed in the territory of Ukraine in connection with the Russian armed aggression, it is first necessary to present and evaluate the actions taken by the ICC regarding the crimes in Ukraine, because the ICC was established only under the Rome Statute of 1998 and could not therefore deal with the crimes committed during the armed conflict in the territory of the former Yugoslavia.

2. Options to Prosecute Perpetrators of International Crimes Committed in the Territory of Ukraine after 24 February 2022

Under customary international law, a state has the right to exercise criminal jurisdiction within its territory and over its nationals, and can choose the specific attributes of that jurisdiction.[26] In the *Arrest Warrant* (Congo v. Belgium) case, the International Court of Justice concluded that national legislation reflects the circumstances in which a state provides in its own law the ability to exercise jurisdiction. But a state is not required to legislate up to the full scope of the jurisdiction allowed by international law.[27] It is a sovereign prerogative of a state

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24 T. Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, "The American Journal of International Law" 1998, vol. 92, no. 2, pp. 236-237.

25 United Nations Security Council Resolution adopted on 25 May 1993, S/RES/827.

26 F.A. Mann, *The Doctrine of Jurisdiction in International Law*, "Recueil des Cours de l'Academie de Droit Internationale" 1964, vol. 111, p. 9.

27 Arrest Warrant of 11 April 2000 (Congo v. Belgium) [2002] ICJ Rep 2001 para. 45 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).

to limit the delegation of specific powers under national law, but a state is not limited in delegating powers under international law.[28]

Ukraine is not a state party to the Rome Statute (like Russia) but this does not preclude the ICC's exercise of jurisdiction over the most serious crimes of concern to the international community committed in the territory of this state. Pursuant to Article 4(2) of the Rome Statute, the Court may exercise its functions and powers in the territory of any State Party and, by special agreement, in the territory of any other state. Article 12(3) provides for the option for a state which is not a Party to the Statute to accept the exercise of jurisdiction by the Court regarding the crime in question, by declaration lodged with the Registrar. Ukraine has submitted two declarations. The first declaration was lodged by the Government of Ukraine in April 2014 and covered crimes against humanity and war crimes committed in its territory in the period from 21 November 2013 to 22 February 2014.[29] Subsequently, on 8 September 2015, the Minister of Foreign Affairs of Ukraine lodged a second declaration in which the Government of Ukraine accepted the ICC's jurisdiction in relation to international crimes committed in the territory of Ukraine since 20 February 2014 onwards.[30] Consequently, the ICC's jurisdiction with respect to crimes committed in the territory of Ukraine covers the period starting from 21 November 2013.

Notwithstanding the options for the ICC's exercise of jurisdiction, Ukraine has territorial jurisdiction over persons who commit crimes in its territory and may be prosecuted under Ukrainian criminal law.[31] In theory, nothing prevents prosecution of the perpetrators of crimes committed as part of the Russian armed aggression under Ukrainian national legislation. However, in practice, there are specific obstacles to the effective prosecution by the authorities in Ukraine. These include, immunities held by very senior state officials, or the inability to prosecute them.[32] On the one hand, conducting criminal proceedings before Ukrainian courts against perpetrators of crimes committed in the territory of Ukraine offers a number of advantages, such as direct contact with victims and witnesses, easier

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28 M. Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, Cambridge 2020, p. 5.

29 The text of the declaration is available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf (accessed: 14.10.2023).

30 The text of the declaration is available at: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine (accessed: 14.10.2023).

31 M. Sterio, *The Ukraine crisis and the future of international courts and tribunals*, "Case Western Journal of International Law" 2023, vol. 55, p. 483.

32 K.J. Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis*, "Journal of Genocide Research" 2022, p. 8.

access to evidence, and no need for translation. On the other, however, Ukraine's law enforcement agencies may not have full operational, logistic and personnel capabilities during the ongoing international armed conflict in the territory of Ukraine.[33] Further, it is generally accepted that war crimes, crimes against humanity, the crime of genocide and the crime of aggression are covered by universal jurisdiction,[34] which should be understood as a principle of international law enabling a state to initiate criminal proceedings in relation to certain crimes regardless of the place of their commission and the nationality of the perpetrator or victim.[35] Universal jurisdiction enables any state to initiate criminal proceedings against the perpetrator of an international crime committed anywhere in the world because international crimes, given their gravity, are of concern to the entire international community.[36] Therefore, any state may initiate an investigation against a person who is reasonably suspected of having committed one of the international crimes in the territory of Ukraine in connection with the Russian armed aggression. However, in the case of universal jurisdiction, very senior state officials, such as the president, prime minister, government ministers, will enjoy personal immunity,[37] which makes it impossible to initiate proceedings against this category of persons.

Out of the above-mentioned options for prosecuting perpetrators of international crimes committed in the territory of Ukraine in connection with the Russian armed aggression, an international tribunal will be the most appropriate, and in the first place the ICC, unless there is an agreement between states that the ICC may not be capable of dealing with the scale of international crimes committed in the territory of Ukraine in connection with the Russian armed aggression, and that another *ad hoc* tribunal will have to be established.

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33 M. Sterio, *The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC*, "ILSA Journal of International and Comparative Law" 2013, vol. 19, p. 249.

34 R. Hesenov, *Universal Jurisdiction for International Crimes – A Case Study*, "European Journal on Criminal Policy and Research" 2013, vol. 19, p. 277.

35 K.C. Randall, *Universal jurisdiction under international law*, "Texas Law Review" 1988, no. 66, pp. 785–788.

36 X. Philippe, *The principles of universal jurisdiction and complementarity: how do the two principles intermesh?*, "International Review of the Red Cross" 2006, vol. 88, no. 862, p. 378.

37 Ł. Kułaga, *Inicjatywa dotycząca specjalnego trybunału ds. zbrodni agresji przeciwko Ukrainie – wyzwania i perspektywy*, "Prawo i więź" 2022, no. 4(42), pp. 74-75.

3. Preliminary Examination and Investigation of the Case Regarding Crimes in Ukraine Conducted by the ICC

A note must be made at the outset that before 24 February 2022, the ICC Office of the Prosecutor conducted a preliminary examination regarding the situation in Ukraine considering the annexation of the Crimean Peninsula by the Russian Federation and the military operations in the territory of the eastern oblasts of Ukraine in which the Russian Federation was involved. The preliminary examination was opened on 24 April 2014 based on an *ad hoc* declaration lodged by the Government of Ukraine accepting the jurisdiction of the ICC, which was subsequently extended by a second declaration by Ukraine, lodged in 2015, to encompass crimes committed in the territory of Ukraine from 20 February 2014 onwards. In her statement of 11 December 2020, the then Prosecutor of the ICC Fatou Bensouda concluded that in the course of the preliminary examination there was a reasonable basis at the time to believe that a broad range of conduct constituting war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine.[38] The findings include three categories of crimes: (i) crimes committed in the context of the conduct of hostilities; (ii) crimes committed during detentions; and (iii) crimes committed in Crimea.

On 28 February 2022, the ICC Prosecutor Karim A.A. Khan QC announced the decision to proceed with opening an investigation into crimes committed in the territory of Ukraine[39] following the onset of a new stage of the Russian armed aggression. In his statement, the Prosecutor said: "I have reviewed the Office's conclusions arising from the preliminary examination of the situation in Ukraine, and have confirmed that there is a reasonable basis to proceed with opening an investigation. In particular, I am satisfied that there is a reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed in Ukraine in relation to the events already assessed during the preliminary examination by the Office. Given the expansion of the conflict recently, it is my intention that this investigation will also encompass any new alleged crimes falling within the jurisdiction of my Office that are committed by any party to the conflict on any part of the territory of Ukraine." The investigation

[38] The text of the statement is available at: https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine (accessed: 25.10.2023).

[39] Communication on official opening of an investigation is available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening (accessed: 30.10.2023).

of the case regarding the situation in Ukraine was initiated on 2 March 2023,[40] after 43 States Parties to the Rome Statute officially presented on 1 March 2022 the situation in Ukraine to the ICC Office of the Prosecutor.[41]

On 17 March 2023, ICC Pre-Trial Chamber II issued warrants of arrest for two individuals in the context of the situation in Ukraine: Mr Vladimir Vladimirovich Putin, President of the Russian Federation, and Ms Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation. Based on the Prosecution's applications of 22 February 2023, Pre-Trial Chamber II considered that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children. The President of the Russian Federation was charged with the unlawful deportation and transfer of population (Article 8(2)a(vii) of the Rome Statute) and the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (Article 8(2)b(viii) of the Rome Statute). The charge alleges the commission of these war crimes as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible (Article 25(3)a of the Rome Statute) and with respect to superior and subordinate relationships (Article 28(b) of the Rome Statute).[42] Maria Alekseyevna Lvova-Belova was charged under the same Articles 8(2)a(vii) and 8(2)b(viii) of the Rome Statute, with alleged commission of these crimes as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible (Article 25(3) a of the Rome Statute).

Also, noteworthy is the establishment of the Joint Investigation Team (hereinafter referred to as the JIT) with the support of the European Union Agency for Criminal Justice Cooperation. The JIT comprises Ukraine, Poland and Lithuania.[43] The Team is led by Ukraine, a non-EU country. A JIT is an investigative

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40 Decision of 2 March 2023 on assigning the situation in Ukraine to Pre-Trial Chamber II, International Criminal Court, No. ICC-01/22.

41 Information available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states (accessed: 30.10.2023).

42 Information on the charges contained in the warrants of arrest is available at: https://www.icc-cpi.int/situations/ukraine (accessed: 28.10.2023).

43 Information available at: https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes and https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint (accessed: 25.10.2023).

instrument established under the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000[44] with a view to prosecuting cross-border crime within the EU by a group of EU Member States. The main purpose of the JIT is to facilitate investigations and international judicial cooperation. A JIT's composition can be extended to non-EU countries based on a separate agreement, which was not the case with Ukraine. On the one hand, using a JIT to investigate crimes in the territory of a party to an international armed conflict and giving that country the role of the team leader may be controversial, but on the other, the composition of the JIT is rather limited anyway, given that a number of EU Member States conduct investigation of crimes in the territory of Ukraine. Three more EU Member States (Estonia, Latvia and Slovakia) joined the JIT after it had been set up. From the point of view of the activities by the ICC against international crimes committed as part of the Russian armed aggression, it should be emphasized that on the basis of an agreement between the ICC Office of the Prosecutor and the JIT, the ICC Prosecutor became a participant in the work of the JIT and actively contributes to the Team's meetings.[45] The agreement with the ICC Office of the Prosecutor will enable rapid and real-time coordination and cooperation with the JIT partner countries, in connection with investigations conducted by the Office of the Prosecutor and competent national authorities. Moreover, the agreement between the JIT and the ICC Office of the Prosecutor is the first-ever cooperation project of its kind between EU Member States and a non-EU country, and sends a clear message that all efforts will be undertaken to effectively gather evidence on international crimes committed in Ukraine and bring those responsible to justice. Noteworthy, on 23 March 2023, the Prosecutor General of Ukraine, Andriy Kostin, and the Registrar of the ICC, Peter Lewis, signed a cooperation agreement on the establishment of an ICC country office in Ukraine, in Kyiv.[46] To date, ICC country offices have been established in Kinshasa and Bunia (Democratic Republic of the Congo, "DRC"); Kampala (Uganda); Bangui (Central African Republic, "CAR");

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44 Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, Journal of Laws of 2007, No. 135, item 950.

45 In view of the fact that the ICC Prosecutor is an independent organ, he could not become a member of the JIT, but only a participant in the work of the Team to ensure proper cooperation between the Team and the ICC.

46 Information available at: https://www.icc-cpi.int/news/ukraine-and-international-criminal-court-sign-agreement-establishment-country-office (accessed: 30.10.2023).

Abidjan (Côte d'Ivoire); Tbilisi (Georgia); and Bamako (Mali). An ICC country office is set up to streamline cooperation between a specific country and the ICC.

One novelty in the context of the ICC's activities is the recent proposal of the ICC Prosecutor to extend the Court's jurisdiction to acts constituting cyber-attacks that, in the opinion of the ICC Prosecutor, fulfil the elements of crimes as already defined in the Rome Statute.[47] It is proposed to extend the jurisdiction of the ICC to cyberattacks, most likely not as a separate international crime, but by expanding the catalogue of forms of the crimes now existing in the Rome Statute. Cyberattacks are considered a new means of statecraft and warfare that has a direct impact on the civilian population.[48] The ICC Prosecutor's initiative suggests that cyberattacks constitute a new type of crime against states and nations that should also be prosecuted at the international level. Cyberattacks have been and still are used against Ukrainian institutional and private systems. They were launched both before 24 February 2022 (post 2014) and ever after.[49]

At this point, an attempt should be made to answer the question whether the ICC's response to date to international crimes committed by Russians in the territory of Ukraine in connection with the Russian armed aggression has been sufficient from the perspective of the ongoing armed conflict. Unfortunately, many believe that the ICC, despite decisions issued in multiple cases and actual prosecution of those responsible for the most serious crimes under international law, is quite "instrumentalized" by states. By way of example, under the Rome Statute the UN Security Council has a direct influence on the ICC's activities, and in the case of the UN Security Council, the permanent members will have a special role decisive, through voting, to the ICC's exercise of jurisdiction over international crimes committed in the territory of a state which is not party to the Rome Statute.[50] Moreover, in accordance with Article 16 of the Rome Statute, "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect." Thus, the Security Council can effectively delay the

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47 Information available at: https://digitalfrontlines.io/2023/08/20/technology-will-not-exceed-our-humanity/ (accessed: 1.11.2023).

48 K.L. Snider, R. Shandler, S. Zandani, D. Canetti, *Cyberattacks, cyber threats, and attitudes toward cybersecurity policies*, "Journal of Cybersecurity" 2021, vol. 7, no. 1, pp. 2-3.

49 For more on this, see: M. Baezner, *Hotspot Analysis: Cyber and informational warfare in the Ukrainian conflict*, Zurich 2018.

50 C. Gegout, *The International Criminal Court: limits, potential and condition for the promotion of justice and peace*, "Third World Quarterly" 2013, vol. 34, no. 5, pp. 804-805.

investigation or prosecution before the ICC. From the perspective of the independence of a body such as a court, including an international tribunal, to allow another body to influence the exercise of jurisdiction or the course of proceedings is inappropriate, to say the least. This is in particular the case with a body that is currently struggling to ensure efficiency of its work because there is a permanent member who persistently violates the principles provided for in the UN Charter. This situation may, eventually, lead to a significant politicization of the function of the ICC Office of the Prosecutor.

On the one hand, the fact that the ICC issued a warrant of arrest against the President of the Russian Federation (permanent member of the UN Security Council) and the Commissioner for Children's Rights of the Russian Federation, who had been directly involved in the deportation of children (Ukrainian citizens) to the Russian Federation, sends a proper message to the critics of the ICC and supporters of its "politicization". On the other hand, it cannot be ignored that in the event of significant isolation of the Russian Federation and its state officials, issuing a warrant of arrest against the incumbent President will not restrict his current methods of movement or political relations. The reason is that the Russian Federation is currently allied with states that are not parties to the Rome Statute and, consequently, are not obliged to detain a person covered by an ICC warrant of arrest. Also, there have been cases in the past where a State Party to the Rome Statute, while admitting a person covered by an ICC warrant of arrest to its territory, failed to fulfil its obligation to detain such a person. It was the case in 2010, when Omar Al Bashir (President of Sudan), wanted under an ICC warrant of arrest, arrived at an official visit to Chad, where he was welcomed by the country's most senior officials. Being a party to the Rome Statute, Chad was obliged to detain Omar Al Bashir and take further steps to transfer him.[51] This was not done, in defiance of international obligations. That case shows two problems; first, despite the obligations arising from the Rome Statute, some states party to it do not fulfil them; second, in the event of a state's failure to comply with the obligations under the Rome Statute, the ICC has no mechanisms to enforce compliance[52] or hold the state to account. The very fact that the ICC issued a warrant of arrest for President Putin and Ms Lvova-Belova may indeed be a significant breakthrough in the ICC's practice. Still, States Parties to the

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51 G.P. Barnes, *The International Criminal Court's ineffective enforcement mechanism: the indictment of President Omar Al Bashir*, "Fordham International Law Journal" 2011, vol. 34, no. 6, pp. 1585-1586.

52 S.C. Roach, *How Political Is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy*, "Global Governance" 2013, vol. 19, pp. 512-513.

Rome Statute, especially those that care about good relations with Russia for political and economic reasons, may decide not to fulfil the obligation to detain and further cooperate with the ICC in this respect, knowing that this does not entail any consequences.

It is also worth noting that in view of the powers conferred on the ICC Prosecutor under the Rome Statute, he is considered to be a kind of "driving force" of the Court. It is the ICC Prosecutor who decides whether to open an investigation based on a referral by a State Party to the Rome Statute or by the UN Security Council.[53] Consequently, a referral under Article 14 of the Rome Statute requesting the Prosecutor to investigate a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed does not necessarily lead to opening the investigation. Another reason for this is the fact that the ICC Prosecutor is independent and does not have to coordinate his procedural decisions with ICC judges, States Parties to the Rome Statute or the UN Security Council. While for most this is a major advantage of the ICC Office of the Prosecutor, for some it is too much accumulation of power in the hands of the ICC Prosecutor.[54] The incumbent ICC The prosecutor responded immediately to the referral regarding crimes in the territory of Ukraine and to the emergence of the initial evidence of murders committed by Russian soldiers. On 15 April 2022, the ICC Prosecutor made his first visit to Bucha, where one of the largest massacres of the Ukrainian population was committed during the ongoing Russian armed aggression.[55]

Conclusions

The international armed conflict that broke out as a result of the Russian armed aggression, which actually covers the entire territory of Ukraine, is a formidable challenge to international criminal law. The response that the ICC and the ICC Office of the Prosecutor have so far made to Russian crimes in Ukraine appear to be relevant, but may be insufficient.

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53 B. Kotecha, *The International Criminal Court's selectivity and procedural justice*, "Journal of International Criminal Justice" 2020, vol. 18, p. 115.

54 J.R. Bolton, *The risks and weaknesses of the International Criminal Court from America's perspective*, "Law and Contemporary Problems" 2001, vol. 64, no. 1, pp. 169-170.

55 Information available at: https://www.jurist.org/news/2022/04/icc-chief-prosecutor-visits-bucha-as-court-investigates-alleged-war-crimes-in-ukraine/ (accessed: 25.10.2023).

First, the issuance of warrants of arrest is indeed an important step, although more of a symbolic one, since it is hardly imaginable that those wanted would actually be detained and transferred to the ICC. Therefore, the incumbent President Putin continues to supervise operations for armed aggression against Ukraine, and the Russian Commissioner for Children's Rights continues to coordinate activities related to the illegal deportation and forced transfer of children from the territory of Ukraine. This shows the extent of the ICC's dependence on cooperation with the States Parties to the Rome Statute and those which, e.g. by lodging an appropriate declaration, submitted to the jurisdiction of the Court. When a State Party to the Rome Statute has violated its obligations under the Statute, the ICC does not have any mechanisms to enforce compliance or hold the state to account, which significantly reduces the weight and effectiveness of the actions that it undertakes.

Also, it took the ICC more than five and a half years to conduct a preliminary examination with regard to the situation in Ukraine in view of the annexation of the Crimean Peninsula by the Russian Federation and the military operations in the territory of the eastern oblasts of Ukraine in which the Russian Federation was involved. Following the examination, no warrant of arrest was issued, although significant evidence had been gathered to establish that there was a reasonable basis to believe that acts constituting war crimes and crimes against humanity within the jurisdiction of the Court had been committed in the territory of Ukraine. The findings included three categories of crimes: (i) crimes committed in the context of the conduct of hostilities; (ii) crimes committed during detentions; and (iii) crimes committed in Crimea.

In the course of the ongoing investigation of the case, specific steps have been taken (two warrants of arrests issued), but after 617 days of the Russian armed aggression, after very extensive evidence has been gathered in cooperation with Ukrainian prosecutors, and after the perpetrators have been identified for such crimes as the Bucha massacre, is the issuance of two warrants of arrest in connection with the charge of unlawful deportation and transfer of Ukrainian children really sufficient? The body of evidence grows by the day for crimes committed by the aggressor state, which, in addition to acts in violation of international humanitarian law of armed conflicts and other crimes under international law, constantly shells civilian objects, in particular critical infrastructure, killing civilians. It is therefore hardly imaginable that the ICC Office of the Prosecutor, working together with Ukrainian prosecutors, would fail to find sufficient grounds to issue warrants of arrest against other persons, including military commanders of the Russian Federation. To recapitulate, an assessment of the response by

the ICC from the perspective of the evidence gathered so far in the territory of Ukraine shows significant doubts as to whether the ICC is capable of effectively prosecuting the perpetrators of crimes committed in the territory of Ukraine after 24 February 2022, given the scale of these crimes and the fact that the armed conflict is still ongoing, and part of Ukraine's territory is under the occupation of the aggressor state, where it enjoys full impunity.

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Chapter 2

Joanna Dzierżanowska

Scientific Evidence in International Criminal Proceedings

1. Concept of Scientific Evidence

In international criminal proceedings, scientific knowledge plays a significant role in gathering evidence that enables the establishment of factual truths. The use of specialized, often innovative research methods contributes substantially to the effective prosecution and conviction of perpetrators of international law crimes. International tribunal judgments are characterized by a high degree of complexity and diversity in the issues considered, which necessitates the use of so-called (*scientific evidence)*. This evidence is provided by experts as part of their opinions[1].

It is emphasized in the literature that the discussed category of evidence is based on the achievements of various scientific disciplines, verified both in theory and in forensic practice. It also refers to expert opinions derived from new research methods, often still in the process of development and verification[2]. Furthermore, it is important to note that the introduction of scientific evidence into international criminal proceedings is widely accepted and essential for achieving its objectives[3].

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1 P. Girdwoyń, *Opinia biegłego w sprawach karnych w europejskim systemie prawnym. Perspektywy harmonizacji*, Warszawa 2011, s. 119 i n.; A. Gaberle, *Dowody w sądowym procesie karnym. Teoria i praktyka*, Kraków 2010, s. 51 i n.

2 Zob. T. Tomaszewski, *Dowód z opinii biegłego w procesie karnym*, Kraków 1998, s.121 i n.; J. Wójcikiewicz, *Dowód naukowy w procesie sądowym*, Kraków 2000, s. 7.

3 M. Klinkner, *Forensic science expertise for international criminal proceedings: an old problem, a new context and a pragmatic resolution*, „The International Journal of Evidence & Proof" 2009, nr 13, s. 104; P. Girdwoyń, *Opinia biegłego*..., s. 83.

Expert opinions offer specialized knowledge beyond everyday experience and knowledge. The rapid development of forensic science has expanded the scope of expert research capabilities and has significantly improved the precision and conclusiveness of findings presented to judicial bodies.

It is also worth noting the differences in the presentation of expert evidence in international criminal tribunals compared to domestic criminal proceedings:

A. In international criminal cases, evidence collection is often hindered by ongoing armed conflicts. Without the cooperation of multiple states, a significant portion of the evidence may be destroyed or distorted.
B. International criminal tribunals employ a model that combines elements from various legal systems, particularly referring to continental law traditions and solutions adopted in *common law systems*[4].

The standard for assessing the value of scientific evidence always poses a significant challenge for judicial bodies. Modern legal proceedings distinguish three legal systems concerning the verification of scientific evidence:

1. a conservative system which does not admit new scientific evidence or does so in a very limited manner, protecting the criminal process against pseudo-scientific evidence, but at the same time preventing the use of new scientific advancements (e.g., in the Netherlands and Germany);
2. a liberal system which allows new scientific evidence provided specific criteria are met (e.g., in the United States);
3. a system which lacks specific and general rules regarding the admissibility of new scientific evidence (e.g., Polish legal system)[5].

It is crucial to select appropriate criteria when assessing the probative value of expert opinions based on specialized research methods. Special attention should be given to the standard established in the U.S. legal system, particularly the so-called Daubert Standard. The 1993 U.S. Supreme Court ruling in Daubert v. Merrell Dow Pharmaceuticals[6] introduced criteria for evaluating the probative value of scientific evidence, including:

a. falsifiability, the research method must be subject to verification through independent scientific research.

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4 M. Klinkner, *Scientific Evidence Before International Criminal Tribunals*, w: G. Bruinsma, D. Weisburd (red.) *Encyclopedia of Criminology and Criminal Justice*, Springer 2013, s. 4683.

5 Zob. P. Girdwoyń, *Nowe metody identyfikacji w praktyce sądowej*, „Jurisprudencija" 2005, t. 66(58), s. 93.

6 Daubert v. Merrell Dow Pharmaceuticals, 509 US 579.

b. review and publication, the method should have been published and subjected to scientific evaluation in specialized literature.
c. diagnostic value, the method should have a specified error rate.
d. standardization, the method should have a developed standardized methodology.
e. general acceptance, the method should be accepted by the scientific community[7].

These American criteria are intended to ensure a thorough evaluation of judicial expertise, enabling judicial bodies to distinguish between scientific and pseudo-scientific methods.

The authors of the report *„Scientific Evidence in Europe"* identified four criteria for assessing scientific evidence in English law:

1. the subject of the opinion must extend beyond the common knowledge and experience of the judicial body,
2. the opinion concerns an area that is sufficiently well-organized and recognized as a reliable source of knowledge, and it is the speciality of an expert helping the court to reach the truth,
3. the expert must have acquired sufficient knowledge through study or experience to make their opinion useful to the court,
4. the expert must be impartial[8].

Similarly, the Dutch Supreme Court (Hooge Raad) in 1998 indicated that significant criteria for assessing scientific evidence include: the general principles of the discipline, the theoretical justification of the method used, the probative and diagnostic value *(reliability and validity)* of the method, and the qualifications of the expert[9].

Polish case law has not developed a general standard for the admissibility and evaluation of scientific evidence. However, based on the jurisprudence of the Supreme Court, the following criteria should be indicated:

- sufficient certainty of scientific research results,
- consistency and general acceptance of the method,
- methodological impeccability of the method,
- certification of the laboratory,

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7 Zob. J. Wójcikiewicz, *Dowód naukowy*..., s. 20-26; E. Gruza, M. Goc, J. Moszczyński, *Kryminalistyka czyli o współczesnych metodach dowodzenia przestępstw*, Warszawa 2020, LEX/el.

8 Ch. Champod, J. Vuille, *Scientific Evidence in Europe – Admissibility, Evaluation and Equality of Arms*, „International Commentary on Evidence" 2011, vol. 9 Iss.1, Article 1, s. 40-41.

9 Zob. P. Girdwoyń, *Opinia biegłego*..., s. 122.

- identification by a recognized research institution,
- the research method should result from an accepted scientific theory, and when applying it, the strict adherence to research rules that guarantee accurate results[10] must be followed.

Therefore, the literature on the subject rightly emphasizes that the assessment standards should be based on a wide range of criteria, which include:

1. reliability of the research method,
2. the research procedure applied,
3. the tools used in the research,
4. an assessment of how widely the research method is used in other countries, particularly those with leading forensic science and human rights protection,
5. the diagnostic value of the method, including a known and described error rate and the factors influencing incorrect results,
6. whether the research method is sufficiently described in the relevant scientific literature,
7. the appropriate qualifications of the expert interpreting the research results[11].

The final assessment of the expert's opinion is always made by the court adjudicating the case, with the key requirement being the skilful application of a wide range of criteria that ensure the research method qualifies as unquestionable scientific evidence.

2. Admissibility of Scientific Evidence

Evidence proceedings before *ad hoc* tribunals do not indicate strict rules for the admissibility of evidence. In the proceedings before the International Criminal Tribunal for the former Yugoslavia[12], the Trial Chamber may admit any evidence relevant to the case, applying evidentiary rules that best serve the determination of truth in accordance with the Statute[13] and general legal principles (Rules 89

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10 Zob. J. Dzierżanowska, J. Studzińska, *Biegli w postępowaniu sądowym cywilnym i karnym. Praktyczne omówienie regulacji z orzecznictwem*, Warszawa 2019, s. 436-437.

11 Zob. T. Tomaszewski, *Dowód z opinii biegłego*..., s. 122; D. Karczmarska, *Dowód naukowy*, w: Kmiecik R. (red.), *Prawo dowodowe. Zarys wykładu,* Warszawa 2008, s. 204 i n.

12 Międzynarodowy Trybunał Karny do Ścigania Osób Odpowiedzialnych za Poważne Naruszenia Międzynarodowego Prawa Humanitarnego Popełnione na Terytorium byłej Jugosławii, UN Doc. S.C. Res 808, z 22.2.1993 r. (dalej: MTKJ).

13 Międzynarodowy Trybunał Karny do Ścigania Osób Odpowiedzialnych za Poważne Naruszenia Międzynarodowego Prawa Humanitarnego Popełnione na Terytorium byłej Jugosławii, UN Doc. S.C. Res 808, z 22.2.1993 r. (dalej: MTKJ).

B and C – ICTY Rules of Procedure and Evidence)[14]. Evidence may be declared inadmissible if the need to ensure a fair trial outweighs its probative value (Rule 89 D). Moreover, evidence obtained through methods that raise substantial doubts about its credibility or whose admission would be unethical or severely undermine the fairness of the proceedings may be excluded (Rule 95).

The ICTY has also established several criteria that evidence must meet to be considered admissible: it must be relevant, possess probative value, and be reliable[15]. Therefore, the tribunal avoids relying on a formal theory of evidence, instead opting for a „holistic" approach characteristic of continental legal systems[16].

The International Criminal Court [17]adopts a flexible approach to the admissibility of evidence. The principles developed result from the evolution of evidentiary law and the jurisprudence of previous international criminal tribunals[18]. Article 69(3) of the Rome Statute[19] states that the court may request the submission of all evidence it considered necessary for establishing the truth.

The International Criminal Court applies the principle of free evaluation of evidence when assessing the gathered evidence, as outlined in the Rules of Procedure and Evidence[20]. According to Rule 63(2), the Chamber has the authority, as provided in Article 64(9) of the Rome Statute, to freely evaluate all evidence presented to it in order to determine its relevance and admissibility in accordance with Article 69 of the Statute. It is emphasized that freedom does not mean arbitrariness, and that the evaluation must be based on knowledge, experience, and principles of logical reasoning[21].

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14 Reguły Procesowe i Dowodowe dla Międzynarodowego Trybunału Karnego dla byłej Jugosławii (Rules of Procedure and Evidence, IT/32/Rev.50, https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf (dostęp: 10.06.2024 r.), dalej Reguły Procesowe i Dowodowe MTKJ.

15 Zob. H. Kuczyńska, P*rawo dowodowe w postępowaniu przed Międzynarodowym Trybunałem Karnym,* w: *System Prawa Karnego Procesowego. Tom VIII. Dowody, cz. 2,* red. Jerzy Skorupka, Warszawa 2019, LEX/el.

16 Tamże.

17 Międzynarodowy Trybunał Karny, MTK (ang. *International Criminal Court*, *ICC*) powstał na podstawie przyjętego 17 lipca 1998 roku Rzymskiego Statutu. Oficjalna strona internetowa Międzynarodowego Trybunału Karnego: https://www.icc-cpi.int/about/the-court (dostęp: 10.06.2024 r.).

18 M. Klinkner, *Scientific Evidence*..., s. 4683.

19 Rzymski Statut Międzynarodowego Trybunału Karnego – akt prawa międzynarodowego przyjęty w dniu 17 lipca 1998 r. (Dz.U. Z 2003 r. Nr 8, poz. 708), dalej: Statut Rzymski.

20 Rules of Procedure and Evidence. Official documents of the International Criminal Court, ICC-PIDS-LT-02-002/13 – (dalej: Reguły Procesowe i Dowodowe).

21 Por. P. Płachta, Międzynarodowy Trybunał Karny, tom I, Zakamycze 2004, s. 791-792.

According to Article 69(4) of the Rome Statute, the Court may rule on the relevance and admissibility of any evidence, taking into account its probative value and any prejudicial effect it may have on the fairness of the trial or the fair evaluation of witness testimony. Scholars have pointed out that the flexible approach to the admissibility of evidence allows judges to make better decisions regarding each piece of evidence, particularly in verifying its probative value and usefulness, considering the totality of the evidence presented[22].

When evaluating the relevance of evidence, judges consider whether the evidence relates to issues decided by the Trial Chamber with regard to the charges in the indictment or the harm caused to victims, and whether the evidence is significant in establishing a fact[23]. The concept of relevance is understood broadly by the ICC—it includes not only evidence affecting the guilt of the accused, but also evidence related to other aspects of the case, such as the circumstances of the crimes, the nature of the armed conflict, the character of the accused, and the circumstances related to the other party to the conflict[24].

Additionally, the probative value of each piece of evidence must be taken into account. The Chamber of the International Criminal Court evaluates each piece of evidence individually, considering its type, credibility, reliability, the context in which it was obtained, and its relation to the charges in the indictment[25].

Expert evidence is introduced into international criminal proceedings to provide the court with specialized information beyond everyday knowledge and experience. ICTY case law states that expert opinions must be relevant to the case, and the expert must be independent, qualified to provide the opinion, and skilled in the appropriate research methods[26]. The ICTY Rules of Procedure and Evidence distinguish expert testimony (Rule 90 C) and allow the submission of written expert opinions. The admissibility of evidence from an expert also depends on the opinion of the opposing party, which may notify the court within a set timeframe if it accepts the expert opinion without objections, intends to cross-examine the expert, or questions the expert's qualifications or the probative value of the opinion (Rule 94 bis).

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22 Zob. H. Kuczyńska, *Prawo dowodowe...,* LEX/el.

23 The Prosecutor v. Lubanga, Decision on the admissibility of four documents, decyzja z 13 czerwca 2008 r. Zob. także P. Hofmański, H. Kuczyńska, *Międzynarodowe prawo karne,* Warszawa 2020, LEX/el.

24 Zob. H. Kuczyńska, *Prawo dowodowe*..., LEX/el.

25 Zob. P. Hofmański, H. Kuczyńska, *Międzynarodowe prawo karne*..., LEX/el.

26 Zob. H. Kuczyńska, *Prawo dowodowe*..., LEX/el.

Scientific evidence may be introduced into proceedings before the International Criminal Court at the preparatory stage. The Prosecutor is obligated to establish the substantive truth (Article 54(1)(a) of the Rome Statute), and under Article 54(3)(a), the Prosecutor has the authority to collect and assess evidence. The ICC Prosecutor can also request that the Pre-Trial Chamber appoint experts to assist (Article 56(2)(c) of the Rome Statute), particularly if there is a need to conduct investigative actions that cannot be repeated at trial.

It is important to note that the ICC Trial Chamber may determine the scope of expert opinions, the number of experts to be appointed, how they will be instructed, and the form and deadline for submitting the expert opinions (Regulation 44(5) of the ICC Rules[27]). Additionally, the Chamber can appoint an expert *proprio motu* in accordance with Regulation 44(4) of the ICC Rules.

3. Status of an Expert

In international criminal proceedings, the concept of an expert is not defined by the Statutes, Rules of Procedure, or Evidence of the ad hoc tribunals, nor by the ICC's Statute or Rules. However, guidelines can be drawn from the case law of the ad hoc tribunals, which specify the requirements for individuals serving as experts in particular fields.

In the jurisprudence of the ICTY and ICTR[28], an expert is recognized as a person equipped with specialized knowledge in a particular field, enabling them to provide testimony in the form of an opinion. Whether a person qualifies as an expert is determined by the Trial Chamber in each case, and experts are expected to possess scientific or technical knowledge beyond the experience and knowledge of the person describing facts[29]. In the Delalić case, it was clarified that expert testimony is necessary when the expert's scientific or technical knowledge assists the Trial Chamber in understanding facts that are beyond ordinary knowledge[30].

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27 Regulations of the Court. Official documents of the International Criminal Court, ICC-BD/01-05-16 (dalej: Regulamin MTK).

28 Międzynarodowy Trybunał Karny do Ścigania Osób Odpowiedzialnych za Ludobójstwo i inne Poważne Naruszenia Międzynarodowego Prawa Humanitarnego Popełnione na Terytorium Rwandy oraz Obywateli Rwandy Odpowiedzialnych za Ludobójstwo i inne takie Naruszenia Popełnione na Terytorium Sąsiednich Państw, UN Doc. S.C. Res. 955 z 8.11.1994 r., dalej: MTKR.

29 Sprawa Bagosora (ICTR-96-7-T), § 8; Sprawa Delalić (IT-96-21-T), § 10. Zob. także K. Kremens, *Dowody osobowe w międzynarodowym postępowaniu karnym*, Toruń 2010, s. 222.

30 Sprawa Delalić (IT-96-21-T), § 10.

This issue was addressed in the Bagosora case, where it was stated that expert evidence is admissible when the expert's specialized knowledge, based on the evidence underlying their opinion, may contribute to the understanding of the given evidence by the Chamber[31]. In the Simba case, it was established that experts are appointed to clarify specific technical issues requiring specialized knowledge in a given field[32]. However, in the Akayesu case, it was rightly emphasized that an expert must demonstrate impartiality towards the case on which they are giving an opinion[33]. Therefore, it is appropriate to conclude that an expert should possess specialized knowledge, exhibit impartiality, and provide an opinion relevant to resolving the case[34].

According to Regulation 44(1) of the ICC Rules, the Registrar maintains a list of experts available at all times to all bodies of the Court and all participants in the proceedings. Experts are added to the list if they demonstrate relevant expertise in a given field. The ICC Trial Chamber may allow expert testimony from individuals not listed as experts.

In the Prosecutor v. Lubanga case, the Court ruled that the expert list should include a wide selection of experts with verified competencies, committed to safeguarding the interests of justice. The list should ensure fair geographical and gender representation (the ICC supports the submission of applications from women experts)[35]. The Court stressed the need to include experts with knowledge and experience in trauma, particularly trauma related to sexual violence crimes against children, the elderly, and people with disabilities[36].

Experts are added to the list if they have at least seven or nine years of experience (with the possibility of shortening this period if they hold advanced academic degrees) and demonstrate proficiency in one of the two working languages of the ICC, i.e. English or French. Experts on the list serve for five years, with the possibility of renewing their term.

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31 Sprawa Bagosora (ICTR-96-7-T), § 8.

32 Sprawa Simba (ICTR-01-76-T), § 6.

33 Sprawa Akayesu (ICTR-96-4-T), Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9.03.1998.

34 Zob. K. Kremens, *Dowody osobowe*..., s. 222-223. Zob także O. Kaluzhny, K. Shukhevych, *Evidence in the International Criminal Court – the Role of Forensic Experts: The Ukrainian Context*, „Access to Justice in Eastern Europe", *2022,* nr 4-2 (17), s.57-58.

35 The Prosecutor v. Lubanga, Decision on tha procedures to be adopted for instructing expert witnesses, z 10 grudnia 2007 r. (ICC-01/04-01/06-1069), § 24.

36 The Prosecutor v. Lubanga, Decision on tha procedures to be adopted for instructing expert witnesses, z 10 grudnia 2007 r. (ICC-01/04-01/06-1069), § 24.

The regulations concerning experts giving opinions before the International Criminal Court do not explicitly mandate impartiality or diligence. However, a candidate for an expert is obliged to complete a detailed form that includes questions directly related to maintaining high standards of professional and personal integrity and strict adherence to confidentiality rules[37]. The form allows the Court to assess the candidate's competence and qualifications, in line with the requirements necessary to fulfil the objectives of ICC proceedings.

The key criterion for selecting experts on the list is the relevance of their specialized knowledge to the cases handled by the Court. Although the fields of expertise for which candidates can apply are specified, the list of specializations remains open. The most sought-after experts by the ICC include those in ballistics, finance, forensic medicine, handwriting analysis, psychology, compensation issues, legal history, military science, police science, political science, and linguistics.

The process of appointing experts and preparing and presenting opinions was further clarified in the Prosecutor v. Lubanga case. It was stated that to save time and costs, a single impartial and qualified expert should be appointed and then have access to the versions of events presented by both parties. It is crucial for both parties to appoint the expert to avoid subsequent disputes over the expert's qualifications and impartiality. The expert would then present one opinion, addressing issues raised by each party, as well as by the judges, and subject them to analysis and evaluation. Each party must obtain the permission of the Trial Chamber to appoint an expert, and the Trial Chamber may also appoint an expert *proprio motu*[38]. In the discussed case, the Court provided guidance on evaluating expert evidence, stating that it should encompass the expert's competence in the field, the methodology used, the consistency of the opinion's conclusions with other evidence, and the general credibility of the expert[39].

The practice of appointing experts in proceedings before the International Criminal Court demonstrates that experts were called upon when:

1. It was necessary to present an opinion to supplement the evidence and establish the true course of events: For example, in Prosecutor v. Lubanga, the

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37 Wzór formularza (dalej: wzór formularza) umieszczony jest na stronie internetowej MTK, https://www.icc-cpi.int/get-involved/experts (dostęp: 10.06.2024 r.). Zob. także A. J. Bélohlávek, R. Hótowá, *Biegli w środowisku międzynarodowym w postępowaniu: sądowym, cywilnym i karnym oraz arbitrażowym, a także w sporach inwestycyjnych,* Warszawa 2011, s. 131.

38 The Prosecutor v. Lubanga, Decision on tha procedures to be adopted for instructing expert witnesses, z 10 grudnia 2007 r. (ICC-01/04-01/06-1069), § 14-23. Zob. H. Kuczyńska, *Prawo dowodowe..,* LEX/el.

39 The Prosecutor v. Lubanga, wyrok z 14 marca 2012 r., (ICC-01/04-01/06-2842), § 112.

Trial Chamber determined that in order to understand the historical and factual context of the events under consideration, more than one expert opinion was required. The Court noted that the right to appoint experts arises from general rules, and judges may introduce evidence to supplement the proceedings and the material presented by the parties[40].

2. Judges want to obtain an opinion that is not influenced by any of the parties(in the Prosecutor v. The Lubanga case, witnesses were interviewed who were children at the time the crimes were committed. The ICC appointed expert psychologists to assess the credibility of their testimonies and the impact of trauma on the content of their statements[41].

4. Expert testimony practices

Expert testimony in international criminal proceedings covers a wide range of topics. Experts are appointed in fields commonly used in domestic criminal proceedings (e.g., forensic medicine, psychological examinations, psychiatric assessments, DNA testing), but there are also less typical areas of expertise, dictated by the unique nature of international criminal justice (e.g., opinions on ethnic profiling of populations in certain areas, cultural, social, and historical contexts, and the use of propaganda by media to incite genocide)[42].

The use of scientific evidence in international criminal proceedings has been particularly important in trials before the International Criminal Tribunal for the former Yugoslavia. Scholars emphasize two key factors that contributed to the extensive use of expert testimony before the ICTY:

1. The unique case of international law crimes committed in Bosnia and Herzegovina, where the perpetrators of the genocide in Srebrenica in 1995 used mass graves to bury their victims.
2. The need for unprecedented searches and identification of war victims in the former Yugoslavia[43].

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40 Zob. H. Kuczyńska, P*rawo dowodowe*..., LEX/el.

41 Tamże.

42 Zob. szerzej K. Kremens, *Dowody osobowe*..., 222 i n.

43 C. Fournet, *Forensic Truth? Scientific evidence in international criminal justice*, „Humanity Journal" 2017, https://humanityjournal.org/blog/forensic-truth/ (dostęp: 10.06.2024 r.).

ICTY case law shows that scientific evidence from disciplines such as forensic medicine, forensic archaeology, forensic anthropology, and forensic pathology[44] played a key role in proving international crimes. The indicated review areas enabled the location of mass graves, exhumation of victims, DNA testing, identification, determination of causes of death, and investigation of torture marks. The ICTY proceedings ad hoc required the involvement of specialized teams, including experts, investigators, and support staff, who worked together on exhumation, autopsies, and analysis of the evidence obtained[45]. The evidence was recorded in autopsy protocols, supplemented with photos and x-rays, and then submitted to ICTY offices in The Hague[46].

Key cases demonstrating the importance of scientific evidence related to mass grave investigations include Krstić[47], Mladić[48], and Karadžić[49]. Through the exhumation of mass graves, the Trial Chamber established that genocide had occurred, specifically involving mass executions of Bosnian Muslim men of military age in Srebrenica. In July 1995, around 8,000 men[50] were killed in these precisely planned and carried out mass executions. Experts confirmed that the victims had not died in combat but were executed by gunfire. The bodies were found with blindfolds and bound hands. Experts also pointed out the civilian clothing and personal items of the victims in the graves, while no military uniforms or military equipment were found . The Tribunal concluded that the evidence pointed to an intent to physically destroy the Bosnian Muslim population as an ethnic group.

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44 C. Fournet, *Forensic Evidence: International Criminal Courts and Tribunals*, University of Exeter 2022, http://hdl.handle.net/10871/128715, (dostęp: 10.06.2024 r.).

45 M. Klinkner, *Proving Genocide? Forensic Expertise and the ICTY*, "Journal of International Criminal Justice" *2008,* vol. 6 Issue 3, s. 447-466. Zob. także N. Mason, I*dentifying and enhancing forensic science skills in the investigation and prosecution of war criminals within international proceedings* (A thesis submitted in partial fulfilment for the requirements for the degree of LLM by Research in International Law at the University of Central Lancashire, 2013), chap. 4, https://www.academia.edu/8284439/Identifying_and_Enhancing_Forensic_Science_Skills_in_the_Investigation_and_Prosecution_of_War_Criminals_within_International_Proceedings (dostęp 10.06.2024 r.).

46 Klinkner, Proving Genocide?..., s. 447-466.

47 Sprawa Krstić (IT-98-33-T).

48 Sprawa Mladić (IT-09-92-T).

49 Sprawa Karadžić (IT-95-5/18). Zob. szerzej: Klinkner M., *Karadžić's guilty verdict and forensic evidence from Bosnia's mass graves,* "Science and Justice" 2016, nr 56 (6).

50 Zob. szerzej A. Szpak, *Zbrodnie w Srebrenicy i Sarajewie przed Międzynarodowym Trybunałem Karnym ds. zbrodni w b. Jugosławii. Casus Ratko Mladicia*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2012, z. 4, s. 84 i n.

Additionally, the pattern of the executions and subsequent attempts to hide the bodies were evident.

In the Krstić case, from the 21 mass graves associated with the Srebrenica executions, 14 were primary sites where the bodies were buried, and seven graves were identified where bodies were later relocated to hide the crime. These findings were made possible through the examination of bullets, shell casings, palynological research, and chemical analysis of clothing fragments[51]. Similarly, in the Karadžić and Mladić cases, forensic medical experts examined the arrangement of mass graves. The Tribunal established that coordinated actions had been taken to conceal the bodies of the men, making it difficult or impossible to conduct subsequent criminal investigations[52]. It is worth noting that the scientific evidence gathered and examined in these proceedings before the ICTY helped prove that:

- the target of the actions was a specific ethnic group,
- the killings and burials were systematic,
- many of the victims were civilians,
- there were visible efforts to hide the crimes,
- the execution and burial required a high level of coordination[53].

In the Popović trial[54]expert opinions helped prove crimes against humanity related to ethnic cleansing. Experts indicated that the victims did not die in combat, as they were not wearing military uniforms, were of varying ages, some were disabled, and many had been blindfolded and bound. Numerous victims were shot in the back of the head. In the Popović case, the Tribunal found the scientific evidence credible in determining the cause of death, based on the expert testimony[55].

The case of Prosecutor v. Ntaganda, which was heard by the International Criminal Court, deserves attention. In this trial, evidence obtained through exhumations carried out in Sayo and Kubu in the Democratic Republic of Congo was used. Experts from diverse disciplines, such as forensic medicine, forensic archaeology, forensic anthropology, DNA testing, and forensic pathology, presented

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51 Por. K. Kremens, *Dowody osobowe*..., s. 243-244; zob. także M. Klinkner, *Forensic science expertise for international criminal proceedings: an old problem, a new context and a pragmatic resolution*, "The International Journal of Evidence & Proof" 2009, nr 13.

52 Por. C. Fournet, *Forensic Evidence: International Criminal Courts and Tribunals*, University of Exeter 2022, http://hdl.handle.net/10871/128715, (dostęp: 10.06.2024 r.); M. Klinkner, *Karadžić's guilty verdict and forensic evidence from Bosnia's mass graves*, "Science and Justice" 2016, nr 56 (6).

53 Zob. M. Klinkner, *Scientific Evidence*..., s. 4688.

54 Sprawa Popović (IT-05-88-T).

55 Por. M. Klinkner, *Scientific Evidence*..., s. 4688-4689.

their opinions. The ICC noted that the scientific evidence in this case was not presented as the sole or decisive proof of guilt but was used as additional confirmation of the collected evidence[56]. The ICC emphasized that scientific evidence gathered in a reliable manner and admitted to corroborate the other collected evidence should be treated as credible and relevant[57].

In 2021, the International Criminal Court issued a significant ruling in the case of Prosecutor v. Ongwen[58]. In this case, the Trial Chamber accepted and deemed reliable the DNA evidence presented by experts. The scientific evidence demonstrated cases of forced pregnancies and their connection to sexual violence, which was used as a weapon of war. These expert opinions played a pivotal role in convicting Dominic Ongwen of war crimes and crimes against humanity, specifically involving forced pregnancies[59].

5. Summary

In international criminal proceedings, scientific evidence, in addition to witness testimonies, statements from the accused, and documentary evidence, constitutes a crucial part of the evidentiary material. The involvement of experts from various fields has proven essential in numerous instances. The jurisprudence of international tribunals confirms that expert opinions often serve as the foundation of the evidentiary record, playing an indispensable role in establishing the truth.

Undoubtedly, efficient gathering of key evidence, including specialized examinations conducted by expert teams, is vital for the fair prosecution of perpetrators of crimes under international law. The practice of expert testimony before international criminal tribunals shows that scientific evidence is primarily introduced to prove crimes such as genocide, crimes against humanity, and war crimes. Courts have recognized that expert opinions can also effectively influence the confirmation of allegations of crimes involving forced pregnancies—as seen in the Ongwen case—or charges related to the recruitment of child soldiers, as in the Lubanga case.

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56 The Prosecutor v. Ntaganda, wyrok z 8 lipca 2019 r. (ICC- 01/04-02/06-2359 08-07-2019, pkt 276).

57 Zob. C. Fournet, *Forensic Evidence: International Criminal Courts and Tribunals*..., s.13-14.

58 The Prosecutor v. Ongwen, wyrok z 4 luty 2021 r. (ICC- 02/04-01/15-1762-RED 04-02-2021).

59 Zob. szerzej. C. Fournet, *Forensic Evidence: International Criminal Courts and Tribunals*..., s. 14 i n.

Due to the complexity of international criminal cases, the value of expert testimony should always be assessed in the context of the specific trial. It is the role of the adjudicating court to determine the objectivity and impartiality of the expert, as well as the credibility and methodological accuracy of the opinion provided. The judicial body must decide which expert opinions are reliable and scientifically justified and which should be disregarded.

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Iwona Bień-Węgłowska

The Course of Evidentiary Proceedings Before the International Criminal Court

Introduction

The International Criminal Court (hereinafter: ICC) is the first permanent criminal court established by international agreement on 17 July 1998 to prosecute the most serious crimes of international concern: genocide, crimes against humanity, war crimes and crimes of aggression[1]. Criminal proceedings before the International Criminal Court are based on the Rome Statute[2], an international

[1] The International Criminal Court (ICC) represents the inaugural permanent international judicial institution with the mandate of adjudicating the accountability of individuals for crimes under international law, rather than that of states. The official website of the International Criminal Court can be accessed at https://www.icc-cpi.int/about/the-court (last accessed 27/06/2024).

[2] Following the atrocities perpetrated during the wars in the former Yugoslavia and Rwanda, and in a favourable political climate, the Rome Statute of the International Criminal Court was adopted on 17 July 1998 in Rome (UN Doc.). A/CONF.183/9. The Statute came into force on 1 July 2002, following the ratification of the 60th State. At present, 123 states, including Poland, have signed the Statute, while the United States has not yet ratified it. During the ICC's initial years of operation, the United States was strongly opposed to the ICC. This was evidenced by the conclusion of bilateral agreements by that country, which were designed to exclude US citizens from the potential jurisdiction of the ICC. It is, however, important to note that there has been a shift in the US position towards the ICC in recent years. For further information, please refer to Szpak, Agnieszka**.** *Proliferacja trybunałów międzynarodowych oraz jej pozytywne i negatywne strony (ze szczególnym uwzględnieniem międzynarodowych trybunałów karnych),* „Przegląd Prawa Publicznego" 2011, vol. 11, p. 49-50
The Polish version of the Rome Statute of the International Criminal Court is available in Official Journal of the European Communities, 2003 No. 7, item 708. It is henceforth referred to as the Rome Statute.

treaty signed in Rome on 7 July 1998 following a diplomatic conference held from 15 June to 17 July 1998. The Statute contains highly detailed provisions on procedural matters (Articles 53-85). Despite this level of detail, its provisions are supplemented by the Rules of Procedure and Evidence[3] (Rules 63-225). Thus, the procedural regulations governing proceedings before the ICC are highly developed and define the procedural model before the Court, its principles, and the specific roles of the participants with great precision.

It should be noted that the procedural system adopted by the ICC is an original combination of rules derived from two legal traditions: the common law system and the continental civil law system. The procedural rules of the ICC are not merely repetitions of these traditions but often represent creative developments, introducing, in many instances, institutions previously unknown to international law.

1. The Development of Evidentiary Proceedings before International Criminal Tribunals

Evidentiary proceedings before international criminal tribunals constitute a crucial component of the international criminal justice system. Their development is inextricably linked to the establishment and evolution of these tribunals, as well as to the necessity for ensuring a fair trial in the context of the most serious international crimes. The evidentiary procedures before international criminal tribunals have been regulated with regard to the specific needs of each tribunal. The legal frameworks governing such proceedings are typically found in the foundational documents that establish the tribunals or in supplementary legal instruments adopted for a tribunal already in operation.

1.1. Evidentiary Proceedings before the International Military Tribunals at Nuremberg and Tokyo

The evidentiary proceedings of international criminal tribunals can be traced back to the Nuremberg Trials, which were held in the aftermath of the Second World War, and the parallel proceedings of the Tokyo Tribunal. The operation

[3] Rules of Procedure and Evidence. These are the official documents of the International Criminal Court, ICC-PIDS-LT-02-002/13. They are henceforth referred to as the ICC Rules of Procedure and Evidence.

of the International Military Tribunal at Nuremberg (hereinafter: Nuremberg Tribunal)[4] and the International Military Tribunal for the Far East (hereinafter: Tokyo Tribunal)[5] exerted a considerable influence on the subsequent development of the evidentiary framework employed in *ad hoc* tribunals and the International Criminal Court.

The architects of the military tribunals at Nuremberg and Tokyo were tasked with establishing evidentiary rules that would be recognised as fair and effective by representatives from diverse legal traditions. Given the disparate approaches to the admissibility of evidence and the principles governing evidentiary proceedings across different legal systems, the Nuremberg Tribunal adopted an informal procedure that permitted the admission of any evidence deemed relevant to the case[6]. The rules of evidence at the Nuremberg Tribunal were set forth in Articles XIX and XX of the Charter of the International Military Tribunal. Article XIX of the Charter of the International Military Tribunal stated that: "The Tribunal shall not be constrained by the technical rules of evidence. The Tribunal shall adopt and apply, to the greatest extent feasible, expeditious and non-technical procedures and shall admit any evidence that it deems to have probative value." Article XX of the Charter of the International Military Tribunal provided: "The Tribunal may require disclosure of the nature of any evidence before it is offered in order to rule upon its relevance"[7]. Consequently, there were no restrictions on the categories of evidence that could be submitted, nor were there any exclusionary regulations in place. Similarly, the Tokyo Tribunal admitted all evidence of material significance to the case and was not bound by formal evidentiary rules. However, one of the most significant challenges was obtaining evidence, as the tribunals lacked practical means to acquire evidence located outside the occupied territories or Allied-controlled areas.[8]

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4 The Nuremberg Tribunal was established by the International Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, signed in London on 8 August 1945 (OJ 1947, No. 63, item 367), (hereinafter: London Agreement of 8.08.1945).

5 The Statute of the International Military Tribunal for the Far East was established on 19 January 1946, taking the Nuremberg Statute as a model. The Tokyo Tribunal held trials against 28 former Japanese leaders between 1946 and 1948. For further information, please see P. Hofmański, H. Kuczyńska. *Międzynarodowe prawo karne*, Warszawa, 2020, p. 23

6 Ibid, 186; see also, F. Ryszka, *Norymberga: prehistoria i ciąg dalszy,* Warszawa, 1982, p. 10.

7 London Agreement of 8.08.1945

8 See also P. Hofmański, H. Kuczyńska, *Międzynarodowe prawo karne*..., p. 186

1.2 Evidentiary Proceedings before *Ad Hoc* International Criminal Tribunals

The *ad hoc* international criminal tribunals, namely the International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY)[9] and the International Criminal Tribunal for Rwanda (hereinafter: ICTR)[10], were informed by the experiences of the military tribunals. The efficacy of the procedural mechanisms adopted was rigorously evaluated during the proceedings before the ICTY and ICTR. The proceedings were conducted in accordance with the statutes[11] of the respective tribunals, which were largely similar in content, as well as the Rules of Procedure and Evidence (hereinafter: RPE)[12], which were adopted in identical form for both *ad hoc* tribunals.

The judges of the ICTY and ICTR were vested with the authority to shape the Rules of Procedure and Evidence themselves (by a majority vote in the Assembly of Judges), thereby enabling them to apply solutions most suited to the tasks facing the tribunals. As a consequence of this judicial authority to develop the rules, the procedural and evidentiary regulations, initially adopted in identical form, were able to evolve independently at later stages of the proceedings.[13]

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9 International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, UN Doc. S.C. Res 808, 22.2.1993.

10 International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Nationals Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, UN Doc. S.C. Res. 955, 8.11.1994.

11 The full name of the statutes is the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter ICTY Statute), https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-tribunal-prosecution-persons-responsible (accessed 26.06. 2024) and the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Nationals Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States from 1 January 1994 to 31 December 1994, (hereinafter ICCR Statute), https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-criminal-tribunal-prosecution-persons (accessed 26.06.2024).

12 Article 15 of the ICTY Statute and Article 14 of the ICTR Statute. Article 15 of the ICTY Statute reads, 'The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of pre-trial proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other relevant matters.'

13 See also H. Kuczyńska, *Prawo dowodowe w postępowaniu przed Międzynarodowym Trybunałem Karnym*, [in] *System Prawa Karnego Procesowego, vol. VIII*, ed. J. Skorupka, Warszawa, 2019, p. 1695 et seq.

The ICTY and ICTR Statutes do not specifically regulate the law of evidence, except for two provisions that deal with court proceedings, namely Articles 20 and 21 of the ICTY Statute. Article 20(3) of the ICTY Statute states:" The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial."[14] It follows from the above provision that, after the Trial Chamber has read the indictment, the accused has the opportunity to comment on his or her plea regarding guilt. It also follows from the Statute that the accused has the right to cross-examine witnesses both called by himself and prosecution witnesses on the same basis, since Article 21, Paragraph 4 (e) states that: "In the determination of charges under this Statute, the accused shall be entitled, on a basis of full equality, to at least the following guarantees: (...)(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[15]

The International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) served as primary forums for the development of international criminal procedural law until the establishment of the International Criminal Court. Proceedings before these ad hoc tribunals were based on solutions drawn from the common law tradition, characterized by a strict adversarial approach. However, the adversarial model in its pure form does not stem from the statutes of these tribunals, indicating that there was no formal adoption of the Anglo-Saxon procedural system. Instead, the adversarial nature of the proceedings is inscribed in the Rules of Procedure and Evidence, which comprehensively regulate the conduct of trials before the ICTY and ICTR. It is important to note that, while the tribunals initially relied on common law procedures, as they sought to balance the speed and effectiveness of prosecutions with procedural fairness, they increasingly adopted procedural mechanisms from continental legal systems. The judges of the ad hoc tribunals recognized that a strictly adversarial process was not suitable for fulfilling the objectives of international tribunals, nor was it adapted to the specific conditions of their work.

It is important to note that, while the tribunals initially relied on common law procedures, as they sought to balance the speed and effectiveness of prosecutions with procedural fairness, they increasingly adopted procedural mechanisms from continental

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14 Statutes of the ICTY, https://www.gov.pl/web/sprawiedliwosc/miedzynarodowy-trybunal-karny-dla-bylej-jugoslawii (accessed 26.06.2024).

15 Statute of the ICTY, https://www.gov.pl/web/sprawiedliwosc/miedzynarodowy-trybunal-karny-dla-bylej-jugoslawii (accessed 27.06.2024). Cf. Kuczyńska, Prawo dowodowe..., 1696.

legal systems. The judges of the ad hoc tribunals acknowledged that a purely adversarial process was not an optimal means of achieving the objectives of international tribunals, nor was it an effective approach to the specific conditions of their work. The application of the strict adversarial model in international criminal trials was at odds with the overarching objective of establishing the "historical truth", which entails a precise delineation of the actual sequence of events. The nature and purpose of proceedings before the ad hoc tribunals diverged from those of the Anglo-Saxon model. The further advancement of a purely adversarial procedure could have resulted in the stagnation of international judicial bodies, ultimately undermining their efficacy.

In consequence of the search for a procedural model most appropriate to the particularities of the work of *ad hoc* tribunals, the adversarial model underwent further evolution, incorporating additional elements of the continental process and the limited adversarial model[16]. A significant advancement was the considerable deviation from the principle of immediacy. The distinctive characteristics of the cases addressed by ad hoc tribunals rendered an unquestioning adherence to this principle impractical. During the initial period of the ICTY, proceedings were unduly prolonged, with hundreds of witnesses being heard in each trial. This resulted from the fact that their testimony could not be replaced by any other form of evidence. Consequently, there arose the possibility of derogating from the principle of immediacy and, consequently, modifying the rules governing the presentation of evidence at trial. As a result of these amendments, Rule 89(F) of the ICTY PCD permitted the presentation of testimony in written form if it was deemed to serve the interests of justice. Furthermore, it permitted testimony to be given using technical devices (via video link) at the request of a party or *ex officio* if it was in the interests of justice (Rule 81bis of the ICTY PCD). Another modification was the introduction of the admissibility of hearsay evidence, provided that such testimony is deemed credible and relevant to the case. The aforementioned solutions introduced by the judges ultimately contributed to the acceleration and streamlining of evidentiary proceedings.[17]

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16 See H. Kuczyńska, *Model kontradyktoryjności w postępowaniu przed Międzynarodowym Trybunałem Karnym*, „Państwo i Prawo" 2014, vol. 10, p. 55-56.

17 See H. Kuczyńska, *Prawo dowodowe w postępowaniu przed Międzynarodowym Trybunałem Karnym*, [in] *System Prawa Karnego Procesowego, vol. VIII*, ed. J. Skorupka, Warszawa, 2019, p. 1696-1698.

1.3. Shaping the Model of Evidence before the International Criminal Court

The present form of proceedings before the International Criminal Court (ICC), established as a permanent institution, is the consequence of a compromise between disparate legal traditions and a confluence of hybrid solutions. It would be inaccurate to describe proceedings before the ICC as adversarial in the pure form that is characteristic of *common law* systems. This is because they are characterised by the greater influence of the *continental* system. In formulating procedural solutions, a balance was sought between the rights of the parties in the proceedings and the effectiveness and efficiency of the proceedings. This was achieved through the utilisation of elements from diverse legal systems, thereby eschewing the assumptions inherent to a single legal system.

Specific procedural elements and procedural institutions derived from disparate legal traditions have gradually lost their anchoring in these systems, becoming elements of a unique model of criminal procedure[18]. It merits emphasis that the judicial procedure before the International Criminal Court is wholly distinct from that employed before *ad hoc* tribunals, as well as from national legal systems. The types of evidence, the course of evidence, and the rules of admissibility of evidence are exclusive to the International Criminal Court.[19]

The Rome Statute of the International Criminal Court, which was negotiated by 160 states, contains numerous provisions that reflect fundamental aspects of United States law.[20] It should be noted that during the drafting of the Rome Statute (similarly to the process of establishing regulations for the ICTY), opinions were expressed concerning the shaping of the criminal procedure in such a way that it would effectively aim to establish a legal basis for the verdict that is consistent with reality. Although the Rome Statute contains numerous provisions modelled after those in the *common law* system, in the area of determining factual findings aligned with reality, the Statute includes many regulations drawn from the *civil law* system. The making of factual findings is a critical objective of the proceedings before the International Criminal Court, and this is reflected in the provisions of the Rome Statute, in which the legislator has explicitly indicated the undertaking of truth-oriented activities. Such an important attachment to a materially true determination of the course of events is related to the fact that

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18 See H. Kuczyńska, *Model kontradyktoryjności* ....., p. 56-57.

19 See P. Hofmański, H. Kuczyńska**.** *Międzynarodowe prawo karne*..., p. 187.

20 See. A. Usacka, *Building the International Criminal Court*, "Global Business and Development Law Journal", 2011, vol. 23, no. 2, p. 230.

the cases pending before the ICC concern the most serious crimes: crimes of genocide, crimes against humanity, war crimes and crimes of aggression, and it follows from the function of the ICC's rules of procedure in this regard[21] . The International Criminal Court has jurisdiction over perpetrators of the most serious crimes committed after 1 July 2002 who were over the age of eighteen at the time of the act. The jurisdiction extends territorially to all States Parties to the Statute, as well as to other states that recognize the jurisdiction of the ICC in a specific criminal case.[22] Currently, the International Criminal Court is a key component of the international criminal justice system.[23]

The Rome Statute and the ICC Rules of Procedure and Evidence, which supplement its provisions, do not contain an exhaustive list of categories of evidence used in proceedings before the ICC, nor do they specify in what order evidence is to be presented during the trial. According to Article 69(3) of the Rome Statute[24] , parties may present all evidence relevant to the case. This is mainly related to the activation of the role of the judge as the body managing the course of evidence. Article 64(8)(b) of the Rome Statute[25] provides that during the trial, the presiding judge may give directions as to the conduct of the proceedings, including directions to ensure that the proceedings are conducted fairly and impartially. In contrast, under the provisions contained in the Rules of Procedure and Evidence, there are three ways in which the conduct of evidence proceedings may be regulated. Firstly, the presiding judge may establish any course of procedure, depending on the needs and characteristics of the case, and may, if necessary, determine the order in which evidence is to be presented and the conditions under which it is to be presented. Secondly, the parties themselves may enter into an agreement as to the order in which the evidence is to be presented. Finally, if the parties do

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21 See J. Jodłowski, *Zasada prawdy materialnej w postępowaniu karnym,* Warszawa, 2015, p. 223, 226.

22 Cf. P. Wiliński, J. Izydorczyk, *Postępowanie przed Międzynarodowym Trybunałem Karnym*, „Państwo i Prawo" 2005, vol. 5, p. 65.

23 See P. Wiliński, *Skuteczność Międzynarodowego Trybunału Karnego z perspektywy zewnętrznej*, [in:] Międzynarodowy Trybunał Karny: Humboldt Kolleg Międzynarodowy Trybunał Karny System prawa: teoria, praktyka, wyzwania, ed. A. Górski, Warsaw 2017, p. 73.

24 Article 69(3) of the Rome Statute states: „The parties may adduce evidence relevant to the case in accordance with Article 64. The Tribunal has the power to require the production of all evidence it deems necessary to establish the truth."

25 Article 64(8)(b) of the Rome Statute states: „During the hearing, the presiding judge may give directions as to the conduct of the proceedings, including directions to ensure that the proceedings are conducted fairly and impartially. Subject to directions given by the presiding judge, the parties may give evidence in accordance with the provisions of these *Statutes.*"

not agree on the order in which evidence is to be presented, then the presiding judge determines the order of procedure[26] .

Summary

The establishment of international criminal tribunals, including the "Nuremberg-type" tribunals, *ad hoc* tribunals, and especially the permanent International Criminal Court, has led to a dynamic and creative evolution in international substantive law and criminal procedure. The creation of these tribunals was made possible through international cooperation and a broad consensus among representatives of various legal systems. The statutes of international criminal courts represent a unique and previously unknown combination of two distinct legal systems—*common law* and *continental law* (also known as the civil law system)

2. Basic Principles of Evidence before the International Criminal Court

The main principles of evidentiary proceedings before the International Criminal Court (ICC) are closely linked to the role the Court plays on the international stage. The primary objective of the proceedings is to establish material truth. This obligation directly impacts the structure of the entire process and is closely tied to the second objective, namely the principle of the active participation of the judge in the evidentiary process. The third distinctive feature of the proceedings is the introduction of evidence into the process by the parties involved.

2.1. Establishing Material Truth

The primary objective of the evidentiary proceedings before the International Criminal Court (ICC) is to establish material truth, an obligation that derives from the role of the Court. Its task is to clarify the sequence of events leading to the commission of international crimes, as well as the background and causes of these crimes. This objective, in turn, has necessitated the adoption of an appropriate procedural model. The duty to establish the material truth has a direct

[26] Rule 122, ICC Rules of Procedure and Evidence. See. H. Kuczyńska, *Model kontradyktoryjności*..., p. 60.

impact on the structure of the entire ICC process and is a consequence of the adoption of a procedural model characteristic of countries with continental legal systems.[27] In civil law jurisdictions, criminal proceedings are geared towards reconstructing the actual course of events and, as a result, the correct application of substantive criminal law norms. The determination of the true course of events is one of the main objectives of the procedure, which makes it possible to achieve substantive justice.[28]

While the principle of material truth is not explicitly defined in the Rome Statute, it is referenced in two articles. In examining the provisions in light of the material truth principle, the initial reference is to Article 69(3) of the Statute, which states: In accordance with Article 64, the parties may submit evidence that is pertinent to the case in question. The Court is thus empowered to request the submission of any and all evidence it deems necessary for the determination of the truth. The wording of this provision indicates that the court is obliged to base its decision on material (objective)[29] truth, rather than on formal truth derived from the dispute and the initiative of the parties. This duty to uncover material truth is linked to the principle of the active participation of the judge in the evidentiary process, and the judge is also required to provide justification for their ruling.[30]

Undoubtedly, Article 69(3) of the Rome Statute indicates that the establishment of facts in accordance with reality was an important objective of the proceedings. It should also be emphasised that the content of this provision is, in principle, at odds with the rules governing criminal procedure in common law systems, which provide for judicial involvement in the taking of evidence only in exceptional cases.[31]

Article 54(1)(a) of the Rome Statute, on the other hand, contains the concept of 'substantive truth', which occurs only once in the Statute and refers to the procedural role of the prosecutor: "The prosecutor is obliged: (a) in order to establish substantive truth, expand the scope of the pre-trial investigation to

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27 H. Kuczyńska, *Prawo dowodowe* ...., [in:] *System Prawa...,* p. 1739.

28 The distinct structure of criminal procedures in the Anglo-American model and in the *civil law* system entails a significant difference in the place and role of the principle of material truth. In the *common law* system, the principle of material truth is deprecated. See J. Jodłowski, Zasada prawdy materialnej..., p. 221.

29 See C. Kulesza, A. Niegierewicz, *Postępowanie dowodowe przed Międzynarodowym Trybunałem Karnym a zasada prawdy materialnej*, [in:] *Międzynarodowy Trybunał Karny: Humboldt Kolleg Międzynarodowy Trybunał Karny System prawa: teoria, praktyka, wyzwania*, ed. A. Górski, Warszawa, 2017, p. 59.

30 See P. Hofmański, H. Kuczyńska, *Międzynarodowe prawo*..., p. 195.

31 See J. Jodłowski, 224.

include all facts and evidence necessary to clarify the question of criminal responsibility under this Statute and, in doing so, take into account circumstances both in favour of and against the accused." The regulation in the Rome Statute requiring the prosecutor to collect and disclose evidence both against and in favour of the accused appears to be a significant departure from the rules adopted under the Anglo-American legal system. Indeed, the role of the prosecutor in the *common law* system is reduced to that of a participant in a contest, the success of which is judged by the prism of proving beyond reasonable doubt the implementation of the criminal act, rather than achieving a state of substantive veracity of the outcome. At the same time, the norm contained in Article 54(1)(a) of the Rome Statute confirms how important a place the attainment of factual findings consistent with reality has in the criminal procedure before the ICC[32] . The duty to discover the truth in proceedings before the ICC therefore concerns both the Prosecutor and the court. The realisation of the principle of substantive truth at trial requires ensuring the adversarial principle, including guarantees of the rights of the defence, but also the associated fairness of the evidentiary process.

2.2. Active Role of the Judge in Evidentiary Proceedings

The authority of judges to actively participate in hearings and influence evidentiary material has become a "clash of legal cultures": the culture of the passive judge (inherent in *common law* systems) versus the active judge (inherent in the continental legal systems)[33] . The drafters of the Rome Statute gave judges the power to influence the scope of evidence, both in terms of the power to take evidence themselves and the power to require a party to supplement evidence with specific evidence.[34] The majority of judges recognised that in cases as complex and intricate as those heard by the ICC, there is a need to control the conduct of the proceedings. Furthermore, the implementation of the duty of the judges of the Court to seek the truth on the merits led to the conclusion that only the judge's control over the course of the trial and the evidentiary process allows for a smoother and faster conclusion of the proceedings.[35]

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32 Ibid., 225.

33 See K. Ambos**,** *International Criminal Procedure: 'Adversarial,' 'Inquisitorial' or Mixed?*, "International Criminal Law Review" 2003, vol. 3, no. 3, p. 1747.

34 Ibid.,:1748.

35 See H. Kuczyńska*, Prawo dowodowe...,* p. 1749-1750.

2.3. Method of Presenting Evidence in Proceedings

According to Article 69(3) of the Rome Statute, it is the parties to the proceedings who hold the right to present evidence relevant to the case. The provision underscores the strictly adversarial nature of the proceedings, characteristic of common law countries, where the parties summon witnesses and conduct examinations by posing questions, while the court's role is limited to hearing both sides as they present their versions of events (the "two cases approach"). The objective is to present evidence in a manner that supports each party's respective case, rather than to establish material truth. Despite this principle, a shift can be observed in proceedings before the International Criminal Court, where witnesses are not necessarily expected to exclusively support the version of events presented by the calling party. Instead, witnesses are viewed as "witnesses to material truth." This approach allows for a more neutral stance toward witnesses, akin to the *civil law* system, where they are not treated as "weapons" in procedural combat, but rather as "allies of the court" in the pursuit of establishing material truth.[36]

Summary

The initial design of the evidence model reflected the model of criminal procedure in force in countries with a common law legal culture. On the other hand, the drafting of the evidentiary rules, including the Rules of Procedure and Evidence, was aimed at introducing legal solutions characteristic of the continental model of criminal procedure. The main objective of the ICC proceedings is to establish the material truth, judges have been given the power to actively influence the scope of evidence, and finally, the witness has gained the position of a 'material truth witness'.

3. Disclosure of Evidence in Proceedings before the International Criminal Court

The practice of evidence disclosure is not observed in continental (civil) law systems. However, this procedure is implemented in proceedings before the International Criminal Court, serving various critical procedural purposes for both the

[36] See P. Hofmański, H. Kuczyńska, *Międzynarodowe Prawo*..., p. 195.

parties and the court in terms of organisational efficiency and trial preparation. The obligation to disclose evidence is applicable at various stages, including prior to the confirmation of charges hearing, subsequent to referral for trial, and before the commencement of the trial. Furthermore, the obligation extends to instances where the Prosecutor obtains evidence that is significant to the preparation of the defence.

3.1 Objectives of the Evidence Disclosure Procedure

In proceedings before the ICC, the procedure of disclosure of evidence, derived from the legal systems of common law countries, is employed. The primary objective of this institution is to facilitate the exchange of information between the two parties involved in the proceedings regarding the evidence they intend to present before the court. Effective communication between the parties is crucial, as it is not possible to present evidence at the trial that has not been disclosed to the opposing litigant prior to the trial. Furthermore, the procedure for disclosure of evidence serves another important procedural purpose, namely the realisation of the accused's (suspect's) right to a defence[37]. In proceedings before the ICC, there are no formal case files, which is characteristic of a continental trial. The institution of disclosure of evidence provides the parties with the opportunity to adequately prepare for the trial. This is particularly important in developing an evidentiary strategy, which is especially crucial for the preparation of the accused's line of defence. This, in turn, determines the smooth conduct of the trial, during which the parties already have adequately prepared arguments to counter the opposing party's allegations. It is important to note that the obligation of the parties to disclose evidence they intend to present at the trial is continuous. This obligation extends to witnesses that a party decides to call additionally, and the other party must be informed as soon as possible[38]. The institution of disclosure of evidence plays an integral role in the organisation of judicial proceedings. It enables the court to anticipate the evidence that will be presented by the parties supporting and in rebuttal to certain allegations. The disclosure of evidence pertains to two distinct categories of evidence. The first encompasses the evidence that a party intends to present to the court in support of specific allegations or in rebuttal to the opposing party's claims. The second category comprises the evidence in the

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37 See H. Kuczyńska, *Prawo dowodowe...,* p. 1742.

38 See P. Hofmański, H. Kuczyńska, *Międzynarodowe Prawo*..., p. 195-196.

possession of the prosecutor, which is required to be disclosed when it may be advantageous to the accused[39].

3.2. Disclosure of Evidence by Parties prior to Plea Approval Hearing

In proceedings before the ICC, the obligation to disclose evidence is implemented at an early stage of the proceedings, namely before the plea approval hearing. At this stage, the parties are obliged to disclose the evidence they intend to present at the hearing before the Pre-Trial Chamber of the ICC. Article 61(3) and (4) of the Rome Statute provide:

> (3)Within a reasonable time before the hearing, the person shall: (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial, and (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing. 4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

In accordance with Article 61 of the Rome Statute, once the objective of the pre-trial proceedings has been achieved, the Prosecutor requests authorisation for the charges to be brought before the Court. The commencement of trial proceedings is overseen by the Pre-Trial Chamber of the ICC, which assesses all the evidence presented to the Chamber and determines whether it is adequate to refer the case for trial before the Trial Chamber. Prior to the hearing, the suspect is informed of the charges and the evidence that the Prosecutor will present during the hearing. This procedure exemplifies the implementation of the principle of the right to defence, which is a guarantee of a fair trial[40].

Prior to the hearing, the suspect should be afforded the opportunity to become acquainted with the prosecution's evidence, in accordance with Article 61(b3) of the Rome Statute, which stipulates that this should occur "within a reasonable time." The time limit is further clarified in Rule 121(3), which states that the Prosecutor must provide the Pre-Trial Chamber and the person concerned

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39 See H. Kuczyńska, *Prawo dowodowe*..., p. 1742.

40 Cf. C. Kulesza, A. Niegierewicz, p. 54.

with a detailed description of the charges and a list of the evidence to be presented at the hearing no later than 30 days prior to the hearing. Conversely, Rule 121, paragraphs 4 and 5, stipulates an even more abbreviated timeframe when the Prosecutor intends to amend the charges under Article 61(4) of the Rome Statute. The Prosecutor shall notify the Pre-Trial Chamber and the person concerned of the amended charges and the list of evidence he intends to present in support of those charges at the hearing no later than 15 days before the date of the hearing. The same deadline applies to the Prosecutor for communicating to the Chamber and the suspect the list of new evidence he intends to present at the trial[41].

In practice, the manner and timing of the Prosecutor's disclosure of evidence to the defence give rise to certain concerns, as it creates significant challenges for defence counsel in preparing their strategy before the Chamber's hearings. As Kulesza and Niegierewicz observe, these issues originate from the withholding of the identities of prosecution witnesses, frequent amendments to documents provided to the defence, and the delivery of evidence in a condensed, digitised format. Consequently, defence counsel encounter considerable challenges in preparing their case before the Pre-Trial Chamber, particularly when conducting investigations abroad and outside their home jurisdiction[42]. Undoubtedly, such prosecution practices violate the guarantees of the right to defence set out in Article 67 of the Rome Statute.

3.3. Disclosure of Documents and Information by the Arbitral Chamber prior to the Commencement of the Hearing

Following the referral of the case to trial, pursuant to Article 64(3)(c) of the Rome Statute, the Trial Chamber designated to hear the case must ensure, sufficiently in advance of the trial, the disclosure of any documents and information previously undisclosed, to facilitate adequate preparation. The parties are also required to disclose evidence they intend to present at trial. This obligation is ongoing in nature[43]. The Arbitral Chamber does not possess the case file for consultation purposes. However, it may request that participants provide general information regarding the nature and content of their case, as well as a compre-

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41 ICC Rules of Procedure and Evidence.

42 *Evidence before the International Tribunal*..., p. 55. Article 67(b) of the Rome Statute guarantees the accused the right to: „(b) to have adequate time and facilities for the preparation of his defence, as well as to communicate freely and confidentially with counsel appointed by the accused."

43 See H. Kuczyńska, Prawo dowodowe..., p. 1742.

hensive list and summaries of their evidence. Furthermore, the Arbitral Chamber has access to the decision of the Pre-Trial Chamber, which confirms the charges and authorises the transfer of the accused to the Chamber. Furthermore, the record of the proceedings conducted[44] can be utilised as a 'tool' to facilitate the preparation of the hearing[45].

3.4. Disclosure by the Prosecutor of Evidence Relevant to the Preparation of the Defence

The ICC Prosecutor shall ensure that the defence has access to evidence relevant to the preparation of the defence. This obligation arises from Rule 77, which provides that the Prosecutor shall, subject to the limitations on disclosure provided for in the Statute and Rules 81 and 82, permit the defence to inspect all books, documents, photographs and other tangible objects in his possession or under his control which are relevant to the preparation of the defence or which the Prosecutor intends to use as evidence at trial[46].

The ICC prosecutor is obliged to disclose both incriminating and mitigating evidence to the defence, but should present each type of evidence separately. The Prosecution cannot combine all types of relevant evidence in one omnibus document and thus burden the defence with the task of separating them when reviewing the disclosed material. Each piece of evidence must be linked to a factual description, and each specific factual description must be linked to a specific element of the offence and the terms of liability. In addition, the Prosecution must ensure that the document explains in detail the context of the facts that gave rise to the charge. Disclosure of most mitigating evidence must therefore take place before the preliminary hearing. According to Article 67(2) of the Rome Statute, mitigating evidence includes any evidence which, in the opinion of the Prosecution, indicates or may indicate the innocence of the accused or mitigating circumstances for the guilt of the accused or which may undermine the credibility of the Prosecution's case. Evidence containing mitigating circumstances may also include potentially exculpatory evidence. Since most exculpatory evidence should be presented before trial, some of the evidence presented after confirmation will therefore consist of incriminating evidence that the Prosecution intends to present at trial. After the hearing, the defence may have access to any prosecution material relating to the

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44 Rule 130, ICC Rules of Procedure and Evidence.

45 Cf. S. Swoboda, *The ICC Disclosure Regime – a Defence Perspective*, "Criminal Law Forum" 2008, vol. 19, p. 460.

46 ICC Rules of Procedure and Evidence.

conflict situation, which may be helpful in understanding the background to the conflict and its consequences, and thus assist in the preparation of the defence[47].

Summary

Many aspects of the system of disclosure of evidence developed before the Pre-Trial Chamber and the ICC Trial Chamber deserve commendation. The ICC's information policy on charges is demanding in terms of providing accurate information, particularly in terms of citing facts that illustrate the context and background of individual charges, and a precise statement of the conditions of accountability is required. However, the negative dimension of the evidentiary process is manifested in the incomplete disclosure of relevant evidentiary information to the defence, the constant modification of the documents presented, their abbreviated form, the withholding of data of prosecution witnesses, which is undoubtedly a consequence of conducting criminal investigations during conflicts and the inability to provide the necessary protection to witnesses. However, the prosecution's difficulties in ensuring the availability of evidence cannot be to the detriment of the accused in terms of the implementation of the right of defence.

4. The Course of Evidentiary Proceedings

The evidentiary procedure before the International Criminal Court differs from that of *ad hoc* tribunals. Its peculiarities are influenced by procedures derived from both Anglo-Saxon (*common law*) and continental (*civil law*) legal systems, namely: a flexible approach to the presentation of evidence, cross-examination of witnesses and the power of the judge to direct the proceedings.

4.1. The Order of Presentation of Evidence at the Trial

Proceedings before the International Criminal Court have adopted a specific approach to the presentation of evidence, departing from the Anglo-Saxon model used in *ad hoc* tribunals, which is characterised by precise and binding rules on the order in which evidence is presented[48] . It has become a principle of the law of

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47 Cf. S. Swoboda, *The ICC disclosure regime*..., p. 453-456.

48 See H. Kuczyńska, *Model kontradyktoryjności*..., p. 60.

evidence that there should be a flexible approach to the introduction of evidence into proceedings, and an aversion to the obstacles posed by technical rules on the admissibility of evidence[49] .

The order in which evidence is to be presented in proceedings before the ICC is not clarified by the provisions of the Rome Statute. Article 64(8)(b) of the Statute merely sets out the general rule that during the trial, the presiding judge may give directions as to the conduct of the proceedings, including directions to ensure that the proceedings are conducted fairly and impartially. By contrast, the detailed rules governing the taking of evidence are set out in the Rules of Procedure and Evidence. Under Rule 140(1), the taking of evidence may be conducted in three ways. Firstly, the presiding judge may determine any procedure adapted to the needs and characteristics of the case. This is at the discretion of the judge, who may also decide that it is not necessary for him to take part in the proceedings. Secondly, if the presiding judge does not determine the order in which evidence is to be presented, the parties to the proceedings may take the initiative and reach an agreement on the order in which evidence is to be presented. However, if the presiding judge decides to regulate the course of the evidence by means of directions, the parties' agreement may only cover those elements of the evidence which are not regulated by the judge's order. As a last resort, if the parties do not agree on the order in which the evidence is to be presented, the presiding judge will determine the order of the proceedings[50].

In the evidentiary proceedings before the ICC, there is no reference to a 'prosecution case' and a 'defence case'. In practice, this is due to the fact that there is no obligation to fully present the evidence prepared by the prosecution first, and only then to move on to the evidence of the defence. Proceedings before ad hoc tribunals under such rules have resulted in an unusually lengthy presentation of evidence phase. The breadth of the indictment and the number of charges brought against the accused made it difficult for both the defence and the court to control all the evidence, and it was a challenge for judges to match specific (numerous) charges with specific evidence presented at later stages of the trial. Thanks to the use of a more flexible procedure at the ICC, the parties are not

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49 See C. Kulesza, A. Niegierewicz, Postępowanie dowodowe ... , p. 60.

50 ICC Rules of Procedure and Evidence. See also Kuczyńska, „Model kontradyktoryjności... „:60. The provisions of the Rome Statute and the Rules of Procedure and Evidence allow judges to admit new evidence on their own initiative, albeit in a supplementary manner, as confirmed in the decision in Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07), Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, 20.11.2009.

obliged to present all the evidence gathered in the first phase of the trial, but can do so at a later stage of the trial. The flexible order of presentation of evidence makes it possible to move away from presenting all the prosecution's evidence at the beginning of the trial; evidence can be presented thematically, sequentially in relation to individual charges, or in relation to individual elements of the crime. In relation to a particular charge, all the evidence is presented: both that of the defence and that of the prosecution, before moving on to the next fact to be proved. It should be stressed, however, that the presentation of evidence may also follow the principles of the *common law* system; in practice, judges adopt just such a rigid pattern of trial proceedings[51], in which the prosecutor begins the evidence at the trial by explaining the substance of the charges and then presents all the prosecution's evidence[52] .

4.2. The Rules for Hearing Witnesses

Article 69(3) of the Rome Statute provides that the parties may present all evidence relevant to the case, and the ICC has the power to require the production of any evidence it deems necessary to establish the truth. These provisions refer only to certain types of evidence, with most attention being paid to the evidence of the accused's statements and the evidence of a witness. In ICC proceedings, however, the rules governing the examination of witnesses are not specified in detail[53]. The Rules of Procedure and Evidence propose a model of questioning adopted by the ICTY based on the US model of examination. However, the lack of a definite

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51 See H. Kuczyńska, Prawo dowodowe..., p. 1745. In fact, there are huge factual discrepancies between the possibilities of obtaining evidence by the prosecution and by the defence, this is undoubtedly the result of the obligation imposed on the Prosecutor of the ICC to seek the material truth and, consequently, the organisational facilities at his disposal. See H. Kuczyńska, *Funkcje prokuratora Międzynarodowego Trybunału Karnego w postępowaniu przygotowawczym*, [in:] *Z problematyki funkcji procesu karnego*, ed. T. Grzegorczyk, J. Izydorczyk, R. Olszewski, Warszawa, 2013, p. 99.

52 Cf. P. Wiliński, J. Izydorczyk, *Postępowanie przed Międzynarodowym Trybunałem Karnym*, „Państwo i Prawo" 2005, vol. 5, p. 47.

53 In the first case in which a conviction was handed down by the ICC (Prosecutor v Lubanga), 96 witnesses were heard. The Court did not differentiate between the evidentiary value of the testimony of witnesses interviewed in The Hague and witnesses interviewed by video link, and broadly admitted documents, letters, photographs and maps introduced during the witness's testimony or separately. See The Prosecutor v. Lubanga, judgment of 14 March 2012, (ICC-01/04-01/06-2842), § 93.

form of the verb in the Rules and the use of the phrase "may be examined" makes the rules on the order of examination of witnesses non-binding[54] .

The Rules of Procedure and Evidence set out the general rules for the examination of witnesses (Rule 122). Rule 140 defines the procedure in which the party calling the witness has the right to cross-examine the witness first[55] . At the next stage, the prosecution and defence have the right to cross-examine the witness on relevant issues relating to the witness's testimony and credibility, the witness's credibility and other relevant issues[56]. This type of questioning is called cross-examination - but the Rules of Procedure and Evidence do not use this term. The doctrine is that this is a deliberate move, dictated by a desire to move away from the common law system and to show that the way of questioning witnesses contained in the Rules of Procedure and Evidence is only appropriate for proceedings at the ICC. It should be noted that during the hearing, the presiding judge may also be the first to ask questions, which allows him or her to get an idea of the course of events and to hear the witness's testimony before the parties subject him or her to cross-examination. This also allows the judges to hear from witnesses and experts about the background and circumstances of the acts committed[57] . An expert witness in proceedings before the ICC provides evidence in the form of an opinion[58] . In the Delalić case, it was emphasised that an expert opinion is necessary and required when the expert can assist the Arbitral Chamber with his or her scientific knowledge or technical knowledge, which is beyond the knowledge and experience of the person describing the facts[59] . By contrast, in the Bagosor case, it was held that expert evidence is admissible when the expert's special knowledge can contribute to the Chamber's understanding of the evidence in question[60] . The absence of rigid rules of evidence leaves the management of the proceedings in the hands of the presiding judge, who may question and provide evidence to witnesses and experts regardless of the stage of the trial[61] .

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54 See H. Kuczyńska, *Prawo dowodowe*..., p. 1746.
55 Rule 140(2)(a), ICC Rules of Procedure and Evidence.
56 Rule 140(2)(b), ICC Rules of Procedure and Evidence.
57 See H. Kuczyńska, *Prawo dowodowe*..., p. 1747.
58 For a broader discussion, see K. Kremens, *Dowody osobowe w międzynarodowym postępowaniu karnym,* Toruń, 2010, p. 222-33.
59 Delalić case (IT-96-21-T), § 10.
60 Bagosora case (ICTR-96-7-T), § 8.
61 See H. Kuczyńska, *Prawo dowodowe*..., p. 1747.

4.3. The Role of the Judge in the Evidentiary Procedure

In the continental system, the judge is the administrator of the proceedings, and he or she also orchestrates the proceedings. Such a role for the judge is also provided for in the legislation governing the functioning of the ICC. In analysing the provisions of the Statute, attention should be paid to the impact of the ICC judge on the course and scope of the evidentiary process. The flexible rules of evidence have the effect of placing the management of the proceedings in the hands of the presiding judge. The provisions of the Statute empower the presiding judge to give directions for the conduct of the proceedings, including directions to ensure that the proceedings are conducted in a fair and impartial manner[62] .

For the role of the ICC judge, the imposition of a duty to establish the material truth has proved fundamental. This obligation is also related to the role played by international criminal tribunals, since their task is to clarify the course of events leading to the commission of crimes under international law. ICC judges have three types of jurisdiction[63] . Firstly, the judge can require the parties to the proceedings to produce "evidence in addition to that which has already been collected before the trial or has been presented at the trial by the parties "[64], furthermore "the Court has the power to require the production of all the evidence it deems necessary to establish the truth"[65] . Secondly, "(...) in the exercise of its functions before or during the hearing, the Arbitral Chamber may, if necessary: require the attendance of witnesses and their testimony and the production of documents and other evidence by way of your assistance, if necessary, as provided by this Statute."[66] Thirdly, the Arbitral Chamber has the right to ask questions of a witness both before the witness is questioned by a party, the proceedings, and afterwards[67] .

All of these powers mean that ICC judges can go beyond the traditional role of arbitrator adopted in Anglo-Saxon systems. They are not limited to ruling solely on the evidence presented by the parties, since the introduction of evidence into the proceedings no longer requires the cooperation of either party. The actions

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62 See C. Kulesza, A. Niegierewicz, *Postępowanie dowodowe...,* p. 61-62.
63 See H. Kuczyńska, *Model kontradyktoryjności*..., p. 63.
64 Article 64(6)(d) of the Rome Statute.
65 Article 69(3) of the Rome Statute.
66 Article 64(6)(b) of the Rome Statute.
67 Rule 140(2)(c), ICC Rules of Procedure and Evidence.

of ICC judges have shown that they are willing to use their powers in a manner consistent with the limited adversarial model[68] .

Summary

The development of criminal proceedings before the ICC is characterised by a shift from a purely adversarial model to a limited adversarial model. The technical rules of evidence are taken fully from the *common law* system: the parties introduce evidence into the trial, the order in which evidence is presented can be flexible, witnesses and experts are cross-examined. In contrast, the basic tenets of the criminal trial remain the same as those of the continental (*civil law*) system; the aim of proceedings before the ICC is to establish substantive truth.

Conclusion

The form of the evidentiary procedure before the International Criminal Court has been adapted to its specific needs. The legal orders and jurisprudence of the *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, which in turn drew on the experience of the "Nuremberg-type" military tribunals, provided the basis for the development of a specific model of evidentiary proceedings. The emergence of international criminal tribunals, and in particular the permanent International Criminal Court, has led to a dynamic and creative development in international law regarding substantive international law and criminal procedure. The establishment of the tribunals was made possible by international cooperation and a broad consensus among representatives of different legal systems.

The initial form of the evidentiary model of the ICC reflected the model of criminal procedure prevailing in countries with a common law legal culture, but over time there has been a shift towards a limited adversarial model. Technical rules of evidence have been borrowed from the purely adversarial process, where the parties present evidence at trial, the order of presentation of evidence is flexible, and witnesses and experts are cross-examined. In contrast, the main principles of the ICC's criminal procedure are characteristic of the continental model of criminal procedure: the aim of the proceedings is to establish the

[68] See H. Kuczyńska, *Model kontradyktoryjności*..., p. 64

material truth, the prosecutor has been given the function of an impartial organ of justice, the witness has been given the position of a "material truth witness" and, finally, the judges have been given the competence to actively influence the scope of evidence and thus manage the course of the proceedings. Under these circumstances, it can be concluded that the solutions adopted in the creation of the ICC have contributed to the emergence of a new model of evidentiary proceedings, unknown in other legal systems, whose basic premise is the realisation of the legitimate interests of all participants in the proceedings. It is a model of limited adversarial proceedings, adapted to the needs of the ICC and unique to it, which can still develop dynamically.

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Chapter 4

Marcin Berent

Previous International Criminal Tribunals and the Justification for Establishing an Ad-Hoc Criminal Tribunal to Prosecute Russian Crimes in Ukraine

Introduction

In the third year of the Russian-Ukrainian war, initiated by the aggression of the Russian Federation on 24 February 2022, its outcome remains uncertain. The crimes committed in Ukraine by Russian troops and allied peoples also remain unpunished. This situation has not changed in recent months, despite the optimistic expectations raised by the initiative of The Hague-based International Criminal Court. This failure stems from the normative impotence inherent in the systemic foundations of the international judiciary itself as far as enforcement of criminal liability is concerned, as well as the unfavourable circumstances that have hindered effective criminal prosecution in the status quo. The above claim is supported by the persistent lack of progress, with no clear prospects for resolving the impasse, which undermines trust in international criminal tribunals and erodes the authority and dignity of the law.

This expert opinion sets out to discuss the existing experience in the operation of international criminal tribunals and to assess whether it would be potentially relevant to establish a new, special criminal tribunal for Russian crimes in Ukraine. Considering the facts of the current international situation, this expert opinion is critical of the limited effects of the initiatives taken to date by the International Criminal Court, notwithstanding genuine praise for the efforts undertaken within the modest options available. At the same time, it emphasizes the generally positive, though varied, outcomes of the previously operating supranational criminal courts. As a consequence, this assessment advocates for the establishment of a new

international criminal tribunal, capable of prosecuting officials of the Russian Federation and effectively enforcing criminal accountability in the face of its barbarous actions, which are scarcely imaginable in 21st-century Europe. While some might have naively believed that such events would never happen again, history provides ample evidence that one must be ready for war at any time and in any place. It is true that the International Criminal Court was not designed to address the calamities that the world saw in Bucha, Irpin, Motyzhyn, or Gostomel.

This expert opinion is based on an article previously published by its author, in which he evaluated the need for a new international criminal tribunal to prosecute crimes under international law committed in Ukraine in connection with the aggression of the Russian Federation on 24 February 2022.[1] Indeed, as this article has demonstrated, it is precisely these crimes that the Russians and their allied forces have committed during that war, including, despite ambiguous interpretations, the crime of genocide.

As in the article itself, this expert opinion adopts a general, somewhat philosophical perspective to outline the current position of the International Criminal Court against the background of the armed conflict in Ukraine. From a methodological perspective, the formal-dogmatic approach is used here, with a focus on conceptual frameworks and broad conclusions, rather than purely dogmatic research and analyses.

This expert opinion has been produced much later than the referenced article. The time that elapsed between the two gives an excellent basis for answering a fundamental question related to the performance of the International Criminal Court and the effectiveness of its criminal prosecution of crimes under international law. In anticipation, the assessment will be unequivocally critical in this respect, notwithstanding the understandable reasons why the war in Ukraine has continued unabated or why it has been difficult to bring those responsible for unleashing it to account, or even to detain those named in the arrest warrants issued by the Court more than 2.5 years ago. Spectacular declarations aside, the Court has not successfully closed any case within its jurisdiction.

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[1] See M. Berent, *Unveiling the necessity for a new international criminal court (ICC). A personal perspective amidst 21st century international law crimes in Ukraine linked to Russian Federation aggression*, "Studia Prawnicze KUL" 2023, vol. 4 (96), pp. 27-48.

1. Previous International Criminal Tribunals

1.1. Nuremberg: An Unsurpassed Model

The Nuremberg International Military Tribunal invariably remains a point of reference in all discourses on international criminal justice for crimes under international law. This is because, chronologically speaking, it is, in fact, the first modern supranational criminal court. The author of this expert opinion asserts, moreover, that it is not only a fixed point of reference but also a model for this type of court. Unfortunately, despite the unquestionable imperfections of the Nuremberg Tribunal and the passage of time, in the expert's opinion, it is still an unsurpassed model. It was in Nuremberg in the immediate post-war period that the basic concepts, including the rules and principles of criminal liability at the level of international law, were developed. Without Nuremberg, we would have neither a general concept of crimes under international law nor a definition of standards for prosecuting war criminals.

Finally, there would be no concept of „genocide" itself, although the role and significance of Raphael Lemkin are paramount here and cannot be overestimated. Conversely, one could argue that it would be good if these concepts had never been developed, whether in Nuremberg, or elsewhere at any time. The lack of these would, after all, mean that there has never been a need to build legal institutions concerning genocide and other war-related atrocities, at least at the level necessary for practical application.

The phenomenon, or at least the specific nature of criminal law, regardless of its branch, especially when it comes to international or supranational criminal law, is that in an ideal world, the norms of this law should never be applied. In a properly developed criminal policy, the most desirable outcome is the absence of any subsumptive process, whereby facts of a case are brought under specific norms of criminal law. While in other areas of law the disuse of a norm makes it dysfunctional, in the area of criminal law, it indicates that no crimes have been committed, which is by all means desirable, achieving the basic objectives and functions of criminal law.

However, Nuremberg provided the entire conceptual apparatus and put it into practice because that was the need of the time. The Nuremberg Principles have become an integral part of the teaching curricula for law students at European universities, and their basic outline remains relevant to this day.[2]

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[2] Cf. ibid, p. 37 and the literature cited there, especially: L. Gardocki, *Prawo karne*, Warszawa 2021, p. 4; T. Dubowski, *Czynnik czasu w funkcjonowaniu międzynarodowych trybunałów karnych – wybrane aspekty*, „Białostockie Studia Prawnicze" 2010, vol. 7, p. 135.

1.2. New International Criminal Tribunals

The experience of the Nuremberg International Military Tribunal and the very principles of its operation have shaped the way of thinking about supranational criminal justice for almost half a century. After the period of the Nuremberg Principles in action, their essence and assumptions became the subject of research and analyses conducted from a historical and legal perspective, primarily of interest to historians rather than practising jurists. This was not so much due to the permanence of a perfect model but rather to the banal fact that in the following decades, subsequent tribunals were simply not needed, as Europe, tragically affected by World War II, entered an era of relative peace and stability.

The relative peace and security that Europe enjoyed after World War II came to an end in the 1990s, with the problem of prosecuting crimes committed in Yugoslavia, and later outside Europe, in Rwanda, Sierra Leone, and Cambodia. Accordingly, after certain axioms had been reformed and approaches to human rights were reoriented, the International Criminal Tribunal for the former Yugoslavia (1993), the International Criminal Tribunal for Rwanda (1994), the permanent International Criminal Court (1998), and the Special Court for Sierra Leone (2002) were established.[3]

Contemporary international criminal tribunals can be established ad hoc by the UN Security Council to prosecute specific perpetrators of crimes under international law committed in a specific conflict , or – as mixed tribunals – established on the basis of international treaties by specific states, or finally – as permanent tribunals, operating on the basis of a statute adopted by the states that are contracting parties. An example of a tribunal established ad hoc was the International Criminal Tribunal for the former Yugoslavia[4] (1993) or the International Criminal Tribunal for Rwanda[5] (1994); a mixed tribunal – the Cambodia tribunal ; and an example of a permanent tribunal – the Hague-based International Criminal

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3 Cf. M. Berent, *Unveiling*..., op. cit., p. 37 and the literature cited there, viz.: D. Heidrich, *Przyszłość międzynarodowych trybunałów karnych ad hoc. Strategie zakończenia oraz rozwiązania rezydualne, ze szczególnym uwzględnieniem Międzynarodowego Trybunału Karnego dla byłej Jugosławii*, „Studia Europejskie" 2013, no. 3, pp. 159-184, esp. pp. 159-160.

4 The International Criminal Tribunal for the former Yugoslavia established by the UN Security Council resolution 808 of 22 February 1993 (SC/Res/22.02.1993) and resolution 827 of 25 May 1993 (SC/Res/25.05.1993).

5 The International Criminal Tribunal for Rwanda, established by the UN Security Council resolution 955 of 8 November 1995 (SC/Res/08.11.1995).

Court.[6] (1998). The latter, as it currently operates and addresses the situation in Ukraine, will be analysed in detail later on in this expert opinion.

The track record of international criminal courts, measured in figures, is far from impressive. This is demonstrated by the sheer number of tribunals established in the 20th century, the number of defendants prosecuted, and the statistics of convictions compared to the total number of actual perpetrators of crimes under international law. A grim proof comes with the data on convictions of German Nazi criminals by the Nuremberg International Military Tribunal, which is taken as a role model in this expert opinion, covering, according to estimates, no more than 2% of all the perpetrators.[7]

The International Criminal Tribunal for Rwanda is no better in this regard. The scale of the crime was, of course, smaller than that committed by the German Nazi regime (although its bestiality was on par with the most brutal murders committed in Europe). The Rwanda Tribunal had the authority to prosecute only individuals; it applied the doctrine of command responsibility and was in principle familiar with the construction of chain incitement (i.e., „incitement to incite").[8] During the two decades of its operation (1995–2015), the Rwanda Tribunal organized and conducted a total of 93 trials, in which 61 individuals were convicted of genocide, crimes against humanity, and war crimes.[9]

The Special Court for Sierra Leone produced even more modest outcomes: it conducted only four trials against 10 defendants, nine of whom were found

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6 See M. Berent, *Unveiling*..., op. cit., s. 37 ff. and the literature cited there: M. Płachta, *Międzynarodowe trybunały karne: próba typologii i charakterystyki*, „Państwo i Prawo" 2004, no. 3; T. Dubowski, *Czynnik czasu*..., op. cit., pp. 133-134.

7 As indicated in this expert opinion above, the mere low figures in criminal law do not necessarily demonstrate pathology; just the reverse, a modest level may come from desirable social arrangements in which people do not commit crimes. The point, however, is that it was not the insignificant number of offences (crimes) under international law that was responsible for the limited achievements (generally unimpressive achievements in terms of the number of convictions) of international criminal tribunals, but the dysfunctions that often lay at the roots. The causes of these dysfunctions are usually known and, in some sense, understandable. However, if one takes not the cause (the reason for the dysfunction) but the effect (the dysfunction itself), then one has to be critical of the accomplishment balance of the international criminal courts to date, even if the scores may vary on the case-by-case basis.

8 Cf. K. Pilip, *Prawnomiędzynarodowa odpowiedzialność za ludobójstwo na przykładzie Międzynarodowego Trybunału Karnego do spraw Rwandy*, „Facta Simonidis" 2015, no. 1(8), p. 229 ff.

9 For a detailed report containing information on the trial conclusions, including the names of those convicted (and acquitted – 14 individuals), see https://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf, as at: 13 October 2024.

guilty (one individual died during the trial). All the defendants were leaders of the warring factions, whose responsibility seemed obvious.[10] The modest number of defendants resulted from pre-existing calculations, as the UN Secretary-General stated in his reports that the Sierra Leone Court should prosecute no more than 30 individuals.[11] In this sense, the Court may have delivered on the plan. Still, it was a selective plan of prosecution, which, the author of this expert opinion claims, is frequently a clumsy symbol of a certain weakness and impotence that has been inherent in the operations of an international court from the outset (as in the case of Sierra Leone), or that has manifested itself for other reasons subsequently —i.e., during the work of the international court itself (as was the case in Nuremberg). The overall balance of the efforts of the new (20th-century, post-Nuremberg) international criminal tribunals, as indicated above, remains unsatisfactory.

2. International Criminal Court in The Hague

2.1 General Characteristics of the ICC

The International Criminal Court was established on 17th July 1998 under the Rome Statute drawn up on that date. It is currently the only permanent court in Europe with universal jurisdiction to pursue supranational criminal prosecution. For this reason alone, it is of primary importance for this expert opinion. The fact that its jurisdiction does not cover crimes under international law committed before 1st July 2002 is immaterial, as these considerations pertain to the ongoing armed conflict in Ukraine Expanding the triad of Nuremberg crimes, the jurisdiction of the International Criminal Court encompasses crimes against humanity, war crimes, crimes of aggression (including the initiation of a war of aggression), and genocide. The Court is authorized solely to prosecute specific perpetrators, i.e., individuals, and not states—even when it is evident that the perpetrators acted on behalf of a state or under orders issued by its officials.

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10 Cf. R. Kerr, J. Lincoln, *The Special Court for Sierra Leone Outreach, Legacy and Impact, Final Report*, 2018, p. 5, https://www.rscsl.org/Documents/slfinalreport.pdf, as at: 13 October 2024.

11 See W. Burek, *Specjalny Trybunał Dla Sierra Leone jako nowy etap w rozwoju międzynarodowego sądownictwa karnego*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2016, vol. IV, p. 103. I would like to thank Ms Natalia Urbańska for identifying the sources contained in this paragraph and collating the figures.

The Court's jurisdiction is defined as complementary to the jurisdiction of state authorities, meaning that the Court's authority to prosecute arises secondarily. In principle, it is the national judicial system that should undertake prosecution in the first instance. Only when national authorities are incapable of prosecuting crimes under international law does the jurisdiction of the International Criminal Court come into effect—a mechanism which, as will be discussed later in this expert opinion, is inefficient in practice.

Furthermore, despite its status as a permanent tribunal, the Court is not—like criminal law and the principle of universal repression itself—a universal tribunal with jurisdiction over all states, including all European states. From a practical standpoint, the Court's competence in administering criminal justice is conditional on ratification of the Rome Statute, which many states have yet to ratify. At the same time, any state that has previously ratified the Statute may withdraw from it at any time, thereby ceasing to be a State Party and, in doing so, terminating the Court's jurisdiction.

Thus, it becomes evident that the International Criminal Court is not, and will not become, an effective mechanism for prosecuting the crimes committed in Ukraine.[12]

2.2. ICC Proceedings on the Russian Federation's Aggression against Ukraine

Within a few days of Russia's invasion of Ukraine, on 2nd March 2022, the International Criminal Court opened proceedings in the case. On 17th March 2022, the Court issued an arrest warrant for the President of the Russian Federation, Vladimir Putin, and his Commissioner for Children's Rights, Maria Lvova-Belova. In the explanatory note to the arrest warrant applications), the two individuals were charged with the unlawful transfer of Ukrainian children, as such an act satisfies the elements of the crime of genocide, which does not necessarily have to consist solely of the physical extermination of the population. By opening criminal proceedings in response to the war in Ukraine, the Court undertook its first serious task of this nature since its formal establishment.[13]

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12 Cf. M. Berent, *Unveiling*..., op. cit., p. 38 and the literature cited there: K. Smith, *Acculturation and the acceptance of the Genocide Convention*, "Cooperation and Conflict" 2013, vol. 48, no. 3, pp. 358-377.

13 Cf. M. Berent, *Unveiling*..., op. cit., p. 38 ff.

2.3. What has the ICC Achieved in the Ukrainian Case?

There is no doubt that the outcome of the task before the International Criminal Court, measured primarily by the effectiveness of prosecution, will become the prism for assessing the efficiency of the functioning of the Court itself and, consequently, provide a foundation for questioning the rationale behind its continued existence. While it may still be too early to take a final stance on this, in the third year of the war in Ukraine, the assessment of the performance of the International Criminal Court must be considered clearly negative. The Court has failed to resolve any of the cases falling within its jurisdiction, including failing to arrest the chief Russian decision-makers covered by the arrest warrants.

The reasons for this are understandable and, in some sense, justified. This is not, therefore, a reproach that the Court has done nothing or that it has done too little. On the contrary, the Court seems to have done everything it could. The point is, however, that what it could do, mainly from the perspective of its formal powers, was simply not enough. The inefficiency, therefore, lies not with the judges of the Court, but with their principals who, although this is again understandable, failed to equip them with sufficient instruments necessary to enable them to act effectively. However, it is only the causes of inefficiency, which constitute the original and inexcusable sin of the Rome Statute, that may be understandable, but not the effects. The effects are objectively and tangibly devastating, as nothing has changed in Ukraine.

This is not a result of the Court's obstruction or an undue lengthening of the proceedings, but of its objective impotence, by which basically nothing happens before the Court that would be decisive or even meaningful for bringing the perpetrators of the crimes in Ukraine to account. Worse still, the prospects for changing this state of affairs seem slim, if not non-existent, as the Court is incapable of conducting any real proceedings against perpetrators of crimes under international law. To date, no defendants have, in fact, been brought before the Court, nor is there any indication that they will be.

2.4. Reasons for the Inefficiency of the ICC Proceedings

What are the reasons for the above state of affairs and therefore the inefficiency of the International Criminal Court in view of the situation in Ukraine?

2.4.1. Sin I: The Voluntary Ratification of the Rome Statute and the Uncertainty Regarding the Positions of the States Parties to the Rome Statute

The primary reason, as indicated above in this expert opinion, is the voluntary nature of ratification of the Rome Statute and the possibility of withdrawing from it at any time, in principle. While the issue of the enforceability of an arrest warrant in a state party to the Statute is secondary compared to the possibility of dropping out of the Statute, the experience of the last 30 months has shown that there are justifiable doubts regarding whether a state party to the Statute would fulfil its obligation to detain Russian Federation officers upon their arrival. The predictions in this respect are again unclear, and in some cases, explicitly negative. There are known examples of states under an obligation to execute arrest warrants openly declaring that they would not arrest Vladimir Putin, granting him full safety within their territory. At this stage, the crack that undermines the Court's authority was already visible on an international scale.

As regards the voluntary ratification of the Rome Statute, it is important to note that the Russian Federation is not a party thereto. Although Ukraine ratified the Statute in August 2024, this is essentially irrelevant given Russia's prior withdrawal from the Statute in 2016. Russia is therefore not a party to any of the founding treaties in this domain, so regardless of Ukraine's situation, the question arises whether the Court has the formal power to try Vladimir Putin or any official acting on his orders or with his consent. For this to occur, one must assume that the International Criminal Court's jurisdiction extends to the Russian „special military operation in Ukraine," thereby rejecting the argument that the Court's decisions are not binding on a state that does not recognize its jurisdiction[14]. This assumption, however, is factually inaccurate or at best highly questionable.

2.4.2. Sin II: Unavailable In-Absentia Trials

Even if one were to accept that there is a formal authority to prosecute and try Russian officials following Russia's denunciation of the Rome Statute, there remains the issue of the International Criminal Court's lack of authority to administer criminal justice in absentia. The Hague Tribunal, unlike Nuremberg, does not have such authority. The unavailability of in-absentia proceedings means that, on

[14] For more on the argument in favour of the Court's powers this respect, see A. Zmarzły, *Jurysdykcja międzynarodowego trybunału karnego nad rosyjską „specjalną operacją wojskową" w Ukrainie – osądzenie „rosyjskiej wielkiej trójki"*, „Palestra" 2023, no. 7.

a purely technical level, it is impossible to prosecute Vladimir Putin. It would only be possible if Vladimir Putin voluntarily reported to the Court or were arrested by one of the states party to the Rome Statute. The former can be categorically ruled out, while the latter must be considered extremely improbable, either because of the aforementioned reasons or because Putin will likely never visit any state where, even formally, he might be at risk of being arrested.[15].

2.4.3. Sin III: Prosecuting Transfer Instead of Killing. Complicated ICC Rules of Procedure and Evidence

For the International Criminal Court to have issued arrest warrants for officials of the Russian Federation in connection with crimes under international law committed in Ukraine after the aggression in February 2022 was seen as meeting the expectations of the civilized world for a response to these acts of barbarity. However, enthusiasm was quickly replaced by questions about why the prosecution focused solely on transfers rather than genocide itself, understood as the systematic killing of a population. The world saw the murders in Bucha and other sites of execution and torture. Yet, the legal basis (explanatory notes) for the arrest warrants illustrates another weakness of the Court, beyond the ratification requirement and the unavailability of in-absentia proceedings. From the perspective of the rules of evidence, the transfer of the Ukrainian population is the easiest crime to prove, a factor that influenced the choice. This applies both to the arrest proceedings and any future trials[16] .

3. Efficiency of the ICC Prosecution. A critical summary

The performance assessment of criminal prosecutions conducted by the International Criminal Court presents a grim overall picture, marked by impotence in three critical areas: (I) the dependence of the Court's jurisdiction on the ratification of the Rome Statute by a state, (II) the unavailability of powers to conduct trials in absentia, and (III) a complicated evidentiary procedure that results in a subsumptive process, undermining the gravity of the criminal lawlessness inherent in the acts listed in the indictment.

From the perspective of causal processes, failure in one, or even any, of these areas directly undermines the Court's operational efficacy. In the case of Ukraine,

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15 Cf. M. Berent, *Unveiling*..., op. cit., p. 38.

16 For more on this, see ibid, p. 39 ff.

this systemic impotence is the inevitable outcome of the flawed design across all three domains.

4. Can the ICC Respond Adequately to the Crimes Committed in Ukraine?

The considerations above raise the question of whether the International Criminal Court possesses either the formal (theoretical) or real (practical) capacity to properly respond to crimes under international law committed in Ukraine. The answer is unequivocally negative. This incapacity stems from both the flawed design of the normative sources on which the Court relies and the practical challenges to the realization of its powers.

The author of this expert opinion contends that the Court's practical impotence is secondary to the defective design of its formal procedures. While the willingness of individual states party to the Rome Statute to execute arrest warrants issued by the Court holds some significance, this aspect is more symbolic than substantive. The core issue lies in the foundational pathology of the Court's operation, which stems from the structural inadequacies embedded in its Statute. Consequently, any debate about the approaches adopted by individual states is ultimately irrelevant, as the Court's inability to fulfil its mission originates directly from the deficiencies in its foundational framework.

5. Efficiency of international criminal tribunals. A fair assessment

In light of the above, it is necessary to acknowledge, for the sake of scholarly honesty and integrity, that none of the international criminal tribunals has fully achieved its intended purpose, nor even a significant portion of it. The Nuremberg Tribunal, often upheld as a role model in this context, was similarly fundamentally disappointing, having shamefully failed to fulfil its role by prosecuting only a negligible fraction of German Nazi criminals.

However, the failures of the Nuremberg Tribunal were rooted in entirely different factors than those undermining the International Criminal Court. At Nuremberg, the failure was primarily due to political will—or, more accurately, the lack thereof—not only within Germany itself but also among other stakeholders.

This lack of determination to confront the past allowed many perpetrators to evade accountability entirely and often live prosperous lives in post-war Germany, even holding high positions in state administration. Thus, the defect of the Nuremberg Tribunal was secondary rather than primary.

Systemically, the Nuremberg Tribunal had the foundational capability to prosecute crimes. It was the flawed implementation in practice that undermined the sound theoretical principles and procedural frameworks of a military tribunal. By contrast, the International Criminal Court suffers from defects that are primary in nature, embedded in its formal foundations. These foundational flaws mean that the ICC lacks the inherent capability to prosecute crimes effectively.

Compounding this primary defect is a secondary flaw: the unwillingness of many states party to the Rome Statute to act in accordance with its provisions. However, this secondary issue becomes irrelevant when the primary defect prevents the Court from fulfilling its fundamental mandate. The issuance of arrest warrants by the ICC was a significant step, but time has brutally demonstrated its inability to enforce them. What remains is little more than symbolic gestures and illusory hopes.

6. Social climate and sentiment in today's Russia

The above does not exhaust the list of the original flaws of the Rome Statute. The ICC lacks the power to try cases in absentia or to enforce accountability against individuals who are not citizens of states party to the Statute (though, as discussed earlier, this remains a debatable point). Furthermore, its complex evidentiary rules have shifted the focus of its proceedings from addressing genocide outright to prosecuting cases of population transfer, despite the world having witnessed acts amounting to genocide. Even if these procedural deficiencies were remedied, the issue of complementarity in prosecution would remain. This issue must now be considered in light of the prevailing social climate and sentiment within Vladimir Putin's contemporary Russia.

Currently, there is no social or political climate in Russia conducive to holding its ruling administration, including Vladimir Putin, accountable for its actions. Public opinion polls, even those conducted by relatively reliable sources, consistently indicate that Putin retains considerable support across large segments of the Russian population. This data challenges and outright refutes the notion that Russians are an oppressed people suffering under authoritarian rule. The evidence demonstrates otherwise: Russians as a collective, not just their leadership,

perpetuate imperial ambitions that have neither been extinguished nor confined to a narrow ruling elite.

In this regard, Russians exhibit striking similarities to Germans during the National Socialist era, when widespread complicity underpinned the atrocities committed in the name of a criminal ideology. The perception that Germans blindly followed their Führer while oppressed Russians rejected their tsars is an enduring myth unsupported by historical or contemporary evidence. Just as the Germans sought territorial expansion to the East („Drang nach Osten"), Russians have pursued western expansionist policies since at least the time of the Pereyaslav Agreement in 1654.

While post-war Germany has, to some extent, reckoned with its historical responsibilities, Russians have not done so and appear disinclined to do so in the foreseeable future. Historically and culturally, Russia does not align with the European tradition, and efforts to integrate it into the Western cultural sphere have proven futile or, at best, severely misguided. Consequently, it is unrealistic to expect that the Russian people will hold their current regime accountable—not due to a lack of capacity, but a lack of collective will.

Any potential change in leadership within Russia is unlikely to result in systemic accountability. A regime change would most likely entail replacing one authoritarian figure with another, perpetuating the same underlying imperialist tendencies. As such, even under the assumption of the ICC's jurisdiction complementing Russian national jurisdiction, the Court remains fundamentally incapable of enforcing criminal accountability for acts committed during the „special military operation" in Ukraine.

7. Would it be Possible to have another Nuremberg Tribunal, an Unsurpassed Model?

The author of this expert opinion obviously believes that it is not possible to have a Nuremberg Tribunal reincarnated. The Nuremberg International Military Tribunal operated in a specific historical context and in a particular geopolitical situation. It could only exist in conditions of complete disintegration of the state and its administration, when the Allies controlled essentially the entire territory of Germany, stationed in the capital of the fallen country. The initial alignment (if incomplete, then at a sufficient level) among the victorious powers on the method of bringing war criminals to justice, and their capability to actually enforce justice coming from the actual control over the territory, made criminal

prosecution significantly easier. The conditions for the success of the Nuremberg Tribunal will never be met for Russia, as it is difficult to imagine a military victory of Ukraine, supported by the European and US coalition, which would involve the actual seizure of the entire territory of Russia.[17] This does not mean, however, that the Nuremberg model cannot be followed, if only by granting the ICC the power to try in absentia. While the author of this expert opinion is aware of the reasons why the International Criminal Court was not endowed with such powers, a change in the scope of authority in this respect is still formally possible. The Nuremberg experience also points to the effectiveness of trials in absentia, as evidenced by the case of Martin Bormann, who was ultimately convicted in his absence at Nuremberg, and that with capital punishment.

Conclusion

Despite the efforts of the Ukrainian people, supported by an alliance of European countries and the United States of America, the war continues. In its third year, the prospects for a quick end are uncertain, and any scenario is possible. Over this time, the International Criminal Court, despite the initiatives taken, including in particular the arrest warrants issued, has not contributed in any way to ending the conflict. At this level, however, this is not an accusation, as the courts are not primarily responsible for ending wars, but for prosecuting their perpetrators. History has shown that effective prosecution of perpetrators of crimes under international law usually takes place after the cessation of hostilities, when it is possible to settle accounts with those who lost. However, the International Criminal Court took steps to bring the perpetrators of genocide to justice, adopting a broad interpretation of the crime of genocide as also including the transfer of the Ukrainian population. The arrest warrants issued have not been executed and none of the actions taken have produced the expected outcomes. This was due to the formal deficiencies of the Rome Statute, which translated into practical deficits that destroyed the options of effective prosecution. These deficiencies include in the first place the fact that the jurisdiction of the International Criminal Court is dependent on the ratification of the Rome Statute. In practice, this means a requirement for the criminal to voluntarily place his head under the executioner's sword, since the options of institutionalized criminal proceedings against him are conditional on his prior consent. Moreover, such consent may

17 Cf. Ibid, p. 42.

be withdrawn at any time, as soon as the criminal becomes displeased by the prospect of the sword shining over his head, as any state may withdraw from the Rome Statute. At the level of international law, voluntary membership in a supranational organization is an understandable axiom. However, in the case of supranational criminal law, which is something different from international criminal law, this voluntary choice becomes a systemic aberration that makes it impossible to bring those responsible for crimes against humanity to account. However, mere accession to the Rome Statute does not guarantee accountability for an official of a state party to the Statute, since the Statute makes the Court complementary to national jurisdiction. This means that the Court's jurisdiction to prosecute and try, to put it somewhat simplistically, comes real only after the internal path has been exhausted, which is out of the question in contemporary Russia. The weakness of the Court also results from the unavailability of in-absentia proceedings. As there is no real prospect of bringing personally Vladimir Putin or other individuals acting on his orders or with his consent before the Court, criminal proceedings against him or anyone else are an utter illusion. The position of the Court is further undermined by the lack of alignment among the states parties to the Rome Statute, with some openly declaring their refusal to arrest the President of Russia in the event of his arrival to their territory. With all this in mind, the International Criminal Court is not a suitable court to prosecute crimes under international law committed in Ukraine in connection with the aggression of the Russian Federation on 24 February 2022. This, for the reasons revealed and discussed in this expert opinion, speaks in favour of establishing a special criminal tribunal for Russian crimes in Ukraine. What such a special tribunal should be like is a question for a separate study to answer.

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George Goradze

Territorial Arrangement of Ukraine After Russia-Ukraine War – Unitarism v. Federalism

Introduction

A state's territorial arrangement implies the division of its territory according to certain principles, and based on these principles, the separation of powers between the existing territorial units and the centre.[1] The future of the state is greatly influenced by the issue of how accurately the model of state organization is chosen, how well it aligns with the psyche of the nation and the patterns of historical development, how effectively global practices are considered, and how soundly conclusions are drawn from them.[2] Adopting the wrong model is not only a legal flaw that hinders the country's development and prevents it from fulfilling its functions, but also often inflicts irreparable damage on the spiritual condition of society, its character, and its psyche, fostering discord that ultimately leads to the state's decline and dissolution.[3]

After the collapse of the Soviet Union and the achievement of independence, Ukraine's constant challenge has been the search for an optimal balance between federal and unitary aspirations and the development of a new territorial structure.[4] There were frequent opinions and projects about decentralization of Ukraine in

1 *Introduction to Constitutional Law*, ed. D. Gegenava, Sulkhan-Saba Orbeliani University Press, Tbilisi 2021, p. 237.
2 G. Goradze, *Federalism Prospects in Georgia. Critical Analysis*, Tbilisi 2011, p. 5.
3 G. Gogiashvili, *Concept and Essence of Federalism*, PhD Thesis, Tbilisi 1999, p. 4.
4 W. Hołubko, *Administrative-Territorial Division of Ukraine: Historical Experience and Prospects*, "Roczniki Administracji i Prawa" 2014, no. 14/2, p. 88.

general, as well as deep decentralization (regionalization)[5] and federalization.[6] This issue gained particular significance after the Minsk Agreements of 2014–2015, which, in some respects, represented a step towards federalism.

This study examines the future territorial arrangement of Ukraine. Both the main features of the existing territorial structure and future trends are analysed in it. The research does not concern the level of local self-government and their competences, moreover, the research does not claim to present a ready-made recipe for the future territorial arrangement of Ukraine, but its main goal is to answer the conceptual question whether Ukraine should be a unitary or a federal state? Given the new reality created after the end of the Russia-Ukraine war, it is likely that the issue of Ukraine's territorial arrangement will once again come to the forefront, adding further relevance to this paper

1. Constitutional Foundations of the Territorial System of Ukraine

1.1. The Constitutional Principles of the Territorial Structure of Ukraine

Chapters I ('General Principles'), IX ('Territorial Structure of Ukraine'), X ('Autonomous Republic of Crimea'), and XI ('Local Self-Government') regulate the territorial structure of Ukraine. The second paragraph of Article 2 of the Constitution of Ukraine succinctly states that Ukraine shall be a unitary state. The meaning of 'unitary state' is clarified in Chapter VIII of the Constitution. According to Article 132 of the Constitution, Ukraine's territorial arrangement is based on the following principles:

- The principles of unity and integrity of the State territory;
- The combination of centralisation and decentralisation in the exercise of the state power;

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5 See: T. A. Olszański, *Ukraine: Sovereign Decentralisation or Federalism Without Sovereignty?* "OSW Commentary" 2014, no. 134, https://www.ceeol.com/search/gray-literature-detail?id=564471 [access: 28.08.2024]

6 See: K. Wolczuk, *Catching Up with 'Europe'? Constitutional Debates on the Territorial-Administrative Model in Independent Ukraine*, "Regional & Federal Studies" 2002, no. 12(2), p. 65-88; M. Gligich-Zolotareva, *United States of Ukraine*, "Questions of Law" ("Voprosy prava") 2014, no. 2, p. 35-50; etc.

- The balanced socio-economic development of regions considering their historical, economic, ecological, geographic, and demographic characteristics, ethnic and cultural traditions.

The unitary state is indivisible, it does not recognize the political independence of the territorial unit.[7] It is precisely this important characteristic of Unitarianism that is expressed in the above-mentioned first principle. The principles of unity and integrity of the State territory imply that there are no state-like entities within Ukraine.[8] Ukraine is a unit and whole state, the constituent units of which are inseparably interconnected and obey only the common laws of Ukraine,[9] and the system of public authority is unified and integral.[10] For Ukraine, the principle of territorial unity has acquired a sacred meaning due to threats to the existence of an integral state,[11] especially since the occupation/annexation of the Ukrainian territories by Russia.

As for the second principle, it implies such a combination of centralization-decentralization in the implementation of public authority, during which the interests of both the general state and individual regions will be fully taken into account.[12] Increasing the role of the state in modern society has given it numerous tasks, the solution of which cannot be solved by the central government at the same time. That is why it is important to free the central government from those duties that local bodies can perform.[13] However, on the other hand, the transfer of excessive powers to territorial units may create some problems. Therefore, this principle indicates the optimal ratio of centralization of public authority and decentralization of state regulatory functions.[14]

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7 D. Gegenava, B. Kantaria, L. Tsanava, T. Tevzadze, Z. Macharashvili, P. Javakhishvili, T. Erkvania, T. Papashvili, *Constitutional Law of Georgia*, third edition, Prince David Institute for Law, Tbilisi 2016, p. 116.

8 M. Savchin, *Constitutional Law of Ukraine*, Kyiv 2009, p. 891.

9 M. Voronov, A. Zubenko, T. Kaganovskaia, J. Miroshnichenko, V. Pisarenko, A. Chervjavtsova, *Constitution Law of Ukraine*, Guide Manual, Kharkiv 2012, p. 384.

10 M. Savchin, *Constitutional Law of Ukraine*, Kyiv 2009, p. 891.

11 A. Nadutyy, *Specific Features of Legal Provision of Territorial Integrity of Ukraine*, "Legea Şi Viaţa" 2019, no. 7/2(331), p. 61.

12 M. Voronov, A. Zubenko, T. Kaganovskaia, J. Miroshnichenko, V. Pisarenko, A. Chervjavtsova, *Constitution Law of Ukraine*, Guide Manual, Kharkiv 2012, p. 384.

13 D. Gegenava, B. Kantaria, L. Tsanava, T. Tevzadze, Z. Macharashvili, P. Javakhishvili, T. Erkvania, T. Papashvili, *Constitutional Law of Georgia*, third edition, Prince David Institute for Law, Tbilisi 2016, p. 116.

14 M. Voronov, A. Zubenko, T. Kaganovskaia, J. Miroshnichenko, V. Pisarenko, A. Chervjavtsova, *Constitution Law of Ukraine*, Guide Manual, Kharkiv 2012, p. 384.

The third principle of balanced socio-economic development of regions means that the state takes responsibility for equal development of regions.[15] Balance is ensured by unified approaches in the implementation of regional policy by the state, equalization of the development of regions with the help of economic and financial levers. In relation to residents, balance means accessibility to management services and their relatively equal redistribution within specific administrative and territorial units.[16] Otherwise, imbalance can lead to uneven development of regions and economic weakening of individual regions, which can be the cause of internal migration, significant depopulation of individual territories, and excessive population concentration on the other hand.

This principle also takes into account the historical, economic, ecological, geographic, and demographic characteristics, ethnic and cultural traditions of the region, which means preserving their identity.[17]

1.2. The Territorial Organization of Ukraine

Ukraine is an asymmetric unitary state with several levels of local self-government, as outlined in Article 133 of its Constitution. Ukraine comprises one autonomous republic (Crimea), 24 oblasts, and two cities with special status: Kyiv and Sevastopol. The status of these cities is governed by separate law.[18] The administrative-territorial structure of Ukraine also includes raions, cities, districts, settlements, and villages. As noted in the Ukrainian literature, These administrative-territorial units are divided into three structural levels:

- the highest level— the Autonomous Republic of Crimea (ARC), oblasts, and cities of national significance, specifically Kyiv and Sevastopol
- the middle level - the raions, the city of regional subordination;
- the lower level - the city of district subordination, settlement (urban-type settlement), village.[19]

This division is not entirely accurate. Equating the status of the Autonomous Republic of Crimea with that of oblasts and cities with special status is incorrect due to Crimea's distinct constitutional and legal status and powers.

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15 G. Zadorojhnja, J. Zadorojhnii, I. Sopilko, *Constitution Law of Ukraine*, Kyiv 2010, p. 418.
16 M. Savchin, *Constitutional Law of Ukraine*, Kyiv 2009, p. 895.
17 G. Zadorojhnja, J. Zadorojhnii, I. Sopilko, *Constitution Law of Ukraine*, Kiev 2010, 421.
18 The Constitution of Ukraine of 1996, Art. 133 (2).
19 M. Voronov, A. Zubenko, T. Kaganovskaia, J. Miroshnichenko, V. Pisarenko, A. Chervjavtsova, *Constitution Law of Ukraine*, Guide Manual, Kharkiv 2012, p. 389.

Crimea is a specific administrative-territorial unit with a special status and broader powers, which essentially distinguishes it from the oblast as administrative-territorial units of the unitary state.[20] First, the constitutional status of Crimea as an autonomous republic is enshrined in a dedicated Chapter X of the Constitution. As for the oblasts, it is true that they are mentioned by name in the constitution together with the ARC,[21] which means that their abolition, replacement or creation of a new entity of the same status would require an amendment to the constitution, but in the constitution the oblasts are united in the Chapter XI – "Local Self-Government". Accordingly, the oblast is only a unit of local self-government. This is confirmed by the article 1(3) of the Law of Ukraine "On Local Self-Government", where oblasts, raions, cities, districts, settlements and villages are named as units of local self-government. Thus, there is no doubt that the oblast is a unit of local self-government, although it is at a hierarchically higher level compared to other units.

"Regarding the two cities with special status—Kyiv and Sevastopol—their powers are significantly less than those of the autonomous republic. The main powers of Crimea are regulated by the Constitution of Ukraine, while the powers of cities with special status are governed by the ordinary laws,[22] highlighting the higher status of Crimea's autonomy. In addition, in terms of the content of powers, the cities with special status are significantly behind the autonomy of Crimea. For instance, only the ARC has its own constitution.[23] Moreover, the results of the local referendum on this issue and the decision of the Verkhovna Rada of Crimea should be taken into account for the change of the autonomous territory of Crimea.[24] The Verkhovna Rada of Ukraine can directly alter the territorial boundaries of Kyiv[25] and Sevastopol.[26] However, in Kyiv's case, such changes require a proposal from the Kyiv City Council, agreed upon with the relevant councils.

Also, we should distinguish between oblasts and cities of special importance. Kyiv's special status stems from its role as the capital city. It serves as the political

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20 L. Garcheva, N. Nikiforova, *Features of the legal status of the Republic of Crimea as a Territorial Autonomy*, "Economy of Crimea" 2012, no. 2 (39), p. 271.

21 The Constitution of Ukraine of 1996, Art. 133 (2)(3).

22 See: The Laws of Ukraine of 2006 "On the Capital of Ukraine - the Hero City Kyiv" of 1999 and "on the Hero City of Sevastopol".

23 The Constitution of Ukraine of 1996, Art.135 (1).

24 The Constitution of the Autonomous Republic of Crimea of 1998, Art. 7(2).

25 The Law of Ukraine of 1999 "On the Capital of Ukraine - the Hero City Kyiv", Art. 2(2).

26 The Law of Ukraine of 2006 "On the Hero City of Sevastopol", Art. 2(2).

and administrative centre of Ukraine, housing the highest state bodies, foreign diplomatic missions, and acting as a spiritual, cultural, historical, scientific, and educational hub of the country.[27] Kyiv's unique functions arise from the following roles: creation of appropriate conditions for the activities of higher authorities, foreign countries and international organizations' official representatives, as well as scientific, educational, and health care institutions; resolving issues regarding the placement of central bodies of Ukraine, as well as diplomatic missions, consulates of foreign countries and representative offices of international organizations in Ukraine; contractual arrangements for the provision of communal, engineering, socio-cultural, transport, information and other services to state bodies, diplomatic missions of foreign states, and missions of international organizations located in the city of Kyiv; and interaction with the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine in the development and implementation of measures, programs and projects affecting the interests of the capital, etc.[28] To perform these functions, the law provides for the additional powers of the mayor[29] and the city council of Kyiv[30] and their financial provision.[31]

Regarding Sevastopol, Article 1 of the Law of Ukraine 'On the Hero City of Sevastopol' lists six reasons for its special status, although the last three—especially the sixth—are the most significant. This reason is the temporary location on the territory of the city of military units and units of the Black Sea Fleet of the Russian Federation.[32] The other two are: the location of the command and the main part of the Naval Forces of Ukraine in it and performance of statewide functions on the use of the Black Sea water area in state interests.[33] However, unlike Kyiv, the law does not grant Sevastopol any additional functions.

Some scholars focus on the normative conflict regarding the status of Sevastopol.[34] In particular, according to the article 5 of the Law of Ukraine "On the Autonomous Republic of Crimea" of 1995 it is stipulated that the city of Sevastopol is an administrative-territorial unit of general state subordination and is not part of the ARC. Its status is determined by the laws of Ukraine. At the same time, the city of Sevastopol is located on the territory of the ARC, and

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27 The Law of Ukraine of 1999 "On the Capital of Ukraine - the Hero City Kyiv", Art. 1(2).
28 Ibid., Art. 4(1).
29 Ibid., Art. 17.
30 Ibid., Art. 22.
31 Ibid., Art. 18-19.
32 The Law of Ukraine of 2006 "On the Hero City of Sevastopol", Art. 1(6).
33 Ibid., Art. 1(4-5).
34 M. Savchin, *Constitutional Law of Ukraine*, Kyiv 2009, p. 910.

in accordance with the article 7 of the Constitution of the ARC of 1998, the Representation of the city of Sevastopol can be established and function at the Verkhovna Rada of the ARC. Despite this entry in the Crimean constitution, it is impossible to question the special status of Sevastopol, given the unequivocal position of the Ukrainian constitution, the law of Ukraine on the status of Sevastopol itself, and other laws. In addition, the Constitution of Ukraine, as the highest law, is hierarchically a higher legislative act than the Constitution of an autonomous entity, even if it is approved by the Ukrainian legislative body. However, the given entry of the Crimean constitution is not so contradictory that the status of Sevastopol is put under a question mark. It envisages only the possibility (and not the obligation) for Sevastopol to have its representation in the Supreme Rada of Crimean Autonomy.

According to some opinions, this norm is intended to create an organizational and legal framework for the preservation and maintenance of cultural and economic ties between the ARC and the city of Sevastopol.[35] Most likely, this statement is due to geographical considerations, the location of Sevastopol on the Crimean Peninsula, since decisions on the autonomy of Crimea may affect the entire peninsula, including Sevastopol. And since Sevastopol has an important function from the perspective of military and security, it should be informed about the activities of the higher bodies of the autonomous unit of Crimea.

Based on the above, we can conclude that according to the status and scope of powers, the system of the administrative-territorial structure of Ukraine is divided into three structural levels:

- the first (and the highest) level is the Autonomous Republic of Crimea;
- the second level are the cities with special status – Kyiv and Sevastopol;
- the third is multi-level local self-government, where the highest unit is the oblast.

1.3. The Autonomous Republic of Crimea

According to the Constitution of Ukraine, the ARC is an integral constituent part of Ukraine and resolves issues relegated to its authority within the frame of its reference, determined by the Constitution of Ukraine.[36] Under Article 135 of the Constitution, autonomy for the ARC is defined by the Constitution adopted by the Verkhovna Rada of the ARC and approved by the Verkhovna Rada of

[35] G. Demidov, *Commentary on the Constitution of the Autonomous Republic of Crimea*, Kyiv 2010, p. 48.

[36] The Constitution of Ukraine of 1996, Art. 134.

Ukraine. In accordance with paragraph 2 of the same article, the normative acts of the legislative and executive bodies of the Autonomous Republic must comply with the Constitution of Ukraine, its laws, and other normative acts.

The Constitution of Ukraine defines the representative, executive and judicial bodies of the ARC, in particular, according to Article 136 of the Constitution, the representative body of the ARC is the Verkhovna Rada of the ARC, and the executive body is the Council of Ministers. As for judicial, it is administered by courts that are part of the unified judicial system of Ukraine, which means that Crimean autonomy does not have its own judicial system.

Article 137 of the Constitution of Ukraine contains an exhaustive list of areas that the autonomous republic is empowered to effect normative regulation. These areas are: agriculture and forestry, reclamation and quarries, public activities, urban development and household farming, tourism, hunting, fishing and others. The President of Ukraine has the right to suspend the regulatory acts of the Verkhovna Rada of the ARC on the grounds of unconstitutionality and at the same time appeal to the Constitutional Court.

Article 138 of the Constitution defines the range of issues delegated to the ARC. These are issues of the republican importance of the autonomy, such as the appointment of elections to the Supreme Council of the Autonomous Republic and approval of the composition of the election commission; organization and holding of referendums of local importance; Management of the property of the Autonomous Republic; development, approval and implementation of the budget of the Autonomous Republic, considering the tax and budget policy of Ukraine; Developing, approving and implementing a program on issues of socio-economic and cultural development of Crimea, rational use of natural resources and environmental protection in accordance with national programs; Granting the status of a resort and determining the zone of sanitary protection of resorts; Promotion of human rights and freedoms, national consensus, protection of law and order and public safety; ensuring the functioning and development of national languages and cultures of the state and autonomous republic; protection and use of historical monuments; Participation in the development and implementation of state programs for the return of deported peoples; Initiating the declaration of a state of emergency in the autonomous republic or its separate parts, and establishing a zone of special ecological situation.

It should be noted here that according to the last paragraph of Article 138, the given list of competences is not exhaustive, and according to the law of Ukraine it is possible to delegate certain competences to the Autonomous Republic of Crimea.

Finally, a few words must be said about the name of Crimean autonomy. "Autonomous Republic" is a term introduced and established by the Soviet state. That is why, except for the post-Soviet countries, this term is not found in the name of the autonomous unit of any state in the world. Calling an autonomous territorial unit "republic" is incorrect because it is a characteristic of the state's form of government, and referring to a territorial unit within the state with such a term may become a provoking factor of separatism. By assigning a similar name to the autonomies, the Soviet state planted a long-range mine to facilitate the separatist movement in these territories, of which we have many examples.[37] Thus, the name "Autonomous Republic of Crimea" is a Soviet relic and should be changed.

2. The Occupied Territories of Ukraine

All that has been said so far are only normative provisions, some of which differ from the existing reality and do not actually apply.

After the Euromaidan in late 2013 and Kremlin-backed President Viktor Yanukovych fled to Russia, the Kremlin responded by occupying Crimea and parts of eastern Ukraine, namely the Donbas region, which was soon followed by the annexation of Crimea.[38] Later, on February 21, 2022, three days before the start of a full-scale war, Russia first declared the so-called independent states. People's Republics of Donetsk[39] and Luhansk,[40] and in September of the same year, like Crimea, officially annexed them.[41]

It is important to note that the fact of occupation/annexation is not mentioned in the Constitution of Ukraine at all, although Ukraine is not an exception

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37 G. Goradze, *The Historical and Legal Aspects of Autonomy of Ajara*, Avtandil Demetrashvili 80, Collection of Articles, Sulkhan-Saba Orbeliani University Press, Tbilisi 2021, p. 400-401.

38 See: The Federal Constitutional Law of the Russian Federation of March 21, 2014 "On the admission of the Republic of Crimea to the Russian Federation and the formation of new subjects within the Russian Federation - the Republic of Crimea and the federal city of Sevastopol".

39 See: The Decree of the President of the Russian Federation of February 21, 2022 No. 71 "On the Recognition of the Donetsk People's Republic".

40 See: The Decree of the President of the Russian Federation of February 21, 2022 No. 72 "On the Recognition of the Luhansk People's Republic".

41 See: The Federal Constitutional Laws of the Russian Federation October 4, 2022 "On the Admission of the Donetsk People's Republic to the Russian Federation and the Formation of a New Subject within the Russian Federation - the Donetsk People's Republic" and "On the Admission of the Luhansk People's Republic to the Russian Federation and the Formation of a New Subject within the Russian Federation - the Luhansk People's Republic".

in this respect. Georgian legislators have the same approach. The territories of Georgia - Abkhazia and South Ossetia/Tskhinvali Region de jure are occupied by Russia since at least August 2008,[42] but de facto - they are annexed,[43] although this is not mentioned in the Constitution of Georgia. But de facto – they are annexed.

There is a Law of Ukraine of April 15, 2014, "On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine". According to this law, Crimea, Donetsk and Luhansk are considered temporarily occupied territories. Here is nothing about annexation. This approach of Ukraine is understandable because with the mentioned law, it declares that the territory is illegally occupied, but does not recognize the internal, unilateral and unlawful act of Russia about annexation of those territories.

This Law defines the status of the territory of Ukraine temporarily occupied as a result of armed aggression of the Russian Federation, establishes a special legal regime on this territory, defines the specifics of the activities of state bodies, local government bodies, enterprises, institutions and organizations under this regime, observance and protection of human and civil rights and freedoms, as well as the rights and legitimate interests of legal entities.[44] The law regulates such issues as protection of the rights and freedoms of citizens living in the occupied territories and providing them with social services, and imposes responsibility for the violation of human rights in these territories on the Russian Federation as the occupying country.[45]

The law also applies to commercial activities[46] and transportation of goods[47] in these territories, purchase of property and exemption from mortgage credits, if the subject of the mortgage is located in the occupied territory and the occupation took place after the conclusion of the mortgage agreement,[48] and others. Articles 12, 12-1 and 16 of the same law are also important, which respectively concern particular organizational issues related to the administration of justice, court proceedings and the transfer of judges from the occupied territories.

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42 Judgment of the European Court of Human Rights of 21 January 2021, Georgia v. Russia (II), application no. 38263/08, 142-144.

43 S. Malashkhia, *Conflicts ' Anatomy*, Tbilisi 2011, p. 25.

44 The Law of Ukraine of 15April 2014 "On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine", Art. 2(1).

45 Ibid., Art. 5(5).

46 Ibid., Art. 13.

47 Ibid., Art. 13-1.

48 Ibid., Art. 15.

If we compare the mentioned law of Ukraine with the similar law of Georgia, the superiority of the Ukrainian law is obvious because the Georgian law is very less and includes only 11 articles, including transitional and final provisions. It says nothing at all about matters related to mortgages, shipping, or justice.[49] The Law of Georgia "On Occupied Territories" does not mention at all the issues related to the exercise of the right of citizens living in the occupied territories to participate in the election, including the referendum, which is a subject of dispute in Georgia,[50] unlike the Ukrainian law, Article 8 of which regulates this problem in detail.

3. Models of the Federalization of Ukraine

3.1. The Idea of Federal Ukraine and Russia's Attempts

The idea of federalization of Ukraine is not new, and espoused by the intellectuals of the Ukrainian national movement in the 19th century.[51] Ukraine's regional diversity has been the subject of numerous political discussions since the collapse of the Soviet Union. Federalism was one of the proposed solutions, formulated by different political forces in the early 1990s.[52] In 1989-1994, the idea of federalism emerged in various regions and among certain ethnic minorities. Basically, in the early 1990s the demands of federalization or autonomization were related to the Donbass region, which was dictated by the concern of the socio-political forces of the region about the prospects of forced Ukrainization, outbreaks of national extremism, and the severance of economic ties with Russia.[53] Since this

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49 See: The Law of Georgia of 30 October 2008 "On Occupied Territories".

50 See: G. Goradze, *Permissibility of Holding Referendum under the Conditions of Occupation of the Territories of Georgia*, "Journal of Constitutional Law" 2023, no. 1, p. 109-125.

51 K. Wolczuk, *Catching up with ‚Europe'? Constitutional Debates on the Territorial-Administrative Model in Independent Ukraine*, [in:] Region, State and Identity in Central and Eastern Europe, ed. J. Batt, K. Wolczuk, London, 2002, p. 67; O. Rohovenko, S. Zapara, N. Melnik, R. Cramar, *The Current Status of the Local Self-Government Reform in Ukraine: Preliminary Conclusions and Outlook*, "Journal of Advanced Research in Law and Economics" 2017, no. 8(1), p. 182.

52 O. Protsyk, *Majority-Minority Relations in Ukraine*, "Journal on Ethnopolitics and Minority Issues in Europe" 2008, vol. 7, no. 1, p. 9.

53 V. Shebelnikov, *Administrative-Territorial Structure in National History (XVIII – beginning of XXI century)*, Donetsk 2017, p. 70.

period, the issue of federalization-unitarization has always been on the agenda of the political life of Ukraine.[54]

In this regard, the "Party of Regions" stood out, whose programme contained, as one of its cornerstones, a promise of federalization reform.[55] However, nothing was done to implement it even when the leader of this party, Viktor Yanukovych, was the president of Ukraine.[56] As Sasse says, "the rejection of federalism is one of the few issues on which there is a consensus among national-level elites in Ukraine."[57]

The Russian Federation tried to make significant corrections in this matter and to federalize Ukraine. The federalization issue was raised from the beginning of the crisis in 2013 by politicians,[58] and immediately after the annexation of the Autonomous Republic of Crimea and the invasion of Donbas, Russia officially demanded the federalization of Ukraine. According to the head of his foreign ministry, the internal political crisis in Ukraine has clearly shown deep differences between the south-east and the west of the country in terms of their choice of further development. And this confirms the fragility of the previously chosen model of state organization by Kyiv. In essence, the unitary state no longer works in Ukraine. Its foundations were laid by the political cataclysms that shook the country for many years... One of the reasons for such a situation is the absence of a balanced basic law in Ukraine that would adequately take into account the interests of all nationalities and linguistic groups... Federalization is a way for each region to feel comfortable. To feel that his rights are secured, traditions and the usual way of life are protected.[59] Moscow demanded that the Verkhovna Rada of

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54 G. Sasse, *The ‚New' Ukraine: A State of Regions*, "Regional & Federal Studies" 2001, vol. 11, no. 3, p. 80-81; K. Wolczuk, *Catching up with ‚Europe'? Constitutional Debates on the Territorial-Administrative Model in Independent Ukraine*, [in:] *Region, State and Identity in Central and Eastern Europe*, ed. J. Batt, K. Wolczuk, London 2002, p. 72-77.

55 O. Protsyk, *Majority-Minority Relations in Ukraine*, "Journal on Ethnopolitics and Minority Issues in Europe" 2008, vol. 7, no. 1, p. 10.

56 V. Shebelnikov, *Administrative-Territorial Structure in National History (XVIII – beginning of XXI century)*, Donetsk, 2017, 73.

57 G. Sasse, *The ‚New' Ukraine: A State of Regions*, "Regional & Federal Studies" 2001, vol. 11, no. 3, p. 82.

58 O. Jastrzębska, *Pro-Western policy of the new Ukrainian President Volodymyr Zelensky as threat for possible Russian concept of Ukraine federalization*, "Ante Portas - European Journal of Social Sciences and Humanities" 2019, no. 2(13), p. 110.

59 S. Lavrov, Federalization of Ukraine Is Necessary so that Each Region Feels Its Rights Are Protected, 16 April 2014. http://russian.rt.com/article/27957 [Access: 28.08.2024]r

Ukraine establish "without delay a constitutional assembly in which all regions of Ukraine will be equally represented".[60]

There are two points to be noted in this definition: one, where it talks about the opposition of the south-east and west of Ukraine, and, second, the protection of all nationalities and linguistic groups through federalization. If we consider these two moments in the context of federalism, Russia desired to modernize Ukraine into a bipolar and ethnic federation, which most of all, meant the disintegration of Ukraine. Russia tried to obtain political status for the administrative-territorial units of Ukraine inhabited by ethnic Russians, which would then continue with the scenario of Crimea. As researchers note, In the case of the implementation of the Russian proposal, it would permanently paralyse the Ukrainian state and deprive it of sovereignty.[61]

On September 5, 2014, the Minsk Agreement (Minsk 1) was signed between Russia and Kyiv with the participation of the Organization for Security and Co-operation in Europe. Based on paragraph 3 of this agreement, Ukraine was obliged to conduct decentralization of power, including by adopting the Law of Ukraine "On the temporary order of local self-government in certain districts of Donetsk and Luhansk regions" (Law on special status). According to paragraph 9 of the same agreement, local elections should be held on the bases of the new Law on special status. Soon, on February 12, 2015, an additional agreement, "Package of measures for the Implementation of the Minsk Agreements" (Minsk 2) was signed. The second agreement clarified, although it can be said, aggravated Ukraine's situation regarding territorial reform. In particular, according to the paragraph 11 of the Minsk 2, "Carrying out constitutional reform in Ukraine with a new Constitution entering into force by the end of 2015, providing for decentralization as a key element (including a reference to the specificities of certain areas in the Donetsk and Lugansk regions, agreed with the representatives of these areas), as well as adopting permanent legislation on the special status of certain areas of the Donetsk and Lugansk regions in line with measures as set out in the footnote until the end of 2015." It was the most catastrophic and essentially unfulfilled norm, which was aimed at the disintegration of Ukraine. The fact is that Donbass and Luhansk were occupied by Russia at that moment, and the so-called The People's Republics of Donbass and Luhansk, with the help of Russia, had already

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60 T. A. Olszański, Ukraine: Sovereign Decentralisation or Federalism Without Sovereignty? "OSW Commentary", no. 134, 2014, https://www.ceeol.com/search/gray-literature-detail?id=564471 [access: 28.08.2024]

61 Ibid.

held referendums on independence and declared their independence.[62] Under these conditions, according to the Minsk 2 agreement, Ukraine had to carry out constitutional reforms and decentralize the territory, including granting special status to the separate regions of Donbass and Luhansk, which would be agreed with the representatives of these regions. Leaving aside the dictation from the occupying Russia, which is already clear, the goal of the separatist is to achieve independence. Therefore, he will never agree to terms that do not allow him to do so at least in the future. Thus, it was expected that no matter what status and powers the Ukrainian government offered, it would still not be enough for the separatist government. Therefore, there was almost no chance of an agreement. It should be noted here that according to paragraph 11, the special status should be given to certain areas of the Donetsk and Luhansk regions. If special statuses were to be granted to individual regions within Donetsk and Luhansk, then Donetsk and Luhansk themselves should have much more.

It is also worth noting that Ukraine could restore control over the state border only after fulfilling the mentioned Article 11, which actually could not happen. Thus, Russia's statements regarding the federalization or decentralization of Ukraine only imply the latter's disintegration. He had such attempts before.

In 2004, during the 'Orange Revolution,' the Party of Regions proposed the creation of the "Autonomous Republic of South-Eastern Ukraine". According to the project, the given autonomous republic included 9 industrial districts of south-eastern Ukraine and the autonomous republic of Crimea.[63] These are the territories, a large part of which was annexed by Russia in 2014 and 2022.

On November 26, 2004, the Luhansk Regional Council voted in favour of creating an autonomous district in South-Eastern Ukraine. On the same day, a group of deputies formally requested assistance from the President of Russia.

On November 28, 2004, St. The so-called "All-Ukrainian meeting of deputies of all levels", which was attended by representatives of the district councils of most regions of southern and eastern Ukraine, the then presidential candidate Viktor Yanukovych and the mayor of Moscow Yury Luzhkov on Putin's direct order (who even gave a speech at the meeting). As some researchers point out, observing the active intervention of Western countries during the presidential

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62 A. Šmídová, T. Šmíd, *Unfinished story of the Donetsk and Luhansk People's Republics: towards a De Facto State?* [in:] *De Facto States in Eurasia*, ed. T. Hoch, V. Kopeček, London 2020, p. 143.

63 M. Bukalisnkiy, *Federalization of Ukraine as a Tool for Resolving the Political Crisis*, "Geopolitics" 2014, Issue XXIII, p. 9.

election campaign and the likelihood of Viktor Yushchenko's victory, the leaders of Ukraine's southeastern regions chose to collectively oppose it.

The members of the meeting threatened Yushchenko that in case of active intervention of the Western countries in the election process, they would create the South-Eastern Autonomous Republic of Ukraine, with the capital in Kharkiv.[64] With the victory of Viktor Yushchenko, the said plan failed then.

The Minsk Agreements were terminated as a result of Russia's aggression and annexation of Ukrainian territories, with reference to Articles 60 and 62 of the 1969 Vienna Convention on the "Law of Treaties", which provide justification for terminating a treaty due to a breach or a fundamental change in circumstances.

3.2. Bipolar Federalism in Ukraine's Reality

Ukraine's regional diversity and the pronounced "West-East" dichotomy are among the most distinctive features of its state and society. This duality frequently serves as a basis for discussions about the federalization of Ukraine. In Ukraine's case, federalization often implies an ethnic and bipolar federation, where bipolarity refers to the division between two primary ethnic groups: Ukrainians and Russians.

Ethnic federalism, characterized by the alignment of internal political and ethnic boundaries, differs significantly from territorially based federations. Historically, ethnic federations such as the USSR, Yugoslavia, and Czechoslovakia proved unstable, leading to their eventual disintegration. While some argue that this instability is inherent to ethnic federalism, others suggest that these collapses were primarily due to the broader crisis of communism.[65] Current examples of ethnic federations include India, Myanmar, Ethiopia, and, to some extent, Russia and Belgium.[66]

Bipolar federations unite two ethnic or territorial entities[67], regardless of the total number of constituent units. Belgium is often cited as a bipolar state[68] , despite having three federal regions. Advocates of Ukraine's federalization frequently

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64 A. Kovalenko, *Prospects of the Federalization of Ukraine*, "Geopolitics" 2010, Issue II, p. 16-21.

65 G. Khubua, *Federalism as a Normative Principle and Political Order*, Tbilisi 2000, p. 172.

66 Ibid.

67 Ibid., p. 333-334.

68 See: e.g., W. Swenden, M. Brans, L. De Winter, *The Politics of Belgium: Institutions and Policy under Bipolar and Centrifugal Federalism*, "West European Politics" 2006, vol. 29, no. 5, p. 863-873.

reference the Belgian and Canadian models, emphasizing their ability to mediate between dominant linguistic or ethnic communities.

Proponents of the idea of federalization of Ukraine often point to bipolar federations. In their opinion, the experience of Belgium and Canada is the most important for Ukraine, since the state organization of these countries is due to the political struggle between the two largest linguistic communities of the country.[69]

Scholars such as Vasileva[70] and Charmoyantz[71] propose Belgium as a potential model for Ukraine. However, Charmoyantz cautions against granting Ukrainian regions the extensive legal autonomy found in Belgium without implementing strict control mechanisms. In his view, such autonomy could foster separatist tendencies, threatening the state's integrity.[72]

Belgium is a very complex case, with a federal model rife with contradictions.[73] The Belgian federal system consists of both communities (linguistic groups) and regions (geographic areas).[74] According to Article 2 of the Constitution, Belgium includes three Communities: the Flemish Community, the French Community and the German-speaking Community. Under Article 3 of the same Constitution, Belgium also comprises three Regions: the Flemish, the Walloon and the Brussels Regions. In addition to societies and regions, Belgium is divided into 4 linguistic regions: French-speaking, Dutch-speaking, bilingual (capital Brussels) and German-speaking regions.[75] Each commune of the Kingdom of Belgium is part of one of the linguistic regions.[76]

Power is divided between the central and substate entities, hardly any shared competencies. Still in some sectors, some subsectors are under by the federal government, but others by the substrate entity. Yet, a clear definition of the federal

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69 A. Muchnik, *Unitary Intolerance or Federal Good-Neighbourliness?* Bulletin of the Conference "Federal Ukraine", Kiev, 2012, p. 36-39.

70 See: N. Vasileva, *Parliamentary Coalitions in the Political System of Belgium: Features of Formation*, SevNTU Newsletter, Series: Political Science, Sevastopol, 2011, pp. 171-181.

71 A. Sharmojants, *Experience of State Building in Belgium in the Context of Regionalization of Ukraine*, Scientific Notes of the Taurida National University named after V. I. Vernadsky, Series "Legal Sciences" 2011, Volume 24 (63), no. 1, p. 355.

72 Ibid.

73 J. Wouters, A. Andrione-Moylan, *Federalism: a Lifeline for Belgium?*, "Jura Falconis" 2021, vol. 57, no. 3, p. 755.

74 The Constitution of Belgium of 2014, Art. 1.

75 Ibid., Art. 4(1).

76 Ibid., Art. 4(2).

powers is still lacking, and in case of conflicts of competences between levels, there is no constitutional hierarchy between federal legislation and regional acts.[77]

Belgium was not always a federal state. From gaining independence in 1830 until the end of the 20th century, it existed as a unitary state, however, as a result of the devolutionary reforms that began in the 1970s, it was transformed into a federal state.[78]

Belgium's modern federal model is the result of successive reforms carried out in six waves.[79] As a result of each reform, more and more competences were transferred to the subjects of the federation. After the sixth state reform, the majority of powers – excluding social security – are now vested in the federated states.[80] The passage of time is the main cause of the country's current strong centrifugal dynamics, leading to its gradual disintegration. Therefore, the state is forced to make new concessions every time. Gradual devolution remains the primary strategy to ensure Belgium's continued existence. Despite this fragility, many scholars believe that the collapse of Belgium is far from inevitable.[81] The stability of the Belgian state is determined by several factors.

First, the political and economic significance of Brussels.[82] It is often said that if Brussels were not located in Flanders and bordered by the Flemish Region, Belgium would have split in two a long time ago[83]. Without Brussels, the partition of Belgium might have occurred as smoothly as in Czechoslovakia[84] . Moreover, the presence of the EU and NATO headquarters in Brussels cannot be ignored by Flanders and Wallonia.[85]

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77 L. De Winter, *The Sustainability of (Con-) Federal Belgium*, "Diálogos El federalismo Belga" 2012, p. 40.

78 G. Goradze, *Federalism Prospects in Georgia. Critical Analysis*, Tbilisi, 2011, p. 223-225.

79 J. Wouters, A. Andrione-Moylan, *Federalism: a Lifeline for Belgium?*, "Jura Falconis" 2021, vol. 57, no. 3, p. 755.

80 J. Goossens, P. Cannoot, *Belgian Federalism after the Sixth State Reform*, "Perspectives on Federalism" 2015, vol. 7, no. 2, p. 50.

81 Ibid., 768.

82 Ibid.

83 R. Van Dijk, *Regionalism, Federalism and Minority Rights in Belgium*, Ethnic and Regional Conflicts in Eurasia. Book 3. International Experience in Resolving Ethnic Conflicts, ed. B. Coppieters, E. Remacle, A. Zverev, Moscow, 1997, p. 260.

84 K. Deschouwer, *Will Brussels Survive the Next Century?* Ethnic and Regional Conflicts in Eurasia. Book 3. International Experience in Resolving Ethnic Conflicts, ed. B. Coppieters, E. Remacle, A. Zverev, Moscow, 1997, p. 273.

85 J. Wouters, A. Andrione-Moylan, *Federalism: a Lifeline for Belgium?*, "Jura Falconis" 2021, vol. 57, no. 3, p. 768.

Secondly, the importance of Belgium's international presence serves as a strong motivation for sustained collaboration among its federated units.[86]

The external factor is also important. Many leading European states grapple with separatism. These states understand that the disintegration of Belgium could create a "domino" effect, as seen in former socialist federations.[87] Consequently, they will try to prevent the emergence of new states within the European Union.[88]

The next important factor is the policy of the European Union towards the regions. The EU's concept of a "Europe of regions" and the principle of subsidiarity separate powers among EU structures, nation-states, and federated entities, enhancing the role of regions at the European level. This dynamic plays a stabilizing role.[89.]

In general, many scholars argue that bipolar federations carry a much higher risk of disintegration compared to federations[90] with more constituent units. Due to the peculiarities of the Belgian federalism model, adapting it to other states is challenging. It is a sui generis form of federalism.[91] Due to the peculiarities of the Belgian federalism model, adapting it to other states is challenging. It is a sui generis form of federalism. Some scientists believe that due to low economic development, differing historical experiences, and varying realities, the Belgian model would be difficult to apply to post-Soviet countries.[92]

Despite sympathy for Belgium's territorial arrangement, some scholars point to significant differences between Belgium and Ukraine that could pose dangers if Ukraine were to federalize. These include Ukraine's lower average income, lower quality of life, and deeper divisions.[93]

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86 Ibid.

87 Z. Ormonbekov, *Belgian Model of Federalism: Features and Prospects*, "Kazan Federalist" 2004, no. 1 (9), p. 146.

88 G. Goradze, *Prospects of Federalism in Ukraine*, "Caucasus International University Herald" 2014, no. 7, p. 71.

89 Z. Ormonbekov, *Belgian Model of Federalism: Features and Prospects*, "Kazan Federalist" 2004, no. 1 (9), p. 146.

90 G. Gogiashvili, *Comparative Federalism*, Tbilisi, 2000, p. 22; G. Khubua, Federalism as a Normative Principle and Political Order, Tbilisi, 2000, p. 334.

91 L. De Winter, *The Sustainability of (Con-) Federal Belgium*, "Diálogos El federalismo Belga" 2012, p. 15.

92 Z. Ormonbekov, *Belgian Model of Federalism: Features and Prospects*, "Kazan Federalist" 2004, no. 1 (9), p. 152.

93 M. Marlin, *Concepts of "Decentralization" and "Federalization" in Ukraine: Political Signifiers or Distinct Constitutionalist Approaches for Devolutionary Federalism?*, "Nationalism and Ethnic Politics" 2016, vol. 22, no. 3, p. 291.

Additionally, Belgium's membership in the European Union and Brussels' status as the institutional capital of Europe provide stabilizing factors that Ukraine lacks. Adapting the Belgian model to Ukraine would require first addressing the factors that ensure Belgium's unity.[94] Thus, if we talk about adapting the Belgian model for Ukraine, it would be more correct to start this conversation with the factors restraining the country's disintegration and adapting these factors to Ukraine, as this makes the unity of the Kingdom of Belgium possible but extremely fragile.[95]

Geopolitical realities must also be considered: Belgium does not have hostile, aggressive neighbours whose goal is its disintegration. If Belgium had a geographic location and geopolitical importance akin to Ukraine's — with a neighbour like Russia — Belgium's fragile federal arrangement might have collapsed. Thus, the Russian factor must necessarily be considered when discussing Ukraine's federalization.[96].

The bipolar federation model would yield very unfortunate results in Ukraine's case. In addition to the ethnic and economic factors that typically underpin secessionist movements, the Russian factor would play a significant role. The annexation of Crimea, the conflicts in Donetsk and Luhansk, and the large-scale war against Ukraine clearly demonstrate Russia's aspirations not only to seize Ukrainian territories but also to dismantle the Ukrainian state.

Federalizing Ukraine and granting federal subject status to its southeastern regions would be extremely favourable for Russia. Under the doctrine of divided sovereignty (which posits that in a federation, sovereignty is distributed between the centre and the federal subjects), Russia could exploit federal structures to manipulate Ukraine's internal affairs. The Minsk Agreements represent one such attempt. When Russia failed to manipulate Ukraine regarding the political status of Donetsk and Luhansk, it resorted to aggression.

It is no coincidence that pro-Kremlin forces, later echoed by Russian scientists, frequently advocate for Ukraine's federalization.[97] On the Eurasian continent, none of Russia's neighbouring countries are federations. Is this merely a coincidence?

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94 G. Goradze, *Prospects of Federalism in Ukraine*, "Caucasus International University Herald" 2014, no. 7, p. 72.

95 G. Goradze, *Prospects of Federalism in Ukraine*, "Caucasus International University Herald" 2014, no. 7, p. 72.

96 Ibid.

97 See: M. Gligich- Zolotareva, *United States of Ukraine*, "Federalism" 2014, no. 2, p. 36.

3.3. Other Arguments against Federalization of Ukraine

When discussing Ukraine's federalization, attention must also focus on the inherent challenges of federalism. When discussing the federalization of Ukraine, in addition to the above-mentioned geopolitical factors, attention should be focused on the inherent challenges of federalism.

Firstly, bureaucratization poses the challenge for a federal state. Federalism often strengthens bureaucratic elements in governance, creating obstacles for representative democracy.[98] Ukraine's legacy of Soviet-era bureaucracy makes this a significant risk.[99]

The second problem is the delay in making decisions. Federalism requires negotiations and consensus-building across different levels of government.[100]Combined with bureaucratization, this could hinder Ukraine's post-war development.

Federalism could exacerbate challenges in controlling local elites[101], leading to the emergence of feudal-like structures and centres of separatism.[102]Adding the Russian factor to this mix would worsen the problem.

Federal subjects could become economically insular, especially in eastern regions, fostering connections to Russia's economy.[103]. This would undermine Ukraine's unity and economic integration, which would lead to a natural connection of the eastern regions of Ukraine to the Russian economy. Such a perspective is not hidden by Russian "pro-Kremlin" scientists such as Gligich-Zolotaryova, who, regarding Ukraine's regions, states that they are sufficiently mature to be independent and responsible for their own development. This scientist advocates creating unified "Euroregions" together with the regions of Russia and Belarus adjacent to Ukraine's eastern regions.[104]

During the events of 2004, part of the southeastern regions of Ukraine refused to transfer funds to the central budget. This situation did not last long but created a very negative precedent. It is possible that the precedent could repeat

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98 G. Khubua, *Federated Georgia?*, Perspectives of the federalization of Georgia: PRO ET CONTRA, a collection of conference materials, ed. V. Keshelava, V. Lortkipanidze, Tbilisi 2000, p. 150.

99 G. Goradze, *Prospects of Federalism in Ukraine*, "Caucasus International University Herald" 2014, no. 7, p. 72-73.

100 G. Khubua, *Federalism as a Normative Principle and Political Order*, Tbilisi 2000, p. 53.

101 Ibid.

102 G. Goradze, *Prospects of Federalism in Ukraine*, "Caucasus International University Herald" 2014, no. 7, p. 73.

103 Ibid.

104 M. Gligich- Zolotareva, *United States of Ukraine*, "Federalism" 2014, no. 2, p. 49.

itself in the case of the federalization of Ukraine, which is why the country's central budget can become a "hostage" to local political elites.[105]

Compared to unitarism, federalism requires significantly greater financial expenditure. This is due to the costs associated with the governments and parliaments of the federation's constituent entities, the establishment of additional governmental structures necessary for a federal state within the central government (such as a bicameral parliament), and the prolonged procedures required for decision-making.[106] For post-war Ukraine, which is grappling with severe economic and financial challenges, increasing the costs of maintaining the state apparatus would not be appropriate.

In addition, with the presence of financial powers allocated by the levels of government, individual parts of the country will develop economically unevenly. Individual parts of the country might develop faster than others. The negative result of such development can be manifested not only in hindering the economic development of the country, but this situation could also pose a real threat to the unity of the country.[107]

Conclusion

The federalization of Ukraine aligns with Russia's interests, as it would weaken the state and make it more susceptible to disintegration. However, rejecting federalism does not imply that Ukraine's current territorial organization is without flaws. Ukraine is too large to remain highly centralized. Reforms should focus on decentralization within a unitary framework, delegating functions to self-governments with appropriate financial support. Simultaneously, efforts should aim to minimize bureaucracy and optimize state governance. The goal is to develop an administrative-territorial model that preserves Ukraine's unitary nature while accommodating regional uniqueness.[108]Crucially, defeating Russia and restoring the integrity of the territory of Ukraine within the internationally recognized borders.

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105 Ibid.

106 G. Khubua, *Federalism as a Normative Principle and Political Order*, Tbilisi 2000, p. 37.

107 Z. Rukhadze, *Government and Legislation*, PhD Thesis, Tbilisi 2003, p. 88.

108 W. Hołubko, *Administrative-Territorial Division of Ukraine: Historical Experience and Prospects*, "Roczniki Administracji i Prawa" 2014, no. 14/2, p. 94.

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Part II

Crimes Committed on the Territory of Ukraine as Part of Russian Armed Aggression

Chapter 1

Joanna Siekiera

Genocide Under International Law

Introduction

The crime of genocide is considered one of the most serious crimes against international law, and therefore also the cruellest manifestation of violation of human rights, which comprise a special catalogue of rights that are guaranteed under the norms of international law. Although the definitions and legal regulations concerning genocide are relatively new, their history spanning less than 100 years, societies and nations on all continents have committed or been victims of this crime since the beginning of human history. At the outset, it is worth noting that genocide was first criminalized only in the second half of the 20th century. It was the tragedy of World War II, especially the tragedy of the Holocaust, that made international decision-makers aware of the need for a more effective, and thus legally codified, protection against this crime under international law the tragedy of World War II, above all the drama of the Holocaust, that made international decision-makers aware of the need for more effective, and therefore legally codified, protection against this international crime, not without reason called the "crime of crimes".[1] In 1948, the General Assembly of the United Nations unanimously adopted the Convention on the Prevention and Punishment

1 S. Jurewicz, *Szczególne miejsce ludobójstwa wśród zbrodni przeciwko ludzkości,* "Studia Prawno-Ekonomiczne" 2011, LXXXIV, pp.131-145.

of the Crime of Genocide.[2] The Convention continues to be the basic legal act penalizing the crime of genocide in international law.

Core international crimes have a unique normative, criminological, but above all axiological character.[3] They are not established as crimes under national criminal legislations; hence it is international law (international humanitarian law, international criminal law, law of armed conflicts, international human rights law, to name the most relevant areas) as a branch of public law that covers these matters. Despite the formidable toll and the humanitarian, social and economic price exacted not only from generations contemporary with genocide but also from many thereafter, there are few studies on the subject matter in the scholarly literature, especially in the context of public international law. This shortage is visible primarily for the legal form of the crime, its definitions in the regulations of international criminal law, as well as the analysis of the evolution of definitions or public policy driven by the activities of international bodies or the practices of individual states. After all, regardless of the establishment of consecutive international criminal tribunals, the term "genocide" has come to be widely used in the public debate as an argument *ad personam,* thus arousing new political and historical controversies, but also moving the essence of the term away from its initial meaning.

The classification, nomenclature and legal characteristics of individual core international crimes, including genocide as discussed in this study, raise doubts and even controversy, even though the crime of genocide has been operating in the language of international law since the mid-20th century. In the Polish context, legal and social intricacies aside, the legal qualification of the Katyn massacre and the Volhynian massacre raises a lot of controversy. There is a long-standing dispute about the elements of the crime, that is, whether these crimes should be called genocide or a war crime, or maybe "only" a crime against humanity, without diminishing its gravity or the tragedy of the victims or their families. The problem can be seen not only in Polish scholarly literature or legal or political documents, but also in international instruments at the national, regional and global level. Examples include the international crimes of the massacre of Armenians by the Turks, the Great Famine (Holodomor) in the former Union of Soviet Socialist Republics (USSR), or the present-time extermination of the Rohingya by the

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2 Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. Poland ratified the Convention on 18 July 1950 (Journal of Laws of 1952, No. 2, item 9).

3 Cf. T. Iwanek, *Zbrodnia ludobójstwa i zbrodnie przeciwko ludzkości w prawie międzynarodowym,* LEX 2015.

regime in the former Burma (Myanmar), or the ethnic cleansing of the Tigrayan population by Ethiopian forces.

This study sets out to present genocide is from the perspective of international law, that is, in isolation from historical and political controversies. This is not an easy task, as almost every nation or ethnic group has suffered some throes from international crimes in its history, both in times of war and peace. Still, once the legal bases have been brought forward from the perspective of public international law, this will facilitate a substantive discussion on the crime of genocide, with a view to bringing the perpetrators to account and preventing re-emergence of the crime, as prescribed in its definitions and as intended by their framers.

1. The beginnings

The legislative dilemmas regarding war crimes, a narrower category of crimes under international law, are related to the very nature of international law and the relations between its subjects, that is, states. International-law crimes are acts committed in the international arena against the paradigm of international law established in the Charter of the United Nations.[4] The very first article of the Charter provides that the purpose of the UN is to "maintain international peace and security".[5] The term "war crimes" will have narrower coverage. The exact definition of war crimes is based on Article 8 of the Statute of the International Criminal Court[6] (the ICC), which will be discussed later on in this study.

As pointed out by Jan Kłos, associate professor at the Department of Particular Ethics of the John Paul II Catholic University of Lublin, "Most often, genocide has an ideological source. A single person gets killed sometimes with premeditation, sometimes on impulse, even by accident (...), but genocide is always ideologically driven. This is because the scale of wrongdoing in genocide, its irrational cruelty and duration are so enormous that they require incessant palliation and justification. Of course, by justification I do not mean a reference

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4 J. Siekiera, *Odpowiedzialność karna za zbrodnie prawa międzynarodowego a prawno-polityczne możliwości ukarania sprawców wojny na Ukrainie*, "Kwartalnik Prawa Międzynarodowego" 2023.

5 Charter of the United Nations, Statute of the International Court of Justice and Agreement establishing the Preparatory Commission of the United Nations of 15 October 1945 (Journal of Laws of 1947, No. 23, item 90).

6 Statute of the International Criminal Court, done at Rome on 17 July 1998 (Journal of Laws of 2003, No. 78, item 708).

to what we usually call justice, but rather to what we call rationalization. Justification in genocide has little to do with justice. Genocide needs – metaphorically speaking – a constant supply of ideological fuel of hatred."[7]

Hatred towards another social, ethnic or religious group has always been there in human civilizations. It has been used as a substratum for conflicts, wars and post-conflict situations, the latter being very dangerous as, although peace was restored *de jure*, a ruined state (nation, family, group) *de facto* had no chance or means to prosper, develop economically, let alone struggle with the trauma of the war generation and many generations thereafter. Therefore, as a matter of fact, in the modern era, when the norms of international law were developed, while emphasizing the importance of the Peace Treaty - the Peace of Westphalia[8] that provided for the emergence of a state-centric international system, states were not interested in having war crimes codified in any way but treated wars as a natural element of international relations. It was only the outbreak of World War I that changed the approach to international crimes. Although no definition of the crime of genocide was proposed at that time, the still undefined concept of genocide first appeared in the context of considerations on the responsibility of the Central Powers for serious violations of laws and customs during the Great War.[9]

The interwar period brought the first large-scale legal analyses and political debates between state representatives regarding responsibility for war crimes. The crimes of the Central Powers as enumerated by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, a commission at the Paris Peace Conference in 1919, characterized by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity, later on were used to frame the definition of genocide. A year later, the Treaty of Sèvres was signed (but never ratified)[10] between the Entente Powers and Turkey. The concept of genocide was used in the text of that Treaty.[11]

The meeting of the Conference of the International Bureau for the Unification of Criminal Law in 1933 in Madrid brought about a separation of two types of

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7 J. Kłos, *Ludobójstwo – czyli zbrodnia, której nie ma*, "Zeszyty Naukowe KUL" 2018, vol. 61, no. 3 (243), p. 128.

8 The Peace of Westphalia based on the Peace Treaty(ies) of 1648 was not a single event in the development of modern international law, but the beginning of a long evolution.

9 J. Jurewicz, *op. cit.*

10 Signed on 10 August 1920.

11 Cf. M. Flemming, *Międzynarodowe sądownictwo karne. Nowe perspektywy*, "Wojskowy Przegląd Prawniczy" 1994, vol. 2, p. 5 and M. Lippman, *Genocide* [in:] M. Ch. Bassiouni (ed.), *International Criminal Law, vol. 1: Crimes,* Brill, 1999, p. 589.

international crimes, that is, acts of barbarity, meaning extermination of racial, religious and social groups, and acts of vandalism, meaning destruction of culture and works of art of racial, religious and social groups.[12] Despite the high scholarly merit of the Conference, the concept of genocide was not included at that time. The author of the concept, and the promoter of the separation of the crime of genocide by the Conference in Spain, was a Polish lawyer of Jewish descent, Rafał Lemkin (1900-1959). A specialist in international criminal law, he sought even before World War II to legalize the criminalization of mass murders aimed at the extermination of national, racial and religious groups.

2. Contemporary legal basis

It was only after the tragic experiences of World War II that the international community decided to begin work on an international convention on genocide. Although genocide was referred to as a crime as early as in the London Agreement of August 1945 between the Allies (the United Kingdom, the United States, France and the USSR), the application of the term was limited exclusively to the duration of the war.[13] Then, in December 1946, the UN General Assembly adopted Resolution 95(I). The famous resolution, and at the same time the highest-ranking source of international law,[14] read: "Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings (...). Genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable."[15]

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12 K. Kosińska, *Zbrodnia ludobójstwa w prawie międzynarodowym*, Wyd. A. Marszałek, Toruń 2008, pp. 52-54; J. Sawicki, *Ludobójstwo. Od pojęcia do konwencji 1933–48*, Drukarnia Przemysłowa, Kraków 1949, p. 23.

13 H. T. King, B. B. Ferencz, W. R. Harris, *Origins of the Genocide Convention*, "Case Western Reserve Journal of International Law" 2008, vol. 40, p. 16.

14 Not in terms of hierarchy of law; unlike national law, usually in constitutions, public international law does not have a hierarchy of sources of law, and the doctrine only lists international agreements or sources of law from international organizations (such as the UN cited here) as norm-setting instruments for the actors of this law.

15 M. Ickiewicz-Sawicka, *Prawne i kryminologiczne aspekty zbrodni ludobójstwa serbskiej ludności na Bałkanach w XX wieku wybrane zagadnienia*, "Elpis" 2013, 15/27; S. Totten (ed.), *Teaching About Genocide: Issues, Approaches, and Resources, Information Age Publishing*, Greenwich, Connecticut 2004, pp. 32-33.

Rafał Lemkin, called the father of the definition of genocide, created and vigorously promoted the first legal definition of the concept internationally, among academics and statesmen alike. The lawyer coined the concept so expertly and then persuaded theoreticians and practitioners of international criminal law to use it so effectively that it was used essentially unchanged in the indictment of the chief war criminals before the Military Tribunal in Nuremberg. According to the indictment of German commanders, "the defendants conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, particularly Jews, Poles and Gypsies and others."[16]

The above document of the International Military Tribunal in Nuremberg,[17] commonly known as the judgment of the Nuremberg Trials, enabled fast progress in the work on the legal regulation of the crime of genocide. In its Resolution of 11 December 1946, the UN General Assembly recognized that genocide constitutes a crime within the meaning of international law. Moreover, responsibility for this particular international crime was attributed to private individuals as well as public officials and statesmen, which marked a novel approach in international law. Secondly, the Assembly pointed to a wide catalogue of motives, i.e. the crimes committed for religious, racial, political or other reasons. This allowed states to provide for a broad framing of genocide with a view to ensuring protection of as many victims as possible. A request was made to UN member states to accommodate that definition in their legal systems, also with a view to later effective international cooperation in the field of preventing and punishing the crime of genocide. Finally, as it is most widely known, the Economic and Social Council, i.e. one of the main UN General Assembly bodies, was instructed to prepare a draft convention on genocide.[18]

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by decision of the United Nations General Assembly on 9 December 1948, following the earlier work of the Committee on the Codification and Progressive Development of International Law in 1947. The drafting process of the Convention, including defining the crime itself, was the subject of both legal discussion and political controversy, given the play of post-war powers. Ultimately,

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16 J. Sawicki, *op. cit*., pp. 25-26.

17 K. Wierczyńska, *Pojęcie ludobójstwa w kontekście orzecznictwa międzynarodowych trybunałów karnych ad hoc*, Scholar, Warszawa 2010, p. 59.

18 T. Cyprian, J. Sawicki, *Prawo norymberskie: Bilans i perspektywy*, Wyd. Eugeniusza Kuthana, Kraków 1948, p. 527.

as a result of intense negotiations, the following definition of genocide was established, as contained in Article II:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

Moreover, the scope of punishable acts under the Convention, besides genocide itself, covered conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.[19]

Another international legal instrument that contains a legal definition of genocide is the Statute of the International Criminal Court (ICC), called the Rome Statute due to the place where the agreement establishing the Court was signed. From the perspective of international law, the Rome Statute is a point of reference for other criminal tribunals, international law doctrine, and norm-setting initiatives taken by states and other international organizations. The jurisdiction of the ICC covers war crimes, a concept that has a narrower meaning than core international crimes. War crimes are defined as grave breaches of the four Geneva Conventions 1949[20] and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, as well as serious violations of article 3 common to the Geneva Conventions and other serious violations of the laws and customs applicable in armed conflicts not of an international character, referred to as non-international conflicts.[21]

Article 5 lists core international crimes, dividing them into four categories, which at the same time form the scope of the Court's jurisdiction: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

In its Article 6, the ICC Statute defines genocide in the same way as the 1948 Convention. Apparently, Lemkin's definition was found to be so accurate that

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19 Article III of the Convention on the Prevention and Punishment of the Crime of Genocide.
20 Geneva Conventions for the Protection of War Victims signed at Geneva on 12 August 1949 (Journal of Laws of 1956, No. 38, item 171).
21 J. Siekiera, *op. cit.*

any modification, even in good faith, would be detrimental to the protection of victims of genocide and the prosecution of its perpetrators.

3. The work of subsequent criminal tribunals

The next institutional step in punishing the crime of genocide was the establishment in 1993 and 1994 of two *ad hoc* tribunals to prosecute war crimes committed in the former Yugoslavia and in Rwanda. These Tribunals were established on the legal basis of the Convention on the Prevention and Punishment of the Crime of Genocide, which in its Article VI provides for the options to set up *ad hoc* tribunals to try those charged with the prohibited acts listed.

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, commonly known as the International Criminal Tribunal for the Former Yugoslavia (ICTY), was established by the United Nations Security Council Resolution 808 of 22 February 1993[22] and amending Resolution 827 of 25 May 1993.[23] The ICTY was established in a response to the drama of the civil war in the former Yugoslavia in 1991-1995, and especially the crimes committed in Bosnia and Herzegovina, ethnic cleansing, massacres of civilians, and the infamous crime in Srebrenica.

The drafting of the ICTY Statute, which governs the functioning of the Tribunal, was left to its organs and appointed judges, resulting in a set of procedures first of its kind in international criminal law.[24] Importantly, from the perspective of this study on the crime of genocide, the Statute set out the powers that the Tribunal had granted by the parties, thus setting the limits of its operation. The material competence of the ICTY is set out in Articles 2-4. It covers grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity. Its jurisdiction is delimited in the first paragraph of Article 4: "The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article." Further on, the text provides a definition of genocide and lists the prohibited acts amounting to it.

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22 Resolution SC/Res/22.02.1993.

23 Resolution SC/Res/25.05.1993.

24 United Nations International Criminal Tribunal for the former Yugoslavia, *Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia:*https://www.icty.org/en/documents/rules-procedure-evidence (accessed: 3.12.2023).

According to the ICTY Statute, genocide comprises acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. These acts include killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and, forcibly transferring children of the group to another group. Indeed, this is a repetition, although not *verbum verbi,* of the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide. Similarly to the Rome Statute, the acts punishable under the ICTY Statute include not only the crime of genocide, but also conspiracy to commit genocide, direct and public incitement, attempt and complicity in genocide. Unlike in the regulations concerning crimes against humanity, these do not have to be committed in armed conflict, so the 'during war' temporal link is irrelevant. It was already noted in the Report of the UN Secretary that the Tribunal applies international humanitarian law in force, expressed both in the form of agreements (conventions) and custom,[25] whether the crime of genocide is committed in time of war or in time of peace.[26]

What was also novel in the work of the Tribunal was the catalogue of those responsible for crimes in the former Yugoslavia, as the group was deliberately not limited to a specific nationality. Therefore, the Tribunal's jurisdiction covered not only ordinary citizens, but also, for example, personnel of the North Atlantic Treaty Organization (NATO) peacekeeping forces or other military troops.[27]

The penalty of imprisonment has been and still is the main penalty imposed by international tribunals, both *ad hoc* or permanent (the International Court of Justice in The Hague, which is one of the UN bodies, and the above-mentioned International Criminal Court, also based in the capital of the Netherlands). The exceptions were the judgements of the Nuremberg and Tokyo Tribunals,[28] which also passed death sentences.[29]

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25 K. Wierczyńska, *op. cit.*

26 A. Spychalska, *Zbrodnia ludobójstwa w statutach trybunałów międzynarodowych,* "Acta Erasmiana IX, Varia II" 2015, pp. 87-104.

27 *Ibid.*

28 International Military Tribunal for the Far East. The Tribunal, called the Tokyo Tribunal due to its seat and the administration of justice towards the leaders and other citizens of Japan during World War II, did not specifically claim competence for the crime of genocide.

29 R. Śliwa, *Międzynarodowy Trybunał ds. ścigania osób odpowiedzialnych za poważne łamanie międzynarodowych praw człowieka na terytorium byłej Jugosławii począwszy od 1991, Bałkany u progu zjednoczonej Europy*, [in:] *Bałkany u progu zjednoczonej Europy*, P. Czubik (ed.), Instytut Multimedialny, Kraków 2008.

Another *ad hoc* international tribunal which dealt with the crime of genocide the 1990s was the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, called the International Criminal Tribunal for Rwanda (ICTR). Following the ICTY model, the Rwanda Tribunal was established based on the powers of the UN Security Council under Chapter VII of the Charter of Nations. Resolution 955 of 8 November 1994[30] opened the legal process in the fight for international justice.

Arguably, the Rwanda genocide was an unprecedented event. As a result of a bloody ethnic conflict between the Hutu and the Tutsi, over a hundred days more than 800,000 people were killed, mainly civilians and not members of the armed forces. Therefore, due to the characteristics of both crimes, the Rwanda Tribunal was different from the Former Yugoslavia Tribunal. The material competence of the ICTR was regulated in Articles 2-4 of the Statute, pointing primarily to the crime of genocide because it was mainly the perpetrators of this crime who were to be tried.[31] Two additional categories of crimes to be tried before the ICTR were crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The definition of genocide, the catalogue of prohibited acts and their forms, and the list of groups under special protection in this respect are the same as those for the ICTY.

After the conflict in Rwanda, but also after it spilled over to Uganda, Burundi and Zaire, as many perpetrators, fleeing from the Rwandan Patriotic Front, sought refuge abroad to continue committing crimes there and thus fuel the spiral of revenge, it turned out that more a hundred thousand defendants would have to be tried. This would have led to complete paralysis of the Rwandan judicial system, which was still struggling with social and structural problems inherited from the colonial times. That is why it was so important to establish an international tribunal to prosecute the perpetrators of the gravest massacres. At the same time, it was decided to establish Gacaca courts to hold to account perpetrators of lower-level crimes.[32]

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30 Resolution S/RES/955.

31 A. Spychalska, *op. cit.*

32 For more on this, see: J. Nowakowska-Małusecka, *Odpowiedzialność karna jednostek za zbrodnie międzynarodowe popełnione w byłej Jugosławii i Rwandzie*, WUŚ, Katowice 2000.

The jurisprudence of the Nuremberg, Tokyo, Yugoslavia and Rwanda Tribunals has significantly contributed to expanding the acquis related to genocide. Suffice it to cite the judgments, in which the tribunals commented on the key elements of the crime of genocide. The ICTY clarified the importance of group identity by defining genocide as any of several acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, where the term "as such" is paramount as it indicates that the crime requires an intent to destroy a collection of people who share a specific group identity. The ICTR pointed out that the norm of the prohibition of genocide belongs to the body of customary international law, including *ius cogens,* that is, a mandatory norm, which means that its rank is so high that it has absolute force and cannot be repealed by another norm of international law (either conventional or customary).[33]

Then, 1998 saw the culmination of international law ambitions to establish an international criminal tribunal that would no longer be territorially linked to a state in whose territory a crime against international law occurred. At the Conference in Rome, on 17 July 1998, 160 states adopted the text of the Statute of the International Criminal Court, the Rome Statute. Importantly, one of the arguments for the establishment of the ICC was to make the international justice system independent of the UN International Court of Justice, which was ineffective in numerous instances and carried the stigma of a "post-colonial", where the veto right of the "Permanent Five" continues to exist.[34]

Currently, 123 states are parties to the ICC.[35] Noteworthy, contrary to common knowledge, the Statute of the ICC, the Rome Statute indicated above, is not the only basis for the Court's operation. In addition to the Statute, the Tribunal operates based on the Elements of Crimes, the Rules of Procedure and Evidence, as well as treaties, principles and rules of international law.[36] The catalogue of crimes covered by its jurisdiction was mentioned above in this study, including Article 6, which is crucial in the context of this paper with its definition of the

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33 C. Lingaas, *Defining The Protected Groups Of Genocide Through The Case Law Of International Courts*, ICD Brief 18/2015; Human Rights Watch, *Genocide, War Crimes and Crimes Against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda*, 2010.

34 P. Krawczyk, *Individual responsibility of the Heads of State, Head of Government and the Senior Government Officials for international crime. Voice in discussion,* "Studia Iuridica Toruniensia" 2021, vol. 26, pp. 211-230; H. Mistry, *The significance of institutional culture in enhancing the validity of international criminal tribunals,* "International Criminal Law Review" 2017, vol. 17.

35 International Criminal Court,*The States Parties to the Rome Statute*: https://asp.icc-cpi.int/states-parties (accessed: 3.12.2023).

36 Article 21(1) of the Rome Statute.

crime of genocide. However, the criminalized crime of genocide under Article 6 is described in terms of prohibited acts, but not the methods of committing the crime as is the case in the Statutes of the *ad hoc* tribunals. Complicity and conspiracy to commit the crime are not included.[37]

Instead, the acts recognized as the crime of genocide are further specified in the above-mentioned Elements of Crimes.[38] Articles 6a-6e list and describe in detail all prohibited acts that meet the criteria of genocide, namely, killing, causing serious bodily or mental harm (through, among others, torture, rape, sexual violence or inhuman and degrading treatment), deliberately inflicting conditions of life calculated to bring about physical destruction (through poor nutrition, lack of/bad medical care, evictions), y imposing measures intended to prevent births within a group, and forcibly transferring children. Further, each of these is attributed elements of the crime which change only *mutatis mutandis* as to the circumstances of a specific case of crime, rather than the general issue or definition of genocide. Thus, the perpetrator of a prohibited act killed/contributed to the suffering of one or more persons; the person or persons belonged to a specific national, ethnical, racial or religious group; the perpetrator acted with an intent to destroy, in whole or in part, that national, ethnical, racial or religious group as such; the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.[39]

What is of paramount importance, and refers to the previously cited ideological basis of hatred in committing the crime of genocide, is the intent. Each of the articles in the ICC's Elements of Crimes marks a direct link between genocide and the victims' belonging to a particular national, ethnical or religious group. The intent of the person committing the crime of genocide is to destroy this particular group in whole or in part, which is the perpetrator's military or military and political goal. The framing of "intent" is therefore key in the provisions of the ICC Statute. According to Article 30, a person will be criminally responsible and liable for punishment only if "the material elements are committed with intent and knowledge." The perpetrator must therefore act deliberately and with the intent to commit a prohibited act. The framing of the norm in this way is yet another novelty compared with previous regulations, as for the first time ever the material

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37 Cf. D. Dróżdż, *Zbrodnia ludobójstwa w prawie międzynarodowym*, Wolters Kluwer Polska, Warszawa 2010, pp. 220-222.

38 International Criminal Court, *Elements of Crimes:* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf (accessed: 3.12.2023).

39 Ibid.

element of crime was codified in an instrument of international law, which thus became a necessary proof of the individual responsibility of the perpetrator.[40]

Finally, the latest type of international tribunals dealing with violations of international law caused by armed conflicts should be mentioned. After the "Nuremberg"-type tribunals (Nuremberg Tribunal and Tokyo Tribunal), *ad hoc* tribunals (ICTY and ICTR), as well as the permanent tribunal (ICC), it is necessary to point out the development of international criminal law through the institutionalization of "hybrid" courts. This fourth category of internationalized criminal tribunals combines aspects of national and international legal orders, with a criminal law system regulated at both local and global levels. Examples include the Courts for Cambodia, Kosovo, Sierra Leone and East Timor.[41]

Conclusions

Kofi Annan, the seventh Secretary General of the United Nations (1997-2006), a great reformer of the Organization, who also appointed the UN Mission in Bosnia and Herzegovina, stated that we must all (international institutions, governments, individuals) acknowledge our responsibility for not having done more to prevent or stop the genocide. "Neither the United Nations Secretariat, nor the Security Council, nor Member States in general, nor the international media, paid enough attention to the gathering signs of disaster. Still less did we take timely action? When we recall such events and ask "why did no one intervene?" we should address the question not only to the United Nations, or even to its Member States. No one can claim ignorance. (...) The risk of genocide remains frighteningly real. (...). Genocide almost always occurs during war. Even apparently tolerant individuals, once they engage in war, have categorized some of their fellow human beings as enemies, suspending the taboo which forbids the deliberate taking of human life. And in almost all cases, they accept that civilians may also be killed or hurt, whatever efforts are made to limit so-called "collateral damage"."[42]

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40 J. Quigley, *The Genocide Convention: An International Law Analysis*, Routlege, New York, 2006, pp. 88-136.

41 P. Łubiński, *Sądownictwo międzynarodowe w kontekście rozwoju międzynarodowego prawa humanitarnego*, [in:] M. Marcinko (ed.), *Osiągnięcia i wyzwania międzynarodowego prawa humanitarnego*, PCK, Kraków 2011, pp. 81-96.

42 United Nations, *Address by Kofi Annan to the Commission on Human Rights* (7.04.2004): https://www.un.org/sg/en/content/sg/speeches/2004-04-07/address-kofi-annan-commission-human-rights (accessed: 3.12.2023).

Although new bodies are being established to improve the prosecution of the crime of genocide (the Office of the Prosecutor of the International Criminal Court at the UN is developing and striving for closer cooperation with regional agencies, in the first place with the Genocide Network established in 2002 on the initiative of the European Commission[43]), the International Criminal Court and *ad hoc* tribunals seem to be the most effective response to the tragedy of genocide. Subsequent statutes of the courts and tribunals refer to the definition framed by a Polish lawyer, Rafał Lemkin, who covered conceptually this most cruel of crimes against international law. The Nuremberg Tribunal ruled that genocide is the deliberate and systematic extermination of racial and national groups of civilian populations in order to destroy particular races and classes of people and national, racial or religious groups. This definition of Lemkin's remains relevant in the face of ongoing and future wars.

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Crime Against Humanity as One of the Most Serious Crimes Under International Law

Introduction

According to international customary law, a crime against humanity, next to genocide and war crimes, is one of the most serious crimes under international law. Its prohibition has attained the status of a peremptory norm *ius cogens,* and therefore there can be no other norm that would repeal the prohibition of committing crimes against humanity, transforming it into an absolutely binding legal norm. Crimes against humanity are committed not only during major armed conflicts, but also in times of peace. Individuals convicted or facing criminal proceedings before international criminal tribunals or national courts have committed crimes against humanity during the rule of military juntas in Central and Latin American countries such as Guatemala, Lima, Chile, Uruguay, and Argentina, as well as during major ethnic cleansing or armed conflicts in countries such as Cambodia, East Timor, Sierra Leone, the Democratic Republic of Congo, Sudan, Rwanda, and the countries that were part of the Former Yugoslavia. Unfortunately, events on the territory of Ukraine since 2014 , particularly the commencement of a new, official stage of Russian armed aggression against Ukraine, i.e. a full-scale armed invasion – have led Ukraine to face the greatest unprovoked and openly declared armed aggression on the European continent since World War II, regardless of the propaganda arguments presented by the aggressor.

The seriousness and scale of acts committed by Russian soldiers on the territory of Ukraine since February 24, 2022, compelled the international community to react. The International Criminal Court in The Hague (hereinafter – ICC), currently the only body possessing jurisdiction over acts committed since February

24, 2022, on the territory of Ukraine, was forced to take specific actions. This expertise aims to present the definition of crimes against humanity by analysing the individual elements of *mens rea*, and based on the example of selected jurisprudence of the international tribunal. Since only the International Criminal Tribunal for the Former Yugoslavia (hereinafter – ICTY) had jurisdiction exclusively over events within the context of an armed conflict, which at selected stages had the character of an international conflict, it serves as a comparative reference.

Undoubtedly, the armed conflict in the territory of the Former Yugoslavia did not arise as a result of open and unprovoked armed aggression; nevertheless, the elements of *mens rea* in crimes against humanity committed in the territory of the former Yugoslavia are, in principle, similar to those committed by soldiers of the Russian army in the territory of Ukraine.

1. *Mens Rea* Elements in Crimes Against Humanity

The element of mens rea is not explicitly specified as a prerequisite for criminal liability in the ICTY Statute, as it is in the ICC Statute[1]. In the Delalić case, the Tribunal acknowledged that both the material and psychological elements must be proven[2]. In the *Tadić* case, it was stated that the basis for criminal liability was the principle of individual guilt[3], which is directly related to the perpetrator's psyche. *Mens rea*, as a subjective element, refers to the psychological or moral aspect of committing a crime against humanity, which literally translates to "guilty mind"[4]. Consequently, it must be proven that the accused, at the time of committing the act, had: 1) the intention to commit the act or acts; 2) consciousness of the attack against the civilian population; 3) consciousness that his or her act is part of that attack[5]. It should be emphasized that the *mens rea* of crimes against humanity elevates an ordinary crime to an international crime[6]. It is considered that the

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1 Zgodnie z artykułem 30 Statutu MTK *osoba ponosi odpowiedzialność karną i podlega karze za zbrodnię objętą jurysdykcją Trybunału tylko wtedy, gdy świadomie i z zamiarem jej popełnienia realizuje znamiona zbrodni.*

2 *Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21-T, 1998, par. 326.

3 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-A, 1999, par. 186.

4 W. A. Schabas, *Mens Rea and The International Criminal Tribunal for the Former Yugoslavia*, „New England Law Review" 2003, vol. 37, s. 1015.

5 *Prosecutor v. Blaskic*, ICTY, Case No. IT-95-14-A, 2004, par. 124; *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, par. 99, 102.

6 Y. Aksar, *Implementing International Humanitarian Law – From the Ad Hoc Tribunals to a Permanent International Criminal Court*, London 2004, s. 254.

accused, to bear criminal liability for crimes against humanity, must have been conscious of the facts and circumstances accompanying its commission, which fulfil the elements contained in its definition[7]. For example, homicide is a crime prosecuted under the criminal code within the jurisdiction of national courts, but only when committed against the civilian population during an international or internal armed conflict, of which the perpetrator must be aware[8], it becomes a crime against humanity within the meaning of the ICTY Statute and the Rome Statute. Therefore, *mens rea* in crimes against humanity includes not only intent and knowledge, but also the circumstance of an ongoing armed conflict and the fact that the act was committed as part of an attack against the civilian population.

1.1. Intent

Intent is not a directly enumerated element in the definition included in the ICTY Statute. In the absence of such a regulation in the definition, the matter of intent to commit crimes against humanity has been left to the Tribunal judges for interpretation. In the first judgment issued by the ICTY in the *Tadić* case, the Trial Chamber acknowledged that the reason why crimes against humanity deeply shock the conscience of humanity and guarantee the intervention of the international community is that they do not constitute isolated and random acts of an individual, but rather result from intentional attempt to attack the civilian population. It was therefore underlined that this crime is characterized by the intent to commit it against the civilian population[9]. The fact that the intent of the accused has to be proved was confirmed in the Report of the Preparatory Committee on the Establishment of the ICC, in which it was recognized that *an individual may be held criminally responsible for committing the crime that falls within the jurisdiction of the ICC only when the act was perpetrated with the intent or (and) knowledge*[10]. The case law of ICTY describes different types of intent concerning various international law crimes. As a result, when discussing crimes against humanity, one can distinguish direct intent (*dolus directus*) and eventual intent (*dolus eventualis*)[11]. There is also a view that one can have intent

7 A.Cassese, *The Oxford Companion to International Criminal Justice*, Oxford 2009, s. 674.

8 M. Płachta, *Międzynarodowy Trybunał Karny*, t. 1, Kraków 2004, s. 436-437.

9 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, par. 653.

10 Report of the Preparatory Committee on the Establishment of an International criminal Court, Vol. II, Compilation of Proposals, U.N. Doc. A/50/22, Supp. No. 22, 1996.

11 M. E. Badar, *Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, „International Criminal Law Review" 2006, vol. 6, s. 315.

regarding "action" and "consequence." The intent to act specifically means that the person wants to engage in committing the act, whereas the intent to cause a specific consequence means that the person aims to cause that consequence or knows that it will occur in the ordinary course of events[12].

In the *Česić* case, the perpetrator, threatening his victims with a gun, forced two Muslim brothers detained in Luka camp to perform sexual intercourse acting with intent, as he personally admitted, fully conscious that it happened without the victims' consent[13]. The situation mentioned above confirms the view that the perpetrator's intent is based on his consciousness of the circumstances of the act[14]. Nevertheless, intent and knowledge are distinct *mens rea* elements of crimes against humanity.

Nonetheless, the intent cannot be identified with the perpetrator's motive. The Trial Chamber in the *Milutinović* case provided that crime against humanity may be committed for "purely personal" reasons[15]. Therefore, the perpetrator's motive is not relevant in terms of qualifying the act as the crime against humanity. Considering that crime against humanity is one of the most serious international crimes, it can be committed only when the perpetrator, having the intent, is conscious of the circumstances of the act, which means that crime against humanity cannot be committed as a result of recklessness[16].

1.2. Knowledge

Another *mens rea* element is knowledge, which is directly related to the intent but not identical to it. The intent is based on the knowledge of the circumstances in which the act is committed, especially knowledge of the attack directed against any civilian population and the fact that a particular act constitutes part of this attack[17]. However, knowledge of the details of the attack[18] is not required. An

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12 R. S. Clark, *The Mental Element in International Criminal Law: the Rome Statute of the International Criminal Court and the Elements of Offences*, „Criminal Law Forum" 2001, vol. 12, s. 302.

13 *Prosecutor v. Cesic*, ICTY, Case No. IT-95-10/1-S, 2004, par. 16.

14 K. Ambos, *Estudios de Derecho Penal Internacional*, Caracas 2004, s. 160.

15 *Prosecutor v. Milutinovic et al.*, ICTY, Case No. IT-05-87-T, 2009, par. 158.

16 A. Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, „The European Journal of International Law" 1999, vol. 10, no. 1, s. 153-154.

17 Cassese A., Acquaviva G., Fan M., Whiting A., *International Criminal Law – cases and commentary*, Oxford 2011, s. 168; *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 434.

18 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, par. 102.

essential criterion for individual criminal liability is the perpetrator's conscious engagement in the decision to violate international law[19]. Therefore, knowledge entails awareness that a particular circumstance exists, or that a result will occur in the ordinary course of events[20]. The criterion of knowledge is also met when the perpetrators are conscious of both the risk of an attack and the risk that certain circumstances of the attack pose a greater threat than if the attack did not exist[21].

While committing the crime against humanity in the form of murder and extermination, the knowledge means consciousness that the particular act of the perpetrator or the omission of it is possible to cause death (as far as the crime of extermination is concerned, the consciousness regards the possibility of causing death of a significant number of people)[22]. The consciousness of a widespread attack on the civilian population is evident in the *Blagojević and Jokić* case, since they participated in an organized, inhumane and usually aggressive process of separation of men from the rest of the population[23].

A particular emphasis should be put on the knowledge element while committing crimes of a sexual nature. Consciousness of a widespread or systematic attack against the civilian population is often evidenced by the perpetrator's behaviour. In the *Zelenović* case, the acts to which the accused confessed were part of a plan of sexual assault against many individuals, lasting several months in several separate locations[24]. This continuity and repetitiveness of the acts, which took the form of multiple rapes of women of specific origin held in detention centres[25], make these acts fit the definition of crimes against humanity. In the *Kunarac* case, the Tribunal provided that the knowledge at the time of committing the crime of rape is proved by the fact that the perpetrator was conscious that he acts without the victim's consent[26].

Committing crimes against humanity in the territory of The Former Yugoslavia often resulted from acting on the orders of superiors or within a service relationship. This requires defining *mens rea* in the form of *knowledge* for the

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19 Królikowski M., *Odpowiedzialność karna jednostki za sprawstwo zbrodni międzynarodowej*, Warszawa 2011, s. 42.

20 M. Płachta, *Międzynarodowy Trybunał Karny*, t. 2, Kraków 2004, s. 436-438.

21 N. Theodorakis, D. P. Farrington, *Emerging Challenges for Criminology: Drawing the Margins of Crimes against Humanity*, „International Journal of Criminology and Sociological Theory" 2013, vol. 6, no. 2, s. 1156.

22 *Prosecutor v. Blagojevic & Jokic*, ICTY, Case No. IT-02-60-T, 2005, par. 556, 572.

23 *Prosecutor v. Blagojevic & Jokic*, ICTY, Case No. IT-02-60-T, 2005, par. 617.

24 *Prosecutor v. Zelenovic*, ICTY, Case No. IT-96-23/2-S, 2007, par. 38.

25 *Prosecutor v. Zelenovic*, ICTY, Case No. IT-96-23/2-S, 2007, par. 38.

26 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 460.

act committed in a given case. In the *Kordić and Čerkez* case, the Trial Chamber distinguished two situations: 1) the superior has the knowledge that subordinates are committing or intend to commit a crime; 2) the superior "has a reason to know" that subordinates are committing or intend to commit a crime[27]. The first situation refers to possessing direct evidence or circumstantial evidence[28], while the second to having information indicating the need to conduct further investigation to determine whether subordinates are committing a crime[29].

1.3. International or Internal Armed Conflict

The Trial Chamber in the *Tadić* case addressed the issue of armed conflict, provided an armed conflict arises when the parties resort to armed force or similar actions[30]. According to Protocol I to the Geneva Conventions, a non-international conflict *takes place in the territory of one of the Contracting Parties, between its armed forces and dissident armed forces or other organized armed groups, under responsible command, and exercising such control over a part of its territory as to carry out continuous and coherent military operations*[31]. Therefore, an internal armed conflict occurs when at least one of the parties is non-governmental[32]. To distinguish an internal armed conflict from internal disturbances, criteria such as the intensity of the fighting and the level of organization of the parties[33] should be considered. An armed conflict is international when it arises between two or more States[34]. An international armed conflict is specified as an attack by one State on another[35] motivated by the intent to cause harm. Besides these types of armed conflict, international law recognizes the concept of an internationalized armed conflict. This occurs when a conflict between two fractions or internal groups is

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27 *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, par. 425; Podobne sformułowanie zostało również zawarte w artykule 7 Statutu MTKJ.

28 *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, par. 426

29 *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, par. 429.

30 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, par. 70

31 Artykuł 1 Protokołu dodatkowego do konwencji genewskich z dnia 12 sierpnia 1949 r. dotyczący ochrony ofiar niemiędzynarodowych konfliktów zbrojnych.

32 S. Vite, *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, „International Review of the Red Cross" 2009, no. 873, s. 75.

33 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, par. 561-568; *Prosecutor v. Mucic et al.*, ICTY, Case No. IT-96-21-T, 1998, par. 184.

34 Artykuł 2 Konwencji Genewskiej o polepszaniu losu rannych i chorych w armiach czynnych, sporządzonej w Genewie dnia 12 sierpnia 1949 r., Dz. U. z 1956 r., nr 38, poz. 171, załącznik.

35 S. Vite, *Typology of armed conflicts*..., s. 72-73.

supported by other States[36], or a situation when armed intervention of the third State into an internal armed conflict[37] takes place. In the context of intervention, one can distinguish between third-state intervention to support one side and the intervention of multinational forces to conduct peace operations[38]. An example of an internationalized conflict is the intervention of NATO in 1999 in the armed conflict between the Federal Republic of Yugoslavia and the Kosovo Liberation Army[39]. Regarding the conflict in the territory of the Former Yugoslavia during the years 1992 -1995, it should be noted that it had the character of an international armed conflict, as confirmed by United Nations Security Council (UNSC) Resolution, adopted on July 13, 1992, which *stated that the parties are bound by the observance of international humanitarian law, particularly the Geneva Conventions*[40]. In accordance with Common Article 2 of the Geneva Conventions, *they apply in all cases of declared war or any other armed conflict between two or more States*, therefore in the case of international armed conflict. The conflict in the Former Yugoslavia is similarly classified in the literature[41] of international law.

According to the wording of Article 5 of the ICTY Statute, for the Tribunal to exercise jurisdiction and for the perpetrator to be held criminally responsible for committing a crime against humanity, it remains irrelevant whether the armed conflict had an international or internal[42] character. In the *Brdanin* case, the Trial Chamber recognized that the existence of a conflict serves only to determine whether the Tribunal has jurisdiction over a particular act[43]. In the *Kunarac* case, the Appeals Chamber called the existence of a conflict a prerequisite, which is fulfilled by proving that an armed conflict took place and the perpetrator's act was related to it both geographically and temporally[44]. From this, it can be concluded that a crime against humanity is connected to an armed conflict if it

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36 D. Schindler, *International humanitarian law and internationalized internal armed conflicts*, „International Review of the Red Cross" 1982, no. 230, s. 255.

37 H. Gasser, *Internationalized non-international armed conflicts: Case studies of Afghanistan, Kampuchea and Lebanon*, „The American University Law Review" 1983, vol. 33, s. 145-146

38 S. Vite, *Typology of armed conflicts*..., s. 85.

39 S. Egorov, *The Kosovo crisis and the law of armed conflicts*, „International Review of the Red Cross" 2000, no. 837, s. 183.

40 United Nations Security Council Res. 764, U.N. Doc. S/RES/764, 1992

41 C. Greenwood, *International Humanitarian Law and Tadic Case*, „The European Journal of International Law" 1996, vol. 7, no. 2, s. 269-272.

42 *Prosecutor v. Tadic*, ICTY, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction, 1995, par. 75-82.

43 *Prosecutor v. Brdanin*, ICTY, Case No. IT-99-36-T, 2004, par. 133.

44 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, par. 83.

was committed during the actual time of the conflict and in the territory where hostilities between the conflicting parties were occurring. However, this does not mean that the act must be committed in the exact location of the fighting, it is sufficient if it is connected to the military operations[45]. For example, torturing a civilian away from the battlefield to obtain information[46] would suffice.

However, it should be noted that committing crimes against humanity during an armed conflict is not a requirement under customary international law[47]. In the *Tadić* case, the Appeals Chamber affirmed that, in accordance with customary international law, the crime against humanity does not have to be committed in relation to international armed conflict or any other type of conflict[48]. The condition of an ongoing conflict is only a procedural requirement within the definition provided in the ICTY Statute. Consequently, under customary international law, a crime against humanity can also be committed in times of peace[49].

1.4. Attack against Civilian Population

An attack directed against a civilian population involves elements of policy and planning[50]. The Tribunal has found that due to structural, organizational, and military capability factors, an attack against a civilian population almost always occurs under orders from state authorities[51]. Regarding the extent or systematic nature of the attack, it is important to note that the first criterion pertains to the scale of the attack, often reflected in the number of victims, while the systematic nature refers to the non-random repetition of criminal acts[52]. It is significant that the extent or systematic nature of the attack is related to how it is carried out. The criterion of regularity was added to include jurisdiction over acts committed in an attack that did not reach a sufficient scale to be considered extensive but

45 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, par. 626.

46 A. Szpak, *Kontrola przestrzegania międzynarodowego prawa humanitarnego w orzecznictwie międzynarodowych trybunałów karnych ad hoc*, Toruń 2011, s. 344

47 *Prosecutor v. Martic*, ICTY, Case No. IT-95-11-T, 2007, par. 56.

48 *Prosecutor v. Tadic*, ICTY, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 1995, par. 141.

49 A. Szpak, *Kontrola przestrzegania*..., s. 348.

50 B. A. Boczek, *International Law: A Dictionary*, Lanham 2005, s. 155.

51 *Prosecutor v. Limaj et al.*, ICTY, Case No. IT-03-66-T, 2005, par. 191.

52 *Prosecutor v. Lukic & Lukić*, ICTY, Case No. IT-98-32/1-T, 2009, par. 875; *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, par. 94; *Prosecutor v. Blaskic*, ICTY, Case No. IT-95-14-A, 2004, par. 101.

were, nonetheless, characterized by a plan, organization, and regular pattern of action[53]. The ICTY Trial Chamber also found that, according to the definition of crimes against humanity included in the ICT Statute and others, the requirement for regularity or large-scale nature of the attack is alternative, meaning that it is sufficient if the specific attack meets only one of these requirements[54]. To demonstrate that an attack meets the criterion of being extensive or systematic, the following elements should be considered: 1) the impact of the attack on the civilian population targeted; 2) the number of victims; 3) the nature of the acts; 4) the involvement of authorities or State officials; 5) the possibility of distinguishing a specific pattern of committed acts[55]. The criterion of extensive or systematic attack was established to exclude isolated and random criminal acts[56] from the category of crimes against humanity. It is undisputed that the object of an extensive or systematic attack is the civilian population, which constitutes a common element for all existing definitions of crimes against humanity.

In accordance with the I Additional Protocol to the Geneva Conventions, the term "civilian population" includes all civilian persons, defined by excluding prisoners of war and members of the armed forces, with the additional presumption that in case of doubt, a person shall be considered a civilian[57]. In the *Tadić* case, the Trial Chamber recognized that the term "civilian" includes all the persons who do not have combatant status[58]. It is noteworthy that, for example, the presence of soldiers within the civilian population does not deprive it of its civilian character. The Tribunal stated that the civilian population consists of civilians, but the presence of non-civilians within it does not deprive it of this status[59]. Consequently, it is sufficient that the population is predominantly civilian[60]. In the *Limaj* case, the Trial Chamber defined the civilian population as both persons actively resisting

53 M. M. deGuzman, *Crimes against humanity*, [w:] *Routledge Handbook of International Criminal Law*, W. A. Schabas, N. Bernaz (red.), Oxford 2011, s. 130.

54 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, par. 646-648.

55 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, par. 95.

56 S. Chesterman, *An altogether different order: defining the elements of crimes against humanity*, „Duke Journal of Comparative and International Law" 2000, vol. 10, s. 315.

57 Artykuł 50 Protokołu dodatkowego do konwencji genewskich z dnia 12 sierpnia 1949 r. dotyczącego ochrony ofiar międzynarodowych konfliktów zbrojnych, sporządzonego w Genewie dnia 8 czerwca 1977 r., Dz. U. 1992 r., nr 41, poz. 175, załącznik.

58 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, par. 637

59 *Prosecutor v. Kordic & Cerkez,* ICTY, Case No. IT-95-14/2-A, 2004, par. 50; *Prosecutor v. Galic,* ICTY, Case No. IT-98-29-A, 2006, par. 144.

60 *Prosecutor v. Jelisic*, ICTY, Case No. IT-95-10-T, 1999, par. 54; *Prosecutor v. Naletilic & Martinovic*, ICTY, Case No. IT-98-34-T, 2003, par. 235; *Prosecutor v. Mrksic et al.*, ICTY, Case No. IT-95-13/1-T, 2007, par. 442, 458.

and those *hors de combat*[61]. It is considered that the term "population" indicates a larger collective, giving a specific act a collective nature[62].

With the aim of determining whether an attack was actually directed against the civilian population, the following elements should be considered: 1) the means and methods used during the attack; 2) the status and number of victims; 3) the discriminatory nature of the attack; 4) the nature of the acts committed during the attack; 5) the resistance against the attackers[63]. These criteria can be related to the *Blagojević and Jokić* case, where the Chamber acknowledged the group of Bosnian refugees, who became the target of shelling[64] while seeking refuge in Srebrenica, as a civilian population. The Tribunal considered the act to be a crime of persecution against the civilian population with the intent to induce both fear and panic and to force the Bosnian population to leave the town[65]. Committing an act as part of an attack against a civilian population constitutes the most crucial condition that classifies the act to be a crime against humanity. The perpetrator's consciousness primarily relates to the scope or regularity of the attack.

2. Actus Reus elements of Crimes Against Humanity

The *chapeau* elements of crimes against humanity are not the only ones that must be proven for the accused to be found guilty of the act. The accused will be criminally responsible if it is proven that they fulfilled the elements of individual acts constituting the *actus reus* of crimes against humanity[66]. *Actus reus* is an objective element[67], one of the acts enumerated in Article 5 of the ICTY Statute[68] which, if committed as part of a widespread or systematic attack on the civilian population during an armed conflict, constitutes a crime against humanity. As a result, in accordance with Article 5 of the Tribunal's Statute, *actus reus* of crimes against humanity includes murder, extermination, enslavement, deportation,

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61 *Prosecutor v. Limaj et al.*, ICTY, Case No. IT-03-66-T, 2005, par. 186. Zwrot *hors de combat* dosłownie oznacza *poza polem bitwy*.

62 F. Z. Ntouband, *Amnesty for Crimes against Humanity under International Law*, Leiden 2007, s. 62.

63 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, par. 91.

64 *Prosecutor v. Blagojevic & Jokic*, ICTY, Case No. IT-02-60-T, 2005, par. 611.

65 *Prosecutor v. Blagojevic & Jokic*, ICTY, Case No. IT-02-60-T, 2005, par. 611.

66 C. Damgaard, *Individual Criminal Responsibility for Core Crimes – Selected Pertinent Issues*, Berlin 2008, s. 85.

67 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-A, 1999, par. 227.

68 A. Szpak, *Kontrola przestrzegania*..., s. 373.

imprisonment, torture, rape, persecution on political, racial, and religious grounds, and other inhumane acts.

2.1. Murder

The signs of the crime of murder under Article 5 are identical to those of murder under Article 3 of the ICTY Statute, which refers to violations of the laws or martial customs[69]. In the *Kordić and Čerkez* case, it was also recognized that the crime of murder under Articles 5 and 3 of the Statute is identical to the murder mentioned in Article 2, which refers to grave breaches of the 1949 Geneva Conventions[70]. This stems from the fact that the elements of the crime of murder are beyond doubt, as murder is understood as causing the death of the victim through the perpetrator's action or omission[71]. In the *Krstić* case, the Chamber acknowledged that the perpetrator acted or omitted to act with the intent to kill or cause serious bodily injury, still being conscious that his behaviour was likely to lead to the victim's death[72]. Consequently, *actus reus* of the crime of murder consists of the following elements: 1) the victim named in the indictment is dead; 2) the death of the victim was caused by the action or omission of the accused or a person(s) for whose action or omission the accused bears criminal responsibility; 3) the accused or the person(s) for whose action or omission the accused bears criminal responsibility, acted or omitted to act with the intent to kill or cause serious bodily injury, still being conscious that such action or omission could result in the death of the victim[73].

The crime of murder as a crime against humanity, unlike other acts, does not require proof of many elements. To prove the commission of murder, it is crucial to demonstrate that the victim died as a result of the perpetrator's action or omission. However, in order for the perpetrator to be held responsible for committing the crime against humanity in the form of murder, it must be proven that the perpetrator had the intent to kill and was conscious that the act was part of a widespread or systematic attack on the civilian population during an armed conflict.

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69 *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, 2003, par. 631.

70 *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, par. 222, 236.

71 *Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21-T, 1998, par. 424.

72 *Prosecutor v. Krstic*, ICTY, Case No. IT-98-33-T, 2001, par. 485

73 *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 324; *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, par. 236; *Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21-T, 1998, par. 439.

2.2. Extermination

To distinguish the crime of extermination from the crime of murder, it should be emphasized that extermination is characterized by the perpetrator's intent to cause the death of numerous people. Therefore, the scale of the crime constitutes the difference. Criminal liability for the crime of extermination is primarily based on the large number of victims (the mass scale of the act) and the involvement of the accused[74]. For a long time, the Tribunal did not define the elements of extermination, so when the charge was first brought in the *Krstić* case, the Trial Chamber referred to the ICTR's judgment in the *Akayesu* case, The Tribunal recognized that the primary element of extermination is the involvement of the accused or their subordinate in the killing of identified persons[75]. The use of the term "persons" confirms that the crime of extermination occurs when at least two people are its victims.

In the *Stakić* case, the Trial Chamber recognized that the crime of extermination is understood not only as the commission of mass killings or the infliction of conditions causing the death of many people, but also the planning of these acts[76]. Extermination can involve directly killing victims with firearms or indirectly by imposing conditions that ultimately lead to their death[77]. Indirect causation of death may particularly involve depriving victims of food, inadequate protection against extreme weather conditions, or denial of medical care[78].

Consequently, a significant aspect of the crime of extermination is the act or omission of the accused with the intent to kill people on a mass scale[79], which involves a significant number of victims. In accordance with the judgment in the *Lukić and Lukić* case, the Trial Chamber found that there is no minimum number of victims required to meet this criterion, as the scale of a specific extermination crime is assessed based on factors such as the number of victims, the category of victims, the manner of the act, the territory from which the victims came, and its population density[80]. Taking these criteria into account, the Tribunal in the *Lukić and Lukić* case concluded that the killing of 59 people constitutes mass murder and consequently constitutes the crime of extermination[81].

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74 Chesterman, *An altogether different*..., s. 336.
75 *Prosecutor v. Akayesu*, ICTR, Case No. ICTR-96-4-T, 1998, par. 592.
76 *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, 2003, par. 634.
77 *Prosecutor v. Krstic*, ICTY, Case No. IT-98-33-T, 2001, par. 498.
78 *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, 2003, par. 634.
79 *Prosecutor v. Brdanin*, ICTY, Case No. IT-99-36-T, 2004, par. 395.
80 *Prosecutor v. Lukic & Lukić*, ICTY, Case No. IT-98-32/1-T, 2009, par. 938, 943-945.
81 *Prosecutor v. Lukic & Lukić*, ICTY, Case No. IT-98-32/1-T, 2009, par. 945.

As a result, the key factor for incurring criminal liability for the crime of extermination is its mass nature; therefore, extermination must be committed on a large scale[82]. However, due to the lack of precise criteria regarding the scale of this crime, the Tribunal considers the circumstances of its commission on a case-by-case basis.

2.3. Slavery

Another act that constitutes a crime against humanity if committed as part of a widespread or systematic attack against the civilian population during an armed conflict is the crime of slavery. The fundamental element of the crime of slavery is exercising rights[83] of ownership over a specific individual. However, it should be noted at the outset, that ICTY jurisprudence includes not only the crime of slavery, but also the concept of sexual slavery, which is a separate act enumerated in the ICC Statute's definition of crimes against humanity[84].

The first time the charge of slavery was brought before the Yugoslav Tribunal was in the case of *Kunarac, Kovač, and Vuković*. The Trial Chamber referred to the definition of slavery in the 1926 Slavery Convention, which defines slavery as *the status or condition of a person over whom any or all of the powers attaching to the right of ownership*[85] *are exercised.* Ultimately, the Tribunal concluded that under customary international law, slavery as a crime against humanity means exercising some or all of the powers attaching to the right of ownership over a person, with the perpetrator acting with the intent to exercise these powers[86]. Indicators of the crime of slavery include manifestations of control and ownership, restriction or control of a person's autonomy, limitations on or control over freedom of choice or movement, often resulting in profit for the perpetrator[87]. Additionally, exploitation of the person, forced labour involving physical hardship, sexual exploitation, forced prostitution, and human trafficking[88] also indicate the

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82 A. Szpak, *Kontrola przestrzegania*..., s. 389.

83 A. T. Gallagher, *The International Law of Human Trafficking*, Cambridge 2010, s. 213.

84 Artykuł 7 Statutu MTK

85 Artykuł 1 Konwencji w sprawie niewolnictwa, sporządzonej w Genewie dnia 25 września 1926 r., Dz. U. z 1931, nr 4, poz. 21.

86 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 539-540; *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 350.

87 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 542.

88 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 542

commission of the crime of slavery, which ultimately benefits the perpetrator. The fundamental aspect of the crime of slavery is the lack of the victim's consent[89].

In the *Kunarac, Kovač, and Vuković* case, the Tribunal also addressed the issue of sexual slavery. The accused were charged with detention, rape and sexual torture of Muslim women of Bosnian origin in the town of Foča, with some women being taken into slavery by soldiers[90]. The places of detention were later referred to as "rape camps," where Serbian soldiers had direct access to detained girls and women subjected to rape, torture, and humiliation. Therefore, it is crucial that the crime of slavery must be related to a specific purpose, often associated with the commission of other crimes, as is the case with the crime of slavery for the purpose of forced labour. Thus, the mere prolonged deprivation of the victim's liberty cannot be considered the crime of slavery[91].

2.4. Deportation

At the outset, it is necessary to distinguish between deportation and forced displacement, as these concepts are not synonymous[92] under customary international law. Deportation is the forced transfer of a population from one country to another; therefore, deportation involves crossing international borders, while forced displacement is limited to moving people within a single country. As a result, deportation is a separate act enumerated in the definition of crimes against humanity in the ICTY Statute, whereas forced displacement is categorized by the Tribunal as other inhumane acts[93].

In the *Krnojelac* case, recognize the Trial Chamber that deportation involves the forced transfer of people from the territory where they legally reside, contrary to international law, through eviction or another coercive act[94]. A key aspect of deportation is that it is carried out against the will of the population, which has no choice in the matter[95]. The Tribunal also noted that the transfer of people

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89 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 542.

90 P. V. Sellers, *Wartime Female Slavery: Enslavement?*, „The Cornell International Law Journal" 2011, vol. 44, s. 125.

91 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 542.

92 *Prosecutor v. Krstic*, ICTY, Case No. IT-98-33-T, 2001, par. 521.

93 *Prosecutor v. Kupreskic et al.*, ICTY, Case No. IT-95-16-T, 2000, par. 566.

94 *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 474. W tym samym wyroku Izba Orzekająca, powołując się na artykuł 49 Konwencji Genewskiej o ochronie osób cywilnych podczas wojny, uznała, że deportacja jest nielegalna, gdy jest wymuszona, co często wiąże się z użyciem siły fizycznej lub groźbą jej użycia.

95 *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 475.

conducted according to an agreement between political or military leaders or under the auspices of the International Committee of the Red Cross (ICRC) or another neutral organization does not render such transfer voluntary[96]. In relation to the criterion of crossing State borders, it is important to note that these can include both internationally recognized borders and unrecognized ones, i.e., *de facto* borders, an example of which may be changing front lines during an armed conflict[97]. In such situations, deportation is considered the forced resettlement of the population to the territory under actual control of another party to the conflict[98]. Therefore, the relocation of people from Kosovo to Montenegro was recognized as deportation, despite the defensive argument that both territories were within the FRY[99].

2.5. Imprisonment

The Prosecutor before the Tribunal has charged the crime against humanity of imprisonment in merely a few cases. It should be emphasized that imprisonment constitutes a crime against humanity only when it is arbitrary, lacking factual or legal basis[100]. In an attempt to define the crime of imprisonment, the Tribunal referred to provisions of the Geneva Convention, which allow for *the internment of protected persons or the assignment of a compulsory place of residence if absolutely necessary for the security of the State in whose power the persons are*[101]. Any other unlawful imprisonment of civilians constitutes grave violations under Article 2 of the ICTY Statute and the Geneva Conventions of 1949. However, if civilians are arbitrarily imprisoned as part of a widespread or systematic attack against the civilian population during an armed conflict, this act constitutes a crime against humanity.

The charge of imprisonment of civilians was first brought in the case of *Kordić and Čerkez*, in which the Prosecutor stated that the elements of the crime of imprisonment are identical to those of unlawful deprivation of liberty of civilians

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96 *Prosecutor v. Gotovina et al.*, ICTY, Case No. IT-06-90-T, 2011, par. 1739; *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-A, 2006, par. 286; *Prosecutor v. Naletilic & Martinovic*, ICTY, Case No. IT-98-34-T, 2003, par. 523; *Prosecutor v. Simic et al.*, ICTY, Case No. IT-95-9-T, 2003, par. 127.

97 *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, 2003, par. 679.

98 *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, 2003, par. 679.

99 K. Margetts, K. I. Kappos, *Current Developments at the Ad Hoc International Criminal Tribunals*, „Journal of International Criminal Justice" 2011, vol. 9, s. 1160.

100 R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure – second edition*, Cambridge 2010, s. 250.

101 Artykuł 42 Konwencji Genewskiej o ochronie osób cywilnych podczas wojny.

under Article 2 of the Tribunal's Statute[102]. Arbitrary imprisonment means depriving a person of liberty without a fair trial[103]. The Tribunal determined that imprisonment is unlawful when the following conditions are met: 1) the civilian population was detained in violation of Article 42 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War; 2) the procedural guarantees specified in Article 43 of the Convention were not upheld; 3) the imprisonment of civilians occurred as part of a widespread or systematic attack against the civilian population[104].

The argument made in the *Kordić and Čerkez* case leads to the conclusion that the definition of crimes against humanity in the form of imprisonment is limited to that found in Article 2 of the Statute. However, in the *Krnojelac* case, the Trial Chamber disapproved of the conclusion above, stating that the crime against humanity of imprisonment means any form of arbitrary physical deprivation of liberty of a civilian, as long as it meets the *mens rea* criterion in Article 5 of the Statute[105]. As a result, the Tribunal determined that the crime of imprisonment consists of the following elements: 1) the person is deprived of liberty; 2) the deprivation of liberty is arbitrary, i.e. without any legal basis; 3) the perpetrators or persons for whom they are criminally liable, acted or failed to act as a result of which the person is deprived of physical liberty, since the perpetrator acted or omitted to act intending the arbitrary deprivation of liberty or was conscious that the behaviour could lead to this deprivation[106]. The Trial Chamber, in subsequent cases before the Tribunal, clarified that imprisonment constitutes any form of physical deprivation of liberty, except for those resulting from a conviction for a crime[107].

2.6. Torture

The prohibition of torture has an *erga omnes* character[108], and its definition is the subject of numerous international documents[109]. Although torture is clearly defined in international law or international humanitarian law, the Statute of

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102 *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, par. 292; *Prosecutor v. Simic et al.*, ICTY, Case No. IT-95-9-T, 2003, par. 59.

103 *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, par. 299.

104 *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, par. 303.

105 *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 112.

106 *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 115.

107 *Prosecutor v. Simic et al.*, ICTY, Case No. IT-95-9-T, 2003, par. 66.

108 *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/1-T, 1998, par. 151.

109 N. Barbero, *La tortura como crimen contra la humanidad*, „Revista de Derecho Penal y Criminología" 2011, vol. 3, n. 6, s. 182.

the International Criminal Tribunal for the Former Yugoslavia (ICTY) does not explain this concept[110]. In qualifying an act as the crime of torture, the Tribunal referred to the provisions of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment[111], in which Article 1 defines torture as *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining information or a confession from that person or a third person, as a punishment for an act committed or suspected to have been committed by that person or a third person, or to intimidate or coerce that person or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of a public official or other person acting in an official capacity.* In this definition, the following elements can be distinguished: 1) any act (including omission); 2) pain or suffering inflicted intentionally; 3) the infliction of pain and suffering has a specific purpose; 4) torture is committed by a public official[112]. Given that, as in the case of the crime of murder or imprisonment, torture may constitute both a crime against humanity under Article 5 of the Statute and a grave violation of the 1949 Geneva Conventions under Article 2 of the Statute, the Tribunal has held that the definition of torture is identical regardless of the article that forms the basis for the charges against the accused[113]. Consequently, the decisive element in qualifying an act as the crime of torture is the context in which it was committed, namely the purpose of the inflicted pain or suffering, the intent, and the identity of the perpetrator.

In accordance with the reasoning of the Trial Chamber in the *Delalic* case, there is no requirement for torture to be committed for one of the above-mentioned purposes, as the phrase "*any other purpose related to discrimination*" makes it an open-ended catalogue[114], and the earlier examples aim to illustrate the nature

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110 R. Lord, *The liability of non-state actors for torture in violation of international humanitarian law: an assessment of the jurisprudence of the International Criminal Tribunal for the former Yugoslavia*, „Melbourne Journal of International Law" 2003, vol. 4, s. 113-115.

111 Konwencja w sprawie zakazu stosowania tortur oraz innego okrutnego, nieludzkiego lub poniżającego traktowania albo karania, sporządzona w Nowym Jorku dnia 10 grudnia 1984 r., Dz. U. z 1989 r., nr 63, poz.

112 A. Szpak, *Ewolucja definicji tortur w orzecznictwie Międzynarodowego Trybunału Karnego ds. Zbrodni w byłej Jugosławii*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2009, vol. 7, s. 150.

113 *Prosecutor v. Brdanin*, ICTY, Case No. IT-99-36-T, 2004, par. 482; *Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21-T, 1998, par. 468-469; *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 178.

114 *Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21-T, 1998, par. 470.

of the act itself. A specific purpose of torture is to humiliate the victim[115]. Further analysing the essence of the crime of torture, the Tribunal in the *Krnojelac* case referred, among other things, to the phrase "*severe pain or suffering*," considering that only acts of gravity can be considered torture. Therefore, mere interrogation or minor violations of bodily integrity do not meet this criterion[116]. To assess whether a specific act or omission of the perpetrator constitutes the crime of torture, the following elements should be considered: the nature and context of the inflicted pain, the intent to inflict suffering, the physical condition of the victim, the relationship of subordination between the victim and the perpetrator and the duration of the period during which the victim is subjected to various forms of mistreatment[117]. It is noteworthy that deprivation of liberty itself does not, in principle, constitute the crime of torture; however, if due to its severity, duration, and purpose, the deprivation causes the victim severe physical and mental suffering, it may be regarded as the crime of torture[118].

It seems important that in the *Kunarac* case, the Trial Chamber held that international humanitarian law does not require the participation of a public official or another person performing a similar function for an act to be classified as the crime of torture[119]. The Tribunal identified several acts which, by their very nature, constitute the crime of torture. These include: beating; sexual violence; prolonged denial of sleep, food, hygiene, or medical care; threats of torture, rape or killing the victim's family members , and bodily mutilation[120]. Other methods used during torture include: nail or tooth extraction, burning, electric shocks, waterboarding, administering drugs to victims in psychiatric institutions or detention centers[121]. In the *Kunarac* case, the Tribunal also included rape in the category of acts which by their nature constitute torture, as it causes severe pain and suffering, both physical and mental[122], with the intent of humiliating the victim.

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115 *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/1-T, 1998, par. 162; *Prosecutor v. Kvocka et al.*, ICTY, Case No. IT-98-30/1-T, 2001, par. 157.

116 *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 181.

117 *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 182.

118 *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 183.

119 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 496.

120 *Prosecutor v. Kvocka et al.*, ICTY, Case No. IT-98-30/1-T, 2001, par. 144.

121 A. Szpak, *Ewolucja definicji*..., s. 153.

122 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, par. 150.

2.7. Rape

Rape is one of the most severe and traumatic forms of sexual violence inflicted on civilians during armed conflicts[123]. During the Yugoslav conflict, rape victims were not only women or girls, but also men, as evidenced by numerous documented cases of rape committed against men and boys[124]. Unlike the Rwandan Tribunal, the ICTY is considered to have a relatively consistent strategy for prosecuting those responsible for the crime of rape, exemplified by the *Kunarac* case, which was the first case before the ICTY to address the charge of committing the crime of torture in the form of sexual violence and the crime of rape[125]. In an attempt to define the concept of rape, the Tribunal initially referred to the jurisprudence of the International Criminal Tribunal for Rwanda[126], concluding that rape constitutes a physical assault of a sexual nature committed under coercive circumstances[127]. Consequently, the Tribunal identified the following elements of the crime of rape: 1) sexual penetration; 2) coercion or use of force or threats of force against the victim or a third person[128]. Analysing the circumstances surrounding rape, the Tribunal distinguished three situations: 1) the sexual act is accompanied through force or threats of its use against the victim or a third person; 2) the sexual act is accompanied by force or other circumstances that render the victim defenseless or incapable of expressing dissent; 3) the sexual act occurs without the consent of the victim[129]. It is important to note that the Appeals Chamber in the *Kunarac* case acknowledged that the victim's resistance is not necessary for an act to be considered rape[130]. This is since the circumstances of the rape leave the victim in

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123 R. Manjoo, C. McRaith, *Gender-Based Violence and Justice in Conflict and Post-Conflict Areas*, „Cornell International Law Journal" 2011, vol. 44, s. 11-12; S. Sivakumaran, *Sexual Violence Against Men in Armed Conflicts*, „The European Journal of International Law" 2007, vol. 18, no. 2, s. 257-258.

124 Final Report of United Nations Commission of Experts Established Pursuant to the Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 and U.N. Doc. S/1994/674/Add. 2, Annex IX, Rape and Sexual Assault.

125 H. Nichols Haddad, *Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals*, „Human Rights Review" 2011, vol. 12, s. 110-111.

126 *Prosecutor v. Akayesu*, ICTR, Case No. ICTR-96-4-T, 1998, par. 597.

127 Trybunał użył powyższej definicji między innymi w sprawie *Delalicia, Kunaracia* oraz *Furundzija.*

128 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 437; *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/1-T, 1998, par. 185.

129 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 442.

130 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, par. 128.

a state that prevents resistance, being particularly vulnerable and unable to resist the perpetrator's actions due to physical or mental incapacity[131].

It is necessary to state that rape was not merely a "by-product" of the Yugoslav conflict, but was systematically committed to terrorize communities and forcibly displace them[132]. The so-called "rape camps" where women and girls were detained and systematically raped, and if pregnancies resulted from these rapes, they were kept until childbirth to prevent them from having an abortion[133]. This conduct confirms that rape, which is only one form of sexual violence, was part of the policy of the parties to the conflict, aimed at terrorizing, intimidating, and humiliating the civilian population.

2.8. Persecution on Political, Racial, and Religious Grounds

Another act that can be recognized as a crime against humanity is persecution on political, racial, and religious grounds. Persecution is most often a combination of several acts, which makes it difficult to define uniformly. As a result, this act has not been defined in international criminal law or even in major national legal systems[134]. What is common across all forms of persecution is its *mens rea* element, which involves committing persecution with the intent to discriminate against the victims on the grounds listed in Article 5 of the ICC Statute[135]. This intent to discriminate relates exclusively to the crime of persecution. The analysis of the phenomenon of persecution itself should begin with the statement that it involves the deliberate deprivation of a person's fundamental rights[136]. For example, in refugee law, persecution is understood as a threat to life, liberty, or serious violation of human rights based on race, religion, or political beliefs[137].

Due to the presence of the conjunction "or" in the enumeration of persecution grounds, it should be noted that the Trial Chamber in the *Tadić* case found that it is sufficient to prove the intent of the accused to discriminate on any of the

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131 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 446.

132 H. Nichols Haddad, *Mobilizing the Will*..., s. 113.

133 Tamże, s. 114.

134 F. Z. Nuband, *Amnesty for*..., s. 76.

135 F. Pocar, *Persecution as a Crime Under International Criminal Law*, „Journal of National Security Law and Policy" 2008, vol. 2, s. 358.

136 R. A. A. Fernández, *Persecución como crimen contra la humanidad*, Barcelona 2011, s. 249.

137 Biuro Wysokiego Komisarza Narodów Zjednoczonych doR. A. A. Fernández, *Persecución como crimen contra la humanidad*, Barcelona 2011, s. 249. Spraw Uchodźców, *Zarys i tryb ustalania statusu uchodźcy – zgodnie z Konwencją dotyczącą statusu uchodźcy z 1951 r. oraz Protokołem dodatkowym do niej z 1967 r.*, Genewa 1992, s. 21.

three enumerated grounds for the act to qualify as persecution[138]. The Tribunal held that persecution means an act or omission by the perpetrator with the intent to harass, cause suffering, or discriminate against the victim in any manner based on political, racial, or religious reasons[139]. Persecution can take various forms, which essentially involve depriving individuals of rights based on their race, religion, or political beliefs. The most common forms of persecution include: banning certain religious practices; systematic and prolonged detention of individuals representing a particular political, religious, or racial group; prohibition of using the national language, even in private; and systematic destruction of monuments or buildings belonging to a specific social or religious group[140].

2.9. Other Inhumane Acts

When analysing this concept, it is difficult to provide a uniform definition or even common elements. The Tribunal has recognized that other inhumane acts constitute a category for remaining acts not explicitly listed in Article 5 of the ICC Statute[141]. Considering the reasoning of the Tribunal, this legal qualification, which then constitutes the basis for bringing charges without defining the specific elements of the act, contradicts the principle of *nullum crimen sine lege*, as one cannot be convicted of an act not defined by law, which in this case in the ICC Statute. However, it must be remembered that as for international crimes, particularly crimes against humanity, every act within its scope must also include *chapeau* elements, which in some way specifies this category and, in light of the wording of entire Article 5, can be considered legal qualification of acts covered by this category. Additionally, the Tribunal stated that the concept of other inhumane acts cannot be seen as a violation of the principle of *nullum crimen sine lege*, as it is part of customary international law[142].

In the *Galicia* case, the Tribunal held that other inhumane acts include acts consisting of the following elements: 1) an act or omission of similar gravity to other acts enumerated in Article 5 of the Statute; 2) the act or omission caused serious suffering or mental or physical harm or constituted a severe attack on

138 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, par. 712. Izba Orzekająca uznała, iż międzynarodowe prawo zwyczajowe nie wymaga istnienia łącznie wszystkich trzech powód prześladowania. Istnienie chociażby jednego z nich stanowi wystarczającą podstawę, aby konkretny czyn o charakterze dyskryminacyjnym uznać za prześladowanie

139 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, par. 698.

140 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, par. 703.

141 *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, par. 442.

142 *Prosecutor v. Dordevic*, ICTY, Case No. IT-05-87/1-T, 2011, par. 1609.

human dignity; 3) the perpetrator acted or omitted with the intent[143]. To assess the significance or gravity of the act, one must consider its nature and context, the age and gender of the victim, and the consequences of the act committed, particularly those concerning the victim's mental or physical health[144].

Most often, the Tribunal has included in the category of other inhumane acts forced relocation, which, unlike deportation, involves relocating a population against its will or without consent to another area within the same State[145]. A necessary element to prove the crime of forced displacement is the fact that the civilian population had legally stayed in the territory from which it was moved,[146] and there is no legal basis for such displacement in international law[147].

Examples of other acts falling into this category include forced pregnancy and forced disappearance[148]. The Court made an interesting legal qualification of the alleged act in the *Tadić* case, where it was recognized that, for example, releasing fire extinguisher contents into the bodies of deceased victims constitutes another inhumane act, emphasizing that it can also be committed against a human body[149].

Other inhumane acts, being a reflection of customary international law, allow for individual criminal liability for committing acts not explicitly listed in Article 5. Therefore, it constitutes a certain guarantee that, regardless of the type of act, the perpetrator will be held accountable for the crime committed against humanity if a specific act meets the *chapeau* elements in Article 5 of the ICC Statute and is comparable in nature to other acts enumerated in that article.

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143 *Prosecutor v. Galic*, ICTY, Case No. IT-98-29-T, 2003, par. 152; *Prosecutor v. Vasiljevic*, ICTY, Case No. IT-98-32-T, 2002, par 234; *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, par. 130.

144 *Prosecutor v. Galic*, ICTY, Case No. IT-98-29-T, 2003, par. 153; *Prosecutor v. Vasiljevic*, ICTY, Case No. IT-98-32-T, 2002, par. 235.

145 *Prosecutor v. Krajisnik*, ICTY, Case No. IT-00-39-T, 2006, par. 723-724; *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-A, 2006, par. 317; *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-A, 2003, par. 229, 233.

146 *Prosecutor v. Dordevic*, ICTY, Case No. IT-05-87/1-T, 2011, par. 1613; *Prosecutor v. Brdanin*, ICTY, Case No. IT-99-36-T, 2004, par. 540.

147 *Prosecutor v. Krajisnik*, ICTY, Case No. IT-00-39-A, 2009, par. 308, 333; *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-A, 2003, par. 222

148 *Prosecutor v. Kupreskic et al.*, ICTY, Case No. IT-95-16-T, 2000, par. 566.

149 *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, par. 748.

Conclusion

The definition of crimes against humanity used by the ICTY is not entirely identical to the definition of such crimes in the Rome Statute of the ICC. This is primarily since the Rome Statute was developed based on the practice of previous *ad hoc* tribunals, including the ICTY. Therefore, the definition of crimes against humanity in the Rome Statute additionally includes following forms of *actus reus*: sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and any other forms of sexual violence of comparable gravity; enforced disappearances; and the crime of apartheid. For example, enforced disappearances frequently occurred during the conflict in the territory of the Former Yugoslavia. Consequently, in some cases, the ICTY charged crimes against humanity in the form of enforced disappearances, which fell into the category of "other inhumane acts."

The practice of the ICTY effectively illustrates how to interpret the definition and individual elements of crimes against humanity, the victims of which are civilians as part of an ongoing armed conflict, regardless of its nature. The practice of the ICC is equally important; however, the preparatory and judicial proceedings conducted or currently being conducted by the ICC do not have the so-called "common denominator" of "attacks directed against civilians within an ongoing armed conflict". Taking into account the fact that the cases of crimes against humanity concern different situations in different countries, the ICC's jurisdiction is not territorially or temporally limited.

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War Crimes as One of the Most Serious Crimes Under International Law

Introduction

Pervasive media reports on crimes committed by Russian troops in Ukraine, the Hamas terrorist organization against Israeli civilians, and attacks by Houthi rebels on merchant ships in the Red Sea, the extermination of the ethnic Muslim minority of Uyghurs by the People's Republic of China warrant an analysis of war crimes in terms of their legal status, definitions and examples from case law.

Armed conflicts are not only prohibited by international law because they violate the fundamental human rights and civil liberties, but because they are inhumane in destroying the world order that guarantees nations peace and conditions conducive to development and advancement of prosperity. There is further a point of human dignity, an inalienable, innate and natural human right that is taken away and trampled when war crimes are committed, both by state entities and by non-state actors (NSAs), the latter gaining increasing notoriety.

This analysis has been inspired by the ongoing war in Ukraine, just across Poland's border, started by the Russian Federation's unlawful aggression against an independent state of Ukraine. One should bear in mind that the starting point of the war in Poland's eastern neighbour was not February 2022, but 2014, when Russian "little green men" invaded Crimea, which began the illegal occupation of this region of Ukraine by Russian troops. That is why it is crucial to identify the legal bases that define and penalize war crimes laid out so powerfully in the basic

source of international criminal law, that is, the Rome Statute of the International Criminal Court (ICC) of 1998.[1]

1. International criminal law

International criminal law is one of the branches of contemporary international law. It is a body of international legal norms that form the basis for individual criminal liability (for both states and private persons, whether individual citizens or stateless persons). International criminal liability is then exacted before international courts or tribunals. International criminal law is therefore a body of substantive and procedural norms that apply to individuals who commit crimes of an international nature, i.e. those who commit crimes under international law, as opposed to criminals who violate the national law of a state.

However, public international law, including the international criminal law at hand, is governed by different principles than national law, including national criminal law. It is so because at the heart of the international order lies the principle of the sovereignty of states. Sovereign states are the primary subjects of international law; they are the basic actors in international relations; they initiate and give form to law between nations; finally, they decide on the scope of duties that they would be willing to impose on themselves. Hence, so, far, they have not provided for a mandatory judiciary in international law. International courts and tribunals exercise jurisdiction only in relation to states that have signed the Statute (or another treaty establishing the body) or in relation to a state in the territory of which crimes were committed, provided that the States Parties express a political will to establish such an *ad hoc* tribunal. Now, these two scenarios carry a danger that a would-be defendant may want to use a gap to escape criminal liability under international law.

In the first case, where the States Parties to the Statute of the International Court are concerned, a party may at its own discretion, without giving reasons – in accordance with the principle of sovereignty - join or leave the Court. The ICC operates outside the structures of the United Nations (UN),[2] and currently has 123 members, being State Parties to the Rome Statute. However, initially, as

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1 Statute of the International Criminal Court, done at Rome on 17 July 1998 (Journal of Laws of 2003, No. 78, item 708).

2 It should not be confused with the International Court of Justice (ICJ), which is also located in The Hague, the capital of the Netherlands, like the ICC. The ICJ is an integral body of the United Nations.

many as 137 states signed the Statute as the founding treaty of the Court. Both the Russian Federation and Ukraine are among the countries that are not States Parties to the ICC. Ukraine has submitted two declarations of submission to the jurisdiction of the Court, which allows for the current investigation to be conducted. Noteworthy from the point of view of the matters of international criminal law at hand, Russia withdrew its membership bid following the unfavourable report of the Court in 2016.[3] The report urged Russia to cease its illegal aggression and occupation of the Crimean Peninsula in 2014 and to immediately pull back Russian troops from Crimea. Russia responded quickly with an attempt to narrate that legal development as a politically motivated attack on its core interests, arguing that the ICC had issued only 4 judgements during its entire term of operation, while participation in it had cost the Russian Federation a billion dollars. Moreover, it claimed that it had been the people of Crimea who democratically voted for their return to the motherland, and therefore Russia would expect the people's vote given in the referendum to be respected.[4]

Why? Well, one of the biggest deficiencies of international law aside, namely the lack of international enforcement mechanisms, Russia, now an entity outside the ICC system as a state not party to the Statute, could not be subject to the jurisdiction of the Court. Interestingly, Ukraine signed the Statute but has never ratified it, which means that Kyiv has never decided to formalize their membership in the ICC out of fear of possible repercussions from Russia. After all, it was in Russia's interest to keep Ukraine out of the international criminal system.[5]

As for the other cases, where states lack the political will to establish an *ad hoc* military tribunal, the best example is the criminal case of former Kenyan President Uhuru Kenyatta.[6] It is also a glaring illustration of the (lost) struggle for international justice where economic gain comes into play.[7] Uhuru Kenyatta was charged with crimes against humanity, including killing, rape, persecutions and deportations. The decisions he had made caused over a thousand deaths, as per official records alone, without taking into account unofficial figures. However,

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3 Report on Preliminary Examination Activities (2016) of 14 November 2016.

4 I. Marchuk and A. Wanigasuriya, *The ICC and the Russia-Ukraine War,* https://www.asil.org/insights/volume/26/issue/4 (accessed: 16.04.2024).

5 J. Siekiera, *Odpowiedzialność karna za zbrodnie prawa międzynarodowego a prawno-polityczne możliwości ukarania sprawców wojny na Ukrainie*, "Kwartalnik Prawa Międzynarodowego" 2023, vol. 3.

6 Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11.

7 For more on this, see: J. Siekiera, *Terroryzm jako zbrodnia prawa międzynarodowego w kontekście wojny prawnej (lawfare)*, "Kwartalnik Prawa Międzynarodowego" 2024, vol. 2.

in view of Kenya's political interests, the witnesses withdrew their testimonies.[8] The official reason for ending the investigation in 2015 before the Court was "insufficient evidence [...] and interference with witnesses".[9]

Infamously, not a single political leader of the country, a head of state, has so far been held criminally responsible for war crimes in a trial before any international court or tribunal. Some international lawyers will question this fact, pointing to the well-known 2012 judgement of the Residual Special Court for Sierra Leone. It passed a conviction of former Liberian President Charles Taylor for war crimes and crimes against humanity.[10] Still, the substantive scope of the jurisdiction of the Court primarily covered crimes codified under the national law of Sierra Leone, and the internationalized court itself was established in agreement with the UN Secretary General based on national law and domestic judges, which is entirely different from the establishment of international criminal tribunals. Therefore, other lawyers, the author of this paper included, consider the judgements of this Court to be domestic judgements, even if issued in cooperation with international bodies, and not international judgements in the strict sense. That Court falls into a separate category of courts, i.e. mixed, hybrid or internationalized courts. In addition to the Sierra Leone dictator, hybrid courts have decided war crime cases for East Timor, Kosovo and Cambodia.[11]

2. Legal bases

The act of aggression committed by the Russian Federation against Ukraine, its territory and civilian population, fulfils the elements of the crime of aggression under the jurisdiction of the ICC. Then, individual actions within the crime of

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8 Cf. ICC, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta*: https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-withdrawal-charges-against-mr (accessed: 16.04.2024).

9 Associated Press, *ICC prosecutors halt 13-year Kenya investigation that failed to produce any convictions*: https://apnews.com/article/kenya-international-court-ruto-kenyatta-3554b42f48f-0b2ad8327e5a3da9fad42; Coalition for the International Criminal Court, *Uhuru Kenyatta*: https://www.coalitionfortheicc.org/cases/uhuru-kenyatta (accessed: 16.04.2024).

10 Prosecutor v. Charles Taylor, SCSL-03-01-T.

11 M. Ścibura, *Hybrydowe sądownictwo karne na przykładzie Sądu Specjalnego dla Sierra Leone i procesu Charlesa Taylora*, "Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne" 2022, vol. 42, cited in: C.P.R. Romano, *Mixed Criminal Tribunals,* [entry in:] *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford 2006.

aggression fulfil the elements of other international crimes, including war crimes. Crimes of international law are acts committed in the international arena against the paradigm of international law established in the Charter of the United Nations. The first article of the Charter establishing the United Nations states that the purpose of the UN is to "maintain international peace and security".[12]

According to the Statute of the ICC, also known as the Rome Statute, international crimes are divided into four categories, which at the same time form the scope of the Court's jurisdiction: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[13] These are crimes so serious, "the most serious crimes of concern to the international community as a whole", to cite the Statute, that statutes of limitations do not apply and a person guilty of such a crime can be brought to justice even decades after it was committed.

This analysis covers war crimes (in the plural) as regulated under Article 8 of the Rome Statute. The author finds it justified not only to cite the 59 editorial units of the Article but also to add a commentary to those sections that may be prone to misinterpretation.[14]

Before defining war crimes for its purposes, that is, for the purposes of the cases that the Court decides, the ICC Statute reserves jurisdiction respecting such crimes against international law "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes".[15] This means that the Court will not recognize as war crime a one-time attack *per se* on specific targets listed in the definition of war crimes, where the attack is carried out in separation from full-scale warfare that is dictated by a strategic plan of the aggressor state. This does not mean, however, that a State Party cannot bring such a case to the Court, arguing that just such a one-off, small-scale attack constitutes a war crime.

The Rome Statute of the International Criminal Court recognizes as war crimes grave breaches of the four Geneva Conventions[16] of 1949,[17] which form the quintessence and legal basis of the International Humanitarian Law of Armed

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12 Charter of the United Nations, Statute of the International Court of Justice and Agreement establishing the Preparatory Commission of the United Nations of 15 October 1945 (Journal of Laws of 1947, No. 23, item 90).

13 Article 5 of the ICC Statute.

14 The discussion and legal analysis of the law of war form the contribution of the author in her capacity as a legal advisor (LEGAD) and consultant in military institutions, primarily in training centres of the North Atlantic Treaty Organization (NATO).

15 Article 5(1) of the ICC Statute.

16 Article 5(2)(a) of the ICC Statute.

17 Geneva Conventions for the Protection of War Victims signed at Geneva on 12 August 1949 (Journal of Laws of 1956, No. 38, item 171).

Conflict, "other serious violations of the laws and customs applicable in international armed conflict",[18] and also, "in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause".[19]

It is these three editorial units (paragraphs (a), (b) and (c)) of Article 8 of the ICC Statute that establish three separate subcategories of war crimes, or rather their enumerative examples. The first group covers the most obvious crimes committed during an armed conflict against protected persons or property (items (i) to (viii), i.e. 8 manifestations). The second group consists of crimes violating international law during an international conflict (items (i) to (xxvi), i.e. 26 examples). The last, third subgroup lists war crimes committed during a non-international conflict, i.e. an armed confrontation, where at least one of the parties is a non-state armed group, consisting of irregular forces and conducting guerilla warfare.[20]

War crimes in the first subgroup are:

- wilful killing;
- torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering, or serious injury to body or health;
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement, and
- taking of hostages.

These war crimes (referred to as core crimes, as they will be committed during armed conflict most often, and given their highest gravity, a belligerent will typically resort to this catalogue of crimes with a potential view to forcing the adversary to surrender quickly) constitute either violations of legal prohibitions and

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18 Article 5(2)(b) of the ICC Statute.

19 Article 5(2)(c) of the ICC Statute.

20 M. Marcinko, *Normatywny paradygmat prowadzenia działań zbrojnych w niemiędzynarodowym konflikcie zbrojnym*, Pressscom, Wrocław 2019.

restrictions on the conduct of warfare, or crimes committed against persons or property protected by humanitarian law. The underlying regulations for these can be found in the above-mentioned Geneva Conventions for the Protection of War Victims. These are: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. The Conventions set out, *inter alia*, the principles of work for prisoners of war or their rights in a prisoner of war camp, military necessity as one of the main principles of the law of war, and unjustified inhumane actions against the civilian population and members of the enemy's armed forces. Hence, the understanding of the concepts and norms put in place by the Geneva Conventions, which the Rome Statute only upholds without explaining in more detail, is absolutely key.

The second subcategory of war crimes covers crimes other than those listed in the first group and which are applicable in particular to an international conflict. This category therefore does not apply to internal disturbances and tensions, such as riots and isolated or sporadic acts of violence. These are:

- intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

- making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- killing or wounding treacherously individuals belonging to the hostile nation or army;
- declaring that no quarter will be given;
- destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- pillaging a town or place, even when taken by assault;
- employing poison or poisoned weapons;
- employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods

of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 (Amendments) and 123 (Review of the Statute);

- committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f),[21] enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;

The catalogue of war crimes committed during international conflicts lists a number of violations of the basic principles of the law of war, such as the prohibition of using persons as human shields, the prohibition of conducting warfare in an impermissible manner, e.g. through the use of treachery or certain types of weapons (such as cluster munitions), or committing acts of theft or destruction that are not justified by military necessity. These principles are also regulated in the doctrine of international law, in its branch of the law of war. Although with the advent of new technologies some manifestations of war crimes will no longer be so relevant, unconventional warfare, also known as hybrid or irregular warfare, does not exclude the use of old war methods or committing war crimes, such as the use of poisoned weapons in the first place. Secondly, in accordance with the interpretation of international law, the understanding of specific norms should be extended to cover their contemporary equivalents, e.g. the prohibited conscription of prisoners of war into the armed forces of the enemy cannot be

[21] The Article reads as follows: ""Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."

advertised via social media, nor is it allowed to use social media to announce that no quarters will be given.

Finally, the third subgroup of war crimes lists those committed in non-international conflicts. The examples are as follows:

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- taking of hostages;
- the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable
- intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- pillaging a town or place, even when taken by assault;
- committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;[22]
- conscripting or enlisting children under the age of fifteen years into the armed forces or groups, or using them to participate actively in hostilities;

[22] Article 3, common to all four Geneva Conventions, sets out the duties of states during a non-international armed conflict, concerning primarily the protection of persons not (any more) taking part in hostilities and providing the International Committee of the Red Cross with access to those in need.

- ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- killing or wounding treacherously a combatant adversary;
- declaring that no quarter will be given;
- subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war.

Clearly, some of the war crimes overlap in the second and third subcategories, that is, in situations of international and non-international armed conflicts. Importantly, the ICC follows the interpretation contained in the "Elements of Crimes". The document assists the International Criminal Court in the analysis and application of Articles 6, 7 and 8 of the Rome Statute.[23] As regards the interpretation and subsequent issuance of indictments, the ICC decides in accordance with the principle that there is no requirement for the perpetrator (war criminal) to make a legal assessment of the existence of an armed conflict (whether it is a war or not) or its nature (international or non-international). Apart from the awareness of the legal assessment, there is no requirement either for the perpetrator to be aware of the facts that led to the determination of the nature of the conflict. All that is required is awareness of the factual circumstances, as suggested by the wording that war crimes/the conduct "took place in the context of and was associated with an international armed conflict/ an armed conflict not of an international character".[24]

3. The work of criminal tribunals

International criminal law developed significantly in the second half of the 20th century, when, just after World War II, international military tribunals were established, the Nuremberg Tribunal and the Tokyo Tribunal. The purpose of

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23 Introduction to the Elements of Crime: International Criminal Court, *Elements of Crime:* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf (accessed: 16.04.2024).

24 Ibid.

those first ever military tribunals in the history of international law was to try war criminals from the Axis countries, and thus the perpetrators and losers of the war. The Nuremberg Principles were then laid down, according to which any individual who commits a crime of concern to the international community is criminally responsible for it and is liable to punishment.[25]

During the Nuremberg Trials before the Military Tribunal in Nuremberg, which was in session from 20 November 1945 to 1 October 1946, 24 major criminals were indicted. In the same period, the International Military Tribunal for the Far East was established in Tokyo. This was preceded by the work of the Far Eastern and Pacific Sub-Commission in Chungking. The work of the Tribunal, as in the case of the Nuremberg Tribunal, was based on The Hague Conventions (after all, the Geneva Conventions were not drawn up until 1949!) on the laws and customs of war, as well as the Geneva Conventions of 1929.[26]

The next institutional step in punishing the crime of genocide was the establishment in 1993 and 1994 of two *ad hoc* tribunals to prosecute war crimes committed in the former Yugoslavia and in Rwanda. Before we discuss their case law briefly, one should take note of the proceedings before the permanent international court, the ICC in The Hague. The first person to be convicted by the International Criminal Court was Thomas Lubanga Dyilo, founder of the Union of Congolese Patriots, a militia formed in 2000 in the northern part of the Democratic Republic of the Congo. That turning point in the history of the Court took place in 2012, more than a decade after the institution of the Rome Statute. Lubanga was sentenced to 14 years in prison for committing war crimes of conscripting and using children under the age of fifteen in hostilities.[27] The Appeals Chamber upheld those findings two years later, making the judgement final.[28]

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25 A. Szpak, *Zbrodnie wojenne a zbrodnie przeciwko ludzkości w orzecznictwie międzynarodowych trybunałów karnych (kryteria różnicowania),* "Państwo i Prawo" 2012, vol. 1.

26 P. Łubiński, *Sądownictwo międzynarodowe w kontekście rozwoju międzynarodowego prawa humanitarnego*, [in:] M. Marcin (ed.), *Osiągnięcia i wyzwania międzynarodowego prawa humanitarnego,* PCK, Kraków 2011.

27 Prosecutor v. Thomas Lubanga Dyilo, Judgement pursuant to Article 74 of the Statute (ICC-01/04-01/06-2842). Decision on Sentence pursuant to Article 76 of the Statute (ICC-01/04-01/06-2901),

28 Prosecutor v. Thomas Lubanga Dyilo, Public redacted Judgement on the appeal of Mr Thomas Lubanga Dyilo against his conviction (ICC-01/04-01/06-3121-Red); Judgement on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute" (ICC-01/04-01/06 A 4 A 6).

The second person from the Democratic Republic of the Congo convicted by the International Criminal Court was Germain Katanga.[29] In 2014, the Congolese self-proclaimed leader of the paramilitary group Patriotic Resistance Force was found guilty of war crimes committed during an attack on the village of Bogoro in the eastern part of the Democratic Republic of the Congo in 2003. The Court pointed to four counts of war crimes committed by Katanga: murder, attacking civilians, destruction of property and pillaging.

Bosco Ntaganda was the third person, after Lubango and Katanga, convicted in proceedings before the ICC, with war crimes being at the core of the charges. The Court issued the judgement on 8 July 2019, finding Ntaganda guilty of committing war crimes and crimes against humanity in the Congolese province of Ituri in 2002-2003.[30] Like in the case of the first war criminal in the history of the ICC, acts constituting war crimes also included conscripting minors into military structures and directly attacking civilian infrastructure.

Finally, the recent 2017 case of Ugandan Dominic Ongwen 2017 is tragic in many ways, showing how the status of a victim (child soldier) can over time be made into that of a victim-perpetrator and then a perpetrator.[31] Noteworthy, among the 70 counts of war crimes, Ongwenda committed the same acts that had once been committed against himself. His conduct fulfilled the elements of a range of war crimes, including those targeting bodily integrity and sexual freedom.[32]

The Tokyo Tribunal was the first to identify rape during war as one of the serious war crimes. From a cultural perspective, sexual assault during warfare was considered a prize of war and compensation for the hardships of combat. Noteworthy, it was the International Criminal Tribunal for the Far East that took a decisive approach to the crime of sexual violence committed by war criminals against civilians, about which the Nuremberg Tribunal remained silent.[33] Article 5c of the Charter of the International Criminal Tribunal for the Far East provided the legal basis that was subsequently used in case law to establish responsibility for "war crimes, including rape committed by persons under command".[34] The rape

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29 Prosecutor v. Germain Katanga (ICC-01/04-01/07).

30 Prosecutor v. Bosco Ntaganda, Judgement (ICC-01/04-02/06-2359).

31 P. Gacka, *Przegląd orzeczeń i decyzji Międzynarodowego Trybunału Karnego*, "Głos Prawa: Przegląd Prawniczy Allerhanda" 2012, vol. 1(7)/6.

32 Prosecutor v. Dominic Ongwen, Trial Judgement (ICC-02/04-01/15).

33 A. Szych, *Wpływ Międzynarodowego Trybunału dla Dalekiego Wschodu na rozwój Międzynarodowego Prawa Humanitarnego Konfliktów Zbrojnych w aspekcie przemocy seksualnej*, "Krakowskie Studia Małopolskie" 2023, vol. 3(39).

34 International Military Tribunal for the Far East Judgement of 4 November 1948, [available in:] International Military Tribunal for the Far East, Judgement of 12 November 1948, in

of Nanking, a war crime committed by Japanese soldiers against 20-80 thousand Chinese women, with about 200 thousand murdered, is commonly cited over this point.[35]

According to the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) of 25 May 1993, the Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The ICTY has tried individuals who committed, or ordered to be committed, grave breaches of the Geneva Conventions, "namely the following acts directed against persons or property protected by the provisions of those Conventions: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the armed forces of a hostile power; wilfully depriving a prisoner of war or a civilian of the right of fair and regular trial; and taking civilians as hostages".[36]

In turn, the Statute of the International Criminal Tribunal for Rwanda (ICTR) of 8 November 1994 provides that the Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda, as well as Rwandan citizens responsible for such violations committed in the territory of neighbouring states, between 1 January and 31 December 1994.

Both Tribunals in their Statutes (Articles 2 and 3 of the ICTY Statute and Article 4 of the ICTR Statute) on war crimes recognize the necessity of an armed conflict at the time of the commission of the crimes and a close link between the armed conflict and those crimes. As a reminder, this *sine qua non* condition would subsequently appear in the 1998 Rome Statute of the ICC. In order to establish a link between a war crime and an armed conflict, it is sufficient to demonstrate that the crimes were closely related to armed operations conducted in the territory controlled by one of the parties to the conflict. As for Article 2 of the ICTY Statute, concerning grave breaches of the Geneva Conventions, apart from the existence of an international armed conflict, it is necessary that

John Pritchard and Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial*, Vol. 22.

35 Historians disagree on the final number of victims.

36 J. Nowakowska-Małusecka, *Odpowiedzialność karna jednostek za zbrodnie popełnione w byłej Jugosławii i Rwandzie,* Wyd. UŚ, Katowice 2000.

the victims of the crimes are persons protected by the Geneva Conventions, i.e. prisoners of war or civilians.[37]

The ICTY also addressed the issue of the relative gravity of war crimes and crimes against humanity in its Tadić Judgement of 11 November 1999. The Trial Chamber found that crimes against humanity are of a more serious nature and carry more severe punishment than war crimes because they are committed in the knowledge that they constitute part of a widespread or systematic attack against the civilian population. Here again we have a direct subsequent reference to the Rome Statute of the ICC. The ICTY concluded that, other things being equal, the former are considered to be of a more serious nature than the latter.[38]

The case law of the Nuremberg, Tokyo, Yugoslavia and Rwanda Tribunals has significantly contributed to expanding the *acquis* related to the matters of war crimes. Importantly, the first two tribunals influenced the creation of the Geneva Conventions of 1949 and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968,[39] while the judgements of the Former Yugoslavia and Rwanda Tribunals influenced the work on the Rome Statute and the definitions contained in it.

Conclusions

International humanitarian law of armed conflicts, i.e. international treaties ushered in by the Geneva Conventions of 1949, along with the works (decisions and auxiliary analyses and interpretations of doctrine) of international war tribunals, first those established *ad hoc* to prosecute acts committed against international law and order, and then of the International Criminal Court, constitute a legal source for prosecuting and trying war crimes. War crimes are the most serious offences against international law, as recognized both in international treaties (including the Statute of the ICC) and in the judgements of criminal tribunals

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37 Prosecutor v. D. Tadić, ICTY, Trial Chamber Judgement of 7 May 1997, IT-94-1-T; Prosecutor v. Z. Delalić, Z. Mucić, H. Delić, E. Landzo, ICTY, Trial Chamber Judgement of 16 November 1998, IT-96-21-T; Prosecutor v. T. Blaskić, ICTY, Trial Chamber Judgement of 3 March 2000, IT-95-14-T; Prosecutor v. Z. Aleksovski, ICTY, Trial Chamber Judgement of 25 June 1999, IT-95-14/1-T, cited after A. Szpak, *Zbrodnie wojenne...*

38 Ibid.

39 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the General Assembly of the United Nations on 26 November 1968 (Journal of Laws of 1970, No. 26, item 208).

(see ICTY). They are atypical to the international order insofar as they can only occur during an armed conflict, whether international (when the parties to the conflict are two or more states) or non-international (when a state and a non-state organized armed group, or only such groups are the belligerents). Moreover, for an act to constitute a war crime, it must be committed in relation with an armed conflict and not "besides" it, e.g. when the prosecutor can prove that the crime was committed in the interests of the warring party and to meet its objectives. Importantly, according to the Nuremberg Principles, it is no longer only a perpetrator state, an aggressor state, that can be considered the perpetrator of war crimes. A private person, but again not necessarily only a member of the military, may be held criminally liable, not only at the national level, but also internationally. After all, although war crimes are most often committed by soldiers or members of armed groups, the growth of NSAs means a growing prevalence of non-state groups, terrorist groups, pirates and lobe wolf mercenaries who commit and will continue to commit war crimes. This also means that not only the direct executor is responsible for war crimes, but also the commander if he issued an illegal order (unlawful under the law of war) or knew that his subordinates were committing these crimes and did nothing to prevent the crime or minimize its effects. Finally, the motivations of the perpetrators may vary[40] – war crimes may be acts of revenge, they may be committed for profit, to expand a sphere of influence, for the strategic objectives of a government or separatist group, or they may simply be acts of cruelty (gratuitous violence).

War crimes are therefore clearly defined in international law, in case law, in international treaties, in the analytical work and interpretations of judges and renowned professors of international law. The legal bases for prosecuting perpetrators of war crimes are ready in place. So, what might be missing? What is missing is the political will to establish an *ad hoc* military tribunal or to bring the accused before a permanent, temporary or hybrid court. However, as the practice of international relations shows, confirmed further by none of heads of state punished for committing war crimes (again, it does not have to be active participation, but knowledge of the commission of such crimes by their subordinates and failure to prevent them from doing so or failure to seek to reduce or neutralize the effects of such unlawful acts), striving for economic gain or belonging to a political alliance often effectively discourages states from fighting legally for international justice.

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40 Uniwersytet Jagielloński, *Klasyfikacja prawna zbrodni międzynarodowych*: https://nauka.uj.edu.pl/aktualnosci/-/journal_content/56_INSTANCE_Sz8leL0jYQen/74541952/150532935 (accessed: 16.04.2024).

The war in Ukraine caused by the aggression of the Russian Federation will show whether states are willing to establish an international *ad hoc* tribunal or not. There are legal bases for prosecuting war criminals, but is there the political will?

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Chapter 4

Krzysztof Masło

The Nature and Status of Crimes Committed in the Territory of Ukraine Between 2014 and 2022

Introduction

International crimes committed by individuals have a dual nature. On the one hand, they are part of national law; on the other, they constitute an essential component of public international law. Historically, they stem from the international law of armed conflicts, which began evolving rapidly at the turn of the 19th and 20th centuries. One could argue that international crimes of individuals permeated national law precisely from international law. Efforts made before The Hague Peace Conferences of 1899-1907 to codify at the national level methods and means of conducting hostilities and establishing criminal responsibility for their violation were rather few. Such efforts can essentially include only the so-called Lieber Code of 1863. Written as instructions for the commanders of the American army, it contained regulations of the law of war, prohibiting any malicious acts of violence committed against persons in occupied territory, the destruction of property, looting, rape, and other actions violating the physical integrity of residents of conflict-affected areas. The Lieber Code also formulated the earliest regulations criminalizing acts committed by members of the US armed forces, such as arson, murder, robbery, theft, burglary, and rape. The Code presumed that acts committed by American soldiers in the territory of another country were considered as committed in the territory of the United States[1]

[1] M. Flemming, *Jeńcy wojenni. Studium Prawno-historyczne*, Dom Wydawniczy Bellona, 2000, p. 27.

The concept of the international origin of individual international crimes is significant for determining the character and status of these crimes, as well as for the rules of criminal responsibility for their commission, particularly regarding crimes committed in Ukraine after 2014. The subject of this opinion is not to determine whether and which international crimes were committed during the armed aggression in the territory of Ukraine after 2014, nor who is responsible for them. This is the task of national and international courts, not the doctrine of international law. The opinion aims to help determine the nature of international crimes committed by individuals and their current legal status. This is not an easy task, as the rules defining permissible methods and means of conducting warfare, defining international crimes, or establishing rules of international criminal responsibility for them are scattered across numerous international agreements. To a significant extent, these rules are also established in sources other than written international law, such as customary international law. This particularly applies to crimes against humanity and crimes against peace (crimes of aggression), which have not yet been regulated in an international treaty obliging states to prosecute and punish them, including international cooperation.

Methods or means of conducting hostilities that are prohibited in one country are not necessarily unlawful in another country. Unless they constitute a binding norm of international customary law for the entire international community, the absence of a treaty regulating the use of various weapons means that such a method of warfare is permissible in a state, even if its use results in enormous suffering for the civilian population and is condemned by many countries. An example of this is the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines, and Their Destruction (1997), known as the Ottawa Convention. Currently, 164 countries are parties to it. However, the Russian Federation[2] has never joined the Ottawa Convention, and Poland, which is under direct threat of Russian aggression, is considering withdrawing from this Convention. Customary international law does not prohibit the use of anti-personnel mines, but restricts their use[3]. It requires that in the case of using anti-personnel mines, special precautions be taken to minimize their widespread

[2] Information available on the website: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-5&chapter=26&clang=_en (access: 18.06.2024 r.)

[3] Information available on the website: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule81 (access: 18.06.2024)

effects. This principle applies in both international and non-international armed conflicts, and is also applicable to anti-tank mines[4].

This opinion aims to establish a catalogue of acts regarded as international crimes and the basis for the Russian Federation and Belarus to be bound by norms prohibiting these crimes and establishing individual international criminal responsibility for their commission. The responsibility of states for their commission will be left out of the scope of this opinion. It is also worth discussing—albeit briefly—the issues of institutional and legal mechanisms for prosecuting international crimes committed during the Russian-Ukrainian armed conflict and the manner of criminalizing international crimes in the domestic legislations of the Russian Federation and Ukraine.

1. The Concept of International Crimes

There is no uniform understanding or catalogue of international crimes at the international level. For the purposes of this opinion, I have assumed that an international crime is conduct deemed criminal by international law, whose prosecution and punishment is a common task of the international community (known as *core crimes)*. International crimes strike at the international community as a whole, violating universal values derived from international humanitarian law and international human rights law, such as human dignity or the right to life[5]. The mass nature of international crimes means that they are directed against individuals not because of their individual characteristics, but because of their belonging to a group protected by international law.

An important feature of international crimes is their criminalization directly by international law, which makes criminalization in national law entirely irrelevant for the perpetrator's criminal responsibility on the international level[6]. International law is characterized by significant fragmentation regarding international crimes. None of the international agreements in force within the international community of states constitute even partial codification of international crimes. The only document that could aspire to such codification, but has never been

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4 Information available on the website: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule81 (access: 18.06.2024)

5 W. S. Schabas, *An Introduction An introduction to the ICC*, Cambridge University Press, 2001, p. 21.

6 Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, Yearbook of the International Law Commission, 1996, vol. II (Part Two), p. 17.

transformed into an international treaty, is the draft Code of Crimes against the Peace and Security of Mankind[7], developed by the International Law Commission. The draft formulates a non-exhaustive catalogue of crimes against peace and the security of humanity, including genocide, crimes against humanity, war crimes, and the crime of aggression[8].

To determine which violations of international law are currently considered international crimes, one should primarily refer to the statutes of international and hybrid criminal tribunals and certain international treaties, although their role in decoding what constitutes an international crime is auxiliary. These tribunals were established to assess violations of human rights and international humanitarian law that occurred during specific armed conflicts or in particular states. Therefore, the scope of subject-matter jurisdiction of international criminal courts considers not only the current development of international criminal law, but also the specificity of individual armed conflicts and the possible compromise achievable among members of the international community[9].

The first tribunal established by the organized international community was the International Military Tribunal, established by the international agreement of August 8, 1945, for the prosecution and punishment of the major war criminals of the European Axis[10]. The attached Charter of the IMT lists the following international crimes under its jurisdiction: crimes against peace, war crimes, and crimes against humanity. An identical catalogue of crimes is indicated by the Charter of the International Military Tribunal for the Far East[11]. Crimes listed in the IMT Charter are recognized as part of international customary law[12].

The aforementioned catalogue of international crimes was also listed in the Rome Statute of the ICC[13]. The Russian Federation signed the ICC Statute in

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7 Ibidem; See also: rezolucja Zgromadzenia Ogólnego ONZ A/RES/51/160 z 30 stycznia 1997 r.

8 Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, Yearbook of the International Law Commission, 1996, vol. II (Part Two), p. 17.

9 D. Shraga, R. Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, "European Journal of International Law" 1994, vol. 5, p. 4.

10 D. Schindler, J. Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, 1988, p. 912-919.

11 Information available on the website: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (access: 18.06.2024).

12 Report of the Secretary General Pursuant to Paragraph 2 of SC Resolution 808 (1993), presented 3.05.1993, (S/25704), par. 35.

13 Rome Statute of the International Criminal Court, Rome, 17 July 1998, UNTS vol. 2187, p. 3.

2010, but on November 30, 2016, the Russian government informed the UN Secretary-General that Russia did not intend to ratify it[14]. Ukraine signed the ICC Statute back in 2000, but has not yet ratified it. However, Ukraine has submitted—under Article 12(3) of the ICC Statute—two unilateral declarations recognizing the ICC's jurisdiction over crimes committed in Ukraine after November 21, 2013[15]. Both of Ukraine's declarations allow the Court to prosecute crimes against humanity, war crimes, and genocide committed by Russian soldiers[16]. However, the ICC cannot exercise jurisdiction over the crime of aggression, as its competence in this crime was activated only in 2018, several years after the submission of both declarations[17]. Additionally, Article 15 bis(5) of the ICC Statute directly prevents the ICC from exercising jurisdiction over the crime of aggression committed by citizens of a state that is not a party to this Statute, or in its territory.

To determine the behaviours classified as international crimes, certain international agreements relating to the law of armed conflicts are also significant, including:

- The 1907 Hague Convention IV regarding the Laws and Customs of War on Land along with The Hague Regulations (hereinafter The Hague Convention IV)[18],
- The four Geneva Conventions of 1949[19] and the two Additional Protocols of 1977[20].

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14 Information available on the website: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_ no=XVIII-10&chapter=18&clang=_en#9 (access: 18.06.2024.

15 Information available on the website: https://www.icc-cpi.int/ukraine (18.06.2024).

16 K. Masło, *Wyzwania stojące przed międzynarodowym prawem karnym w związku z wojną rosyjsko-ukraińską*, [w:] K. Grzelak-Bach, *Prawo humanitarne – zagadnienia wybrane*, Warszawa 2023.

17 Ibidem.

18 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Text after: D. Schindler, J. Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff Publisher, 1988, p. 69-93.

19 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, UNTS vol. 75, p. 2; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, UNTS vol. 75, p. 85; Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, UNTS vol. 75, p. 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, UNTS vol. 75, p. 287.

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

Both the Russian Federation and Ukraine are also bound by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the 1948 Convention)[21], which defined the crime of genocide, and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[22].

Using the statutes of international and hybrid criminal tribunals and certain international agreements criminalizing specific behaviours under international law as a starting point, it can be concluded that international crimes include: genocide, crimes against humanity, war crimes committed in both international and non-international armed conflicts, and the crime of aggression. Treaty crimes, so-called, do not fall within the concept of international crimes. Treaty crimes are understood today as crimes that have their source in national criminal law, based on binding international treaties[23]. Examples of such treaty crimes include piracy[24] and the slave trade[25]. They extend beyond the interest of individual states, and their prosecution and punishment are a common task of the international community, as they affect the interests of several states. Treaty crimes typically have a transnational character. Treaty crimes do not entail individual international criminal responsibility. However, binding by a state to a treaty creates an obligation to properly implement it into national law. Therefore, the absence of binding by a state to a treaty and the absence of typification of a treaty crime in national law means the inability to hold its perpetrator criminally responsible by national justice systems. While treaty crimes are well described in international agreements, these agreements do not specify exact criminal sanctions, only suggestions of penalties.

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vol. 1125, p. 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, UNTS vol. 1125, p. 609.

21 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS vol. 78, p. 277.

22 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, UNTS vol. 754, p. 73.

23 K. Masło, *Międzynarodowa odpowiedzialność karna jednostek za zbrodnie przeciwko ludzkości,* Wydawnictwo IWS, Warszawa 2020.

24 Convention on the High Seas, 29.4.1958, UNTS, I-6465, vol. 450; United Nations Convention on the Law of the Sea, 10.12.1982, UNTS I-31363, vol. 1833; Convention for the suppression of unlawful acts against the safety of maritime navigation, 10.3.1988, UNTS I-29004, vol. 1678.

25 Slavery Convention, 25.9.1926, LNTS 1414, vol. 60; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7.9.1956, UNTS 3822, vol. 266; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 21.3.1950,UNTS 1342, vol. 96.

Some international crimes are simultaneously treaty crimes; these include genocide and some war crimes, particularly those committed during international armed conflicts. War crimes committed during non-international armed conflicts are not treaty crimes, as neither Common Article 3 of the Geneva Conventions of 1949 nor Additional Protocol II of 1977 establish any obligations for states to criminalize violations of these conventions in non-international armed conflicts. However, as for international responsibility for committing an international crime, the implementation (or lack thereof) of the obligation to criminalize this crime in national law[26] is irrelevant.

2. Binding of the Russian Federation and Ukraine to International Crimes

The binding of the Russian Federation and Ukraine to international criminal law is based on international agreements and customary international law. Customary international law continues to play a significant role in the enforcement of international criminal justice, as a customary norm can define an international crime and establish individual international criminal responsibility for its commission. Unlike international treaties, which bind only the States parties to them, customary international law binds all states, except for those that have persistently objected to the formation of a customary norm *(persistent objector rule)*[27]. Considering the different legal bases binding both States to international criminal law, each of the international crimes will be discussed separately below.

2.1. Genocide

The definition and basic obligations of state parties regarding the prevention and punishment of genocide are contained in the 1948 Convention, which has gained widespread recognition within the international community (binding 153 states[28]). The Convention entered into force on January 12, 1951. The Russian

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[26] Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, Yearbook of the International Law Commission, 1996, vol. II (Part Two), str. 17.

[27] Conclusion 15, Draft conclusions on identification of customary international law, 2018, Yearbook of the International Law Commission, 20 1 8, vol. II, Part.

[28] Information available on the website: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280027fac&clang=_en (access: 18.06.2024).

Federation became a party to this convention on May 3, 1954, as well as Ukraine on November 15, 1954.

The prohibition of genocide as formulated in the 1948 Convention is part of customary international law, both in terms of the understanding of genocide and the obligations related to the prevention and punishment of acts of genocide. The prohibition of genocide also has the status of *ius cogens*[29].

The first international court to interpret the 1948 Convention was the International Court of Justice (ICJ) in its 1951 advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide[30]. The advisory opinion was initiated by the UN General Assembly, which requested the ICJ to express its opinion on reservations made by states to the 1948 Convention. The ICJ emphasized that the prohibition of genocide has a universal nature and is not dependent on the fate of the Convention itself, and that the principles underlying the Convention are recognized by civilized nations as binding on states, even without any conventional obligations. The universal nature applies not only to the condemnation of genocide contained in the Convention, but also to international cooperation *aimed at liberating humanity from such an abhorrent plague*[31]. According to the ICJ, states are bound by the prohibition of genocide not only when they are parties to the 1948 Convention. The obligation to observe the prohibition of genocidal acts arises upon joining the community of civilized states and is part of the principles of international law recognized by these states regardless of their conventional obligations. Some doctrine of international law took the position that the ICJ confirmed the customary nature of the prohibition of genocide in 1951.

The 1948 Convention cannot independently serve as an independent basis for the international criminal responsibility of individuals for committing acts of genocide[32]. At the international level, the realization of individual criminal responsibility depends on the existence of a norm prohibiting genocidal acts and associating the violation of this prohibition with international criminal responsibility.

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29 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, (1993) ICJ Rep. 325, Separate Opinion of Judge *ad hoc* Elihu Lauterpacht, p. 440.

30 *Reservations to the Convention on Genocide,* Advisory Opinion, I.C.J. Reports 1951, p. 15.

31 Ibidem.

32 G. Boas, J. L. Bischoff, N. L. Reid, *International Criminal Law Practitioner Library*, Cambridge University Press, str. 150; K. Karski, *The Crime of Genocide Committed against the Poles by the USSR before and during World War II: An International Legal Study,* "Case Western Reserve Journal of International Law" 2013, vol. 45, no. 3, p. 742.

The 1948 Convention does not contain such a regulation. However, a norm establishing such responsibility is contained in the statutes of international and hybrid criminal tribunals (Article 6 of the ICC Statute, Article 4 of the ICTY Statute, Article 2 of the ICTR Statute, Article 4 of the law establishing the Extraordinary Chambers in the Courts of Cambodia, Section 4 of UNTAET Regulation 2000/15 establishing special panels for East Timor), except for the SCSL Statute. However, such a norm does not have to be derived from written law, and its basis can be customary international law. The customary nature of individual criminal responsibility for committing acts of genocide has been well-established in international practice[33]. It was also not questioned during the preparatory work on the ICC Statute[34].

2.2. Against Humanity

Crimes against humanity have not yet been the subject of an international treaty that obligates the international community to prosecute and punish them. However, international jurisprudence and international legal doctrine agree that the prohibition of crimes against humanity and the associated individual international criminal responsibility have their foundations in customary international law[35].

While the customary nature of the prohibition of crimes against humanity and the principles of international criminal responsibility for these crimes are not in doubt, the understanding and scope of crimes against humanity are controversial. This was highlighted by the Cambodian Supreme Court, which acknowledged that crimes against humanity as a legal category existed in customary international law during 1975–1979 (the period of the Khmer Rouge regime, known as Democratic Kampuchea)[36]. The understanding of these crimes has evolved since the end of World War II, and the current customary understanding of these crimes

[33] K. Masło, *Współpraca międzynarodowa państw w ściganiu najpoważniejszych zbrodni międzynarodowych*, [in:] J. Repeć, K. Łuniewska, B. Oręziak, G. Ocieczek, M. Wielec, *Współczesne problemy procesu karnego*. Tom I, Wydawnictwo Episteme, 2021, p. 358.

[34] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 498.

[35] Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22, 13 September 1996, vol. I, para. 59; Report of the ad hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 6 September 1995, paras. 60–61.

[36] G. Mettraux, *International Crimes*..., p. 6–7; K. Kittichaisaree, *International Criminal Law*, OUP University Press 2001, p. 90; W.A. Schabas, *The UN International*..., p. 100; among judgments e.g.: *Prosecutor v. Tadić*, ICTY TCh, Judgment, § 626; *Prosecutor v. Kvočka, Kos, Radić, Zigić, Prčać,* ICTY TCh, Judgment of 2.11.2001, IT-986-30/1, § 127; *Prosecutor v. Vasiljević*, ICTY TCh, Judgment of 29.11.2002, IT-98-32, § 28; *Prosecutor v. Krštić*, ICTY

does not align with the definition used during the Nuremberg trials. In practice, at least several definitions of these crimes are in use internationally, each formulated at different times for different international and hybrid criminal tribunals. Generally, they can be divided into three categories:

a) definitions based on the IMT Charter,
b) definitions contained in the statutes of *ad hoc* tribunals,
c) the definition contained in the ICC Statute.

The IMT Charter included the definition of crimes against humanity in Article VI.In accordance with this provision, they included *murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, as well as persecutions on political, racial, or religious grounds in connection with any crime within the jurisdiction of the tribunal or in connection with it, regardless of whether it violated the domestic law of the country where it was perpetrated*[37].

The Nuremberg understanding of crimes against humanity included two categories of crimes. Firstly, these were murder, extermination, enslavement, deportation, and other inhumane acts. These crimes had to be directed against any civilian population, but they could be committed both before and during World War II. Crucially, for the legal classification of crimes against humanity, the nationality of the victims was irrelevant[38]. They could be committed against individuals who were citizens of the state perpetrating the crimes. Therefore, the victims could be German or Soviet citizens, and the perpetrators could be, respectively, German or Soviet soldiers. This was a significant innovation introduced by the IMT Charter, allowing for the differentiation between crimes against humanity and war crimes. War crimes could only be committed by members of the armed forces against persons belonging to an enemy state[39].

The second type of crime against humanity listed in the IMT Charter were persecutions committed on political, racial, or religious grounds. These

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TCh, Judgment of 2.08.2001, IT-98-33, § 482; *Prosecutor v. Naletilić, Martinović,* ICTY TCh, Judgment of 31.03.2003, IT-98-34, § 232; *Prosecutor v. Fofana, Kondewa*, § 103.

37 *Guek Eav Kaing alias Duch*, Appeal Judgment of 3.02.2012, 001/18–07–2007ECCC/TC, §100; similarly: *Nuoan Chea, Khieu Samphan,* Judgment of 7.08.2014, § 177.

38 Text after: M. Flemming, *Międzynarodowe*..., p. 491

39 K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law,* Oxford University Press, 2011, p. 233.

persecutions could be directed not only against the civilian population but also against members of the armed forces of warring states[40].

During the early development of crimes against humanity, international law required these crimes to be connected to wartime activities. Therefore, under Article 6(c) of the IMT Charter, crimes against peace were not independent and had to be committed in connection with any other crime within the Tribunal's jurisdiction (i.e., war crimes or crimes against peace).

The definition of crimes against humanity contained in the IMT Charter was used as the basis for the International Military Tribunal for the Far East (Article V). It is noteworthy that the definition in the IMT Charter was recognized in the jurisprudence of national and international courts as reflecting the state of customary international law in 1946[41].

The definitions of crimes against humanity of the second type were formulated in the statutes of two *ad hoc* criminal tribunals established in the 1990s to prosecute perpetrators of mass crimes committed during the war in the territory of the former Socialist Federal Republic of Yugoslavia (ICTY)[42] and in Rwanda (ICTR)[43]. The ICTY Statute defined crimes against humanity as crimes directed against the civilian population, committed during an international or internal armed conflict, and included the following acts: murder; extermination; enslavement; deportation; imprisonment; torture; rape; political, racial, and religious persecutions; other inhumane acts. The ICTR Statute contained a similar definition but did not require the commission of crimes during an armed conflict, introducing instead the condition that crimes against humanity be committed for national, political, ethnic, racial, or religious reasons. The ICTR Statute formulated an identical catalogue of acts constituting crimes against humanity.

Both criminal tribunals developed extensive jurisprudence regarding crimes against humanity. Primarily, they made efforts to determine the content of customary international law regarding the understanding of crimes against humanity and individual criminal responsibility. As emphasized by the UN Secretary-General

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40 E. Schwelb, *Crimes Against Humanity*, "British Yearbook of International Law" 1946, vol. 23, p.178.

41 Ibidem.

42 *Attorney-General of Israel v. Eichmann*, ILR, vol. 36, s. 277; *Touvier*, French Court of Cassation (Criminal Chamber), 27.11.1992, ILR, vol. 100, s. 338; *Barbie*, French Court of Cassation (Criminal Chamber), ILR, vol. 78, s. 139; *Korbely v. Hungary*, European Court of Human Rights, Grand Chamber Judgment, App. No. 9174/02, 19.09.2008, § 81; *Guek Eav Kaing alias Duch*, Appeal Judgment of 3.02.2012, 001/18–07–2007 ECCC/TC, § 114.

43 UN Doc. S/RES/827 (1993), annex.

in the report on the establishment of the ICTY, *the application of the principle of legenullum crimen sine lege ensures that every crime specified in the ICTY Statute aligns with customary international law that is undoubtedly part of customary law, as this avoids the problem of treaty obligations binding some but not all states*[44]. The importance of customary international law for international criminal responsibility for crimes against humanity was also highlighted by the ICTY Appeals Chamber in the Blaškić case, indicating that respect for the principle of *nullum crimen sine lege* requires that every crime typified in the ICTY Statute reflects customary international law[45].

The jurisprudence of the *ad hoc* criminal tribunals clarified that in customary international law, crimes against humanity are understood as acts that are part of a widespread or systematic attack directed against any civilian population[46]. Other conditions specified in the ICTY and ICTR statutes, such as the requirement of an armed conflict and part of a state or organizational policy involving the commission of crimes against humanity, are not of a customary nature but only limit the jurisdiction of the specific international tribunal[47]. The ICTY and ICTR statutes served as the basis for understanding crimes against humanity in the Statute of the Special Court for Sierra Leone (Article 2)[48] and the law establishing the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea (Article 5)[49].

The third type of definition of crimes against humanity exists in the ICC Statute. According to Article 7, crimes against humanity are any of the following acts, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political,

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44 UN Doc. S/RES/955 (1994), annex.

45 Report of the SG Pursuant to Paragraph 2 of SC Resolution 808 (1993), presented 3.05.1993 (S/25704), par. 34–35

46 *Prosecutor v. Blaskić*, ICTY ACh, Judgment of 29.06.2004, IT-95-14-A, § 78.

47 *Prosecutor v. Kunarać, Kovać, Vuković*, ICTY ACh, Judgment of 12.06.2002, IT-96- 23&23/1, § 85; *Prosecutor v. Akayesu*, § 578; *Prosecutor v. Fofana, Kondewa*, SCSL TCh, Judgment of 2.08.2007, SCSL-04-14-T, § 110.

48 *Prosecutor v. Tadić*, ICTY TCh, Judgment, § 288.

49 Agreement between the UN and the Government of Sierra Leone on the establishment of a SCSL, 16.01.2002, UNTS vol. 2178, p. 137.

racial, national, ethnic, cultural, religious, gender grounds, in connection with any act or crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid, and other inhumane acts of a similar character, intentionally causing great suffering or serious injury to the body or to mental or physical health.

The understanding of crimes against humanity in the ICC Statute has been significantly expanded compared to previously functioning tribunals, and the ICC's jurisdiction has been considerably limited by supplementing the customary definition of these crimes with additional requirements. This includes conducting an attack in accordance with or in support of a state or organizational policy involving the commission of such an attack. The catalogue of acts considered crimes against humanity has also been expanded. The definition of crimes against humanity in the ICC Statute has not yet evolved into customary international law, although its impact on the international community is significant. It has become the starting point for two international initiatives to develop a universal convention obligating the prevention and punishment of crimes against humanity.

The first of these initiatives was undertaken by the International Law Commission and involved the preparation of draft articles on the prevention and punishment of crimes against humanity[50]. The draft was adopted by the Commission in its second reading in 2019, and the Commission recommended that the UN General Assembly develop a convention or organize an intergovernmental conference. The work on the draft in the General Assembly is not yet complete, but it is worth noting that the draft convention is based on the definition of crimes against humanity contained in Article 7 of the ICC Statute.

Independently of the work in the UN General Assembly, in 2018, a group of states presented a draft convention on international cooperation in the prosecution of genocide, crimes against humanity, and war crimes[51]. This initiative was supported by Poland from the beginning; unfortunately, neither Ukraine nor the Russian Federation participated in the work of the group of states or the intergovernmental conference in Ljubljana in 2023. The outcome of the Ljubljana Diplomatic Conference in 2023 was the adoption of the Ljubljana-Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes Against Humanity, War Crimes, and Other International

50 Agreement between the UN and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6.06.2003, UNTS vol. 2329, p. 2.

51 Draft articles on Prevention and Punishment of Crimes Against Humanity, 2019, Yearbook of the International Law Commission, 2019, vol. II, Part Two.

Crimes. The purpose of the Convention is to eliminate the legal gap in international law regarding state cooperation in detecting, prosecuting, and punishing perpetrators of international crimes. The Convention also includes a definition of crimes against humanity, which, in principle, reiterates Article 7 of the ICC Statute.

2.3. War Crimes

The term „war crimes" refers to violations of international humanitarian law applicable during armed conflicts, which result in the international criminal liability of individuals[52]. Not every breach of international humanitarian law during armed conflict constitutes a war crime. The catalogue of behaviours considered as war crimes is determined by the norms of international law of armed conflict and includes the most serious violations of international humanitarian law. However, there is no uniform list of war crimes.

To attribute the commission of war crimes to an individual, the existence of an armed conflict must be demonstrated, as a war crime can only be committed during such a conflict. Modern international criminal law criminalizes violations of international humanitarian law committed during both international and non-international armed conflicts. The standard of protection for victims is not the same in both types of conflicts. Traditionally, the law of armed conflicts regulated the protection of war victims and the permissible methods and means of military operations during international armed conflicts. Both The Hague Convention IV of 1907, the four Geneva Conventions of 1949, and the Additional Protocol I of 1977 apply only to international armed conflicts. However, only Article 3 common to the four Geneva Conventions of 1949 and Additional Protocol II of 1977 apply to non-international armed conflicts.

This division regarding violations of the law of armed conflicts is reflected in the statutes of the two *ad hoc* criminal tribunals. Their jurisdiction over war crimes included:

a) serious violations of the Geneva Conventions of 1949 and Additional Protocol I of 1977 (Article 2 of the ICTY Statute),
b) violations of the laws and customs of war (Article 3 of the ICTY Statute),
c) violations of Article 3 common to the Geneva Conventions and Additional Protocol II of 12 December 1977 (Article 4 of the ICTR Statute).

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[52] Information available on the website: www.mla-initiative.com (access: 23.06.2024)

The ICTY Statute allowed for responsibility only for war crimes committed in international armed conflicts, while the ICTR Statute applied to war crimes committed in non-international armed conflicts. Obviously, the jurisdiction of both tribunals reflected the specific nature of the armed conflicts in the Former Yugoslavia and Rwanda. Under the influence of the activities of international and hybrid criminal tribunals, a process has developed to equalize the standards of protection for victims of international and non-international armed conflicts. This process, however, does not occur through the adoption or amendment of international agreements, but through the development of international customary law. While it improves the situation of the civilian population during non-international armed conflicts and leads to the criminalization of new war crimes on an international level, it does not translate into the criminalization of war crimes in the criminal law of the Russian Federation and Ukraine (as will be discussed in Chapter 5).

The ICC Statute considers under the concept of war crimes not only existing international agreements but also the development of international customary law. It continues the tradition of dividing war crimes into those committed during international armed conflicts and those committed during non-international armed conflicts. It also separately criminalizes violations of the four Geneva Conventions of 1949 and both Additional Protocols of 1977, and other laws and customs of war. Thus, according to Article 8 of the ICC Statute, the jurisdiction encompasses:

a) grave breaches of the four Geneva Conventions of 1949,
b) other serious violations of the laws and customs of international law applicable to international armed conflicts,
c) serious violations of Article 3 common to the four Geneva Conventions of 1949 in the event of a non-international armed conflict,
d) other serious violations of the laws and customs within the established framework of international law applicable to non-international armed conflicts.

The ICC Statute formulates a wide catalogue of behaviours considered war crimes within these categories. Moreover, this list of acts is constantly being supplemented and expanded.

For example, since 2010, the catalogue of serious violations of laws and customs applicable to non-international armed conflicts has been expanded to include:

a) the use of poison or poisoned weapons,
b) the use of asphyxiating, poisonous, or other gasses, and any similar liquids, materials, or devices,

c) the use of bullets that expand or flatten easily in the human body, such as bullets with a hard shell that does not entirely cover the core or is incised[53],
d) deliberately starving civilians as a method of warfare by depriving them of items essential for survival, including wilfully impeding the delivery of humanitarian aid[54].

Additionally, the catalogue of serious violations of laws and customs applicable to both international and non-international armed conflicts has been expanded to include:

a) the use of weapons that employ microorganisms or other biological agents or toxins, regardless of their origin or method of production[55],
b) the use of weapons whose primary effect is to injure by fragments that are not detectable by X-rays in the human body[56],
c) the use of laser weapons specifically designed, as a combat function or as one of its combat functions, to cause permanent blindness to unenhanced vision, i.e., the naked eye or the eye with corrective devices[57].

2.4. Crime of Aggression

The origins of the crime of aggression are rooted in treaty law and customary international law. Before the outbreak of World War II, two international agreements had a decisive impact on establishing the prohibition of initiating and waging aggressive war and the international criminal responsibility for such acts. The first was the Kellogg-Briand Pact of August 27, 1928[58]. In this treaty, states condemned recourse to war for resolving international disputes and renounced it as an instrument of national policy in their mutual relations (Article I). Additionally, the states recognized that all disputes and conflicts, regardless of their nature or

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53 L. Gardocki, *Zarys prawa karnego międzynarodowego*, Warszawa 1986, p. 112; T. Leśko, *Międzynarodowe ograniczenia w prowadzeniu konfliktów zbrojnych*, Warszawa 1990, s. 293.

54 Amendment to the Rome Statute of the International Criminal Court, Kampala, 10 June 2010, C.N.533.2010.TREATIES-6 (Depositary Notification).

55 Amendment to Article 8 of the Rome Statute of the International Criminal Court, The Hague, 6 December 2019, C.N.394.2020.TREATIES-XVIII.10.g (Depositary Notification).

56 Amendment to Article 8 of the Rome Statute of the International Criminal Court, The Hague, 8 march 2018, C.N.116.2018.TREATIES-XVIII.10 (Depositary Notification).

57 Amendment to Article 8 of the Rome Statute of the International Criminal Court, The Hague, 8 march 2018, C.N.125.2018.TREATIES-XVIII.10 (Depositary Notification).

58 Amendment to Article 8 of the Rome Statute of the International Criminal Court, The Hague, 8 March 2018, C.N.126.2018.TREATIES-XVIII.10 (Depositary Notification).

origin, should be resolved by peaceful means (Article II). This convention, signed by 63 states, including the Soviet Union in 1928, is still formally in force today.

The second was the Convention for the Definition of Aggression, signed in London on July 3, 1933. The London Convention was concluded by the Soviet Union with the countries of Central and Eastern Europe. This convention defined the concept of aggression and the aggressor state. According to Article II of the Convention, an aggressor state is the first to commit any of the following acts:

a) declaration of war upon another state;
b) invasion with its armed forces of the territory of another state, even without a declaration of war;
c) attack with its land, sea, or air forces on the territory, vessels, or aircraft of another state, even without a declaration of war;
d) naval blockade of the coasts or ports of another state;
e) support for armed bands that invade the territory of another state, or refusal to take, despite a request from the invaded state, all possible measures to deprive these bands of any assistance or protection in its own territory.

Both conventions laid the foundation for prosecuting Axis war criminals for crimes against peace after World War II. According to Article 6 of the Nuremberg Charter, the jurisdiction of the International Military Tribunal included crimes against peace, defined as *planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy to commit any of the foregoing acts*[59]. The same definition was included in the Charter of the International Military Tribunal for the Far East.

Crimes against peace form part of customary international law. The International Military Tribunal at Nuremberg stated that the Charter was „an expression of international law existing at the time of its creation."[60] The Tribunal also held that any nation resorting to war as an instrument of national policy after signing the Kellogg-Briand Pact violated the treaty, and individuals who planned and conducted such a war committed a crime[61]. Since neither of the above conventions explicitly formulated the principle of international criminal responsibility of individuals for violating the prohibition of aggressive war, this conclusion had to be grounded in customary international law.

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59 League of Nations Treaty Series vol. 94, pp. 57 – 64.
60 D. Schindler, J. Toman, *The Laws*..., p. 912-919.
61 Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nürnberg 1947.

Today, crimes against peace have been replaced by the crime of aggression. The substantive scope of the two crimes is not identical; however, the crime of aggression broadly encompasses crimes against peace[62]. The draft Statute of the International Criminal Court (ICC) presented to the UN General Assembly in 1994 by the International Law Commission included the crime of aggression within the Court's jurisdiction. However, during the Diplomatic Conference in Rome in June and July 1998, states did not agree on the necessity of including the crime of aggression within the substantive scope of the ICC Statute. Some states made their acceptance of the Statute contingent upon the exclusion of the crime of aggression from the Court's jurisdiction.

3. Institutional and Legal Aspects of Prosecuting International Crimes Committed During the Russian-Ukrainian Armed Conflict

The only effective mechanism currently available in the international community to prosecute perpetrators of international crimes is the International Criminal Court (ICC). In principle, the ICC can exercise its jurisdiction over international crimes committed on the territory of state parties or by their nationals (Article 12(2) of the ICC Statute). The ICC Statute includes a special procedure allowing the Court to extend its jurisdiction to non-party states without requiring them to become parties to the Statute. According to Article 12(3) of the ICC Statute, a state not party to the Statute may, by declaration lodged with the Registrar, accept the Court's jurisdiction over specific crimes. Such a declaration by a non-party state does not replace ratification of the ICC Statute and does not make the declaring state a party to the Statute. Notably, the procedure described in Article 12(3) allows the ICC to exercise jurisdiction over crimes committed in an armed conflict involving a permanent member of the UN Security Council. This situation applies to the conflict between the Russian Federation and Ukraine, where the Security Council, since February 2022, has failed to address the war despite reports of numerous atrocities committed by Russian forces.

In April 2014, Ukraine submitted its first declaration recognizing the ICC's jurisdiction to identify, prosecute, and judge those responsible for acts committed on Ukrainian territory between November 21, 2013, and February 22, 2014. In a subsequent declaration, Ukraine accepted the ICC's jurisdiction over crimes

62 Ibidem.

against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations (the self-proclaimed Donetsk People's Republic and Luhansk People's Republic) after February 20, 2014[63].

Both Ukrainian declarations empower the ICC to investigate allegations of international crimes to a limited extent. The temporal and subjective scope of the Ukrainian declarations does not raise doubts. Ukraine recognized the ICC's jurisdiction for crimes committed after November 21, 2013, with no specified end date. Therefore, the ICC's jurisdiction includes not only crimes committed in connection with the annexation of Crimea and Sevastopol and during the armed conflict in Luhansk and Donetsk, but also the military actions that began on February 24, 2022. Subjectively, the 2014 declaration allows for the prosecution of the perpetrators and accomplices of crimes, while the 2015 declaration specifies that it concerns senior officials in the Russian Federation and leaders of the so-called Donetsk and Luhansk People's Republics. Consequently, the declarations limit the Tribunal's competence to prosecuting and judging individuals holding higher positions in the power structures of the Russian Federation and the so-called Donetsk and Luhansk People's Republics. This precludes the prosecution of individuals in lower positions within the Russian political and military structures. Thus, Ukraine also excluded the prosecution by the ICC of potential international crimes committed by Ukrainian officials[64].

The ICC can exercise its jurisdiction over international crimes committed on the territory of Ukraine. Both Declarations excluded the ICC's jurisdiction over acts committed outside the territory of Ukraine. Since the annexation of the Crimean Peninsula and the so-called Donetsk and Luhansk People's Republics was illegal under international law and these territories still belong to Ukraine, the Tribunal's jurisdiction also includes crimes committed there.

A thesis needs to be put forward that the ICC's jurisdiction encompasses genocide, crimes against humanity, and war crimes[65]. However, while the statutory understanding of genocide and crimes against humanity has not been modified since 2014, the Assembly of States Parties to the ICC Statute has decided on several changes regarding the understanding of war crimes. All these changes have already come into effect, but according to Article 121(5) of the ICC Statute, they only apply to those state parties that have accepted them. This provision specifically

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63 W. A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press 2001, p. 21.

64 Information available on the website: https://www.icc-cpi.int/ukraine (access: 20.06.2024).

65 K. Masło, *Wyzwania stojące*..., p. 36.

precludes ICC jurisdiction over crimes committed by a national of a state party that has not accepted the amendment, or in the territory of such a state. These amendments do not bind either the Russian Federation or Ukraine, as neither state is a party to the ICC Statute. However, Ukraine has accepted, to a limited extent, the ICC's jurisdiction over international crimes as they were understood in 2014 and 2015. Since Ukraine has not modified its declarations after 2015,thus *per analogiam* to Article 121(5), the ICC cannot exercise its jurisdiction concerning war crimes added to Article 8 of the ICC Statute after 2015.

The ICC also cannot exercise its jurisdiction over the crime of aggression committed by the Russian Federation against Ukraine. Consequently, there has been an international proposal to establish a special international court for the crime of aggression against Ukraine. Such a court would be created based on a multilateral international agreement among interested states or a bilateral agreement between Ukraine and an international organization such as the UN, the Council of Europe, or the EU.

In response to the paralysis of the UN Security Council, the Parliamentary Assembly of the Council of Europe (PACE) indicated the need for such a court, urging the international community in 2022 to hold the perpetrators of war crimes and crimes against humanity, as well as potential genocide[66], accountable. PACE emphasized the political and military leadership's responsibility in the Russian Federation for initiating the ongoing war in Ukraine and called on all member and observer states of the Council of Europe to urgently establish an *ad hoc* international criminal tribunal with a mandate to investigate and prosecute the crime of aggression in Ukraine.

The primary goal of establishing such a court would be to bring to justice the Russian leaders bearing the greatest political and military responsibility for the aggression. The prosecution of lower-ranking military personnel ought to remain within the purview of national jurisdictions. From this perspective, it must be an international court established by the organized international community with the jurisdiction to include the crime of aggression as defined in international law. The only international tribunals with such jurisdiction were the Nuremberg Tribunal and the International Military Tribunal for the Far East. In the 2000s, the international community established several courts, including the ICTY and ICTR (created by the UN Security Council), the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia (established by

66 Ibidem.

agreement between the UN Secretary-General and the concerned state). However, none of these had jurisdiction over crimes against peace or the crime of aggression.

4. Criminalization of International Crimes in the Criminal Codes of the Russian Federation and Ukraine

The enforcement of criminal responsibility at the international level is not contingent upon the perpetrator facing such responsibility at the national level, particularly concerning the criminalization of these crimes in domestic criminal laws. This is a universally recognized rule in international law. The Nuremberg Tribunal emphasized that international law can bind individuals, even if national law does not require adherence to international law principles. Individuals have international obligations that go beyond domestic duties imposed by individual states[67]. The principle that a person who commits an international crime bears responsibility and is punishable under international law, irrespective of domestic laws, was also affirmed in the Principles of International Law recognized in the Nuremberg Charter and Judgment[68], developed by the International Law Commission in 1950. This principle is also reflected in Article 15 of the International Covenant on Civil and Political Rights. This provision establishes the rule of *nullum crimen/nulla poena sine lege,* but stipulates that it does not prevent the trial and punishment of a person for acts that, at the time of their commission, were criminal according to the general principles of law recognized by the international community. The international crimes discussed in Chapter 3 undoubtedly have such a character. The Covenant has received widespread acceptance from the international community, and both the Russian Federation and Ukraine are parties to it.

However, national courts can adjudicate criminal responsibility for international crimes only when such crimes are typified in national criminal law. The existence of a norm of international customary law or even an international agreement criminalizing an international crime does not suffice for a national court to directly enforce such an international norm and, in the absence of other national regulations, to rule on criminal responsibility. This is a consequence of

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67 Russian Federation's Aggression against Ukraine: Ensuring Accountability for Serious Violations of International Humanitarian Law and Other International Crimes, Report.

68 Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nürnberg 1947, page 223.

the principle of *nullum crimen/nulla poena sine lege*, which requires the specific definition of a prohibited act.

International agreements may oblige states to criminalize certain behaviours in domestic law and to prosecute these acts, as well as include procedural provisions regarding, among other things, the principles of exercising jurisdiction. However, among international crimes, only genocide and some war crimes have been regulated in international agreements obligating states to incorporate the substantive and procedural norms contained in these agreements into their domestic legal order.

Among international treaties obligating states to prosecute and punish international crimes, we must mention the Convention on the Prevention and Punishment of the Crime of Genocide[69] of December 9, 1948, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[70] of November 26, 1968, the International Convention on the Suppression and Punishment of the Crime of Apartheid[71] of November 30, 1973, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[72] of December 10, 1984. Both the Russian Federation and Ukraine are parties to these conventions. Therefore, before characterizing the criminal laws of these states regarding international crimes, I will briefly explain the obligations regarding the criminalization and establishment of jurisdiction arising from these conventions.

The Convention on the Prevention and Punishment of the Crime of Genocide primarily defines acts considered as genocide and lists forms of participation in genocide (conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide). It also obligates the state parties to prevent and punish genocide, including the obligation to adopt laws to enforce the Convention and to cooperate with other states. The International Court of Justice, in its judgment in the case *Bosnia v. Serbia* of February 26, 2007, pointed out that one of the most effective ways to

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69 Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Yearbook of the International Law Commission, 1950, vol. II, para. 97.

70 Convention on the Prevention and Punishment of the Crime of Genocide, UNTS I-1021, vol. 78.

71 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, 26.11.1968, UNTS I-10823, vol. 754, p. 73.

72 International Convention on the Suppression and Punishment of the Crime of Apartheid, UNTS I-14861, vol. 1015.

prevent genocide is to punish individuals accused of these crimes and enforce the imposed penalties[73].

The crime of apartheid is addressed by the Convention on the Suppression and Punishment of the Crime of Apartheid of November 30, 1973. The Convention recognizes apartheid as a crime against humanity posing a serious threat to international peace and security. The Convention imposes a number of obligations on states related to preventing apartheid and punishing acts resulting from apartheid policies and practices. Article IV(b) of the Convention obliges states to adopt legislative, judicial, and administrative measures to prosecute, try, and punish individuals guilty of apartheid regardless of their location or nationality. According to Article V of the Convention, a person accused of apartheid may be tried by a court of a state party to the Convention or by an international criminal tribunal.

The Convention Against Torture of December 10, 1984, provides a definition of torture and obliges states parties to ensure that all acts of torture, attempts to commit torture, and complicity or participation in torture are offences under their criminal law, subject to penalties that reflect the gravity of the crimes. States parties also commit to taking necessary measures to establish jurisdiction over torture offences and to take effective legislative, administrative, and judicial measures to prevent torture in any territory under their jurisdiction.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of November 26, 1968, is of particular importance for enforcing international criminal responsibility for international crimes. According to the Convention, war crimes specified in the Nuremberg Charter, especially serious violations of the four Geneva Conventions of August 12, 1949, on the protection of victims, and crimes against humanity defined in the Nuremberg Charter, as well as displacements resulting from armed attack or occupation, inhumane acts resulting from apartheid policy, and genocide, do not become subject to statutory limitations regardless of when they were committed. The Convention applies to any individual regardless of the position or rank within the power structure and to direct perpetrators and others participating in the commission of war crimes or crimes against humanity (Article II). The Convention obliges states to take all necessary legislative and other measures to ensure that statutory or other limitation periods do not apply to the prosecution and punishment of war crimes and crimes against humanity.

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[73] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNTS I-24841, vol. 1465.

Both Russian and Ukrainian national legislations include provisions criminalizing international crimes.

The Russian Criminal Code of June 13, 1996, criminalizes:

a) planning, preparation, initiation, and waging of an aggressive war (Article 353),
b) public calls for the initiation of an aggressive war (Article 354),
c) development, production, stockpiling, acquisition, or sale of weapons of mass destruction (Article 355),
d) use of prohibited means and methods of warfare (Articles 356 and 358),
e) genocide (Article 357),
f) international terrorism (Article 361).

The Russian Criminal Code thus criminalizes the vast majority of international crimes. Regarding aggressive war, it is based on the concept of crimes against peace as defined in the Nuremberg Charter, not the crime of aggression developed in Kampala. As for war crimes, Articles 355, 356, and 358 are blanket provisions. They criminalize cruel treatment of prisoners of war or civilians, deportation of civilians, looting of property in occupied territory, and the use of means and methods of warfare prohibited by international agreements binding on the Russian Federation. The Russian Criminal Code also criminalizes genocide by incorporating the definition from the 1948 Convention into Article 357.

However, the Russian Criminal Code does not criminalize crimes against humanity. This does not mean that it is impossible to prosecute individuals committing such crimes in Russia. Perpetrators would be prosecuted for ordinary crimes such as murder. Such an approach, obviously, does not provide adequate protection for civilians, as crimes against humanity target not just individuals but specific groups as a whole. The lack of criminalization of crimes against humanity also has implications for the statute of limitations, as the Russian Criminal Code excludes the statute of limitations only for certain international crimes specified in it (Article 78, paragraph 5). This wording is certainly inconsistent with the international obligations of the Russian Federation under the 1968 Convention, which mandates ensuring the non-applicability of the statute of limitations also to crimes against humanity[74].

Ukraine has codified certain international crimes in its Criminal Code of 2001 in Section XX, titled „Crimes against Peace, Security of Humanity, and International Legal Order". These include:

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[74] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996,* p. 595, par. 164 and 426.

a) war propaganda (Article 436),
b) planning, preparation, and waging of an aggressive war (Article 437),
c) violations of the laws and customs of war (Article 438),
d) use, development, production, acquisition, storage, distribution, or transportation of weapons of mass destruction (Articles 439-440),
e) genocide (Article 442).

Ukraine's regulations on international crimes are based on the provisions adopted in the Nuremberg Charter (particularly regarding crimes against peace) and have a blanket nature. Unfortunately, the absence of criminalization of crimes against humanity is evident; however, it does not hinder the attribution of international responsibility for such crimes committed in the territory of Ukraine (or other states).

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Volodymyr Pylypenko

Forcible Transfer of Ukrainian Children to the Russian Federation as a Form of Crime of Genocide

Introduction

In the context of Russia's full-scale invasion of Ukraine on February 24, 2022, and to this day, issues related to war crimes against Ukrainians, and specifically targeting Ukrainian children require urgent attention not only from the Ukrainian authorities but also the entire international community. In particular, it refers to such unlawful acts as the recruitment and use of children in hostilities, abduction, murder, maiming, sexual violence, and militarization of children in the territories occupied by the aggressor.

According to the Office of the Prosecutor General, as of February 23, 2024, 126,037 crimes of aggression and war crimes have been registered (violation of the laws and customs of war (Article 438 of the Criminal Code of Ukraine (hereinafter – the CCU); planning, preparation or waging of an aggressive war (Article 437 of the CCU); propaganda of war (Article 436 of the CCU), etc. Statistics on crimes against children are maintained separately. According to the Office of the Prosecutor General, 528 children were killed during this period and 1,230 injured[1]. According to other official information sources, between February 24, 2023 and February 15, 2024, 2,185 children were reported missing; 2,3014[2].

But, of course, the most attention now is paid to the ongoing process of the mass "kidnapping" of Ukrainian children from the occupied territories to Russia.

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2 Діти війни. 24.02.2022-16.02.2024. URL:https://childrenofwar.gov.ua/

Since February 24, 2024, different international institutions, including the Council of Europe and the EU, have raised concerns about numerous instances of unlawful deportation of Ukrainian children to the territory of Russia.

In the Resolution No.2448(2022)[3] "Humanitarian consequences and internal and external displacement in connection with the aggression of the Russian Federation against Ukraine," the Parliamentary Assembly of Council of Europe stated that" The Assembly strongly condemns the forced deportation by the Russian Federation of more than 1 million Ukrainians from the temporarily occupied territories of Ukraine to its territory under the guise of "peaceful evacuation" and is struck by the fact that 183 000 children are among them."

In the Resolution No. 2482 (2023)[4] "Legal and human rights aspects of the Russian Federation's aggression against Ukraine," the PACE stated that it is outraged by the numerous reports of atrocities, gross human rights violations and violations of international humanitarian law , especially regarding the forcible transfer and deportation of Ukrainian citizens, including children, to the Russian Federation or Russian-occupied areas. It also called to immediately cease the forced deportation and transfers of Ukrainian civilians, including children, to the Russian Federation and Russian-occupied territories, allow their safe return and, in the case of children, ensure that they are promptly reunited with their families.

Following the aforementioned Resolution, on April, 27, 2023 the PACE passed its Recommendation No. 2253 (2023)[5] "Deportations and forcible transfers of Ukrainian children and other civilians to the Russian Federation or to temporarily occupied Ukrainian territories: create conditions for their safe return, stop these crimes and punish the perpetrators" and on January 25, 2024 - Recommendation No. 2265[6] (2024) "Situation of the children of Ukraine" which was entirely dedicated to the problem of deported Ukrainian children.

In its turn, the European Parliament adopted a Resolution No.(2022/2896(RSP))[7] "Recognising the Russian Federation as a state sponsor of terrorism" on November 23, 2022 and a Resolution No. (2022/2655(RSP))[8]" The fight against impunity for war crimes in Ukraine" on May 19, 2022

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3 URL:https://pace.coe.int/en/files/30191
4 URL:https://pace.coe.int/en/files/31620/html
5 URL:https://pace.coe.int/files/31777
6 URL:https://pace.coe.int/en/files/33348
7 URL:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022IP0405
8 URL:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022IP0218

But the main action,obviously, was taken by the International Criminal Court. On March 17, 2023, Pre-Trial Chamber II of the International Criminal Court (hereinafter -"ICC") issued warrants[9] of arrest for two individuals in the context of the situation with deportation of Ukrainian children – Russian President Vladimir Putin and Russian Child Ombudsman Maria Lvova-Belova. Pre-Trial Chamber II considered, based on the Prosecution's applications of 22 February 2023, that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of population and that of unlawful transfer of population from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children.

As stated in the ICC press-release[10] "Vladimir Putin, born on 7 October 1952, President of the Russian Federation, is allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). The crimes were allegedly committed in Ukrainian occupied territory at least from 24 February 2022. There are reasonable grounds to believe that Putin bears individual criminal responsibility for the aforementioned crimes, (i) for having committed the acts directly, jointly with others and/or through others (article 25(3)(a) of the Rome Statute), and (ii) for his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility (article 28(b) of the Rome Statute). Maria Lvova-Belova, born on 25 October 1984, Commissioner for Children's Rights in the Office of the President of the Russian Federation, is allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). The crimes were allegedly committed in Ukrainian occupied territory at least from 24 February 2022. There are reasonable grounds to believe that Ms Lvova-Belova bears individual criminal responsibility for the aforementioned crimes, for having committed the acts directly, jointly with others and/or through others (article 25(3)(a) of the Rome Statute)".

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9 URL:https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and

10 URL:https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and

Thus, the International Criminal Court identified the actions involving the massive forcible displacement of Ukrainian children as a war crime of unlawful deportation. The purpose of this research is to study the situation related to the qualification of criminal acts of the Russian authorities regarding unlawful deportation and forcible transfer of Ukrainian children from the temporarily occupied territories under the international humanitarian and international criminal law and find whether these acts constitute only a war crime or if they may amount to another international crime – a genocide.

1. Presentation of the Main Topic

1.1. The Current Situation with Ukrainian Children during the Russian-Ukrainian War Conflict

According to the Ukrainian Parliament Commissioner for Human Rights, in the context of the full-scale armed aggression of the Russian Federation against Ukraine since February 24, 2022, numerous violations of the fundamental rights of the child have been revealed: the right to safety, the right to life, the right to education, the right to health and personal development, the right to preserve individuality, including citizenship and family ties, the right to private and family life, the inviolability of the home, the right to care and protection by the state, etc. The most pressing issues that have been constantly in the focus of the Ombudsman's attention under martial law include: the death and maiming of children, deportation, abduction and unlawful detention of children; protection of children left without parental care during the war; social protection of children affected by hostilities and armed conflicts, protection of the rights of orphans, children deprived of parental care, children in difficult life circumstances, etc.

During the full-scale invasion of Ukraine by Russia, almost 70% of Ukrainian children were forced to leave their homes and move within the country or abroad. The war has separated children from their parents, who have either joined the fight to defend their homeland or been unable to leave Ukraine with their children under martial law. Children staying in Ukraine are constantly exposed to danger as a result of hostile, massive shelling by the Russian Federation; due to damage to the power system, water supply, heating; destruction of schools and hospitals; and the use of explosive devices by the occupiers against civilians, etc."[11].

[11] Політична оцінка та правова кваліфікація дій держави-агресора щодо українських дітей. Порушення прав українських дітей на тимчасово окупованих територіях України та у

The Russian occupation authorities started displacing Ukrainian children immediately after the beginning of the aggression on February 24, 2022, and the seizure of Ukrainian territories. Moreover, the facts given below are clear that such actions could have been pre-planned and are part of a broader plan, coordinated by the Russian top leadership.

In the spring, 2022, the Ukrainian Commissioner for Children's Rights reported[12] that, as of May 2, 181,000 children had been illegally transferred to Russia. According to the official information[13] of the aggressor, 183,168 children had already been taken to Russia at the beginning of May. As we can see, the numbers are very close.

In the summer of 2022, the Russians military reported[14] that more than 307,000 Ukrainian children had been taken to Russia. As we can see, the process had become of a massive and systemic nature. In addition to the military, reports of the deportation of minor Ukrainians to Russia were also disseminated by the civil authorities. For example, the family and youth administration of the Krasnodar region posted on its website the information about more than 1,000 children from captured Mariupol, who were transferred to Russian families in Tyumen, Irkutsk, Kemerovo, and Altai regions for adoption. The information has since been deleted, but the Institute for the Study of War (ISW) has a link[15] to an archived version.

Generally, the geography of the forced displacement of Ukrainian children is expansive. They were taken out of all the temporarily occupied regions of Ukraine including Kharkiv, Chernihiv, Zaporizhzhia and Kherson regions. At the same time, the forced transfer of children from the occupied Ukrainian regions of self-proclaimed "Luhansk and Donetsk People's Republics" also took place under the guise of 'evacuation from bombings.' The main destinations were the Vladimir, Omsk, Rostov, Chelyabinsk, Saratov, Moscow, Leningrad regions and Sakhalin. These are not border regions at all, but territories located thousands of kilometres from Ukraine.

Росії: депортація, мілітаризація, індоктринація. Спеціальна доповідь Уповноваженого Верховної Ради України з прав людини. URL:https://ombudsman.gov.ua/childrenofwar-2023/

12 URL: https://mediacenter.org.ua/the-russians-illegally-deported-or-transported-181-000-ukrainian-children-to-the-occupied-territories-commissioner-of-the-president-of-ukraine-for-children-s-rights-and-rehabilitation/

13 URL: https://suspilne.media/233593-rosia-viznala-so-primusovo-vivezla-miljon-ukrainciv/

14 URL: https://www.pravda.com.ua/eng/news/2022/06/19/7353366/

15 URL: https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-august-23

As officially reported by the Prosecutor General in 2024, 19,546 Ukrainian children were deported and/or forcibly transferred; only 388 were returned[16].

Unfortunately, today, it is impossible to establish the exact number of Ukrainian children forcibly displaced against their will to remote regions of Russia. Furthermore, in the third year of the Russian full-scale aggression, the deportation continues. There are many instances[17] of children being taken away even now, allegedly for vacation or rehabilitation, and then not returning. According to Daria Herasymchuk, Advisor – Presidential Commissioner for Children's Rights and Child Rehabilitation, the aggressor state is currently using several scenarios to move Ukrainian children to the territory of Russia and Belarus. She stated, „The occupiers first kill their parents and then deport children to their territory, or remove children directly from their biological family, or use filtration measures to take children away from their families or create unsuitable conditions for the child's life in the occupied territory. Later, allegedly on a voluntary basis, Russians offer parents to send their children for so-called rehabilitation or vacation, from which they will not return home, or move entire special institutions where Ukrainian children live to Russia.

At the same time, the Russians carry out such measures in a systematic manner, not allowing Ukraine to take its children to the territory under the Ukrainian Government control"[18]. It is worth noting that the first Ukrainian child was abducted by the Russians from the temporarily occupied Crimea back in 2014, and Ukraine officially recorded this crime[19].

According to the "Report on violations[20] and non-observance of international humanitarian and human rights law, war crimes and crimes against humanity related to forced movement and/or deportation of ukrainian children to the russian federation" prepared by the Monitoring Mission of Organization for Security and Cooperation in Europe Bureau of Democratic Institutions and Human Rights (document 180/2023), the Mission has identified two main categories of children subject to deportation.

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16 Діти війни. 24.02.2022-16.02.2024. URL:https://childrenofwar.gov.ua/

17 URL: https://lb.ua/society/2022/10/15/532700_okupanti_vivozyat_ditey_z.html

18 Шість підступних сценаріїв: радниця Зеленського розповіла, як окупанти вивозять українських дітей до РФ. URL:https://trueua.info/news/shist-pidstupnih-scenariiv-yak-okupanti-vivozyat-ukrainskih-ditej-na-teritoriyu-rosii

19 Першу українську дитину росіяни викрали з окупованого Криму ще у 2014 році, це геноцид, – Лубінець 1 лютого, 2024. URL:https://espreso.tv/suspilstvo-pershu-ukrainsku-ditinu-okupanti-vikrali-z-okupovanogo-krimu-shche-u-2014-rotsi-tse-genotsid-lubinets

20 URL: https://www.osce.org/odihr/542751

The first category of deported children consists of orphans, i.e. children who no longer have parents due to death, disappearance, or legal abandonment. The second category comprises unaccompanied children-those who have living parents (or a parent) but have been separated from them for various reasons, some of which may be related to the ongoing conflict. This category is diverse, including:

- children placed in foster care, temporarily separated from their families due to life circumstances. Such placements typically last up to 3-6, months;
- children separated due to parental absence, whose parents are working abroad, or whose fathers have been drafted into the army, or whose mothers are away with other family members;
- children who have been forcibly separated from their parents during the current conflict, whose parents failed to pass through filtration processes, or whose parents have been sent to so-called recreation camps, but the return of which is delayed.

2. Advanced Preparations by Russia for Deportation to Deal with Deported Children

a) The Facilities and Organizational Structure

The forcible transfer of children by the Russians is not a random or one-time action, it is a well-coordinated and systematic operation. This can be evidenced by the following.

The removal of children from Ukraine is supervised at the highest state level by the Russian government. The Presidential Commissioner for Children's Rights in Russia has personally visited[21] the occupied territories to monitor the process.

Also, as noted[22] by the office of the Ukrainian Commissioner for Human Rights, the forced deportation was meticulously pre-planned; Ukrainians, including children, were first taken to filtration camps and then redistributed across the regions of Russia. Each region had its specific plan detailing the number of people to be relocated, their destinations, and the logistics of their transfer.

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21 URL: https://www.radiosvoboda.org/a/news-rosiiski-viiska-vyvezennia-ditei/31979016.html

22 URL: https://suspilne.media/237522-rosia-deportuvala-z-ukraini-majze-12-miljona-ludej-ombudsmenka/

Courtney Austrian, the Deputy Chief of Mission at the U.S. Mission to the Organization for Security and Cooperation in Europe (OSCE) confirmed[23] the existence of filtration camps. At the OSCE meeting in Vienna, Austrian described these camps, which were set up in schools, sports centres and cultural institutions captured by Russian troops. In her opinion, the Russian authorities appeared to have prepared for this filtration process even before the invasion of Ukraine began. The OSCE monitoring mission identified 18 filtration camps in the territories occupied by Russia. At the same time, the Reuters news service, referring to the research data of Yale University, has already reported[24] on 21 such camps.

b) The Legal Grounds and Implications

This systematic effort to forcibly transfer Ukrainian children, under the guise of evacuation or care, represents a gross violation of international humanitarian and human rights laws. It further demonstrates Russia's preparation and intent to displace and assimilate Ukrainian children, raising serious legal and ethical questions about these actions, particularly, the state procedure of establishing guardianship and adoption is used.

As early as March 9, 2022, Russian President Vladimir Putin instructed[25] the simplification of the legal process for obtaining guardianship over deported Ukrainian minors. This directive was justified on the grounds that there was allegedly "a queue of Russians willing to establish guardianship over Ukrainian children."

In May 2020, Putin issued a decree[26] regarding a special procedure for granting Russian citizenship to Ukrainian children. This decree specifically targeted orphans and children left without parental care, stating that such children—if citizens of Ukraine, or from the self-proclaimed "Donetsk People's Republic" or "Luhansk People's Republic"—would be eligible to acquire Russian citizenship through a simplified process. Most recently, at the beginning of 2024, Putin issued another decree[27] titled *"On Determining Certain Categories of Foreign Citizens and Stateless Persons Who Have the Right to Apply for Citizenship of the Russian Federation."* This decree extended the special citizenship procedure to

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23 URL: https://www.nytimes.com/live/2022/07/08/world/russia-ukraine-war-news?smid=url-share#the-us-identified-18-russian-filtration-camps-for-ukrainians-a-diplomat-says

24 URL: https://www.reuters.com/world/exclusive-us-report-identifies-21-filtration-locations-run-by-russia-processing-2022-08-25/

25 URL: https://www.youtube.com/watch?v=yoKj293LZgo

26 URL: https://t.me/rian_ru/165351

27 URL: https://www.garant.ru/hotlaw/federal/1668084/

include Ukrainian orphans, further streamlining the process for integrating these children into Russian society. The amendments to Russian citizenship laws over the past four years—and particularly since May 2022—have significantly eased the process of altering the citizenship of Ukrainian orphans or unaccompanied minors. This legislative framework has allowed Russia to unilaterally change the nationality of these children without their consent.

Children under the age of 14 are given virtually no agency in this process, and parental or guardian consent is often disregarded when children are forcibly separated from their families. The legal framework effectively removes barriers to integrating Ukrainian children into Russian society, a move that raises significant concerns under international law, particularly regarding the rights of children to retain their nationality and maintain family connections.

c) The Social and Cultural Integration

Russia is currently conducting[28] an active state propaganda campaign aimed at promoting the adoption of forcibly displaced Ukrainian children, with the clear intent to integrate them into the Russian community. It is worth noting that the Russian children's ombudsman has even adopted[29] a Ukrainian child who was taken out of occupied Mariupol. And the head of Chechnya, Ramzan Kadyrov, personally boasted[30] that he had taken "difficult" teenagers from Ukrainian boarding schools. In addition, Russian social networks are spreading[31] video stories about adopted Ukrainian children, united under the common title: "childhood return".

This practice, widely recognized as "Russification", has been explicitly condemned by the Parliamentary Assembly of the Council of Europe (PACE) in its Resolution 2495 (2023)[32]. Russification involves systematically erasing Ukrainian identity and culture while imposing Russian identity and narratives on forcibly displaced Ukrainian children. Key components of this practice include: a prohibition from speaking the Ukrainian language or expressing in any way their Ukrainian identity and culture, compulsory exposure to the Russian language and culture through classes, blanket exposure to the prevailing propaganda through the media, teaching of the Russian version of history, visits to "patriotic" sites, military training and denigration of the Ukrainian language, culture and history. In some

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28 URL: https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-november-16

29 URL: https://euagenda.eu/news/783221

30 URL: https://t.me/RKadyrov_95/3104

31 URL: https://t.me/voenkorKotenok/42776

32 URL: https://pace.coe.int/files/31776/html

cases, children have been (often falsely) informed that their parents have died; most have no means of knowing where they are or how to contact their families or obtain any help, and many suffer from bullying and psychological harassment.

There is substantial evidence highlighting the systematic effort to assimilate forcibly displaced Ukrainian children into Russian society. According to reports from the Russian media[33], a group of adopted children from Mariupol initially displayed strong Ukrainian patriotic sentiments upon being taken to the Moscow suburbs. These children sang the Ukrainian national anthem, expressed negative views about President Putin, and shouted pro-Ukrainian slogans like "Glory to Ukraine!" However, following their „integration" into Russian families, their attitudes reportedly shifted, reflecting the outcomes of targeted Russification.

One particularly troubling aspect is the role of Chechen leader Ramzan Kadyrov, who has openly threatened to subject Ukrainian children transferred to Chechnya to "military-patriotic education." This raises grave concerns about the ideological indoctrination these children may undergo, leading them to identify as patriots of Russia under duress and manipulation. The above-mentioned propaganda videos about adopted Ukrainians with the telling title "childhood return" contain the whole essence of the displacement – the return to Russia of allegedly "lost" Ukrainians in accordance with the "one nation" thesis proclaimed[34] by Putin.

The role of the Kremlin-backed Russian Orthodox Church (ROC) in the Russification of forcibly deported Ukrainian children underscores the deeply institutionalized nature of this process, as reported[35] by the Institute for the Study of War (ISW) and joint investigations by Russian opposition student journal *DOXA* and open-source outlet *Kidnapping*. These investigations reveal that the ROC plays a direct role in fostering pro-Russian and pro-ROC sentiment among Ukrainian children, further severing their ties to their Ukrainian identity. DOXA found[36] that from the early days of Russia's 2022 full-scale invasion of Ukraine, Russian officials deported children from orphanages and boarding schools in occupied Donetsk Oblast to Russia's Rostov Oblast, where they were visited by Metropolitan Mercury (Igor Ivanov) of Rostov and Novocherkassk, who spoke to them about

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33 URL:https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiQs_y4MT7AhWJxosKHatFDcsQFnoECA8QAQ&url=https%3A%2F%2Fnews.liga.net%2Fpolitics%2Fnews%2Fv-rf-jaluyutsya-chto-pohischennye-iz-mariupolya-deti-peli-gimn-i-ruga

34 URL: http://kremlin.ru/events/president/news/66181

35 URL: https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-june-4-2024

36 URL: https://doxa.team/articles/deport-rpc

the ROC and seemingly enticed them to consider baptism into the ROC. ROC clergy have also called for the baptism[37] of deported Ukrainian children into the ROC, and reportedly encouraged[38] them to join various „military-patriotic" youth organizations in Russia. *DOXA* and *Kidnapping* also found that deported children from occupied Donetsk and Luhansk oblasts stayed at shelters run by the ROC in Voronezh Oblast, where ROC clergy and affiliated officials hold „military-patriotic" events for the deported children to encourage pro-Russian and pro-ROC sentiment and cut the children off from their Ukrainian identities.ISW has previously assessed[39] that the ROC is instrumental in enacting the Kremlin's occupation plan for Ukraine, and this appears to extend to Russian efforts to Russify deported Ukrainian children living in Russia. Kremlin-appointed Commissioner on Children's Rights Maria Lvova-Belova[40], against whom the International Criminal Court has issued an arrest warrant due to her role in facilitating the deportation of Ukrainian children, is notably married[41] to an ROC priest. Lvova-Belova and her husband have themselves adopted a deported[42] Ukrainian child from Mariupol, highlighting the personal involvement of the ROC and other Kremlin officials in the deportation of Ukrainian children.

3. Violations of the IHL and Applicable International Criminal Law

a) A deportation as a War Crime

Children are among the most vulnerable groups during armed conflicts, enduring severe psychological and physical harm. International humanitarian law (IHL) and international criminal law (ICL) provide robust legal frameworks aimed at protecting children. The Geneva Conventions of 1949[43], universally ratified,

37 URL: http://www.e-vestnik.ru/reports/obnyat_i_pomolitsja_pomosh_bezhencam_12147/

38 URL: http://eparchia.patriarchia.ru/db/text/5906094.html

39 URL: https://understandingwar.org/backgrounder/russian-offensive-campaign-assessment-may-3-2024

40 URL: https://www.cnn.com/2023/02/15/europe/russia-ukraine-children-maria-lvova-belova-intl/index.html

41 URL: https://meduza%20dot%20io/en/feature/2023/03/19/just-call-me-masha

42 URL:https://missingchildrenukraine.news-exchange.ebu.ch/the-missing-children-of-ukraine/maria-lvova-belova/#:~:text=Lvova%2DBelova%20and%20her%20husband,and%20her%20husband%20 Pavel%20Kogelman.

43 URL:https://www.googleadservices.com/pagead/aclk?sa=L&ai=DChcSEwiHvfSN-cGGAxUhNwYAHRxcDuEYABAAGgJ3cw&ase=2&gclid=Cj0KCQjw9vqyBhCKARIsAIIc

and their Additional Protocols[44] (APs) of 1977 enshrine specific provisions to ensure the safety and welfare of children in times of war. These include prohibitions against forcible displacement, family separation, and targeting children for assimilation into foreign cultures or political systems.

Removal of Ukrainian children against their will under the control of the occupying state, filtering, preparation of the legislative framework for their integration into Russian society, a public advertising campaign to encourage such actions and further "re-education" and assimilation – all these are components of one plan. This process can hardly be considered simply a deportation.

Evidently, such forcible resettlement of Ukrainian children in violation of the norms of international humanitarian law is carried out by Russia for the purpose not only to displace them but for their further integration into Russian society (Russian national group) via adoption and granting Russian citizenship, to erase national identity and transform their Ukrainian consciousness into Russian one.

According to Articles 7 (1) (d), 8 (2) (a) (vii)-1 and 8 (2) (b) (viii) of the Rome Statute of the International Criminal Court[45] (hereinafter – the Rome Statute), the unlawful deportation and forcible transfer of civilians, thus including children, are qualified as crimes against humanity and/or war crimes.

However, under Article 2 (e) of the Convention on the Prevention and Punishment of the Crime of Genocide[46] (hereinafter – the Genocide Convention), as well as Article 6 (e) of the Rome Statute, „the forcible transfer of children from a protected group to another" constitutes an of genocide if carried out „with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such."[47].

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44 URL: Additional%20 Protocols%20to%20the%20 Geneva%20 Conventions%20of%20 1949%20%20Relief Web%20https:/www.reliefweb.int

45 Римський статут міжнародного кримінального суду від 17.07.1998. URL: https://zakon.rada.gov.ua/laws/show/995_588

46 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948). URL: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

47 Римський статут міжнародного кримінального суду від 17.07.1998. URL: https://zakon.rada.gov.ua/laws/show/995_588

It is also worth noting that the forcible transfer of children from one group to another was defined as one of the elements of the crime of genocide as early as March 28, 1947. The commentary to Article 3 (a) of the draft Genocide Convention in particular emphasized that „the separation of children from their parents leads to the imposition of a culture and mentality different from that of their parents on children, who are then at a vulnerable and susceptible age. This process usually leads to the disappearance of the group as a cultural unit in a relatively short time"[48]. That is why it can be considered that we are talking about a universal approach of the international community to the protection of children as a key component of the social and cultural well-being of the state and the survival of the nation.

Let us remind that the prohibition of genocide is a peremptory norm of international law, i.e. *jus cogens*, and consequently, no derogation from it is allowed, and this prohibition existed at the universal level even before the adoption of the relevant UN Convention, as evidenced, in particular, by UN General Assembly Resolution 96 (1) „The Crime of Genocide" of December 11, 1946[49].

In its report on violations of international humanitarian law and human rights, war crimes, and crimes against humanity committed in Ukraine (April 1 – June 25, 2022), the OSCE Moscow Mechanism Group of Experts noted that during its visit to Ukraine, the mission received confirmation of cases of deportations, although it was unable to obtain the exact number of children affected and emphasized that mass forcible transfers of civilians during a conflict to the territory of the occupying power are prohibited by the Geneva Conventions of 1949. This practice is considered a war crime[50].

The report of the Independent International Commission of Inquiry on Ukraine, among other things, includes information on the forced displacement

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48 Політична оцінка та правова кваліфікація дій держави-агресора щодо українських дітей. Порушення прав українських дітей на тимчасово окупованих територіях України та у Росії: депортація, мілітаризація, індоктринація. Спеціальна доповідь Уповноваженого Верховної Ради України з прав людини. URL:https://ombudsman.gov.ua/childrenofwar-2023/

49 UN General Assembly Resolution 96 (1) "The Crime of Genocide" dated December 11, 1946: URL: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/47/PDF/NR003347.pdf?OpenElement

50 Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine (1 April – 25 June 2022), 14 липня 2022 року. URL: https://reliefweb.int/report/ukraine/report-violations-international-humanitarian-and-human-rights-law-war-crimes-and-crimes-against-humanity-committed-ukraine-1-april-25-june-2022

and deportation of children, which is equivalent to war crimes. The Commission identified three main cases in which the Russian authorities transferred Ukrainian children from one area under their control in Ukraine to another such area or to the Russian Federation. It concerned children who lost their parents or temporarily lost contact with them during the hostilities, or were separated from their parents during detention in the so-called "filtration" facilities, or children who were in children's institutions.

The experts suggested that "Russian government officials had taken legal and political measures regarding Ukrainian children displaced to the Russian Federation. In particular, they were granted Russian citizenship and placed in foster families, which gives reason to believe that some of the children will have to stay in the Russian Federation forever."

The Commission noted, however, that the displacement of the children did not meet the requirements established by international humanitarian law and was not justified on grounds for their safety or health. In addition, according to experts, there was a possibility of evacuating children to the territory controlled by the Government of Ukraine. In this regard, the Report states it is likely that the Russian authorities did not attempt to establish contact with the children's relatives or with the Ukrainian authorities. Therefore, the displacement, which was supposed to be temporary, for various reasons mostly became long-term, and parents or legal guardians and children faced a number of obstacles in establishing contact, family reunification , and returning such children to Ukraine. And according to Article 85(4)(b), "unjustified delay in the repatriation of prisoners of war or civilians" is a serious violation of Additional Protocol I, i.e. it is a war crime.[51]

The Russian Federation is trying to justify the unlawful deportations and forced displacement of children with humanitarian reasons, presenting this process as an evacuation. However, the Trial Chamber judgement in *Prosecutor v. Blagojević and Jokić* states that evacuation must be a voluntary decision of the affected person. In this context, coercion is not limited to physical force but also includes threats of violence, harassment, detention, psychological oppression, abuse of power, and deliberate creation of an unsafe environment. Parties to a conflict are obliged to prevent displacement caused by their own actions, including

[51] Політична оцінка та правова кваліфікація дій держави-агресора щодо українських дітей. Порушення прав українських дітей на тимчасово окупованих територіях України та у Росії: депортація, мілітаризація, індоктринація. Спеціальна доповідь Уповноваженого Верховної Ради України з прав людини. URL:https://ombudsman.gov.ua/childrenofwar-2023/

intimidation and indiscriminate attacks. In addition, the rule on evacuation has a protective element that is absent in the case of deportation"[52].

b) The Genocide

It is important to emphasize that the relevant criminal acts of the aggressor state against Ukrainian children are not chaotic and sporadic, and contain clear signs of a genocidal policy aimed at turning Ukrainian children into enemies of their own nation. Moreover, it is worth noting that the pace and scale of the implementation of this policy has significantly increased with the full-scale invasion of Ukraine by the Russian Federation.

To confirm that such a criminal policy has signs of genocide, we will refer to the crimes listed in the Rome Statute[53] which, in particular, state that to prove the crime of genocide through the forcible transfer of children from one protected group to another, it is necessary to prove the presence of the following elements: 1) the perpetrator forcibly transferred one or more persons; 2) such person or persons belonged to a particular national, ethnic, racial or religious group; 3) the perpetrator intended to destroy, in whole or in part, that national, ethnic, racial or religious group, as such; 4) the transfer was from that group to another group; 5) the transferred person or persons were under the age of 18 years; 6) the perpetrator knew, or should have known, that the person or persons were under the age of 18 years; 7) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself affect such destruction

At the same time, such elements of crime imply that the violent nature of the transfer should be interpreted broadly, not only as the use of physical force, but also as coercion, the threat of force, detention, psychological pressure, abuse of power, and the creation of an atmosphere of fear and lack of freedom. The most controversial circumstance today is the voluntary nature of the consent given by legal representatives to the transfer of children from the temporarily occupied territories to "re-education" camps. The coercive nature of such transfer of minors is supported, in particular, by psychological pressure, as each of the cases

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52 Політична оцінка та правова кваліфікація дій держави-агресора щодо українських дітей. Порушення прав українських дітей на тимчасово окупованих територіях України та у Росії: депортація, мілітаризація, індоктринація. Спеціальна доповідь Уповноваженого Верховної Ради України з прав людини. URL:https://ombudsman.gov.ua/childrenofwar-2023/

53 Elements of Crimes [від 9 вересня 2002 р.]. URL: http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/

of transfer of children with subsequent indefinite detention was preceded by the return of several groups of minors, **creating** the illusion of security and the feeling of a "bad mother (father)" because of the refusal to repeat the "positive" experience. Another scenario involves the abuse of power when representatives of the occupying power, the Russian military, and/or local collaborators came to the homes and insisted on making the "right decision." Threats and intimidation were also used to present parents' refusal as a threat to the best interests of the child and, thus, as a basis for the occupation authorities to deprive them of their parental rights. Finally, the general atmosphere was also of great importance, i.e., military operations with a permanent threat of indiscriminate missile, air, and artillery strikes, limited access to information, and a lack of understanding of when de-occupation would take place[54]. In addition, the "consent" was granted for the temporary transfer, rest, and return of the child within a specified period of time, depending on the institution (usually 2-3 weeks). Therefore, the actions of the Russians to arbitrarily extend the period of transfer of children, to change their place of residence (particularly without notifying their parents), and to refuse to return minors centrally cannot be covered by the consent given under coercion. For example, in one of the camps, about 200 Ukrainian children aged 14-17 were held without their parents' consent[55].

In the Report of May 4, 2023, the experts of the OSCE Moscow Mechanism emphasized that "displacement against the will of a person always contains an element of coercion, but this element does not necessarily involve the use of physical or other force." Rather, the emphasis is on the "lack of real choice [...] in the process of [...] displacement." At the same time, as noted, "it does not matter whether the displacement is permanent or temporary." The experts also concluded that even though the initial consent of their legal representatives to their children's stay in the camps was granted, the arbitrary extension of the detention of minors by the Russian occupation authorities amounted to displacement without consent

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54 Політична оцінка та правова кваліфікація дій держави-агресора щодо українських дітей. Порушення прав українських дітей на тимчасово окупованих територіях України та у Росії: депортація, мілітаризація, індоктринація. Спеціальна доповідь Уповноваженого Верховної Ради України з прав людини. URL:https://ombudsman.gov.ua/childrenofwar-2023/

55 Політична оцінка та правова кваліфікація дій держави-агресора щодо українських дітей. Порушення прав українських дітей на тимчасово окупованих територіях України та у Росії: депортація, мілітаризація, індоктринація. Спеціальна доповідь Уповноваженого Верховної Ради України з прав людини. URL:https://ombudsman.gov.ua/childrenofwar-2023/

and separation from their families, which equates the situation of such children to that of forcibly transferred or deported children[56].

It is also important to note that the Office of the Prosecutor General is currently continuing to investigate, jointly with the ICC, the case of the forced deportation of 19,546 Ukrainian children from the territories temporarily occupied by the Russian Federation. These are children from ages one to 18 years old. Most of them are from the Donetsk region (13,600 children), Kherson (1,600), Zaporizhzhia (1,300) and Luhansk (1,100) regions. However, there are children from Kharkiv, Mykolaiv, Chernihiv, Sumy , and Kyiv regions. In this case, the prosecutor's office is recording all the elements of genocide and investigating the facts of the forced deportation of Ukrainian children. As of November 2023, 386 children were returned thanks to the joint work of the competent authorities of Ukraine and civil society organizations[57].

It should be noted that the criminal actions of the aggressor state aimed at the unlawful deportation and/or forced displacement of Ukrainian children have been repeatedly condemned by the parliaments of foreign countries, as well as regional and international organizations.

Thus, on September 15, 2022, the European Parliament adopted a resolution on human rights violations in the context of the forced deportation of Ukrainian civilians to and forced adoption of Ukrainian children in Russia (2022/2825 (RSP))[58]. It states that the forced displacement and deportation of Ukrainian children, including those from boarding schools, to the Russian Federation and to the territories occupied by the Russian Federation, and their forced adoption by Russian families, are a violation of Ukrainian and international law, in particular Article II of the UN Convention on the Prevention and Punishment of the Crime of Genocide. The Resolution obliges the Russian Federation to make public information on the location of displaced persons who are citizens of Ukraine, to provide them with freedom of movement and opportunities for their immediate

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56 Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine (1 April – 25 June 2022), 14 липня 2022 року. URL: https://reliefweb.int/report/ukraine/report-violations-international-humanitarian-and-human-rights-law-war-crimes-and-crimes-against-humanity-committed-ukraine-1-april-25-june-2022

57 Генпрокурор: Продовжуємо тісну співпрацю з МКС у справі примусової депортації українських дітей. 15.11.2023. URL: https://interfax.com.ua/news/general/947867.html

58 European Parliament resolution of 15 September 2022 on human rights violations in the context of the forced deportation of Ukrainian civilians to and the forced adoption of Ukrainian children in Russia (2022/2825(RSP)). URL: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0320_EN.pdf

return to their homeland. It is important to note that the European Parliament once again calls on the Government of Ukraine to accelerate the ratification of the Rome Statute of the ICC, which will significantly facilitate procedures related to the investigation of war crimes and crimes against humanity, including forced deportations.

In the Resolution 2482(2022)[59] the Parliamentary Assembly of the Counsel of Europe noted that there is mounting evidence that the official Russian rhetoric used to justify the full-scale invasion and aggression against Ukraine, the so-called "De-Ukrainianisation" process, carries characteristics of public incitement to genocide or reveals a genocidal intent to destroy the Ukrainian national group as such, or at least part of it. It recalls that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention"), to which both Ukraine and the Russian Federation are parties, prohibits direct and public incitement to commit genocide and the attempt to commit genocide. It also notes with the utmost concern that some of the acts committed by Russian forces against Ukrainian civilians could fall under Article II of the Genocide Convention, such as killings and forcible transfer of children of one group to another group for Russification purposes through adoption by Russian families and/or transfer to Russian-run orphanages or residential facilities like summer camps.

In its Resolution[60] 2529 (2024), the Parliamentary Assembly is particularly concerned about the fate of children forcibly transferred and deported to the temporarily occupied Ukrainian territories, the Russian Federation, and Belarus. These practices constitute war crimes, crimes against humanity, and, as noted by the Assembly in its Resolution 2482 (2023) "Legal and human rights aspects of the Russian Federation's aggression against Ukraine," possible genocide, since acts "such as killings and forcible transfer of children of one group to another group for Russification purposes through adoption by Russian families and/or transfer to Russian-run orphanages or residential facilities like summer camps" could fall under Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

On April 5, 2023, 49 states and the EU unanimously condemned the actions of the Russian Federation in Ukraine, in particular, the forced deportation of

[59] URL: https://pace.coe.int/en/files/31620/html
[60] URL: https://pace.coe.int/en/files/33348/html

Ukrainian children, as well as other serious violations against children committed by the Russian military in Ukraine[61].

The NGO "The Institute for the Study of War" which is monitoring Russian-Ukrainian war conflict on daily basis assess that the deportation[62] of Ukrainian children, with the intent to destroy their Ukrainian identities via such Russification projects, amounts to a violation of the Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits „forcibly transferring children of a group to another group" on grounds that it is an act of genocide.

Unfortunately, today, it is impossible to establish the exact number of Ukrainian children who have been forcibly deported to remote regions of the Russian Federation against their will. It is only known that the main areas of deportation were the Vladimir, Omsk, Rostov, Chelyabinsk, Saratov, Moscow, Leningrad regions and Sakhalin. That is, not border regions at all, but territories thousands of kilometres away from Ukraine. It is unfortunate that in the third year of Russian aggression, the deportation of Ukrainian children is still ongoing.

As we can see, the displacement of Ukrainian children against their will by the occupying state, as well as its preparation of a legislative framework for their integration into Russian society, a public advertising campaign to encourage such actions, and subsequent "re-education" and assimilation are part of the same plan. This process can hardly be considered a mere deportation.

To qualify actions as deportation or forcible transfer, it is necessary to establish that the perpetrator deported or forcibly transferred, without grounds permitted by international law, one or more persons to another state or place by expulsion or other coercive acts. International criminal law distinguishes between two types of resettlement of people – deportation (movement across the state border) and forcible transfer (within the territory of the state border). Thus, in the case of the Prosecutor v. Jovica Stanišić and Franko Simatović, Case No. IT-03-69-T, Judgment[63] (TC), 30 May 2013 the court found that the crime of deportation requires the movement of victims across a de jure state border, or, in certain circumstances, a de facto border. Forced displacement involves the displacement of persons within national borders. A similar position is contained in the case of

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61 Deportation of Ukrainian children: "Russia cannot deny the truth", 5 квітня 2023 року. URL: https://onu.delegfrance.org/deportation-of-ukrainian-children-no-amount-of-disinformation-spread-by-russia?fbclid=IwAR0Vq5-IS3o-X2S1PGh255u00V5cMU61E6BpjLklu0j-43AxMbRCBtlDXBc

62 URL: https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-june-4-2024

63 URL: https://www.legal-tools.org/doc/066e67/pdf/

Prosecutor v. *Krnojelac*, „Judgement", IT-97-25-T, 15 March 2002[64], para. 474 and in other practice of the International Criminal Tribunal for the former Yugoslavia.

It is obvious that during the crime of deportation, the intention of a perpetrator is to forcedly transfer people from the territory of one state to the territory of another state. The aim of such a crime is the forcible transfer of persons against their will from the territory where they stayed legally.

However, the facts given above show that the Russians' aim is not limited exclusively to the territorial movement of children. Here we can talk about their removal from one community (group) and integration into another one. According to the practice[65] of the International Criminal Tribunal for Rwanda, the term "national group" is interpreted as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties. Thus, the citizens of Ukraine – the Ukrainian people – are a national group in the meaning of Article 2 of the UN Convention on the Prevention and Punishment of the Crime of Genocide and Article 6 of the Statute of the International Criminal Court. Similarly, the national group in the same context is the people of the Russian Federation – Russian citizens bound by common citizenship.

The actus reus of the perpetrators during the process of Ukrainian children's transfer does not end with solely their physical placement on the territory of Russia; it continues through their integration into the national group of the Russian people. It is evidenced by the above-mentioned acts of the Russian state regarding the special procedure for obtaining guardianship over minor Ukrainians and the accelerated procedure for granting them Russian citizenship. These measures enable a legal bond between the displaced children and the new national group. At the same time, cultural, linguistic, and educational integration takes place. Children live in Russian families, receive Russian education, and everything is done to ensure they consider themselves Russians. It is accompanied by public propaganda of such actions, which gives reason to consider this process deliberate conduct with a specific intent to destroy the Ukrainian nation as a protected group.

Therefore, the mass resettlement of Ukrainian children to Russia has signs of not just deportation but the forcible transfer of children from one national group to another. By all elements, this is a forcible transfer of children from one national group to another, and therefore can be qualified as an international crime

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64 URL: http://www.legal-tools.org/doc/1a994b/

65 URL: https://cilrap-lexsitus.org/case-law/content/b8d7bd

of genocide aimed at the destruction of a specific national group, the Ukrainian people.

Nazi's "germanization" and Russian "russification" are identical examples of genocide.

The ongoing kidnapping of Ukrainian children by Russian authorities and their further "russification" is much more similar to the Nazi's "Germanisation" plan during WWII. Actually, both processes look very similar if we refer to the so-called "RuShA Case."

On September 30, 1947, the US Military Government for Germany reconstituted Military Tribunal I, which had earlier been convened for the Doctors' Trial, to try the RuSHA Case. This was Case #8 of the Subsequent Nuremberg Proceedings. The 14 defendants were all leading officials in the RuSHA (Rasse und Siedlungshauptamt) or Main Race and Resettlement Office, a central organization in the implementation of racial programs of the Third Reich, or in other organizations with parallel missions, such as the Lebensborn Society and the Main Office for Repatriation of Racial Germans.

The Nazis, soon after the invasion of Poland, began an extensive campaign of kidnapping foreign children. Although at first, these kidnappings were confined principally to so-called ethnic Germans, it soon became apparent that sufficient children were not being secured to satisfy the Nazi aims; and the program was therefore extended to include all children of „good racial characteristics"; that is, physical appearances, such as blond hair and blue eyes, indicating that the child might have some „Nordic" blood or might make a good German. Racial examiners of RuSHA performed these examinations to determine whether the child was of good or inferior blood. RuSHA actively participated in the kidnapping of alien children. To this organization was delegated the task of making racial examinations and, based on these examinations and racial evaluations, many children were wrested from their parents and relatives and sent to Germany.

In its Judgement[66] the Court stated , that: "Acts, conduct and plans were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by elimination and suppression of national characteristics. The object of this program was to strengthen the German nation and the so-called ‚Aryan' race at the expense of such other nations and groups by imposing Nazi and German characteristics upon individuals selected therefrom and by the extermination of ‚undesirable' racial elements. This program

66 URL: https://werle.rewi.hu-berlin.de/RUSHA-Case%20Judgment.pdf

was carried out in part by ... (a) Kidnapping children. .... (c) Taking away infants of Eastern workers."

The defendants were accused of criminal responsibility for many aspects of the Nazi racial program, including the kidnapping of „racially valuable" children for Aryanization, the forcible evacuation of foreign nationals from their homes in favour of Germans or Ethnic Germans, and the persecution and extermination of Jews throughout Germany and German-occupied Europe. The trial ran from October 20, 1947, and the tribunal rendered its judgement on March 10, 1948. It found eight defendants guilty on all counts, five guilty only of membership in a criminal organization, and one not guilty. The sentences were announced the same day. The chief defendant, Ulrich Greifelt, was sentenced to life in prison, seven to terms of between 10 and 25 years, five to time already served, and one was acquitted on February 17, 1948.

Originally, the word" genocide" was a term coined by Professor Rafael Lemkin in his work "Axis rule in Occupied Europe"[67] to denote a new conception, namely, the destruction of a nation or of an ethnic group. Genocide is directed against a national group as an entity, and the actions involved are directed against individuals, not in their individual capacity; but as members of the national group. According to Lemkin genocide does not necessarily mean the immediate destruction of a nation or of a national group, except when accomplished by mass killings of all its members. It is intended to signify also a co-ordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide has two phases: one, the destruction of the national pattern of the oppressed group, for which the word" denationalization" was used in the' past ; the other, the imposition of the national pattern of the oppressor.

Despite the further meaning of genocide being substantially narrowed down from its original sense during the drafting of the Genocide Convention in 1948, we can clearly see that in the "RuSHA Case," judges treated the Nazi's actions of kidnapping foreign children and their further "Germanisation" as genocide. In fact,

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67 URL: https://books.google.com.ua/books?id=y0in2wOY-W0C&pg=PR17&hl=uk&-source=gbs_selected_pages&cad=2#v=onepage&q&f=false

more than 80 years later, we are facing a new mass kidnapping of children from a foreign state and their "de-nationalization," which is now called "russification."

Conclusions

The war is ongoing, and such criminal acts continue to this day. Today, it is not known how many thousands of Ukrainian children have already been "integrated" into Russian society, and it is not known whether they still recognize themselves as Ukrainians. Will Ukraine be able to bring them home? Unfortunately, there are no answers to these and many other questions as of now. That is why the situation with the deportation of Ukrainian children should be carefully examined by the Office of the ICC Prosecutor for potential elements of the international crime of genocide in the actions of Russian officials.

It is believed that the priority areas in the context of ensuring the protection of children's rights in situations of international armed conflict should be the development and approval of a single standard for documenting identified war crimes, the creation of safety hubs for children affected by war and their families, the development of an effective mechanism for compensation and reparations for victims of war crimes, and the need to create assistance centres for children who have witnessed and/or suffered from horrific crimes. Furthermore, it includes the implementation of a restorative justice project for minors and the joining of forces to ensure further effective cooperation and protection of children's rights by juvenile prosecutors. To implement many of these measures, it is important to obtain testimonies from children who have witnessed and/or suffered from such war crimes with minimal psychological trauma and in a friendly environment.

It is also important to strengthen Ukraine's bilateral and multilateral cooperation with allied states and international organizations, and to develop appropriate mechanisms aimed at returning Ukrainian children home. Notably, in February 2024, Canada and Ukraine agreed to establish an international coalition that will work to return to Ukraine children who were forcibly transferred from the occupied territories to other occupied regions or to Russia[68].

We would especially like to emphasize that on February 2, 2024, the International Court of Justice recognized its jurisdiction in Ukraine's lawsuit against

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[68] Канада й Україна створюють міжнародну коаліцію з повернення українських дітей, вивезених у Росію. 02.02.2024. URL: https://www.eurointegration.com.ua/news/2024/02/2/7178785/

Russia regarding the distortion of the concept of "genocide." This is a case that Ukraine filed against Russia a few days after the start of the full-scale invasion. Although the International Court of Justice will not determine whether Russia committed genocide against Ukraine, it is positive that the decision on the merits in this case may create an additional legal precedent for other lawsuits in which Ukraine is currently involved and will eventually try to bring Russia and its military and political leadership to international legal accountability.

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Małgorzata Ganczar

Cyberattacks as a Factor Shaping the Information Landscape in Cyberspace

Introduction

In the contemporary era, sophisticated technical capabilities are employed for the acquisition, analysis, and storage of substantial quantities of data, signifying a transition from emphasis on quality to that on quantity – a pivotal aspect of the big data era[1]. The term "big data" is used to describe extensive, dynamic datasets that are characterised by high variability and a rapid data flow (generated and recorded continuously and processed in real time). These datasets require the use of advanced tools that extend beyond the capabilities of traditional relational databases and spreadsheets[2]. In the context of the information society, data can be considered to be analogous to the material inputs, raw materials, or fuels that powered industrial innovation[3]. The interconnected world, growth of mobile information and communication devices – especially *smart* products like phones and watches – and the saturation of various objects with Internet-enabled sensors and gauges (e.g. wearable technologies and *the Internet of Things*[4] concept) facilitate

1 See: P. Idzik, *Analiza Big Data. Badania niereaktywne w erze Internetu 2.0* [w:] *Zwrot cyfrowy w humanistyce*, red. A. Radomski, R. Bomba, Lublin 2013, p. 153–168.

2 Ł. Iwasiński, *Big data a problem reprezentacji poznawczej*, „Człowiek i Społeczeństwo" 2022, t. 53, p. 245.

3 K. Leśniak-Moczuk, *Społeczeństwo równości czy zniewolone danetyzacją?*, „Nierówności Społeczne a Wzrost Gospodarczy" 2017, t. 52, nr 4, p. 236.

4 *The Internet of Things* concept covers technological solutions in which individual objects (devices) can directly or indirectly collect, process or exchange data via a computer network, e.g. modern household appliances, heating systems, lighting systems, see *Internet rzeczy. Bezpieczeństwo w Smart city*, ed. Grażyna Szpor, (Warszawa 2015), 33.

the collection and automatic capture of diverse data[5]. In addition to deliberate and conscious data collection, modern analytics, including those related to business, society, and culture, increasingly rely on the automatic acquisition of a wide array of information from both natural and social environments. This includes digital traces left by individuals. The vast majority of aspects of reality are now represented as data, which is aggregated, processed, and subject to algorithmisation and *datafication*[6]. The prevailing view is to quantify and record all aspects of the world, not just for planned processes, but also proactively due to the potential for repurposing collected data beyond the original scope of acquisition[7].

In conclusion, the advancement of technology has rendered the development and acquisition of information nearly limitless. What was previously accessible only to a select few, has now become widely accessible to the average global citizen. However, this expanded access to information, which was previously confined to individuals and organisations that were aware of its strategic importance, now gives rise to a number of risks in relation to the manner in which information is conveyed. In essence, the simplicity of access, the rapid increase, and the limited control over information flows make it increasingly challenging to safeguard. This issue is complex, as information is inherently tied to national interests and citizens' activities. Key sectors, such as energy, public administration, defence, and media, demonstrate the broad scope of this phenomenon, with overlapping boundaries justifying its growing importance and complexity[8].

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5 Ł. Iwański, *Społeczne zagrożenia danetyzacji rzeczywistości* [w:] *Nauka o informacji w okresie zmian. Informatologia i humanistyka cyfrowa*, red. B. Sosińska-Kalata, Warszawa 2016, s. 136.

6 Datafication is understood as the transformation of words into data - the recognition in a digital image of letters, words, sentences, paragraphs. Digital information is useful for computers to process and for algorithms to analyse. Datafication of various dimensions of the physical world for many disciplines, as well as the social world, including: verbal messages, location or people's movements (thanks to geolocalisation). Datafication of reality brings many benefits in the areas of science, engineering, security and well-being in the broader sense, but it is also associated with risks such as loss of privacy and increasing surveillance. See: M. Ganczar, *Analityka danych publicznych dla diagnoz i prognoz dotyczących przedsiębiorców* [w:] *Internet. Analityka danych*, red. G. Szpor, K. Czaplicki, Warszawa 2019, p. 188–200.

7 M. Ganczar, *Administracyjno-prawne uwarunkowania prowadzenia działalności gospodarczej w warunkach społeczeństwa informacyjnego*, Lublin 2018, p. 240.

8 M. Komorowska, *Rola informacji we współczesnym świecie*, „Zeszyty Naukowe SGSP", 2021, Nr 79, p. 187–203.

1. The Significance of Information

The value of information is an indisputable phenomenon that is not open to question and is frequently emphasised in the scientific community[9]. The functioning of individuals, communities, states and even supranational groups is undeniably based on access to a wealth of information. The ability to find and use the most relevant information is now essential. The Internet offers a vast array of information, including specialised and technical data. Information is at the heart of development, shaping the living conditions of societies, states, regions and the world, acting as a productive force and the main driver of civilisational progress. Access to information influences economic processes, socio-economic transformations and the development of new social models.

The term "information" is not defined by legislation, but is typically employed to signify knowledge, communication, or the transfer of data[10]. The notion of information is often conceptualised within the fields of cybernetics and information theory, with different scientific disciplines employing the term in accordance with their respective areas of expertise. In the field of cybernetics, information is defined as any factor conveyed to a person or automated device, irrespective of content or mode of transmission, that can be utilised for more specific actions[11]. In a legal context, information is regarded as a transferable entity, in contrast to privacy, which is a legally recognised inalienable personal right. Information is a transferable good that reduces uncertainty[12]. It belongs to the category of *quasi-public* goods, and its use by one entity does not preclude its use by another entity. Definitions from different disciplines emphasise varying aspects of information, considering it as a physical object or an idea conveyed through gestures, sounds or symbols[13].

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9 See P. Fajgielski, *Informacja w administracji publicznej. Prawne aspekty gromadzenia, udostępniania i ochrony*, Wrocław 2007; K. Celarek, *Prawo informacyjne. Problem badawczy teorii prawa administracyjnego*, Warszawa 2013; E. Sobol (red.) *Mały słownik języka polskiego*, Warszawa 1993 r., p. 265. J. Janowski, *Technologia informacyjna dla prawników i administratywistów*, Warszawa 2009.

10 E. Sobol (red.), *Mały słownik języka polskiego*, Warszawa 1993 r., p. 265, za: P. Fajgielski. *Informacja w administracji publicznej...*, p. 13.

11 W. R. Wiewiórowski, G. Wierczyński, *Informatyka prawnicza. Technologia informacyjna dla prawników i administracji publicznej*, Warszawa 2008, p. 28.

12 After G. Szpor, *Pojęcie informacji a zakres ochrony danych,* [w:] *Ochrona danych osobowych w Polsce z perspektywy dziesięcioleci,* red. P. Fajgielski, Lublin 2008, p. 8.

13 B. Fischer, W. Świerczyńska-Głownia, *Dostęp do informacji ustawowo chronionych, zarządzanie informacja. Zagadnienia podstawowe dla dziennikarzy*, Kraków 2006, p. 9 za:

Information is a fundamental value today, and its importance is growing infinitely thanks to the development of modern information and communication technologies. We encounter the concept of information every day in all areas of life, wherever communication and mutual interaction[14] occur. For this reason, defining a universal concept of information is a particularly difficult, if not impossible, task, as it is of interest to a wide range of research disciplines (e.g. sociology, political science, economics, social psychology, cybernetics and, of course, law). As a result, the term is often defined differently depending on the researcher's objectives and focus. In particular, any concept of information should serve to improve our understanding of the world[15]. The term "information" has been the subject of considerable debate in the literature, with numerous attempts being made to define it[16]. From the perspective of state operations, information represents the foundation for analytical processes. Without its effective and appropriate utilization within the system—be it the administrative system, the state security system, or the state management system—key analytical processes are unable to be employed effectively, appropriately, and expeditiously to facilitate optimal decision-making.

Cyberspace, where digital information and human perception converge, constitutes a unique informational domain, albeit an ambiguous and multifaceted one. It is a specific space in which individuals are expected to engage in cognitive processes without the physical presence of their bodies[17]. Events in cyberspace take place "everywhere" and "nowhere" at the same time, and the division between "here" and "there" is blurred. The signals transmitted, which may be conceptualised as particles of information, are not constrained by the limitations of national

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J. Taczkowska-Olszewska, *Dostęp do informacji publicznej w polskim systemie prawnym*, Warszawa 2014, p. 2.

14 See Z. Duniewska, *Ignorantia iuris w prawie administracyjnym*, Łódź 1998, p. 58.

15 Cf.. W. Taras, *Informacja w postępowaniu administracyjnym*, [w:] *Informacja i informatyka w administracji publicznej*, G. Szpor (red.), Katowice 1993, p. 23.

16 See, inter alia A. Żebrowski, W. Kwiatkowski, *Bezpieczeństwo informacji III Rzeczypospolitej*, Kraków 2000, p. 39; W. Taras, *Pojęcie „informacja" jako narzędzie badania administracji publicznej*, Samorząd Terytorialny 2000, nr 12, p. 35; W. R. Wiewiórowski, G. Wierczyński, *Informatyka prawnicza. Technologia informacyjna dla prawników i administracji publicznej*, Warszawa 2008, p. 29 – 51; W. Kilian [w:] *Prawne i ekonomiczne aspekty komunikacji elektronicznej,* J. Gołaczyński (red.), Warszawa 2003, p. 14; Analizę definicji i rodzajów informacji zawiera K. Liedel, P. Piasecka, T. R. Aleksandrowicz, *Analiza informacji. Teoria i praktyka,* Warszawa 2012, p. 33-38; B. Bińkowska-Artowicz, *Informacja gospodarcza. Informacja kredytowa. System wymiany informacji o zobowiązaniach pieniężnych,* Warszawa 2014, p. 19-31.

17 K. Liedel, P. Piasecka, T. R. Aleksandrowicz, *Analiza informacji. Teoria i praktyka,* Warszawa 2012, p. 30.

borders[18]. However, this fluidity presents significant regulatory changes, whereas state rule-making systems are characterised by a slow, centralised and bureaucratic approach that often fail to align with the rapid pace of change characteristic of the Internet[19]. It is often the case that the regulations created by states are found to be rules designed for technology that is no longer present. Information that is processed electronically and circulated on a global network is an intangible commodity, not stored in any tangible format. In contrast, the domain of law is firmly anchored in a tangible physical reality. The very notion of law is contingent upon the existence of concrete physical entities and objects that are capable of making decisions pertaining to those entities and objects. Internet activity is digital in nature, and the decision-making process that relates to information is often almost entirely automated. The law constructs regimes of responsibility for information content, assuming the conscious use of media channel expressing specific content[20].

Current developments highlight that information holds a decisive advantage for those who possess and effectively utilize it. Information conveys specific meaning for specific audiences, representing events, states of affairs, objects, or institutions from past, present, and future perspectives[21]. It exhibits certain characteristics: independence from the observer, diversity, inexhaustibility, synergy, replicability, and mobility in time and space without degradation, unlike paper-based data. Information can bear distinct meanings for various users, with each piece describing an object based on a single attribute[22]. Other attributes include objectivity, adequacy, comprehensibility, modelability, schematic nature, partiality, selectivity, complexity, diversity, potentiality, and durability—independent of user intent. Information also possesses user-dependent attributes: subjectivity, interpretability, utility, suggestiveness, relevance, problem-oriented nature, replicability, and timeliness[23]. In the virtual domain, information is characterized by transformability (quick and easy processing by computers and users), transmittability (easy, fast, automated transmission via networks), replicability (precise duplication retaining original quality), and indestructibility—not in

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18 Ibid., 69

19 Ibid., 71

20 Ibid., 72

21 A. Monarcha-Matlak, *Obowiązki administracji w komunikacji elektronicznej*, Warszawa 2008, p. 54.

22 W.R. Wiewiórowski, G. Wierczyński, *Informatyka prawnicza...,* p. 32.

23 Following D. Szostek, *Nowe ujęcie dokumentu w polskim prawie prywatnym ze szczególnym uwzględnieniem dokutemu w postaci elektronicznej,* Warszawa 2012, p. 48.

the sense of being undeletable from memory, but rather its resistance to physical degradation, unlike paper-based data[24].

The information stored in information systems is vulnerable to a number of risks, including unauthorised third-party access, modification, data loss, improper processing, or processing for unauthorised purposes[25]. Therefore, it is essential to implement robust protection measures to safeguard this information. Sibiga identifies the primary threats to information protection as third-party actions (e.g. attacks, theft, destruction, modification), actions by authorised individuals (e.g. disclosure, unauthorised use, destruction), and events beyond human control (e.g. software flaws, configuration errors, random events). Other risks include technical and software issues, user actions, and external service providers processing entrusted information[26].

In the process of analysing information, it is also essential to highlight the obstacles that impede access to information sources, as well as the intrinsic value of information. This is particularly crucial when considering the utilisation of information and communication technology (ICT) for the effective exploitation of its potential. With regard to the obstacles encountered, the most commonly cited are: technical barriers (lack of interoperability, lack of access to technology)[27], legal barriers, organisational barriers, economic barriers, psychological barriers, meta-information barriers (lack of information about the source, content, quality, means of access). The value of information is evaluated in accordance with its quality and usefulness. In the modern era, the quantity of information available to us is immense. The selection of that which is valuable, however, is a challenging process. It is, nevertheless, an essential task from the perspective of its usefulness. The quality of information is determined by a number of factors, including timeliness, completeness, relevance, accuracy[28], reliability, functionality, usefulness, efficiency and universality[29]. It should be noted, however, that the value of information cannot be fully quantified, and the value it holds for a par-

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24 W. Cellary, *Przemiany społeczne i gospodarcze*, [w:] W. Cellary (red.), *Polska w drodze do globalnego społeczeństwa informacyjnego*, Warszawa 2002, p. 18.

25 G. Sibiga, *Konsekwencje zastosowania technologii informacyjno-komunikacyjnych (ICT) dla wykonania prawnych obowiązków ochrony informacji – wybrane zagadnienia,* [w:], *Prawne problemy wykorzystywania nowych technologii w administracji publicznej i wymiarze sprawiedliwości*, M. Barczewski, K. Grajewski, J. Warylewski (red.), Warszawa 2009, p. 82.

26 Ibid., p. 83

27 K. Liedel, P. Piasecka, T. R. Aleksandrowicz, *Analiza informacji...*, p. 41.

28 Ibid., 45 and literature quoted there

29 Z. Malara, J. Rzęchowski, *Zarządzanie informacją na rynku globalnym. Teoria i praktyka,* Warszawa 2011, p. 25.

ticular user cannot be determined in advance. Furthermore, it is not possible to determine changes in that value over time.

2. The Informational Space

In the light of the above, an attempt can be made to define what constitutes the information space. This term encompasses the totality of resources, processes and infrastructures that facilitate the generation, processing, distribution and consumption of information within society. It represents a multidimensional environment in which information is created, shared and interpreted within socio-cultural, economic and political contexts. Key elements of the information space include information resources, which comprise data, knowledge, documents, multimedia and other forms of content that can be processed and used by individuals and organisations. The technological infrastructure includes both physical and digital systems, such as telecommunications networks, servers, databases and end-user devices, that enable the transmission, storage, and access to information. In addition, the information processes that take place within this space must be considered; these relate to the creation, transformation, filtering, analysis and distribution of information. Such processes include data collection mechanisms as well as data management, processing and archiving activities. In an age of disinformation and propaganda, verifying the authenticity, quality and reliability of information is also a critical component.

The informational space is populated by diverse entities, including individual users, organisations, government institutions, media outlets, and artificial intelligence algorithms, all of which interact with information and with one another. This space is further regulated by legal, ethical, and normative frameworks that shape the ways in which information is utilized, protected, and controlled. Such regulations encompass data protection laws, copyright regulations, information security, and freedom of speech policies. Political and economic factors also play a significant role in the informational space, as they can impact the availability of information, its credibility, and the dynamics of its flow. As a dynamic and complex environment, informational space is a fundamental element of modern society, shaping its development and stability in the digital era.

3. Cyberattacks as a Shaping Force in Informational Space

A factor shaping informational space is the threat of cyberattacks. Cyberattacks encompass a range of actions aimed at disrupting, damaging, or gaining unauthorized access to computer systems, networks, devices, and data. These attacks are carried out by hackers, cybercriminals, organized crime groups, and sometimes even by states, with goals that may include data theft, extortion, espionage, or sabotage. Cyberattacks often involve social engineering techniques—methods of manipulating individuals to perform certain actions. Social engineering attacks are designed to convince individuals to disclose confidential information or carry out particular tasks. These attacks use a variety of methods to deceive the victim, often relying on psychological aspects of human behaviour. For instance, they may involve convincing the user to open a document from an attachment, download a file, enter sensitive information on a fake website, or follow a link to an infected website. Attackers can take over social media accounts and use them to post fake content. Additionally, they can hack websites to insert false information or alter existing content. They can create fake news sites that look credible but contain false information. When attacks target public institutions, media or businesses, the result can be a loss of credibility and public panic. People may stop trusting official sources of information. The spread of false information can cause chaos and panic in society. Cyber-attacks can lead to the disruption of online services. For example, DDoS attacks can disrupt news services. They can also lead to loss of data and compromise of critical infrastructure. Ransomware attacks can block access to critical information. Taking control of an organisation's IT systems can cripple its operations. Not to mention the theft of data or disclosure of confidential information that can be used for blackmail or further attacks. Finally, cyber-attacks can be used as a political tool to influence elections through information manipulation or direct attacks on electoral systems. The political dimensions of cyber-attacks also include espionage and information warfare carried out as part of broader espionage strategies or information warfare activities between countries[30].

[30] Examples of cyberattacks affecting the information space: Attacks on electoral systems (interference in the 2016 US presidential election); WannaCry attack (2017, Ransomware that infected computers around the world, including healthcare systems in the UK); Influence operations (social media activities of Russian trolls to destabilise other countries); activities of the APT-29 group - known as Cozy Bear, one of the most active hacker groups linked to the Russian government

4. Cyberattacks and Informational Space

The Informational space today is used as a medium for conducting cyberattacks through disinformation and propaganda (i.e., information manipulation). Such cyberattacks may spread false information, thus contributing to disinformation. Among the top cybersecurity threats forecasted for 2030, the European Union Agency for Cybersecurity (ENISA) identifies not only artificial intelligence misuse but also threats exacerbated by malicious AI use, including advanced disinformation campaigns, increased authoritarian surveillance, privacy loss, and targeted attacks enhanced by data from smart devices[31].

Disinformation and propaganda, as components of non-military operations, are becoming elements of so-called "hybrid warfare," which combines military and non-military tactics. To effectively address these threats, especially in the context of the pervasive media saturation and informational noise, precise definitions of "disinformation" and "propaganda." According to the dictionary, the definition of ''disinformation'' is ''to mislead or deceive someone by giving misleading or false information'' (in a second sense, it is ''a situation in which reliable information is lacking'')[32].

Generally speaking, disinformation refers intentionally information that misleads the recipient. The basic assumption when defining the term "disinformation" is its purposefulness - false information is transmitted to achieve a specific effect, providing the recipient with apparent, misleading or even harmful knowledge. This knowledge may then be used to make decisions favourable to the disinformer. There may also be unintended consequences, such as a recipient's misunderstanding or distortion of the content of the information[33]. The European Commission uses a modified concept of disinformation compared to the definitions quoted above, which consists of "false or misleading content that is disseminated with the intention to deceive or to secure economic or political gain, and which may cause public harm" . The concept of "public harm" is also introduced, which includes the undesirable and vaguely defined consequences of disinformation in

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31 A. Gryszczyńska, *Wykorzystanie sztucznej inteligencji w cyberatakach*, [w:] *Internet. Hacking*, A. Gryszczyńska, G. Szpor, W. Wiewiórowski (red.), Warszawa 2023.

32 *Inny słownik języka polskiego*, Mirosław Bańko (ed.), PWN, Warszawa 2020, 263–64, s.v. ,'Dezinoformacja''

33 T. Kacała, *Dezinformacja i propaganda w kontekście zagrożeń dla bezpieczeństwa państwa*, „Przegląd Prawa Konstytucyjnego" 2015, Nr 2 (24).

the form of "threats to democracy, polarisation of public debate and risks to the health, safety and environment of EU citizens"[34].

Disinformation is characterised by the systematic nature of its activities, their professional preparation and organisation, and the consistent use of mass media. Disinformation is the implementation of a consistent programme aimed at replacing views entrenched in the consciousness, or even subconsciousness, of a mass audience. Views identified by the disinformer as unfavourable are replaced. They are replaced by an appropriately chosen narrative prepared in advance by the disinformer. In a broader sense, disinformation is a technique used to influence people. There are two main reasons for this. As a rule, disinformers are members of groups (organisations, institutions, agencies, military units) that carry out both influence and disinformation activities in the broadest sense. These groups are usually associated with counter-intelligence activities. The second reason is that the perception of the target is the same in both cases. This is because the essence of disinformation activities is the introduction of a suitable catalyst for public behaviour into public opinion (information circulation). The key is to maintain the appearance of spontaneity[35]. Disinformation may have a strategic or tactical dimension. Strategic disinformation involves the systematic dissemination of false information in order to distort the picture of a situation and lead to misperceptions. Tactical disinformation is also planned, but its effects have a shorter time horizon, measured in months rather than years.

By contrast, 'propaganda' refers to the practice of lying to entire populations by state authorities, especially those operating in totalitarian states. As such, it was directed at a potential adversary or international opinion, but primarily at one's own society. Since state propaganda used the latest developments in social communication technology of the time, this led to a widespread conviction regarding the deceptiveness of the message being disseminated.

Disinformation and propaganda are cited as elements of information warfare. It can be defined as activities designed to protect, exploit, damage, destroy, or deny information or information resources in order to achieve a significant advantage, objective, or victory over an adversary[36]. Information warfare has been defined slightly differently by the Russians. According to them, it is a form of

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34 *Online Disinformation Policy*, https://digital-strategy.ec.europa.eu/en/policies/online-disinformation, 4.06.2024.

35 T. Kacała, *Dezinformacja i propaganda w kontekście zagrożeń dla bezpieczeństwa państwa*, „Przegląd Prawa Konstytucyjnego" 2015, Nr 2 (24).

36 D. E. Denning, *Wojna informacyjna i bezpieczeństwo informacji*, Wydawnictwo Naukowo Techniczne, Warszawa 2002, p. 11.

warfare between two or more parties and involves the deliberate use of special means and methods to influence the opponent's information resources as well as to protect one's own information resources in order to achieve set goals. The Russians do not speak of information warfare per se, but of information-psychological warfare. This indicates that, in their view, one of the most important targets of attacks in this war is the human being, who is treated as an information resource, and thus as an important element of the information space of any social structure[37]. Information warfare takes the form of information operations. It involves influencing the decisions of an adversary or potential adversary in order to achieve one's own strategic objectives. In terms of the domain in which they are conducted, they can be divided into internal (directed at one's own audience) and external (directed at foreign audiences, both hostile, neutral and allied). It is important to note that both internal and external information operations may not be conducted against society as a whole, but within specific social groups. Information operations include the full spectrum of disinformation, intelligence and counter-intelligence, psychological operations, radio-electronic warfare, cyber operations, as well as the physical destruction of an adversary's information infrastructure and the elimination of its opinion leaders. These activities can be conducted separately and independently, or combined in a single operation. For example, to conduct psychological operations, intelligence on the opponent - his views, habits, prejudices, stated values, channels of information flow and even language in the broadest sense (jargon, dialect) - is essential. Effective psychological action is also impossible without feedback on the opponent's reaction to our influence. Nowadays, psychological action is also closely linked to action in cyberspace. Because of the cognitive and social spheres of influence, psychological operations are becoming one of the main elements of information warfare[38].

In summary, disinformation and propaganda play a key role in hybrid warfare and are an integral part of efforts to destabilise the adversary and achieve strategic political objectives without the need for full-scale military operations. Combining traditional methods of warfare with unconventional means, hybrid warfare uses information tools to manipulate public opinion, weaken morale, and create chaos and disorganisation in an adversary's social and political structures. Disinformation is the deliberate dissemination of false or misleading information to create confusion, undermine confidence in public institutions and generate

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37 A. P. Olechowski, *Dezinformacja i propaganda orężem wojny kognitywnej*, „Media i społeczeństwo" 2022, Nr 17.

38 Ibid.

social tensions. In the context of hybrid warfare, disinformation can take a variety of forms, from fake news[39] to social media manipulation to organised campaigns aimed at disinforming both the enemy public and the international community. Propaganda in hybrid warfare is an organised effort to influence the attitudes and behaviour of societies to elicit desired responses favourable to the aggressor. Propaganda can be both positive and negative, and its aim is to create a particular image of reality, to persuade the audience to adopt the viewpoint imposed by the propagandist. It is important to note that propaganda messages can be contained not only in media messages, but also in literature and art, especially film art. In hybrid warfare, propaganda can be used to reinforce positive narratives about one's own actions and to demonise the opponent. War propaganda uses a variety of communication media, including traditional media, social media, public relations campaigns, and so-called ''information warriors" - individuals or groups involved in spreading propaganda content online.

Through the strategic use of false narratives, aggressors can undermine the internal stability of a state, create internal conflict and confuse policymakers. The widespread use of online social media facilitates the spread of unverified, incomplete or simply false news. Fake news can be seen as a modern, digital version of the rumours and gossip that have long been used for social control. During wartime, rumours were spread by, among others, the secret services to create panic and undermine confidence in state authorities and institutions.

5. The Use of AI in Disinformation

In today's digital landscape, creators and disseminators of fake news are no longer limited to individuals with varying degrees of association with intelligence or special services; instead, specialized programs driven by artificial intelligence—so-called fake news generators—play a significant role. The development of AI applications across diverse fields offers potential benefits alongside substantial risks. These risks can manifest in both material and non-material forms (e.g., loss of privacy, restrictions on the freedom to obtain and disseminate information, human dignity, and issues of discrimination) and are linked to several distinct risk categories. In the context of cyber threats, ENISA identifies the dimension

[39] K. Mroczka, *Fake newsy jako nowa kategoria zagrożenia systemu bezpieczeństwa ekonomicznego państwa w dobie kryzysu epidemicznego*, „Przegląd Bezpieczeństwa Wewnętrznego" 2022, Nr 26 (14).

of malicious use of AI - as AI can be used to create more sophisticated types of attacks, such as advanced social engineering, creating fake social media accounts, using deep generative models to create fake data or malware, or finally using AI to crack passwords. This category includes both attacks that target existing AI systems to change their capabilities, and AI-assisted attacks - where AI-based techniques are used to improve the effectiveness of traditional attacks. When considering cybercrime in the context of AI, it is important to remember that AI can be used in traditional attacks as a means of supporting cybercrime and facilitating hostile attacks. AI can be a key target for attacks. If we simplify by assuming that 'AI is a collection of technologies that combine data, algorithms and computing power', then we understand what needs to be secured (assets that are subject to AI-specific threats and adversarial models): data, algorithms, products (including supply chain attacks)[40].

The efficacy of a social engineering attack is significantly augmented by the use of one of the most conspicuous and debated applications of artificial intelligence, namely deepfake. Deepfakes are videos that have been digitally manipulated to appear realistic, in which individuals are depicted saying and doing things that have never occurred in reality. The functionality of deepfakes is enabled by neural networks that analyse extensive data sets in order to learn to imitate a person's facial expressions, mannerisms, voice and reactions. The growth of deepfake technology is linked to several factors, including the ease with which audiovisual content can be accessed on social media, the availability of modern tools, open-source trained models, relatively cheap and scalable computing infrastructure, and the rapid evolution of deep learning methods, especially Generative Adversarial Networks (GAN). Examples of the use of deepfake technology include the creation of a character that does not exist today, or the generation of a short film documenting an event that did not actually happen.

The technology is recognised as a powerful weapon in today's disinformation wars, where one can no longer trust what you see or hear. Furthermore, when combined with the reach and speed of the internet, social media and messaging apps, deepfakes can reach millions of people in an extremely short timeframe. Given such a short timeframe, deepfakes have significant potential for a range of malicious and criminal purposes, including damaging a person's image and credibility, harassing or humiliating individuals online, committing extortion and fraud, facilitating document forgery, forging online identities, forging or

[40] A. Gryszczyńska, *Wykorzystanie sztucznej inteligencji w cyberatakach*, [w:] *Internet. Hacking*, A. Gryszczyńska, G. Szpor, W. Wiewiórowski (red.), Warszawa 2023.

tampering with electronic evidence in criminal proceedings, disrupting financial markets, spreading disinformation and manipulating public opinion, inciting violence against minority groups, supporting the narratives of extremist or even terrorist groups, or fuelling social unrest and political polarisation[41]. Overall, it can lead to ideological, cultural and psychological distractions in cyberspace. However, the extensive use of artificial intelligence algorithms and computer technology in hybrid warfare cannot hide the fact that the main weapons of this war remain the typical activities of 'classic' psychological warfare - disinformation and propaganda, now supported by advanced technologies.

6. Counteracting Disinformation

The opposite of falsehood is truth, yet the practical counterpart to disinformation is often alternative information that enables fact verification and the pursuit of truth. Combating cyberattacks such as disinformation demands comprehensive efforts across multiple levels, including technology, education, and public policy. In terms of regulatory measures and platforms' responsibility, legislation now mandates that online platforms swiftly remove disinformation and limit its reach. There is, however, a concurrent call to balance these duties with the protection of freedom of speech. The responsibility of social media platforms for user-generated content has increased, with a focus on developing tools to moderate and flag false information[42]. Legal regulations addressing disinformation are being implemented at national, regional, and international levels, aiming to mitigate the spread of false information and shield societies from its harmful consequences. These regulations encompass a broad range of actions, from platform accountability to individual rights protection. Election-related disinformation laws, for example, are designed to prevent manipulative narratives that could impact election outcomes, covering political content monitoring and transparency in electoral advertising. While the General Data Protection Regulation (GDPR) is not directly focused on disinformation, data protection is critical in combating

41 Ibid.

42 The Digital Services Act (DSA) OJ L 277, 27.10.2022, 1-102. This is a new set of EU-wide rules on digital services acting as intermediaries for consumers and goods, services and content. In the context of the Digital Services Act, digital services refer to intermediary services such as hosting providers, online trading platforms and social media networks. It will introduce rules that equally protect all users in the EU, both in relation to illegal goods, content or services and their fundamental rights.

disinformation campaigns, which frequently rely on personal data collection for precisely targeted false content. Legal regulations on disinformation, however, often raise concerns regarding potential restrictions on freedom of speech, with fears that overly strict laws might lead to censorship and civil rights infringements. Thus, it is essential for these regulations to be precise and proportionate. At the same time, they must recognize the need to protect free speech and privacy to avoid excessive state interference in public discourse.

A critical, possibly the most fundamental, level in combating disinformation is educating society in recognizing disinformation and fostering critical thinking skills. Training in source verification, identifying false content, and resisting manipulation is crucial to reducing the impact of disinformation. Technically, managing disinformation involves detecting and limiting it within social networks, including suspending fake accounts, using filtering and flagging mechanisms for fake news, deploying AI tools for fake news detection, and utilizing mobile apps and chatbots powered by fact-checking platforms aimed at the public. Additionally, AI-based pattern recognition can aid in identifying manipulated messages and content[43]. Independent fact-checking platforms, designed to monitor and debunk false information, can be highly effective in fact verification. Such platforms need to be widely accessible to society. Information campaigns aimed at providing reliable data and counter-arguments to false narratives are also beneficial and must be easily understood and accessible to various social groups.

Strengthening cybersecurity is also vital to safeguard against coordinated disinformation campaigns, which may involve both information attacks and cyberattacks aimed at destabilizing informational infrastructure. Cybersecurity encompasses a range of concepts, from information security and operational security to computer system security. Cybersecurity is made up of many concepts, ranging from information security to operational security to computer system security. Cybersecurity can mean many different things to different audiences. For individuals, it is a sense of security, protection of personal data and privacy. For businesses, it means ensuring the availability of mission-critical business functions and protecting confidential data through operational threat management and information security. For governments, it will involve protecting citizens, businesses, critical infrastructure and government computer systems from attack or integrity breaches. The essence of cybersecurity therefore encompasses a set

[43] A. Gryszczyńska, *Wykorzystanie sztucznej.....*

of activities and resources that enable citizens, businesses and governments to achieve their IT objectives in a secure, reliable and privacy-preserving manner[44].

It is crucial to recognize that cybersecurity is a shared responsibility. As participants in cyberspace, all individuals must adhere to the same rules, and these security and information standards should be consistently enforced. Effective cybersecurity standards cannot be implemented without the cooperation of all cyberspace participants. The European Union is committed to expanding knowledge, developing collaborative mechanisms, and devising responses within the framework of its cybersecurity strategy. Legal cybersecurity requirements were established with the NIS Directive and its updated counterpart, NIS 2. This directive, an extension of the original NIS Directive (Directive 2016/1148), adopted by the EU in 2016, aims to strengthen Europe's cybersecurity framework in response to escalating digital threats. NIS 2 was formally adopted by the European Parliament and the European Council in December 2022 to address the growing scope of these challenges and update regulatory standards[45].

Conclusions

The increasing availability of data and computational capabilities has become a global trend marked by features such as advancing automation in manufacturing and service processes, the growth of AI and machine learning technologies, powerful miniature sensors for diverse data collection, and ubiquitous Internet access[46]. Modern society utilizes vast data sets characterized by high variety and rapid flow. The era of Big Data demands advanced data processing tools that surpass traditional databases and spreadsheets. Open access to information and its rapid increase can pose significant threats. Insufficient control over data flow and unchecked distribution have led to various issues, including privacy breaches and security risks. Cyberspace, where information is created and exchanged, is

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44 R. Czulda, R. Łoś, J. Regina-Zacharski, *NATO wobec wyzwań współczesnego świata*, Warszawa 2013, p. 202.

45 Key aims and objectives of the NIS 2 Directive: a) broaden the scope of regulated entities; b) strengthen cyber security requirements (more stringent cyber security risk management and incident response requirements for covered entities); c) harmonise the legal framework across the European Union; d) increase reporting obligations; e) strengthen cooperation between Member States, f) introduce penalties for non-compliance.

46 E. Kuruczleki, A. Pelle, R. Laczi, B. Fekete, *The Readiness of the European Union to Embrace the Fourth Industrial Revolution,* „Management" 2016, t. 11, nr 4, p. 327–347.

an area presenting legal and regulatory challenges. Traditional legal systems are often inadequate in the face of rapid changes in the digital domain, complicating efforts to ensure accountability and protection within the network. The value of information is assessed by its quality, such as its timeliness, accuracy, and reliability. In the era of large data sets, effectively filtering valuable information from the vast quantities available is essential.

The information domain encompasses the resources, processes, and infrastructure that enable information generation, processing, and distribution. It is a dynamic environment where diverse entities, technologies, and regulations influence how information is used and protected. Cyberattacks, including social engineering attacks, pose serious threats to the information domain, leading to disruptions in information access, data loss, and IT system compromise. These attacks can produce false content, which leads to the spread of disinformation and social disorder. Attacks such as ransomware and DDoS attacks can paralyse institutional operations and compromise the credibility of information sources. Disinformation, defined as the deliberate dissemination of false information, and propaganda are central elements of hybrid warfare. These techniques are used to destabilize societies, manipulate public opinion, and achieve political goals without direct military action. The spread of disinformation can lead to polarization in public debate, erosion of trust in institutions, and social tension. In hybrid warfare, disinformation and propaganda are powerful tools for aggressive action without crossing traditional warfare thresholds. Their ability to influence social and political perceptions and behaviours makes them particularly dangerous in modern conflicts, where the lines between war and peace are increasingly blurred. Addressing these phenomena requires advanced defensive strategies, including public education, strengthening democratic institutions, and developing technological tools to detect and counter informational manipulation.

According to the European Union Agency for Cyber Security (ENISA), cybersecurity threats are likely to increase in the coming years, particularly with regard to the misuse of artificial intelligence for advanced disinformation campaigns. These threats could encompass privacy breaches, increased digital surveillance, and targeted attacks bolstered by data from smart devices. The growing application of AI across various sectors brings both benefits and substantial risks. Although AI has significant potential benefits, it can also be used maliciously, leading to more sophisticated forms of cyberattacks, such as advanced social engineering, fake data generation, and password cracking. Deepfake technology, which uses advanced algorithms to create hyper-realistic yet false audiovisual content, represents a severe threat to the truth and credibility of information. It can be

used for various harmful purposes, including reputational damage, harassment, fraud, evidence manipulation, and financial market destabilization. The question whether the perception of increasing disinformation is justified can be answered affirmatively. Increased information production, combined with its accessibility (due to new technologies), inevitably results in a greater volume of manipulated or false information.

Addressing the threats associated with disinformation and *deepfakes* requires comprehensive action at various levels. This includes legal regulations and technical countermeasures, such as content moderation and the development of AI tools for detecting false information. It is also crucial for these regulations to be precise in order to avoid excessive restrictions on freedom of speech and privacy. Cybersecurity necessitates the collaboration of all participants in cyberspace, including individuals, businesses, and states. Strengthening legal frameworks, such as the NIS and NIS 2 directives within the European Union, is essential for protection against rising digital threats and ensuring information security. The introduction of regulations holding online platforms accountable for user-generated content is also significant. However, a balance must be maintained between the necessity for content moderation and the protection of freedom of speech. Such efforts should be complemented by developing tools for detecting and flagging false information.

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Krzysztof Masło

Do Crimes Committed by Russian Soldiers in Ukraine Constitute War Crimes, or Could They Also Qualify as Crimes Against Humanity?

Introduction

The article aims to determine the nature of international humanitarian law violations committed in Ukraine following the Russian Federation's full-scale invasion against Ukraine on 24 February 2022. Specifically, it seeks to establish whether these violations constitute war crimes, crimes against humanity, or both. Since there were no judgments issued from international courts at the time of this study, it primarily draws on reports submitted to the Human Rights Council by the Independent International Commission of Inquiry on Ukraine,[1] as well as the report from the Office of the Prosecutor of the International Criminal Court (ICC).[2] These reports are considered a reliable source of information, as they were not written to prove any predetermined thesis. Furthermore, the report prepared for the ICC provided the grounds for the ICC Prosecutor to initiate preparatory proceedings.

The study is limited to violations of international humanitarian law and human rights law committed by the armed forces of the Russian Federation after 24 February 2022. Violations by the armed forces of Ukraine are beyond the scope of this study.

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1 *Report of the Independent International Commission of Inquiry on Ukraine*, 25 September 2023, A/HRC/52/62; *Report of the Independent International Commission of Inquiry on Ukraine*, 18 March 2024, A/HRC/55/66.

2 *Report on Preliminary Examination Activities*, 2020, The Office of the Prosecutor.

The article begins with a brief overview of the findings made by the Office of the ICC Prosecutor and by the Independent International Commission of Inquiry. This is followed by a description of what constitutes crimes against humanity and war crimes, along with an attempt at subsumption. The provisions of the Statute of the International Criminal Court of 17 July 1998[3] (hereinafter - Rome Statute) constitute the starting point for the analysis. Ukraine, as a state which is not party to the Rome Statute, has accepted the jurisdiction of the International Criminal Court - in accordance with Article 12(3) of the Rome Statute.[4] The acceptance of jurisdiction is partial; however, there is no doubt that Ukraine has recognized the ICC's jurisdiction over war crimes and crimes against humanity committed after 24 February 2022. The article concludes with an attempt to determine whether the violations meet the criteria to be classified as both types of international crimes.

1. Violations of International Humanitarian Law Committed after the Russian Federation's Armed Attack on Ukraine on 24 February 2022

Researchers do not have full access to documents from the preliminary proceedings conducted by the investigative bodies of Poland, Ukraine, or Lithuania, nor to those from the proceedings by the Office of the ICC Prosecutor. Nevertheless, numerous violations of international humanitarian law committed by the Russian Federation in Ukraine after 24 February 2022 have been thoroughly documented in reports prepared for international bodies. These violations will be briefly examined in this chapter.

1.1. Factual and Legal Findings Made by the Office of the ICC Prosecutor

The Office of the ICC Prosecutor investigates violations of international humanitarian law committed after 21 November 2013. The ICC Prosecutor opened a preliminary examination into the situation in Ukraine on 25 April 2014.[5]

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3 Rome Statute of the International Criminal Court, 17.07.1998, UNTS vol. 2187, p.3.

4 Both declarations by Ukraine available at: https://www.icc-cpi.int/situations/ukraine.

5 https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-opens-preliminary-examination-ukraine.

According to the ICC Prosecutor, since 27 February 2014, armed and mostly uniformed individuals, together with locally resident militia members, progressively took control of the Crimean Peninsula. These individuals were later acknowledged by the Russian Federation to be its military personnel.[6] On 18 March 2014, the Russian Federation announced the formal incorporation of Crimea and has since exercised effective control over this territory.[7]

In parallel with the events in Crimea, over the course of March and early April 2014, armed forces took control of key government buildings in several eastern provinces of Ukraine.[8] The Ukrainian government in Kiev ceased to exercise its control over these territories. On 15 April 2014, the Ukrainian government announced the start of an anti-terror operation in the east of Ukraine. According to the ICC Prosecutor's Office, armed conflict, involving the persistent use of heavy military weaponry by both sides, continued in eastern Ukraine from 2014 to 2020.[9] During this time, more than 3,000 civilians were killed, and thousands were wounded.

The preliminary examination conducted by the ICC Prosecutor's Office confirmed that crimes under the Rome Statute had been committed in eastern Ukraine and Crimea. Interestingly, the ICC Prosecutor made an initial distinction between the situation in Crimea and that in the eastern provinces of Ukraine. Regarding Crimea, the ICC Prosecutor determined that the armed conflict there was of an international character. During this conflict, crimes against humanity and war crimes were committed, initially classified as grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of international law and customs applicable to armed conflicts of an international nature.[10] Regarding the conflict in eastern Ukraine, the ICC Prosecutor's preliminary analysis indicated that the following war crimes may have been committed in the areas affected by the fighting:

- intentionally directing attacks against civilians and civilian objects,
- intentionally directing attacks against protected buildings,
- wilful killing/murder,
- torture and inhuman/cruel treatment,
- outrages upon personal dignity,
- rape and other forms of sexual violence,

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6 *Report on Preliminary Examination Activities*, 2020, The Office of the Prosecutor, p. 274.
7 Ibidem.
8 Ibidem, p. 275.
9 Ibidem, p. 275.
10 Ibidem, p. 278-279.

- intentionally launching attacks that resulted in harm to civilians and civilian objects that was clearly excessive in relation to the military advantage anticipated,
- unlawful confinement.

After a preliminary analysis, it may be concluded that the ICC Prosecutor's Office classified the armed conflict in eastern Ukraine as a so-called "internationalized" conflict" – a *prima facie* non-international conflict in which a third State intervened on one of the sides. However, the ICC Prosecutor has never explicitly indicated what third State it was referring to.

The ICC Prosecutor's Office concluded that the criteria for proceeding with an investigation were met with respect to subject-matter, admissibility and the interests of justice.[11] However, the decision to open an investigation was postponed due to a lack of operational capacity and the expiration of the current ICC Prosecutor's term.

The situation changed dramatically on 24 February 2022, when the Russian Federation launched an open attack on the territory of Ukraine. On 25 February 2022, the ICC Prosecutor pointed out that the International Criminal Court may exercise its jurisdiction over and investigate any act of genocide, crime against humanity or war crime committed within the territory of Ukraine since 20 February 2014 onwards.[12]

In his next statement of 28 February 2022, the ICC Prosecutor noted that Ukraine is not a State Party to the Rome Statute and as such, may not itself refer the situation to the Office of the ICC Prosecutor.[13] However, the preliminary examination of the situation in Ukraine completed in 2020 has confirmed that there are reasonable grounds to proceed with an investigation. The Prosecutor stressed that the next step to open an investigation would be to obtain authorization from the Pre-Trial Chamber of the Court. An alternative route set out in the Rome Statute that could further expedite matters would be for an ICC State Party to refer the situation to the Office of the ICC Prosecutor, which would allow him to actively and immediately proceed with an independent and impartial investigation.[14]

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11 Ibidem, p. 289.

12 https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following.

13 https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening.

14 Ibidem.

In response to the ICC Prosecutor's call, 39 States Parties to the Rome Statute referred the situation in Ukraine to the ICC under Article 14, which enabled the ICC Prosecutor to move forward with the investigation.

The investigation remains largely confidential, with the ICC yet to release any significant procedural decisions. To date, the ICC Prosecutor has filed charges for committing international crimes against several individuals. These include: Russian President Vladimir Putin, Russian Ombudsman Maria Alekseyevna Lvovna-Belovna, Russian Minister of National Defence Sergei Shoigu, Chief of the General Staff of the Russian Armed Forces Valery Gerasimov, and Russian servicemen: Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov.[15]

Only the general nature of the war crime charges against them is known to the public. The full justification for these charges and arrest warrants issued by the ICC Pre-Trial Chamber remains undisclosed.

Press releases issued by the Office of the ICC Prosecutor provide some insight into what international crimes may have been committed after 20 February 2022. According to these press releases:

(a) During the armed conflict, hundreds of children were deported from orphanages and children's care homes located in Ukraine. Many of them were given for adoption in the Russian Federation. For this purpose, the law was changed in the Russian Federation to expedite the conferral of Russian citizenship, making it easier for Russian families to adopt Ukrainian children.[16]
At the time of these deportations, Ukrainian children were protected persons under the Fourth Geneva Convention of 1949.[17]
The deportations were carried out in the context of the acts of aggression committed by Russian armed forces against Ukraine, and the scale and circumstances in which they were carried out demonstrate that the removal of children was permanent and unjustified by military necessity or the need to protect them against ongoing military operations.

(b) Russian armed forces carried out missile strikes against the Ukrainian power-supply infrastructure from at least 10 October 2022 until at least 9 March 2023.[18] During this period, they carried out many strikes against numerous

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15 https://www.icc-cpi.int/situations/ukraine.

16 https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin.

17 The Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Geneva, 12 August 1949, Journal of Laws of 1956, no 38, item. 171 (Schedule).

18 https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and; https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-kuzhugetovich-shoigu-and.

electric power plants and substations in multiple locations in Ukraine. These strikes were directed against civilian objects, and for those installations that may have qualified as military targets, the expected incidental civilian harm and damage was clearly excessive relative to the anticipated military advantage.

The findings of the ICC Prosecutor's Office demonstrate that since 24 February 2022, the Russian armed forces have committed war crimes against civilians and civilian objects. Some of these crimes have also been classified as crimes against humanity.

1.2. The Work of the Independent International Commission of Inquiry on Ukraine

The Independent International Commission of Inquiry on Ukraine was established by the Human Rights Council on 7 March 2022.[19] The Commission is composed of three experts in human rights, appointed by the President of the Human Rights Council. The Commission was established:

a) to investigate all violations and abuses of human rights and international humanitarian law in the context of the aggression against Ukraine by the Russian Federation
b) to collect and analyse evidence of such violations,
c) to document and verify relevant information and evidence,
d) to identify, where possible, those individuals and entities responsible for violations or abuses of human rights or violations of international humanitarian law,
e) to make recommendations, in particular on accountability measures.

The mandate of the Commission was originally established for one year but was extended in 2023.[20] So far, the Commission has submitted two reports.[21] They only cover a period after 24 February 2022 and do not include the annexation of Crimea.

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19 Human Rights Council, Resolution 49/1, *Situation of human rights in Ukraine stemming from the Russian aggression*, 4 March 2022, A/HRC/RES/49/1.

20 Human Rights Council, Resolution 52/32, *Situation of human rights in Ukraine stemming from the Russian aggression*, 11 April 2023, A/HRC/RES/52/32; Human Rights Council, Resolution 55/23, *Situation of human rights in Ukraine stemming from the Russian aggression*, 4 April 2024, A/HRC/RES/55/23.

21 *Report of the Independent International Commission of Inquiry on Ukraine*, 25 September 2023, A/HRC/52/62; *Report of the Independent International Commission of Inquiry on Ukraine*, 18 March 2024, A/HRC/55/66.

The analysis of both reports shows enormous civilian suffering and destruction caused by Russian aggression in Ukraine. During the first year of the armed conflict, 8,006 civilians were killed, and 13,287 were injured. After the second year, the death toll rose to at least 10,582, and 19,875 individuals were wounded.[22] In addition to human losses, the armed conflict has caused population displacement on a scale Europe has not seen since World War II.[23] As of 21 February 2023, the Office of the United Nations High Commissioner for Refugees (UNHCR) recorded around 8 million refugees from Ukraine across Europe, of which around 90% were women and children.[24]

The Independent International Commission of Inquiry identified and described numerous violations of international humanitarian law and human rights law. In numerous instances, the Commission succeeded in collecting evidence that allowed attributed violations to the Russian armed forces.

During the war, the Russian armed forces used weapons that posed a threat to civilians and civilian facilities, and their use was disproportionate to the anticipated military advantage. In both reports, the Commission provided numerous examples of attacks with the use of explosive weapons in populated areas controlled by the Ukrainian authorities.[25] Some of these attacks were conducted to take control of cities, while others struck areas far from the front lines. They affected civilian objects, including residential buildings, shops, a hotel, a theatre, but also medical facilities (e.g. hospitals, pharmacies) and educational and cultural facilities (e.g. schools, kindergartens, a theatre and a railway station). The Commission identified four types of weapons used in populated areas: unguided bombs dropped from aircraft; long-range anti-ship missiles of the Kh-22 or Kh-32 type; cluster munitions; and multiple-launch rocket systems.[26]

Attacks were carried out on the Mariupol theatre and the Mariupol Primary and Sanitation Aid Centre No. 3, during the siege of Mariupol, on the Kramatorsk train station (59 civilians were killed and 92 injured), on a shopping mall in Kremenchuk (21 civilians killed, several dozen injured), and on residential areas of Chernihiv (at least 20 civilians were killed, and many others injured).

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22 *Report of the Independent International Commission of Inquiry on Ukraine*, 18 March 2024, A/HRC/55/66, par. 9.

23 *Report of the Independent International Commission of Inquiry on Ukraine*, 25 September 2023, A/HRC/52/62, par. 20.

24 UNHCR, *Ukraine refugee situation*.

25 *Report of the Independent International Commission of Inquiry on Ukraine*, 25 September 2023, A/HRC/52/62, par. 28.

26 Ibidem, par. 30.

The way the attacks were carried out shows that they were indiscriminate, and the Russian armed forces failed to take feasible precautions to verify whether civilians were present in the areas attacked.[27] According to the Commission, the failure to take feasible precautions in planning and launching attacks is evidenced, among other things, by the fact that they targeted civilian buildings, including medical institutions. Even if the Russian armed forces were pursuing military objectives in these attacks, the civilian status of such institutions should have prompted them to exercise greater caution.[28]

Russian armed forces also carried out numerous attacks on energy facilities in Ukraine. Although there were sporadic attacks during the spring and summer of 2022, they increased significantly starting from 10 October 2022. Following the plan of the Russian Defence Ministry and the General Staff, the armed forces launched a massive strike with long-range precision air-, sea- and land-based weapons against critical infrastructure targets.[29] Between 10 October 2022 and 1 February 2023, at least 13 attacks were carried out with the use of hundreds of long-range missiles and drones equipped with explosives. The attacks affected 20 of the 24 provinces in Ukraine and targeted power plants and other infrastructure critical for transmitting electricity and heating. These attacks took place in winter and led to power outages at a time when a steady supply of fuel and energy was most needed due to the prevailing weather conditions. The Commission concluded that the objective was to disrupt the energy system of the entire country, with the predictable effects on the heating system.[30] The disruption of electrical substations, power plants and other installations used to produce energy and heating indispensable to the survival of the population, inflicted significant harm on civilians. Entire regions and millions of people were left without electricity or heating, particularly during the winter, and consequently, they had impaired access to water, sanitation, food, health care, and education. Despite the availability of public information about the civilian harm after the first few attacks, the Russian armed forces continued to target energy infrastructure.[31]

The Commission collected evidence to conclude that during the conduct of hostilities, armed forces of both Russia and Ukraine exposed civilians to a significant risk of explosion in the Zaporizhzhia nuclear power plant.[32] On 4 March

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27 Ibidem, par. 31-32.
28 Ibidem, par. 33.
29 Ibidem, par. 40.
30 Ibidem, par. 40.
31 Ibidem, par. 42.
32 Ibidem, par. 44.

2022, the Russian forces launched an attack on the nuclear plant and heavy fighting erupted as they attempted to take control of it. The Commission secured video footage showing that the attack resulted in a fire, inflicting damage to parts of the plant. In addition, the Russian armed forces placed military equipment in and near the facility and have been launching attacks from there. Satellite footage from 29 August 2022 appears to show military equipment less than 150 metres from a reactor.[33] The Commission's findings also incriminate the Ukrainian armed forces in this regard.[34]

The Commission also documented attacks on cultural objects located in the centre of Odessa and Lviv, as well as numerous examples of confiscation of cultural property. Two waves of attacks on Odessa took place on 20 July and 23 July 2023, damaging the historic centre of the city. The attacks damaged buildings, most of which were historical buildings (e.g. the Transfiguration Cathedral in Odessa).[35] Moreover, the Commission collected information related to the seizure of cultural property by Russian authorities in Kherson, which is under the control of the Russian armed forces. Russian authorities transferred over 10, 000 cultural objects from the Kherson Regional Art Museum and 70% of archival documents from the State Archives of Kherson province to the Autonomous Republic of Crimea.[36]

The vast majority of violations of international humanitarian law are violations that undermine human integrity. The Commission documented numerous cases of deliberate killings, unlawful imprisonment, torture, rape and deportation,[37] as well as forced labour.[38] Violations were committed not only against civilians, but also against people deported from Ukraine to the Russian Federation or those who in any way supported the Ukrainian armed forces or opposed the occupant.[39] In the territories that came under the control of Russian armed forces, detention facilities were established, where civilians were imprisoned, tortured, and sexually abused.[40]

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33 Ibidem, par. 45.
34 Ibidem.
35 *Report of the Independent International Commission of Inquiry on Ukraine*, 18 March 2024, A/HRC/55/66, pars. 29, 41-44.
36 Ibidem, pars. 51-52.
37 *Report of the Independent International Commission of Inquiry on Ukraine*, 25 September 2023, A/HRC/52/62, par. 48.
38 *Report of the Independent International Commission of Inquiry on Ukraine*, 18 March 2024, A/HRC/55/66, pars. 53.
39 *Report of the Independent International Commission of Inquiry on Ukraine*, 25 September 2023, A/HRC/52/62, par. 50.
40 Ibidem, par. 52.

The Russian armed forces carried out mass executions in the Chernihiv, Kharkiv, Kyiv and Sumy regions. In the town of Bucha alone, which is located in the Kyiv region, the Commission confirmed the executions of 65 men, 2 women and a 14-year-old boy.[41] According to medical records and photographs, the most common method of killing was a gunshot to the head at close range.[42]

Unlawful confinements constitute widely documented violations of international humanitarian law. The Commission established a pattern of widespread unlawful confinement of civilians in areas controlled by Russian armed forces. The victims were men and women of all ages and children.[43] The Commission also identified detention facilities where living conditions were inhuman. In numerous instances, the confinement was prolonged, with the longest instance over nine months.[44]

Perpetrators typically detained civilians for real or perceived assistance to Ukrainian armed forces, having relatives in Ukrainian security or law enforcement agencies, refusing to cooperate, participating in protests against the occupation, holding pro-Ukrainian views or having certain types of tattoos.[45] Civilians were detained in improvised facilities with poor living conditions.[46]

Detention often preceded torture and execution.[47] Torture was used against both civilians and prisoners of war (i.e., persons entitled to special protection under international humanitarian law) in all occupied territories of Ukraine.[48] Most of the victims were men aged 21-58.

Torture was particularly severe against current or former members of the Ukrainian armed forces and associated persons and their relatives.[49] Ukrainian prisoners of war were detained in different locations in the Russian Federation and in the areas of Ukraine controlled by the Russian Federation.[50] Torture was perpetrated by members of the Russian armed forces and of the Special Purpose

41 Ibidem, par. 53.
42 Ibidem, par. 55.
43 Ibidem, par. 60.
44 Ibidem.
45 Ibidem, par. 63.
46 Ibidem, par. 64.
47 Ibidem, par. 62.
48 *Report of the Independent International Commission of Inquiry on Ukraine*, 18 March 2024, A/HRC/55/66, par. 58.
49 *Report of the Independent International Commission of Inquiry on Ukraine*, 25 September 2023, A/HRC/52/62, par. 72.
50 *Report of the Independent International Commission of Inquiry on Ukraine*, 18 March 2024, A/HRC/55/66, par. 62.

Units of the Russian Federations' Federal Penitentiary Service and regular personnel of that service.[51] The aim of torture or inhuman treatment was to obtain information about the Ukrainian armed forces, extract confessions, force victims to cooperate, or inflict punishments. Torture was usually combined with long interrogation sessions. Victims often had their hands tied or handcuffed, their legs tied, and their eyes covered with tape or with a hood, clothes or a bag placed over their head.[52] The perpetrators inflicted severe physical and mental pain and suffering, and in some cases torture was followed by execution.[53]

Torture was also committed against civilians detained during house searches.[54] Perpetrators were members of the Russian armed forces, Federal Security Service and detention facility guards.

The Russian armed forces also attacked civilians fleeing from war zones. The Commission documented 18 such cases in February and March 2022, in which 14 men, 8 women, 3 boys and 1 girl were killed, and 6 other civilians were wounded. Most were committed in Kyiv Province.[55] In all cases, the victims were wearing civilian clothes, were unarmed and were among those who were targeted.[56]

Sexual and gender-based violence is another category of violations of international humanitarian law. The Commission has found that the Russian armed forces committed acts of sexual violence in two main situations: during house-to-house searches and against individuals they had detained.[57] Rapes were carried out with extreme brutality and were often accompanied by acts of torture, including beatings and strangling.[58] In addition to rape, the Russian armed forces committed other forms of sexual violence, such as forced nudity.[59]

Unlawful deportation of civilians from Ukraine to the Russian Federation is a well-documented category of violations examined by the Commission. Both men and women were the victims of these deportations[60] In the Russian Federation,

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51 Ibidem, par. 63.

52 *Report of the Independent International Commission of Inquiry on Ukraine*, 25 September 2023, A/HRC/52/62, par. 73.

53 Ibidem, par. 74.

54 *Report of the Independent International Commission of Inquiry on Ukraine*, 18 March 2024, A/HRC/55/66, par. 75-76.

55 *Report of the Independent International Commission of Inquiry on Ukraine*, 25 September 2023, A/HRC/52/62, par. 57.

56 Ibidem, par. 58.

57 Ibidem, par. 78.

58 Ibidem, par. 80.

59 Ibidem, par. 83-84.

60 Ibidem, par. 68.

some detainees were confined in pretrial facilities in the provinces of Bryansk and Kursk. The Commission's Report places particular emphasis on the deportation of children from Ukraine to the Russian Federation. The Commission established that since 24 February 2022, many children had been transferred from Ukraine to the Russian Federation.[61] They were granted Russian citizenship and placed in foster families.[62] The Commission identified three main situations in which the Russian authorities transferred Ukrainian children from one occupied in Ukraine to another one, or to the Russian Federation. The transfers affected children who had lost parents or had temporarily lost contact with them during hostilities, children who had been separated following the detention of a parent at a filtration point, and children in care institutions.[63]

2. Statutory Definition of War Crimes and Crimes against Humanity

The Commission has classified many violations of international humanitarian law and human rights committed by the Russian Federation as war crimes. However, this does not preclude the possibility of classifying these violations also as crimes against humanity. In certain cases, it may be necessary to categorize a particular offence as both a war crime and a crime against humanity to fully capture its gravity and to appropriately reflect all circumstances of violations of international humanitarian law. This chapter outlines the key characteristics of war crimes and crimes against humanity, with their definitions primarily based on the Rome Statute, as Ukraine has partially recognized the ICC's jurisdiction.

2.1. War Crimes

War crimes should be understood as all violations of international humanitarian law committed during armed conflicts that entail the criminal accountability of perpetrators of proscribed acts.[64] However, not every breach of international humanitarian law during an armed conflict qualifies as a war crime. The category

61 Ibidem, par. 95.
62 Ibidem, par. 96.
63 Ibidem, par. 97.
64 Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge 2016, p. 2229

of war crimes is reserved for the most serious violations of international humanitarian law.

War crimes are defined in detail in Article 8 of the Rome Statute. This definition includes two key elements: a contextual framework and specific acts. The Rome Statute identifies two contextual elements: the violation of international humanitarian law during an armed conflict and the intent behind the act. Upon a closer analysis of Article 8, it can be concluded that the definition of war crimes refers to the traditional distinction between international and non-international armed conflicts, and their respective rules under international law. Generally, war crimes in the Rome Statute are divided into four categories. These are:

(a) grave breaches of the Geneva Conventions of 12 August 1949 (acts against persons or property protected under the provisions of the relevant Geneva Convention);

(b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law;

(c) in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions (acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause);

(d) other serious violations of the laws and customs applicable in armed conflicts not of an international character.

To hold a perpetrator liable for a war crime, the existence of an armed conflict must first be established. The Rome Statute follows the well-established division into international and non-international armed conflicts.[65] Consequently, not every war crime committed during an international armed conflict will have its counterpart in a war crime committed during a non-international armed conflict.

An international armed conflict is a conflict that occurs between at least two States.[66] International armed conflicts also include armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes (Article 1(4) of Additional Protocol of 8 June 1977, to the Geneva Conventions). A non-international armed conflict is a conflict in which fighting takes place between governmental authorities and organized and armed groups, or between

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65 A. Novak, *The International Criminal Court. An Introduction*, Springer 2015, p. 45-46.

66 Prosecutor v. Dusko Tadic, *Decision on The Defence Motion For Interlocutory Appeal on Jurisdiction*, 2 October 1995, IT-94-1, par. 70.

such groups within a State.[67] The concept of a non-international armed conflict does not include situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature (Article 8(2)(d) and (f) of the Rome Statute). An armed conflict that broke out in the territory of one State (and is *prima facie* not of an international character) may become "internationalized." This happens when some other State intervenes with its forces in the conflict, or if one of the parties to a non-international conflict acts on behalf of another State.[68] Intervention by a third State in the internal affairs of another State may be carried out with the help of regular military units or other paramilitary groups. Acts committed by such units or groups can be attributed to the State if it exercises control over them.[69]

The Rome Statute provides an extensive catalogue of acts which are considered war crimes and lists a number of acts which constitute violations of international humanitarian law. These include: intentionally launching an attack with the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects, or widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the specific, direct and overall military advantage anticipated; killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion; making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of distinctive emblems of the Geneva Conventions, resulting in death or serious injury to a person; and employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core or is pierced with incisions.

2.2. Crimes against Humanity

Under Article 7 of the Rome Statute, a crime against humanity is an act committed as part of a widespread or systematic attack directed against any civilian population. This is not an isolated incident of violating international law, but rather a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organizational

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67 R. Bierzanek, *Prawa człowieka w konfliktach zbrojnych*, Warszawa 1972, p. 53.

68 Ibidem, p. 47.

69 Prosecutor v. Dusko Tadic, *Decision on The Defence Motion For Interlocutory Appeal on Jurisdiction*, 2 October 1995, IT-94-1, par. 117.

policy to commit such attack. The Rome Statute provides a list of acts that constitute crimes against humanity. These are:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation or forcible transfer of population;
(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) torture;
(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or other forms of sexual violence of comparable gravity;
(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) enforced disappearances of persons;
(j) the crime of apartheid;
(k) other inhumane acts causing great suffering or serious injury to the body, or to mental or physical health.

In the document Elements of Crimes,[70] it is stated that crimes against humanity are among the most serious crimes of concern to the international community, and they warrant and entail individual criminal responsibility.

The definition of crimes against humanity includes two elements: contextual elements and elements that characterize specific crimes. In fact, the contextual elements are the most important, as they enable us to distinguish crimes against humanity from other international crimes (including war crimes) and from ordinary crimes.[71] Based on Article 7 of the Rome Statute and the Elements of Crimes, the following contextual elements of crimes against humanity can be identified:

a) the perpetrator's conduct (i.e. a specific crime) must be part of an attack,
b) the attack must be widespread or systematic,
c) the perpetrator's conduct must be part of a state or organizational policy aimed at carrying out such an attack,

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70 Pursuant to Article 9, Elements of Crimes are adopted by a two-thirds majority of the members of the Assembly of State-Parties. The document assists the Court in the interpretation and application of Articles 6, 7 and 8 of the Rome Statute.

71 K. Masło, *Międzynarodowa odpowiedzialność karna jednostek za zbrodnie przeciwko ludzkości*, Warszawa 2020, p. 133-134.

d) the attack must be directed against a civilian population,
e) the perpetrator's conduct must be intentional.

To be qualified as a crime against humanity, the perpetrator's conduct cannot be a random or isolated breach of international humanitarian or human rights law. According to the Rome Statute, an attack directed against any civilian population must involve the repeated commission of acts listed in Article 7(1) in order to constitute a crime against humanity. Importantly, such an attack should not be equated with a military assault. Rather, it encompasses any conduct that violates international law, including crimes listed in Article 7 of the Rome Statute.

The attack must be either widespread or systematic. This requirement is explicitly stated in Article 7 of the Rome Statute. The terms 'widespread' and 'systematic' are used in the alternative, meaning that only one of these criteria needs to be met to classify an attack as a crime against humanity.[72]

The perpetrator's actions must be part of a governmental or organizational policy to carry out the attack. According to the Elements of Crimes, a 'policy to commit such an attack' requires that the State or organization actively promote or encourage the attack against a civilian population. This interpretation of 'an attack' excludes situations where an individual commits an inhumane act on their own initiative, without the involvement of the State or some organization.

Furthermore, the perpetrator must act with intent. It is stated in The Elements of Crimes that the perpetrator must be aware of a widespread or systematic attack against a civilian population. This does not mean, however, that the perpetrator needs to know every detail of the attack or the full extent of the State or organization's plan or policy. Case law from *ad hoc* criminal tribunals suggests that the perpetrator must have actual, genuine knowledge that their actions or omissions are part of a widespread or systematic attack against any civilian population.[73] This knowledge should be objectively assessed, based on the specific circumstances of the case. Therefore, the perpetrator does not need to be fully aware of what exactly will happen to the victims of the attack.[74] The intent will be attributed to the person if they deliberately engaged in a risky action that could have led

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72 Prosecutor v. Tadić, ICTY ACh, Judgment of 15.07.1999, IT-94-1, par. 646 – 647; Prosecutor v. Akayesu, ICTR TCh, Judgment of 2.09.1998, ICTR-96-4, par. 579.

73 Prosecutor v. Kayishema, Ruzindana, ICTR TCh, Judgment of 21.05.1999, ICTR-95-1, par. 133 – 134; Prosecutor v. Tadić, ICTY ACh, Judgment of 15.07.1999, IT-94-1, par. 626, 638, 656 – 657.

74 Prosecutor v. Tadić, ICTY ACh, Judgment of 15.07.1999, IT-94-1, par. 657, 659.

to the commission of a crime against humanity, even if they expected that their conduct would not result in any harm or damage.[75]

2.3. The Relationship between War Crimes and Crimes against Humanity

The Rome Statute does not define the relationship between crimes against humanity and war crimes, nor does it state whether these two international crimes can be committed simultaneously. The only provision that regulates this issue is Article 78(3), which reads:

When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with Article 77, paragraph 1(b).

This provision only addresses the legal consequences when both crimes occur simultaneously, by introducing a combined penalty; however, it does not clarify the admissibility or nature of their concurrence.

The definitions of both war crimes and crimes against humanity include contextual elements (which differ for each), as well as lists of acts that constitute these crimes. What sets them apart are the contextual elements, which depend on the circumstances in which these crimes were committed.

To find the perpetrator guilty of a war crime, it is necessary to demonstrate the existence of an armed conflict, whether international or non-international. Crimes against humanity, on the other hand, may be committed not only during armed conflicts (regardless of their nature) but also in times of peace. They must be widespread or systematic in nature.[76] Additionally, the perpetrator's act must be part of an attack; which means that an isolated act that is not part of an attack, does not constitute a crime against humanity. On the other hand, a war crime is a violation of international humanitarian law, and even a single act committed during an armed conflict can be classified as a war crime.

Crimes against humanity are directed at civilians, regardless of their nationality.[77] By contrast, victims of war crimes must be persons protected under international humanitarian law. The Four Geneva Conventions, along with their

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75 Prosecutor v. Blaškić, ICTY A.Ch., Judgment of 29.06.2004, IT-95-14-A, par. 251 – 254.

76 Novak, ibidem, p. 45.

77 R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An introduction to international criminal law and procedure*, Cambridge 2012, p. 19.

Two Additional Protocols, are of fundamental importance in protecting victims of armed conflicts. The Geneva Conventions protect the following groups: sick and wounded members of armed forces on the battlefield (First Geneva Convention); sick, wounded, and shipwrecked members of naval forces (Second Geneva Convention); prisoners of war (Third Geneva Convention); and civilians (Fourth Geneva Convention). War crimes can be committed against these groups as long as they are in the hands of a Party to the armed conflict or an Occupying Power of which they are not nationals. For a person to be protected, they must be in territory controlled by a Party to the conflict or by an Occupying Power.[78] In the case of civilians, this condition is met when they are in territory controlled by a belligerent party. For prisoners of war, it applies when they are in the custody of a Party to the conflict, such as in internment camps.

According to Article 50 of the First Additional Protocol, a civilian is "any person who does not belong to any category of the armed forces [...]. The civilian population comprises all persons who are civilians." A person is therefore entitled to protection if:

- they are not part of the regular or irregular armed forces of a party to the conflict, and
- they do not take an active part in military operations and do not contribute directly to the conduct of such operations.[79]

The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character (Article 50(3), Additional Protocol I). The term 'civilian' also includes a person who is forced to use weapons to protect their own life.[80] The Fourth Geneva Convention protects civilians who find themselves in the hands of a party to a conflict of which they are not nationals (Article 4(1), Fourth Geneva Convention), as well as stateless persons and refugees.[81]

The lists of acts that constitute war crimes and crimes against humanity partially overlap. However, the acts that constitute war crimes listed in Article 8 of the Rome Statute, primarily evoke associations with the international law of armed conflicts (e.g., military necessity, prisoners of war, attacking civilian objects). In contrast, the acts constituting crimes against humanity are broader in

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78 The Prosecutor v. M. Naletilić, V. Martinović, ICTY T.Ch., Judgment of 31.3.2003, IT-98-34, par. 208.

79 S. Dąbrowa, *Ludność cywilna w konfliktach zbrojnych*, Warszawa 1973, p. 43.

80 The Prosecutor v. Z. Kupreškić, M. Kupreškić, V. Kupreškić, D. Josipović, D. Papić, V. Santić, ICTY T. Ch., judgement, par. 335.

81 Leśko, *Międzynarodowe*..., p. 212.

scope and relate to universal human values, which are protected regardless of the circumstances (e.g., life, personal liberty, or physical integrity). In principle, nearly every act that constitutes a crime against humanity (apart from apartheid) is also listed as a war crime. For example, murder – depending on the context – can be classified as a war crime committed during an international armed conflict (Article 8(2)(a)(i) of the Rome Statute) and a non-international armed conflict (Article 8(2)(c)(i) of the Rome Statute), as well as a crime against humanity (Article 7(1)(a)). Similarly, torture (Articles 8(2)(a)(ii), 8(2)(c)(i) and 7(1)(f) of the Rome Statute) or acts of rape (Articles 8(2)(b)(xxii), 8(2)(e)(vi) and 7(1)(g) of the Rome Statute) may be classified as either or both crimes. Sometimes, an act is listed in the catalogue of war crimes but is not mentioned *expressis verbis* in the catalogue of crimes against humanity. For example, intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated, constitutes a war crime in an international armed conflict (Article 8(2)(b)(iv) of the Rome Statute). This does not mean, however, that launching such an attack cannot be classified as a crime against humanity as well. The list of crimes against humanity includes so-called 'other inhumane acts' (Article 7(1)(k) of the Rome Statute). Thus, it is possible to classify an attack causing suffering or serious harm to the physical or mental health of civilians not only as a war crime but also as a crime against humanity.

The list of acts that constitute war crimes is much broader than that of crimes against humanity, and not every war crime qualifies as a crime against humanity (e.g., intentionally attacking civilian objects that are not military targets or misappropriating property without military justification). The law of armed conflict protects not only people but also objects, such as civilian infrastructure, humanitarian aid vehicles, religious buildings, and cultural property. Depending on the circumstances, acts like murder, torture, or rape can be classified as either war crimes or crimes against humanity. However, for example, the bombing of cities can be classified only as a war crime.

For the criminal liability of a perpetrator of an international crime, it is crucial to determine whether their act is classified as a war crime, a crime against humanity, or both. The Rome Statute does not clarify the legal implications of such overlap, nor does it specify whether the perpetrator's actions should be treated as a single crime or as multiple crimes under different legal classifications. It only outlines the principles of sentencing when the perpetrator is convicted of at least two international crimes (Article 78(3) of the Rome Statute). Without

going into the ICC's case law on penalties where a perpetrator's actions meet the criteria for both a war crime and a crime against humanity, it is worth noting that the ICC refers to the concept of perfect concurrence of crimes. In such cases, the perpetrator is convicted of each concurrent international crime, and a separate penalty is imposed for each offence. In accordance with Article 78(3) of the Rome Statute, the Court then imposes a joint sentence, specifying a total period of imprisonment. This total cannot be less than the highest individual sentence imposed and may not exceed 30 years of imprisonment. It may also be life imprisonment.

Conclusions

Based on the findings by both the ICC Prosecutor's Office and the Commission of Inquiry, the initial theses regarding the legal classification of violations of international humanitarian and human rights law can be put forward.

Firstly, the weapons used during the Russian-Ukrainian war posed a threat to civilians and civilian objects, and their use was disproportionate to the military advantage anticipated. The Russian armed forces endangered the civilian population by failing to take necessary precautions to the maximum extent feasible, such as avoiding locating military objectives within or near densely populated areas or near nuclear power plants, and thereby violated Article 58 of the 1977 Additional Protocol I. The 1977 Additional Protocol I prohibits 'indiscriminate' attacks; i.e., attacks which:

(a) are not directed at a specific military objective;
(b) employ a method or means of combat that cannot be directed at a specific military objective,
(c) employ a method or means of combat whose effects cannot be limited and consequently, in each such case, are of a nature to strike military objectives, civilians or civilian objects without distinction.

The 1977 Additional Protocol I identifies two types of attacks that are always considered as 'indiscriminate':

(a) attacks by bombardment using any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;
(b) attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which

would be excessive in relation to the concrete and direct military advantage anticipated.

Under the Rome Statute such attacks constitute war crimes as intentionally directing attacks against civilian objects that are not military objectives (Article 8(2)(b)(ii)) and intentionally launching attacks in knowledge that the attack will result in incidental loss of civilian life or damage to civilian objects (Article 8(2)(b)(iv)).

A clear example of 'indiscriminate' attacks is the Russian strikes on Ukraine's energy infrastructure. These attacks targeted civilian objects, and even if one could argue that energy infrastructure could qualify as a military target, the expected incidental harm and civilian damage were clearly excessive compared to the anticipated military advantage. Certainly, such attacks on energy infrastructure were inconsistent with the principle of distinction, which prohibits the use of military methods and means that do not distinguish between military objectives and civilians and other protected persons as well as protected objects. Attacks on energy infrastructure were repeated and directed against civilians. They were launched in accordance with the Russian Federation's policy and were of an extensive and systematic nature. In my opinion, these attacks may also constitute crimes against humanity as 'other inhumane acts' (Article 7(1)(k) of the Rome Statute).

Crimes committed by the Russian armed forces that violate human integrity, such as intentional killings, unlawful imprisonment, torture and inhumane treatment, rape and deportation may be classified as war crimes and crimes against humanity.

Wilful killing of civilians or persons excluded from hostilities (*hors de combat*) in areas controlled by the Russian armed forces constitutes a violation of the right to life. The Fourth Geneva Convention prohibits intentional deprivation of life of protected persons, in particular civilians, and the Rome Statute classifies it as a war crime (Article 8(2)(a)(i) of the Rome Statute). To the extent that such attacks were widespread or systematic in nature and were part of the Russian Federation's policy in the occupied territories of Ukraine, they could also constitute a crime against humanity: murder or extermination (Article 7(1)(a) or (b) of the Rome Statute).

The unlawful deprivation of liberty of civilians and other protected persons without justifiable reasons or without compliance with procedural and basic sanitary requirements constitutes a violation of the right to liberty and personal security. Although international humanitarian law prohibits such practices, the Rome Statute does not explicitly list the unlawful deprivation of protected persons of their liberty as a war crime. Nevertheless, such actions – depending

on the circumstances in which they were committed – constitute a war crime of torture or inhuman treatment (Article 8(2)(a)(ii) of the Rome Statute). The Rome Statute criminalizes imprisonment or other severe deprivation of physical liberty that violate the fundamental rules of international law (Article 7(1)(e)). However, this requires proving that all the contextual elements of a crime against humanity have been met.

International humanitarian law and international human rights law prohibit torture and inhuman or degrading treatment or punishment (e.g., Art. 75(2)(a)(ii) of Protocol I of 1977; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984). The Russian authorities subjected certain categories of protected persons to torture or other cruel or inhuman treatment, and consistently used torture methods in several regions of Ukraine under Russian control. Torture and other inhuman treatment were carried out systematically and widely over a long period of time. These circumstances indicate that torture or other inhuman or degrading treatment used by the Russian authorities can be classified not only as a war crime but also, above all, as a crime against humanity.

The prohibition of rape during armed conflict is firmly established in international humanitarian law. While the Fourth Geneva Convention prohibits rape against civilians, other forms of sexual violence against protected persons are not explicitly addressed in international humanitarian law. However, acts such as forced nudity can be equivalent to torture and as such prohibited under international law. Rape and other forms of sexual violence committed by the Russian armed forces are well documented by the Commission and can undoubtedly constitute war crimes. The Rome Statute lists both rape and other forms of sexual violence (e.g., sexual slavery, forced prostitution, forced pregnancy, and forced sterilization) as war crimes.

International humanitarian law prohibits forcible transfers (whether mass or individual), as well as deportations of protected persons from occupied territory to the territory of the Occupying Power, regardless of their motive (Article 49 of the Fourth Geneva Convention). Nevertheless, the Occupying Power may undertake evacuation of a given area if the security or imperative military reasons so demand. The Fourth Geneva Convention sets out the conditions for carrying out such an evacuation. International humanitarian law also prohibits the evacuation of children who are not nationals of the Evacuating Power, to a foreign country, except in cases of temporary evacuation where compelling health, medical, or safety reasons make it necessary. This requires written consent (Article 78(1) of

the 1977 Additional Protocol I). Neither the evacuation of adults nor children by the Russian armed forces met the requirements of international humanitarian law.

Transfers of children were not justified by health, medical, or safety reasons. The Russian authorities made no effort to contact the children's relatives or the Ukrainian authorities. Although the transfers were initially intended to be temporary, most were extended, and parents (or legal guardians) faced numerous obstacles in establishing contact with their children and then having them returned to Ukraine. In many cases, children were placed in Russian care facilities, foster families, or were adopted by Russian families.

The deportation of civilians and other protected persons (in particular children) from the occupied territories of Ukraine to the Russian Federation constitutes a war crime (Article 8(2)(b)(vii)-(viii) of the Rome Statute). However, this classification alone does not capture the full extent of the unlawful acts committed by the Russian authorities. The large-scale deportation of children to Russia (with 16,000 children deported according to Ukrainian authorities[82]) and its systematic nature, combined with changes in Russian legislation allowing for the adoption of deported children by Russian families, are particularly concerning. This may suggest that these deportations constitute, in fact, a crime against humanity.

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[82] Bowen, Weed, *War Crimes in Ukraine*, October 16,2023, Congressional Research Service, p. 7.

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Pavlo Fris

The Commission of the Crime of Genocide by Russia in Ukraine (Criminologist's Opinion)

Introduction

In the history of humanity, the past 20th century made a special mark with the crimes of genocide committed against various strata of society identified by race, nationality or medical and psychiatric characteristics. It all started with the genocide committed by the Turks against the Armenian nation during and immediately after World War I. The baton in this vile relay race was taken over by the Soviet state, which first organized the genocide of Ukrainians during the "War Communism" and then engineered a man-made famine that led to the death of millions of mainly Ukrainian peasants in the 1920s, 1930s and 1940s. During World War II, the Soviets directed the genocide of their own citizens of various nationalities, including Crimean Tatars, Chechens, Kalmyks, Ingush, Karachays, Balkars, Nogais, Meskhetian Turks and other nations in the territory of the USSR.

Next came the Japanese, who in the 1930s and 1940s in occupied Manchuria and Korea conducted the genocide of the Chinese and Korean peoples. Then, the killing of 6 million Jews, millions of Romas, people with mental illnesses and other categories of the doomed during Hitler's rule in Germany was unprecedented both in terms of the extent and technological advancement of the extermination process; moreover, in terms of the number of victims, it was the most mass genocide in history.

Each time the crime of genocide was committed, those who orchestrated it invoked suitable "scientific" grounds to "justify" it in the eyes of the world; nonetheless, the ideologists and perpetrators of such policies in Nazi Germany and Japan were duly punished by the International Tribunals in Nuremberg and Tokyo.

It would have seemed that those who supported the policy of genocide were clearly and convincingly signalled the response of the international community so that one could have hoped that the crime would not be repeated in the future. Unfortunately, those hopes proved vain, as already in the second half of the 20th century, numerous cases of genocide emerged in various parts of the world. Suffice it to mention the policy of the Chinese ruling elites towards the Uyghurs, the crimes of the Khmer Rouge regime in Cambodia against its own people, the genocide of the Tutsi in Rwanda, the events in the former Yugoslavia, etc. That deplorable history has now been carried over to the 21st century.

Russia's aggression against independent Ukraine has become another page in the history of genocide. As early as 14 April 2022, three weeks after the treacherous attack, the Verkhovna Rada of Ukraine adopted a declaration "On the Genocide Committed by the Russian Federation in Ukraine, which gave a clear account of the elements of genocide in the actions of the armed forces of the Russian Federation[1].

From the first days of the attack, the Russian aggressors began to commit numerous acts of genocide in the occupied territories. Bucha, Irpin, Borodianka, and thousands of other cities, towns and villages that were assaulted by Russian occupation forces became sites of mass murder, rape, forced abduction of children, deportation of populations to remote regions of Russia, all of which are acts that meet the criteria for genocide.

The fundamental decision of the Committee of Ministers of the Council of Europe to arrange for an agreement to be signed with Ukraine on the establishment of a special tribunal to prosecute cases of genocide committed by Russia in Ukraine opens a new page in the history of the fight against this most serious crime against peace, human security and international law and order.

1. General Definition of the Crime of Genocide

Despite the fact that the term genocide itself has a fairly short history, acts falling within the scope of the concept have been known to humanity since antiquity. Some of those were, so to speak, one-off in nature and involved related military action, while others were an inseparable element of the policy pursued by certain

[1] Заява Верховної Ради України «Про вчинення Російською Федерацією геноциду в Україні». URL: https://zakon.rada.gov.ua/laws/show/2188-20#Text (Dostęp: 14.04.2024).

nations and representatives of certain religions for almost the entire history of civilization, as multiple examples can show. As H. Ivanov rightly notes:

> Genocide has been an integral part of human civilization and history since its very beginnings. Indeed, even before the ancient organized states emerged, families, clans, and tribes fought among themselves and exterminated one another with the same ferocity with which modern nations attack and attempt to eliminate groups of those they consider their enemies. By its nature, genocide not only threatens individual groups of people on the grounds of their national, ethnic, racial, religious and other characteristics, but also clearly threatens international law and order, peace, security and the life of all humanity[2].

At the outset, it should be noted that in criminal law theory there is still no clear understanding of what acts constitute the crime of genocide. The world's most renowned genocide researchers, Stanford University professor Norman Naimark and American historian Wendy Laver, call genocide „the crime of crimes"[3]. The Convention on the Prevention and Punishment of the Crime of Genocide (Article 2) (hereinafter referred to as the Convention) defines the crime of genocide as:

> „any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group"[4].

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2 Г. Іванов, *Актуалізація правових досліджень, щодо вивчення та визнання геноциду, як суспільно-небезпечного явища. Український дослідницький простір в умовах війни: адаптація й перезавантаження технічних і юридичних наук*, Харків–Рига 2022, s. 87.

3 В. Лавер, *Геноцид – це злочин над злочинами*. URL: https://localhistory.org.ua/texts/interviu/vendi-lauer-genotsid-tse-zlochin-nad-zlochinami/ (dostęp: 31.05.2024).

4 Конвенція про запобігання злочину геноциду та покарання за нього. Прийнята та запропонована до ратифікації та підписання Генеральною Асамблеєю ООН, резолюція 260 A (III) від 9 грудня 1948 р., набрала чинності для України 13 лютого 1955. URL: https://zakon.rada.gov.ua/laws/show/995_155#Text (Dostęp: 10.05.2024). Niestety, oficjalny tekst wspomnianej Konwencji w języku ukraińskim został udostępniony do użytku dopiero w tym roku pismem Ministerstwa Spraw Zagranicznych nr 72/14-612-54598 z dnia 22.04.2024 r., chociaż została ona ratyfikowana 18.03.1954 r. Unfortunately, the official text of the Convention in the Ukrainian language was made available only this year by letter

Noteworthy, the above understanding of the crime of genocide came from analysis of various contexts in which it was committed against large segments of the population and in various countries. Raphael Lemkin, the author of the concept of the crime of genocide, understood it only as an attempted destruction of a national group. However, today's much more extensive construction of the crime, which also covers attempts at extermination of certain racial, ethnic or religious groups, is now more relevant. Its current definition in the Convention is well grounded in the tragic history of its perpetration.

The Convention was instrumental to the adoption of the Rome Statute of the International Criminal Court and the establishment and functioning of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Still, the full diversity of acts that may constitute the crime seems to escape the definition of genocide in the Convention, which poses difficulties for international judicial bodies in establishing the fact of its commission and holding perpetrators accountable. Considering the above, then, it is necessary to review the basic approaches to the definition of the crime of genocide in light of the realities of today.[5]

2. Basic Determinants of the Crime of Genocide Committed by Russia in Ukraine

The difference between Ukraine and Russia is fundamentally that the two countries belong to different civilizations, with a fault line between them, which, according to Samuel Huntington, separates civilizations and causes conflicts[6].

A civilization is „a human community that for a certain period of time (the process of birth, growth, death or transformation into a civilization) displays certain stable features in its socio-political organization, economy and culture (science, art, etc.), common spiritual values and ideals, and common mentality (world-view)"[7]. With S. Huntington's position as a starting point, let us put forward some theses that may contradict his stance, with the war situation between Russia and Ukraine taken for further illustration.

Ministry of Foreign Affairs No. 72/14-612-54598 of 22/04/2024, although the Convention itself was ratified on 18/03/1954.

5 It was not our task to try and resolve this matter in this paper. We simply make a note of this fact.

6 С. Хантінгтон, *Столкновение цивилизаций* [tłum. Т. Велимеева], Алматы: РДЦ-Алматы 2020.

7 Цивілізація. URL: https://uk.wikipedia.org/wiki/%D0%A6%D0%B8%D0%B2%D1%96%D0%BB%D1%96%D0%B7%D0%B0%D1%86%D1%96%D1%8F (dostęp: 18.05. 2024).

First, S. Huntington believes that it is religious affiliation that demarcates a fault line. In the case of Ukraine, he wrongly assumed that it would run along the line of Orthodox Christianity vs. Greek Catholicism. Strikingly, though, the American scholar was deeply mistaken. As history has shown, there was no fundamental conflict between these faiths.[8] A religious conflict did indeed surface, but along an entirely different line, i.e. Ukrainian Orthodox Church of the Moscow Patriarchate (UOC-MP) vs. Orthodox Church of Ukraine (OCU). Although Huntington correctly recognized that national-religious wars are fought along fault lines, he ignored the fact that the UOC-MP is fully integrated with the Russian statehood and is not an independent institution, as it pursues objectives set for it by the ruscist dictatorial regime.[9] He failed in his assessment of the struggle for Ukrainian national independence in the face of Russia's policy aimed at restoring the USSR, which in fact turned into an attempt to restore the Russian Empire, a „prison of nations". Perhaps the author's position was shaped by the late-stage period of the Cold War and the widespread hope for lasting peace, which the history of the 21st century has proved futile.

3. Civilizational Affiliation of Ukraine and Russia

The war between Russia and Ukraine, which runs along the fault line between them, is, in fact, a clash of civilizations, with underlying processes of historical development of the two countries. Ukraine represents the West, while Russia,

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8 It was only in the first years of independence that some conflicts emerged over the use of religious buildings, but those were resolved rather quickly. Later on, the coexistence of the Orthodox and Greek Catholic denominations was conflict-free in Ukraine. This is true especially for relations between the Greek Catholic Church and the Orthodox Church of Ukraine.

9 Ruscism has been defined as „a new type of totalitarian ideology and practices that underlie the regime established in the Russian Federation under the leadership of President Vladimir Putin and are based on the traditions of Russian chauvinism and imperialism, the practices of the communist regime of the USSR and of National Socialism (Nazism)." Resolution of the Verkhovna Rada of Ukraine „On the use of the ideology of ruscism by the political regime of the Russian Federation, condemnation of the principles and practices of ruscism as totalitarian and anti-human, no. 3078-IX of 2 May 2023 [Постанова Верховної Ради України «Про використання політичним режимом російської федерації ідеології рашизму, засудження засад і практик рашизму як тоталітарних і людиноненависницьких» № 3078-IX від 2 травня 2023 року. URL: https://zakon.rada.gov.ua/laws/show/3078-IX#Text. (Accessed: 05/05/2024].

despite being partially located in Europe, is a representative of Asia[10]. Russia's growth was greatly influenced by Asia, with its inherent authoritarian or totalitarian political regimes in most cases. Asian culture and Asian cultural and civilizational mentality have pervaded Russia. Further, the national composition of Russia obviously includes a significant part of the eastern peoples, for whom this mentality and culture are truly native.

One may also cite S. Huntington's brilliant observation that „the essence of western culture is the *Magna Carta*, not the *Magna Mac*"[11]. The Ukrainian nation was formed as an inseparable part of Western civilization [or, in more accurate contemporary terms, Euro-Atlantic civilization], while the Russian nation emanated from Asian civilization, or perhaps even, more precisely, Central Asian civilization.

The Euro-Atlantic civilization, in addition to the countries of Europe, comprises the United States of America, Canada, Australia, Israel, New Zealand and several other countries. A brief look at this list shows clearly that all these countries are currently in fact allies of Ukraine in the war against Russian aggression. At the same time, it is true that while the conflict draws out, an increasing number of states are dragged into this clash between civilizations, which significantly affects the options for having it ended[12]. Not to mention that this state of affairs leads directly to growing numbers of dead, injured, refugees and huge material losses.

4. Ukraine and Russia on the Path to Forming Civilizational Affiliation.

Ukraine emerged in the territory of Eastern Europe, and therefore, understandably, it absorbed the civilizational values typical of the peoples inhabiting this particular area. The roots of Ukrainian civilization go back hundreds of years. Recent research by historians has proved the claim that already in the middle of

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10 S. Huntington rightly observed that „the term „the west" is now universally used to refer to what used to be called western Christendom. The West is thus the only civilization identified by a compass direction and not by the name of a particular people, religion or geographical area".

11 С. Хантінгтон, *Столкновение цивилизаций* [tłum. Т. Велимеева], Алматы: РДЦ-Алматы 2020, s. 70.

12 С. Хантінгтон, *Столкновение цивилизаций* [tłum. Т. Велимеева], Алматы: РДЦ-Алматы 2020, s. 440-441.

the first millennium BC in the area of today's Galicia where Lviv, the capital of Western Ukraine, lies, there was a well-developed city of Holovsko, which was the capital of many united Slavic tribes. This theory by the Ukrainian researcher Volodymyr Maciak[13] has now been confirmed by the results of archaeological research. Although the theory itself has many critics, there is no doubt that at least from the end of the first millennium AD, there existed a powerful state entity in the territory of Ukraine, which called itself Kyivan Rus and maintained multi-vector relations in its foreign policy.[14]

A critical milestone in the evolution of Kyivan Rus was the adoption of Christianity by Ukraine (988) as a significant step on the way to European civilization. According to scholarly knowledge available today, this period coincides with the birth of Western civilization (100–800 AD). Ukraine's joining Christendom was a key factor that catalysed the adoption of European values by the Ukrainian people.

Ukraine has always been oriented towards Europe. The family ties between the European ruling dynasties and Ukrainian princes testify to this: Almost all the ruling dynasties of contemporary Europe descend at some point from the French queen Anna Yaroslavna. In the complexities of various historical processes, Kyivan Rus also became, in fact, the mother of the future Muscovite state. By inheritance from the rulers of Kyivan Rus, their descendants received thrones in principalities that later became part of the Tsardom of Moscow.

The bifurcation point that marked the border between Kyivan Rus and the future Tsardom of Moscow was the Tatar-Mongol invasion, as a result of which most of Muscovy came under Tatar rule for several centuries. At the same time, most of the Ukrainian lands remained part of the Grand Duchy of Lithuania and Poland (almost all of Volhynia, Chernihiv, Severia, Kyiv, Pereyaslav and Podolia). That determined the continuation and intensification of the processes of shaping the system of European cultural and civilization values in Ukraine.

In parallel, power in Muscovy was effectively in the hands of the Tatar-Mongols, who introduced the civilization values characteristic of their society. They actually ruled Muscovy, appointing its successive masters and transferring some principalities under their authority. The „Mongol yoke" lasted 248 years. Obviously, the influence of the Tatars on the civilization processes in Muscovy at

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13 В. Мацяк, *Дві «концепції» історії Львова*, „Український самостійник" 1958, nr 6; В. Мацяк, *Чия капітуляція щодо історії Львова?*, „Український самостійник" 1959, nr 25.

14 This paper does not set out to research the history of Ukraine. For our purposes, it is enough to point to the key moments in the development of Ukraine, which determined its affiliation with the Euro-Atlantic civilization. The same note applies to the history of Russia.

that time was enormous and actually determined its further affiliation with the Central Asian civilization. In addition to their civilizing influence, one must also consider their vast influence on the genetic characteristics of the local population, which came both through mixed marriages and through the actual inclusion of the invaders themselves in the political structure of Russia, which remained in this form for centuries to come. Asia penetrated incredibly deeply into the very essence of Muscovy, as the genealogies of known Russian surnames clearly show. For example, the princely family of the Naryshkins descends from the Tatar Mordko Kurbat Naryshko; the ancient aristocratic family of the Bakhmetievs descends from the Tatar murza Aslan Bakhmet; and the families of the Apraksins, Arakcheyevs, Dashkovs, Dzerzhavins, Yermolovs, Bulgakovs, Bunins, Saltykovs, Godunovs, Yusupovs and others have similar genealogies. Moreover, in the case of the Sheremetev Counts, their origin is also confirmed by the family coat of arms with a silver crescent. These are the genealogies of only those who left their mark on Russian history, and which can be traced back scholarly. What, then, can one say about the millions of people in Russia, who were raped and gave birth to Tatar-Mongol offspring, those who came from mixed marriages, etc.? It is indeed true what they say: „*Scratch a Russian and you'll find a Tatar*".

The Renaissance, which dates from the second half of the 13th century to the end of the 16th century, had a significant influence on Ukraine, and more precisely on those lands that were then part of Poland and the Grand Duchy of Lithuania. In fact, it can be argued that Ukraine, as an element of that whole, was in no way different from the other parts of those states. The original and autonomous Ukrainian culture, as well as Ukrainian science and art, were part of the pan-European cultural space. European-level universities were established in Ukraine: Ostroh Academy (1576), Kyiv-Mohyla Academy (1618) and Lviv University (1661).[15] The printing industry also spread rapidly. The first printed books were published in Lviv by Ivan Fedorov (Fedorovych), his son Ivan (Drukarevych), and his disciples, including the printers Hrynia Ivanovych of Zabludov, Satchko Senkovych, a saddler, Senko Korunka, and Myn, a monk from the St. Onuphrius Monastery in Lviv. Ukrainian scholars belonged to the elite of European academia. Suffice it to mention just one figure, Yuri Drohobych (Katermak), a doctor of medicine and philosophy, an outstanding Ukrainian scholar, educator, geographer, astronomer, physician, philosopher, astrologer and

[15] Noteworthy, the first university in Russia, Moscow University, was founded only in 1755, that is, almost 200 years after the foundation of the Ostroh Academy, the first university in Ukraine.

traveller. He became famous for his scholarly work at many European universities, was a rector of the University of Bologna, the oldest university of medicine and liberal arts in Europe, a professor and vice-rector of Universitas Istropolitana in Bratislava and a professor at the Jagiellonian University in Kraków. At that time, the Ukrainian nobility were also part of the elite of the European nobility. The families of the Wiśniowiecki, Radziwiłł, Ostrogski and other princes made arts and sciences flourish and ran educational activities, following suit with whatever best that Europe had to offer. One could go on with this list for a long time!

In the 16th and 17th centuries, a great influence on the choice of the European path of Ukraine and on the creation of a European civilization space in Ukraine came from organizations established by the Orthodox population of cities, i.e. Orthodox Christian brotherhoods. Ivan Krypyakevych believed that these church-related institutions, formed in cities where the Magdeburg Rights applied, were formed under the influence of European city trade associations, which gathered the most refined and educated segments of the citizens[16].

The Cossack state (called the Zaporozhian Host), which existed from the mid-17th to the mid-18th century, also played an important role in the civilizational choice of Ukraine. It was in that state that a modern, democratic form of government and a modern political system were born, which are so characteristic of both contemporary Ukraine and the countries of Euro-Atlantic civilization as a whole. The Cossack state was governed by military democracy, which, although quite limited, nevertheless functioned in the form of general military councils, which were a manifestation of the collective will and „...decided all the most important issues of the functioning of the Ukrainian Cossack state – concluding peace and declaring war, marches, electing the hetman and Cossack elders, discussing the terms of international treaties, etc."[17]. The Cossack state was closer to a constitutional monarchy than to any other form of government – the office of hetman was an elected one, and the hetman thus elected had to act as directed by the council.

In the mid-18th century, the French educator and author Charles François Philibert Masson „de Blamont", who stayed at the Moscow court in 1762-1802,

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16 І. Крип'якевич, *Історія України*, Львів, 1992.

17 Горобець В., *Українська козацька держава*. URL: http://www.history.org.ua/?termin=ukrajnska_kozacka_derzhava. (Dostęp: 18.05.2024); *Берестейська унія*. URL: https://uk.wikipedia.org/wiki/%D0%91%D0%B5%D1%80%D0%B5%D1%81%D1%82%D0%B5%D0%B9%D1%81%D1%8C%D0%BA%D0%B0_%D1%83%D0%BD%D1%96%D1%8F (dostęp:18.05.2024 p.).

in his work *Secret Memoirs of the Court of Petersburg* wrote about the Ukrainian Cossacks:

> The warrior nation of the Cossacks shrinks day by day. It will soon disappear from the face of the earth, as other nations that have fallen under the sceptre of Moscow, unless some successful revolution comes soon and throws off the yoke of Moscow. The Cossacks have nothing in common with the Muscovites, except for the Greek religion and the Slavic language, corrupted by the Muscovites. Their customs, way of life, houses, food – everything is entirely different.
>
> The Cossacks are handsome, tall, agile, sincere, honest, brave and not accustomed to slavery. In short, they are the opposite of the Muscovites. Their appearance is not as uniform as that of the Muscovites; the stigma of slavery has not made them automatons and has not degraded them as much as the Muscovites themselves.[18]

Unfortunately, Russia's policy of total annexation of Ukraine led to the disappearance of the Cossack state and ultimately to the de facto loss of Ukraine's independence.

A breakthrough event for Ukraine's choice of a civilizational path to European integration was the Union of Brest in 1596. Following it, a significant part of the Kyiv metropolis united with the Roman Catholic Church „on the conditions of withdrawal from canonical subordination to the Patriarchate of Constantinople, recognition of the authority of the Pope, and acceptance of Catholic doctrine (dogma). At the same time, the newly established Ruthenian Uniate Church, later called the Greek Catholic Church, retained all its Byzantine rites, its own administrative structures, canon law and order, and its spiritual and cultural heritage"[19]. This was a key orientation decision, as it strengthened the European civilizational vector of the country's development.

The political processes in Europe from the 17th to the 19th century led to the disappearance of Ukraine as an independent, united state from the map of Europe. Its territory came under the rule of several states – Russia, Austria-Hungary,

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[18] URL: https://x.com/Tasha130873/status/1804396570118328530/photo/1. [Accessed: 26/06/2024].

[19] *Депортація кримських татар*. URL: https://uk.wikipedia.org/wiki/%D0%94%D0%B5%D0%BF%D0%BE%D1%80%D1%82%D0%B0%D1%86%D1%96%D1%8F_%D0%BA%D1%80%D0%B8%D0%BC%D1%81%D1%8C%D0%BA%D0%B8%D1%85_%D1%82%D0%B0%D1%82%D0%B0%D1%80#%D0%A1%D0%BC%D0%B5%D1%80%D1%82%D0%BD%D1%96%D1%81%D1%82%D1%8C_%D1%82%D0%B0_%D0%BA%D1%96%D0%BB%D1%8C%D0%BA%D1%96%D1%81%D1%82%D1%8C_%D0%B6%D0%B5%D1%80%D1%82%D0%B2 (dostęp: 19.05.2024).

Romania, Poland (different territories at different times). Those parts of the country that did not come under Moscow's rule experienced civilizational growth at the same level as in the metropolises, which ultimately generated a positive outcome in the choice of the development vector after regaining independence in 1991.

In the early 16th century, when the Renaissance was thriving in Europe, trade relations were developing rapidly, new forms of economic relations were emerging, and sciences and arts were flourishing, Moscow was only just beginning to recover and shake off the effects of Mongol-Tatar rule, while retaining all the political institutions that had been formed during the Mongol-Tatar „yoke". All the attributes of Asian domination, including the form of government, the political regime, were preserved. They have remained virtually unchanged throughout the country's history. The only attempt to introduce a constitutional monarchy in Russia was made by Tsar Alexander II, but a successful assassination attempt on his life thwarted those plans. If the aforementioned reform had been put in place, history could have taken a thoroughly different course; well, as the proverb goes, „*History knows no subjunctive mood*!". In fact, only two things changed – Moscow stopped paying tribute to the Horde, and the Moscow princes stopped receiving princely charters („jarliks") from the Tatar khans.

Attempts by Tsar Peter I to somehow graft European values into Muscovy did not in any way affect the issues of power and political regime. Russia was and remained oriented towards the civilizational values characteristic of the states of Asian (Central Asian) civilization. Muscovy escaped the democratic processes of the 19th century set into motion by the French Revolution, while the bourgeois revolutions in Europe in the mid-19th century were brutally suppressed, primarily by Russia itself, which for that policy pursued by Tsar Nicholas I was dubbed the „Gendarme of Europe". Russia was the last country in Europe to abolish serfdom, which only further hindered the growth of economic relations and left the country on the sidelines of the global development path. The form of government, i.e. absolutist monarchy in its most reactionary form, survived until 1917, and all attempts to introduce constitutional checks and balances in 1905 ended in failure.

The Bolsheviks' coming to power as a result of the October coup d'état in 1917 paved the way for the nations of the Russian Empire to build independent, sovereign states. However, it soon turned out that the Bolsheviks were, in fact, in agreement with the imperial policy of the tsars, having chosen that specific vector of civilizational development and not another, which became particularly visible during the dictatorship of Stalin, who, being, in fact, a representative of the Central Asian civilization, established an Asian dictatorial form of government in the union of republics with its inherent political regime. One of the most striking

manifestations of that approach was the policy of genocide against the peoples of the USSR, and above all against the Ukrainian nation.

The February Revolution of 1917, which ended with the overthrow of the monarchy in Russia, also became the starting point for Ukraine to realize the age-old vision of building its own independent state, which had been dreamed of by the nation's moral leaders for centuries. Unfortunately, the opportunities that emerged at that time were not exploited. It is not the purpose of this paper to analyse the mistakes made by the politicians who were at the helm of the country during those turbulent times. It is merely a statement of a fact. In the context of the problem at hand, we focus on just one matter, namely the failure to build an independent, united Ukraine, which, in addition to the mistakes made by the country's leadership, was primarily the result of the policy of active opposition to its independence pursued by Bolshevik Russia.

Lenin, the leader of the Bolsheviks at the time, was perfectly aware of the importance of Ukraine for his party's victory in the fight for Russia's survival against the supporters of the old government, and also in the fight against the famine and devastation that engulfed Russia after the Bolsheviks came to power. Here are some quotes from his letters and speeches on this subject:

„To lose Ukraine means to lose our head."

„To put one and a half million soldiers in Ukraine to help strengthen the work, with a pure interest in it, especially with a sharp awareness and sense of the injustice caused by the greed of the rich peasants in Ukraine."[20]

Lenin realized this immediately after the first attempts were made to establish Ukrainian independence. As soon as the Central Council proclaimed the Ukrainian People's Republic under the Third Universal, Russian Bolshevik troops commanded by Mikhail Muravyov captured Kyiv after heavy fighting and entered the city on 26 January 1918. The territories occupied by Muravyov's troops were put to bloody terror. Here are some facts from eyewitness accounts:

> Eyewitnesses compared the Bolshevik invasion of Ukraine to the Mongol-Tatar invasion. Muravyov did indeed use medieval methods: in Kharkiv the Bolsheviks flayed people, in Poltava they impaled priests, in Ekaterynoslav they crucified and stoned them, in Odessa officers, shackled in chains, were roasted over a slow fire or immersed in a vat of boiling water. Muravyov allowed his soldiers to plunder cities and imposed tribute on the citizens. He called it „a contribution to the needs of the revolutionary army". In this way, he seized 50,000 roubles from Chernihiv, later

[20] В. І. Ленін, *Повне зібрання творів*. Вид 5, т. 44, p. 67.

demanded 5 million from Kyiv, and in Odessa, he took the richest residents hostage and set a ransom in the amount of 10 million roubles.[21]

The further course of events, which is so well known today, testifies clearly to the active policy pursued by the Bolsheviks to prevent Ukraine from breaking away from their rule. However, in reality, this policy was also a policy of genocide conducted against the Ukrainian nation by the government of Bolshevik Russia. The archives of the Cheka–NKVD–MGB–KGB from different years, as well as the memories of witnesses to these events, paint a terrible picture. It should be emphasized that the policy of genocide was not directed against specific individuals, but against the entire nation. The most horrific outcomes of this policy included the man-made famines in the Soviet Union in the 1920s, 1930s and 1940s, which claimed the lives of millions of Ukrainians. According to incomplete data, the famine of 1914–1921 killed over 2 million 500 thousand people, the Great Famine of 1932–1933 claimed over 8 million lives, and the famine of 1946–1947 caused 750 thousand deaths among Ukrainians. The Red Terror of 1929 claimed the lives of 500 thousand people, mostly peasants. Repressions against the Ukrainian intelligentsia, the nation's elite, claimed over 30 thousand victims, and the terror of 1937–1940 about 2 million 300 thousand victims. The total number of victims of the genocidal policy of the Soviet government towards Ukraine is at least 13 million 800 thousand people.

Russia committed genocide not only against ethnic Ukrainians, but also against representatives of other nations that had historically inhabited the territory of Ukraine and linked their fate with this country. For example, in the 1944 mass deportation of the indigenous population of Crimean Tatars from Crimea, as well as Krymchaks, Greeks and other nations, 423,100 people were transferred to remote regions of the USSR. During the deportation and in the first years thereafter, up to 46.2% of the deportees died, accounting for almost half of the entire transferred Crimean Tatar population[22].

At the same time, a policy of social genocide was pursued, which involved restrictions on the rights of Ukrainian citizens and other nations inhabiting the territory of Ukraine. A striking example of such social genocide was the infamous limitation on enrolment of the Jewish candidates for higher education institutions, where a cap was put in place at universities at no more than 2% of the total number

21 URL: https://babel.ua/texts/89479. [Accessed: 16/06/2024].

22 P. Fris, *Psychological and Ideological Basis of Collaboration in the Conditions of Russian Aggression in Ukraine*, „Review of European and Comparative Law" 2023, Special issue.

of admitted students.[23] These restrictions were also applied to representatives of many other nations living in the territory of Ukraine, for example, the Chechens.

In reality, the actual goal of Stalinist policy was to revive the Russian Empire, although this time under an entirely different name. The most aggressive monarchists, supporters of the rebirth of the empire, realized this in due time. In his memoirs, titled *True Stories*, Lev Razgon, who spent 18 years in Stalin's Gulag camps, recalls his fellow prisoner, Admiral Nikolai Roshchakovsky, a friend of Tsar Nicholas II, who praised Stalin and the Bolsheviks for the actual restoration of the Russian Empire[24].

The last attempt to regain independence and restore Ukrainian statehood was undertaken during and after World War II, but due to the considerable imbalance of power, it was doomed to failure from the outset. The point here, however, is not to analyse historical events but to identify the epicentre of the fighting at that time? The answer is simple: it was in the western regions of Ukraine, those regions that clearly belonged to the Euro-Atlantic civilization and where the fault line was the most clear-cut and obvious.[25]

The civilizational fault line that ran and still runs in Ukraine for centuries has always been a catalyst for the struggle for independence. It is true, though, in the years after World War II this struggle took the form of solely political resistance, as is clearly demonstrated by the activities of Ukrainian dissidents in the 1960s and 1980s. Once again, the majority of those who raised their voices against Russian domination and dictatorship were those who embraced Euro-Atlantic values. A short list of these figures confirms this beyond any doubt: Vyacheslav Chornovil, Levko Lukyanenko, Petro Hryhorenko and dozens of others built their movement on the foundation of the pan-European understanding of independence, sovereignty and unity.

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[23] In the last years of his life, Stalin was preparing an action of deporting the entire Jewish nation to distant regions of the USSR, with trials planned to end with death sentences, which were to be held in the largest cities of Ukraine. The action was to begin on 10 March 1953 and only the death of the dictator prevented the plan from being implemented.

[24] J. Mearsheimer, *The Case for f Nuclear Detterent*, „Foreign Affairs" 1993, Vol. 72, s. 54. Cytowane za: С. Хантінгтон, *Столкновение цивилизаций*, [tłum. Т. Велимеева], Алматы: РДЦ-Алматы 2020, s. 34.

[25] Incidentally, the fault line also ran through the Baltic countries, which are part of the Euro-Atlantic civilization and never accepted the Central Asian civilization, to which Russia belongs. It was there that the armed struggle in the years after the end of World War II, besides Western Ukraine, was the fiercest.

The collapse of the USSR raised the question of the further development of the new independent states that emerged from the ruins of the „evil empire" and of the future relations between them.

In his analysis of the relations between Ukraine and Russia from this perspective, John Joseph Mearsheimer, using a statistical method, noted in the early 1990s that „... the situation between Ukraine and Russia is ripe for the outbreak of security competition between them. For a great power like Russia that shares a long and unprotected common border, like the one between Russia and Ukraine, often lapse into competition driven by security fears. Russia and Ukraine might overcome this dynamic and learn to live in harmony, but it would be unusual if they do"[26]. The author was absolutely right, and what came next, unfortunately, confirmed this course of events.

The historical path of Russia's development has produced an imperial mindset among the elites of Russian society, which, with the help of active media propaganda, has become the leading idea of the vast majority of Russian society. This actually provided the basis for Russia's policy towards Ukraine.

After the end of the Cold War, the collapse of the USSR and the proclamation of Ukrainian independence, it initially seemed that relations between Russia and Ukraine would reach a new, civilized level. However, it was not the case.

Russian nationalism almost immediately began to express its dissatisfaction with the collapse of the USSR and the proclamation of Ukrainian independence. At the same time, two trends were observed in it: extreme nationalism, represented by the outstanding writer Aleksandr Solzhenitsyn, and imperial nationalism, represented by the notorious politician Vladimir Zhirinovsky.

Extreme nationalists did not accept the actual division of the USSR, believing that Russia encompassed both all Russians and the related Orthodox nations, i.e. Ukrainians and Belarusians. Imperialist Russian nationalists demanded the rebirth of the Soviet Empire, as well as the revival of its political and military power, while consistently cultivating unequivocally anti-Western views. The representatives of imperial nationalists advocated Russia's external orientation towards the East, which basically corresponded to its actual civilizational orientation, as discussed above. Their primary focus was on the need to unify political practices with the People's Republic of China in the confrontation with Euro-Atlantic civilization, and above all with the United States.

Preparations for putting these „ideas" in practice began in Russia with the coming to power of Vladimir Putin, who, as it now turns out, from the very

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[26] R. Lemkin, *Genocide*, Lexington Books 2012.

beginning of his rule sought the annexation of Crimea, and then parts of Ukraine. Suffice it to recall the conflict over Tuzla Island in 2003 and the provocative speech of former Moscow mayor Yuri Luzhkov in 2008 given in Sevastopol, in which he questioned the status of Crimea as a Ukrainian territory.

The struggle for Ukraine's accession to the European Union and NATO, which was supported by the majority of Ukrainian society, as well as the reluctance to unite in a customs union, which would be essentially a step towards the loss of sovereignty and complete subordination to Russia with a prospect looming for political unification with Russia and loss of independence, led to the Revolution of Dignity and gave rise to Russia's aggression against Ukraine.

A historical analysis of the crime of genocide, especially in the 20th century, brings a conclusion that it is an inherent element of totalitarian and fascist-communist-nationalist political regimes.[27] Wherever fascism or communism comes to surface, it the crime of genocide always goes hand in hand. There are far too many examples of this in history.

5. Drivers of the Crime of Genocide

Once established, the drivers of the occurrence of the crime of genocide will allow for the identification of certain mechanisms of influence to prevent its commission.

As mentioned above, the definition of the crime (Article 2 of the Convention) is not exhaustive. Other acts have also been committed during the Russian aggression in Ukraine, which in fact constitute the crime of genocide. Of course, to ascertain this requires a more detailed analysis of the ways and methods, since they range from the gas chamber in Auschwitz to the Holodomor in Ukraine, from Babi Yar to the shelling of residential buildings, schools and kindergartens in Kherson, Kharkiv, Mykolaiv and other cities of Ukraine, from the destruction of the Ukrainian energy system to the abduction of hundreds of thousands of Ukrainian children...; therefore, it is necessary to attempt to identify the basic factors that determine the commission of the crime of genocide.

In analysing this issue, we will assume that the factors of the crime can be divided into three groups:

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[27] This term is used freely here compared with the generally accepted system of classification of political regimes in legal theory. We do not insist that the existing classification be adjusted. We simply use the term to emphasize that fascism and communist nationalism share their identities.

a) socio-political;
b) socio-economic;
c) biosocial.

We believe it is important to emphasise at the outset that, unlike general crimes, where it is possible to identify the influence of a specific factor on the commission of a crime, the crime of genocide is usually caused by a combination of various factors. At the same time, the „set" of factors may vary depending on historical, national, ethnic circumstances, etc. However, we accept that in each case the main driver will be a political and biosocial complex. Thus, the crime of genocide in the form of famine in Ukraine in the 1920s, 1930s and 1940s was caused by political factors related to the collectivization policy declared by Stalin, the intention to destroy the Ukrainian nation as a separate ethnic group in order to settle immigrants from northern and eastern Russia in the territories historically inhabited by the Ukrainian population, the plan to thwart peasant resistance to Soviet power, etc. On the other hand, the driver of the genocide of Jews by the Nazis was, first of all, the socio-biological factor by which the Jewish nation was denied the the right to exist at all. In both cases, there is also a socio-economic factor, since the policy of genocide also envisaged appropriate economic benefits. The combination of drivers of the commission of the crime of genocide in a country, by concrete perpetrators, against specific nationalities and groups, may be different in each case.

Perhaps the most notorious crime of genocide was the genocide of the Jewish people during the rule of the Nazi regime in Germany. After all, it was that crime that served Raphael Lemkin as the basis for developing the concept of the crime of genocide, which was set out in his famous work *Axis Rule in Occupied Europe* (1944), where he noted:

> [...] genocide does not necessarily mean the immediate destruction of a nation [...] It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups"[28].

[28] A. Hitler Mein Kampf. URL: https://www.yadvashem.org/ru/docs/main-kampf.html.

On this basis, the genocide of the Jewish people is believed to have been caused by the factors from all three above-mentioned groups simultaneously. The biosocial driver was, of course, dominant, compounded by socio-economic and socio-political factors. The underlying factor of that genocide was Hitler's personal hatred of the Jewish people, which became almost paranoid. With the methods used, which we today call „social engineering", this hatred became fundamental also for the majority of Germans at the time and formed the basis of the „Final Solution", which envisaged the extermination of the entire Jewish nation as such. The socio-economic factor came into play as well, deriving from the competition between German and Jewish industrialists and financiers, and the German desire to gain benefits at the expense of the properties and fortunes owned by Jews. Also, the socio-political factor cannot be ignored, which was based on the struggle for political influence in the international arena and the confrontation between National Socialism and Marxism. The workings of the combination of various factors that contributed to the commission of the crime of genocide are perfectly illustrated by Hitler's views contained in his program book *Mein Kampf*, in which he stated, among other things:

> The Jewish doctrine of Marxism repudiates the aristocratic principle of Nature and substitutes for it the eternal privilege of force and energy, numerical mass and its dead weight. Thus, it denies the individual worth of the human personality, impugns the teaching that nationhood and race have a primary significance, and by doing this it takes away the very foundations of human existence and human civilization. If the Marxist teaching were to be accepted as the foundation of the life of the universe, it would lead to the disappearance of all order that is conceivable to the human mind. And thus the adoption of such a law would provoke chaos in the structure of the greatest organism that we know, with the result that the inhabitants of this earthly planet would finally disappear.
>
> Should the Jew, with the aid of his Marxist creed, triumph over the people of this world, his Crown will be the funeral wreath of mankind, and this planet will once again follow its orbit through ether, without any human life on its surface, as it did millions of years ago. [Eternal nature mercilessly avenges itself for violations of its laws.] And so I believe to-day that my conduct is in accordance with the will of the Almighty Creator [...][29].

[29] Post D. Miedwiediewa na platformie „Telegram". URL: https://www.radiosvoboda.org/a/news-medvedyev-pohrozy-isnuvannya-ukrayiny/32778269.html (dostęp:10.02.2024).

This attempt (of course, a quite superficial one) to analyse the drivers of the commission of the crime of genocide should enable their consideration from the point of view of the crime of genocide against the contemporary Ukrainian nation.

Unlike in Hitler's concept, the main determinant of the Russian genocide against the Ukrainian nation today is the socio-political factor. In the very beginnings of the Bolshevik regime, one of its leaders, Leon Trotsky, said rather straightforwardly: „Do not forget for a moment that Ukraine must be ours and will be ours only if it is Soviet [...]" [30]. This approach is also perfectly illustrated by the statement of the Deputy Chairman of the Security Council of Russia, Dmitry Medvedev, who said: „The existence of Ukraine is mortally dangerous for Ukrainians. And I don't mean only the current state, that is, the Banderite political regime. I'm talking about any, absolutely any Ukraine. Why? The existence of an independent state on the historical Russian territories will now be a constant pretext for the resumption of combat actions"[31].

Nikolai Patrushev (then Secretary of the Russian Security Council) was even more specific:

> If we don't conquer Ukraine now, then... WE WILL LOSE EVERYTHING!
>
> We will not get shale gas deposits in the Kharkiv and Donetsk regions. We will not get „critical raw materials" as lithium, cobalt, scandium, graphite, tantalum, niobium and others... deposits of which are so rich in Ukraine.
>
> We will not get sources of bread and food... where there are huge reserves, surpluses of grain, but where it is difficult to take them from at once where there is still Banderite rule....
>
> We have to move at least three million mouths from northern, hungry Russia to Ukraine. We should deploy a 1.5 million army in Ukraine closer to the EU borders so that they start to fear.
>
> The use of executions in occupied territories should be extended (and all this should be published on social media... Fear is our main weapon.) Without this, it is impossible to build the Russia of the future.
>
> Without law enforcement agencies and other similar organizations with repressive functions, Russia as an empire cannot exist[32].

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30 О. Романчук, *Ультиматум. Хроніка одного конфлікту між Раднаркомом РРФСР і Центральною Радою*. URL: https://exlibris.org.ua/text/ultimatum.html.

31 Wystąpienie N. Patruszewa na zamkniętym posiedzeniu Rady Bezpieczeństwa Federacji Rosyjskiej. URL: https://x.com/210ifjd2/1790115057180811594 (dostęp: 15. 05. 2024).

32 Wywiad prezydenta Władimira Putina, udzielony Tuckerowi Carlsonowi 09.02.2024 r. URL: https://www.google.com/search?q=%D1%96%D0%BD%D1%82%D0%B5%D1%80%D0%B2%27%D1%8E+%D1%82%D0%B0%D0%BA%D0%B5%D1%80%D1%83+%D0%BA%D0%B0%D1%80%D0%BB%D1%81%D0%BE%D0%BD%D1

The Russian leadership, and above all President Vladimir Putin, justify the attack on Ukraine primarily with political „claims" – for hand-over of territories that they believe are „eternally Russian", a change of leadership in Ukraine, a contrived „denazification" and a change of the political regime, which they describe as „Banderite", Ukraine's resignation from joining NATO and the EU, etc. All these fabricated claims have only one goal – to eliminate Ukraine as an independent state and destroy the Ukrainian nation as a full-fledged entity in international relations.

The question of the existence of an independent Orthodox Church of Ukraine, which managed to free itself from the authority of the Orthodox Church of the Moscow Patriarchate, also fits closely with the political driver of genocide. After all, the political driver is based on the ideological component rooted in the claim of „one Russian nation". While this claim has been proved groundless above, it is nevertheless still actively promoted in Russia. Moreover, it lately acquired a new legal basis, as on 8 May 2024, immediately after taking office as President of the Russian Federation, V. Putin issued a decree „Fundamentals of State Policy in Historical Education"[33], which in fact fully reflects the views of its author on the history of Russia, the unity of the Russian and Ukrainian peoples, as he clearly expressed in an interview with the American journalist Tucker Carlson on 6 February 2024[34]; he stated directly that Ukraine is in fact part of Russia, thereby confirming Russia's claims to the entire territory of Ukraine.

One of the key parts of the ideological component of the crime is the ideological transformation of the minds of the masses. It is through the mass media that false information about the dominance of fascists in Ukraine, the illegality of the Ukrainian government, „one nation", etc. has been hammered into the minds of Russians for decades. After the active phase of Russia's aggression against Ukraine began, Kremlin propaganda started to promote the commission actively by the

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%83&rlz=1C1GCEA_enUA1021UA1021&oq=%D0%86%D0%BD%D1%82%D0%B5%D1%80%D0%B2%D1%8C%D1%8E+%D0%A2%D0%B0%D0%BA%D0%B5%D1%80%D1%83&gs_lcrp=EgZjaHJvbWUqCQgBEAAYChiABDIGCAAQRRg5MgkIARAAGAoYgAQyCQgCEAAYChiABDIICAMQABgWGB4yCAgEEAAYFhgeMggIBRAAGBYYHjIICAYQABgWGB4yCAgHEAAYFhgeMggICBAAGBYYHjIICAkQABgWGB7SAQoyNzc5NGowajE1qAIIsAIB&sourceid=chrome&ie=UTF-8#fpstate=ive&ip=1&vld=cid:f94e9e70,vid:ncPW2pyOzJU,st:0 (dostęp: 21.05.2024).

[33] Основы государственной политики в области исторического просвещения. Указ президента рф №314 выд 08 травня 2024 р. URL: https://news92.ru/2024/05/08/rossija-utverdila-osnovy-gosudarstvennoj-politiki-v-oblasti-istoricheskogo-prosveshhenija/

[34] Strona „Kanał 24" na platformie „Telegram" 06 czerwca 2024 r. URL:https://24tv.ua/novini_tag1117/ (dostęp: 06. 05. 2024).

aggressors of acts that constitute the crime of genocide within the meaning of the Convention. Kremlin propagandists Vladimir Solovyov, Margarita Simonyan, Dmitry Kiselyov, Olga Skabeyeva and others call outright for the liquidation of Ukrainians and the commission of other acts constituting this crime. In fact, they are repeating the acts committed in Nazi Germany by Julius Streicher, editor-in-chief of the newspaper *Der Stürmer* (The Stormtrooper), who was an ideologist of racism and anti-Semitism, for which he was later found guilty by the Nuremberg Tribunal and executed pursuant to its verdict. A similar situation took place in more recent times: Georges Omar Ruggiu, a presenter of the Rwandan radio station RTLM, was found guilty and sentenced for identical acts related to the extermination of the Tutsi nation. Accordingly, it should be recognized that the crime of genocide also includes acts that provide its ideological justification and, at the same time, incite the commission of the crime.

Having identified the socio-political driver as the main determinant of the commission of the crime of genocide by Russia against the Ukrainian nation, we must not ignore the significant weight of the socio-biological factor. This factor seems to easily escape any analysis of the drivers of the commission of the crime of genocide by Russia against Ukrainians. However, this is only a matter of depth of analysis. Obviously, Russia's leadership cannot afford to speak openly about any biological inferiority of Ukrainians, to refer to them as an „inferior race" or anything like that. But these are just appearances. The factor manifests itself in the denial of the very existence of the Ukrainian nation. The well-known claim „WE ARE ONE NATION" used repeatedly by Russian leaders at all levels is a clear confirmation of the presence of the biosocial factor. It is precisely this that determines the transfer of Ukrainians from the occupied Ukrainian territories to Russia, forcing them to renounce their Ukrainian identity, abductions of children, etc.

First, the concept of the „Russian nation" as interpreted by Russian leaders is devoid of rational foundations. Russians as such constitute a separate national and ethnic group, living along with representatives of other ethnic groups inhabiting Russia, of which there are over 190[35]. Back in the late 19th and early 20th century, the famous historian, professor at the St. Petersburg Academy of Sciences Alexey Shakhmatov, based on the analysis of a massive amount of data, proved

[35] О. Кіндсфатер, «Великоросійський» народ ніколи не мав родинного коріння з українським, „Армія inform" 2021, 10 czerwca. URL: https://armyinform.com.ua/2021/06/10/velykorosijskyj-narod-nikoly-ne-mav-rodynnogo-korinnya-z-ukrayinskym/ (dostęp: 11.02.2024).

that „the Little Russian (Ukrainian) tribes of Polians, Drevlians, Volhynians, Buzhans, Tivertsi, Dulebes and Uliches inhabited the territories from the banks of the Pripyat to the Black Sea, from the Dnieper to the Carpathians. These Slavic tribes had no connection with the Merya, Muromian, Ves, Meshchera, Permian, Pechora, Moksha, Mordvinian, Mari peoples, i.e. tribes that lived in the land of Moxel in the 10th-13th centuries, and later in Moscow, the eternal land of the Great Russians" [36]. Moscow's entire policy towards Ukraine in the 20th century was aimed at destroying the Ukrainian nation and replacing the Ukrainian population with immigrants from Russia. What we are witnessing today is that tactic continued; according to the latest data, citizens of various regions of Russia are being massively transferred to the occupied territories of the eastern regions of Ukraine to replace the Ukrainian population that left these areas, and thus change the demographic structure of the population to Russia's advantage. Cases of forced change of nationality and citizenship among Ukrainian citizens living in the occupied territories, as well as forced resettlement of Ukrainians to Russia and its regions far from the centre, have become common.

Also, the mass direct killing of Ukrainian citizens by Russian aggressors cannot be ignored. One should keep in mind that in addition to hundreds of thousands of battlefield casualties, there are also numerous examples of the direct extermination of thousands of Ukrainians living in temporarily occupied territories, concentration camps and multiple cases of torture of Ukrainian citizens, which are vividly reminiscent of the actions of German fascists in the occupied territories during World War II. Hundreds, if not thousands, of mass graves of Ukrainian citizens who fell victims of Russian aggressors have been discovered in Bucha, Irpin, Gostomel and other cities liberated from Russian occupiers. In the occupied territories, Russians set up hundreds, if not thousands, of torture chambers, through which thousands of Ukrainians passed.

Another piece of evidence for the presence of a biosocial factor in the crime of genocide committed by Russians against Ukrainians is the mass transfer of

[36] *Міністр культури РФ віднайшов у росіян зайву хромосому*, „Еспресо" 2014, 13 marca. URL: https://espreso.tv/news/2014/03/13/ministr_kultury_rf_znayshov_u_rosiyan_zayvu_khromosomu (dostęp: 11.02.2024). Nawiasem mówiąc, sami Rosjanie twierdzą, że mają dodatkowy chromosom. Zob.: *Rosyjski Minister Kultury znalazł dodatkowy chromosom u Rosjan*. Zob. Заява Верховної Ради України "Про вчинення Російською Федерацією геноциду в Україні": Постанова Верховної Ради України Про Заяву Верховної Ради України "Про вчинення Російською Федерацією геноциду в Україні", від 14 квітня 2022 року№ 2188-IX. URL: https://ips.ligazakon.net/document/t222188 (dostęp: 11.02.2024). Incidentally Russians themselves claim that they have an extra chromosome. See *Russian Minister of Culture found extra chromosome in Russians*.

children from Ukraine and their placement with Russian families with a view to changing their national identity. On 17 March 2023, this was confirmed by the International Criminal Court, which issued an arrest warrant for international criminals, Russian President Putin and his Commissioner for Children's Rights Maria Lvova-Belova.

According to analysts from the Washington-based Institute for the Study of War (ISW), Russia's occupation of Ukraine features a deliberate campaign of ethnic cleansing so that the occupied Ukrainian territories cannot be returned to their rightful owners in the future. Russia's occupation policy aims to create „irreversible impact for at least several generations" and isolate Ukraine from the West. To this end, Russians are using a strategy of forced depopulation and repopulation, thereby changing the demographic picture of the occupied territories of Ukraine with a hope to make their recovery impossible.

In identifying the determinants of genocide of the Ukrainian nation, the socio-economic driver is no less important (this was particularly clearly reflected in N. Patrushev's speech quoted above). Ukraine, with its powerful industrial and agricultural sectors and the riches of natural resources, used to hold an important place in the economy of the former Soviet Union. The Ukrainian declaration of independence had a significant impact on the economic potential of Russia and the development of its economy in general. The economic grounds of genocide therefore include the destruction of Ukraine's economic potential, which is ultimately planned to result in the annihilation of the Ukrainian nation. During the full-scale aggression, Russia destroyed more than half of Ukraine's energy capacity, aiming not only to weaken the country's economic potential but also to put Ukrainians on the brink of survival during the cold winter months, to provoke another famine, to spread diseases, etc.

In addition to the deliberate destruction of the economic potential, the aggressors are also committing the crime of ecocide, which is closely linked to the economy. A striking instance of this conduct was the deliberate blowing up of the dam at the Nova Kakhovka hydroelectric power station by Russian invaders, which resulted in the death of an as yet undetermined number of Ukrainians. The breach of the dam has also caused huge negative consequences for the entire surrounding ecosystem, resulting not only in economic weakening of Ukraine but also in long-term impact on the health and life expectancy of its citizens. Among the cases of Russian eco-terrorism there are also the devastation of the historical Askania-Nova nature reserve, which had a significantly positive role in the ecosystems of southern Ukraine, the destruction of fertile chernozems (black soils) as a result of military operations, etc. According to rather rough estimates

of experts, the total damage to the natural environment of Ukraine by May 2024 will have exceeded $67 billion[37].

The above-discussed factors determine five ways in which Russia commits the crime of genocide against Ukraine, depending on the *actus reus*:

- biological genocide
- political genocide
- economic genocide
- social genocide.

Biological genocide means inhibition of the biological growth of the Ukrainian nation, which is manifested in direct and indirect destruction of it, slowing down of its development, forced deportation of the population to regions unrelated to the historical places of settlement of Ukrainians, changing the national identity of children of Ukrainian origin, replacing the population on Ukrainian lands through forced migration to Ukraine from Russia and other countries. All these have already been confirmed by the findings of many international commissions and experts.

Political genocide is manifested in the complete destruction of the political structure of Ukraine in the temporarily occupied territories, which directly affects the existence and growth of the Ukrainian nation as a political entity and in the future will certainly result in a reduction in the population of Ukrainian citizens.

Economic genocide is the destruction of the economic potential of Ukraine in order to reduce the population of the Ukrainian nation, to bring the population to a state of beggars, which in turn will lead to an increase in morbidity and mortality, and thus to a change in the ethnic structure of Ukraine.

Social genocide is the deliberate destruction of social balance in the temporarily occupied territories by reducing the number of Ukrainian citizens, forcing them to accept Russian citizenship, repressing Ukrainian citizens holding official positions in independent Ukraine and replacing them with Russians, etc.

All the above-described methods by which Russia commits the crime of genocide in Ukraine have one common goal, namely the annihilation of the Ukrainian nation as a separate political entity.

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[37] О. Кіндсфатер, *«Великоросійський» народ ніколи не мав родинного коріння з українським*, „Армія inform" 2021, 10 czerwca. URL: https://armyinform.com.ua/2021/06/10/velykorosijskyj-narod-nikoly-ne-mav-rodynnogo-korinnya-z-ukrayinskym/ (dostęp: 11.02.2024).

Conclusions

Almost two and a half years have passed since the beginning of the active phase of Russia's war against Ukraine. In addition to the crime of genocide, the Russian aggressors in Ukraine have committed hundreds of thousands of other war crimes and crimes against peace, citizens' security and international law and order, as well as general crimes. According to the data provided by the Ukrainian Prosecutor's General Office as of March 2024, a total of more than 100,000 criminal cases have been initiated against individuals responsible for these crimes and in connection with them[38] (Table 1).

Table 1

Recently, world leaders and international organizations have become increasingly aware of the fact that Russia's aggression against Ukraine is aimed not only at destroying Ukraine as a full-fledged entity in international relations, but also at destroying the Ukrainian nation as a political entity, which constitutes the crime of genocide within the meaning of the Convention. Therefore, by decision of the International Criminal Court, arrest warrants were issued for the main perpetrators of the crime of genocide committed by Russia in Ukraine, namely President of the Russian Federation Vladimir Putin, Presidential Commissioner

[38] Telegram. Channel Сайт Бавовна ТБ 23/03/2024, 09 h 53 min.

for Children's Rights Maria Lvova-Belova, Minister of Defence of the Russian Federation Sergei Shoigu, Chief of the General Staff of the Armed Forces of the Russian Federation Valery Gerasimov, commanders of some branches of the Russian army and military units. The global practice of prosecuting the crime of genocide and bringing to justice the perpetrators provides grounds to believe that this list will be significantly expanded over time to include both those directly responsible for committing this crime and those who justified, aided and abetted it using tools of propaganda and influencing the minds of the perpetrators.

The UN International Commission of Inquiry on Ukraine, established in March 2022 to investigate war crimes, crimes against humanity and genocide committed by Russia in Ukraine, is collecting relevant documentation that may in the future constitute the basis for lawsuits before international courts. „The scale and brutality of Russia's atrocities in Ukraine are simply beyond human comprehension," Yevheniya Filipenko, Ukraine's ambassador to the UN in Geneva, told the UN Human Rights Council.[39]

On 25 June this year, based on the inter-State applications no. 20958/14 and 38334/18 „Ukraine v. Russia" (re Crimea), concerning mass violations of human rights by aggressors in temporarily occupied Crimea, the European Court of Human Rights (ECHR) announced its judgement, which noted the actual commission of the crime of genocide by Russia in Ukraine, which will have far-reaching consequences in the future.

On 27 June 2024, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution recognizing that Russia is committing cultural genocide in Ukrainian territories and through its actions aimed at erasing Ukrainian cultural identity is effectively committing the crime of genocide with a view to annihilating the Ukrainian nation.[40]

In its Resolution no. 2556, the Parliamentary Assembly of the Council of Europe called on the Prosecutor of the International Criminal Court to investigate the crime of genocide against Ukrainians committed through the forced transfer of Ukrainian children to Russia.[41]

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39 *Комісія ООН і надалі досліджуватиме в Україні воєнні злочини, злочини проти людяності та геноцид*, „Детектор Медіа" 2023, 5 April. URL: https://cs.detector.media/community/texts/185320/2023-04-05.

40 П. Горлач, *У ПАРЄ визнали, що Росія здійснює культурний геноцид на українських територіях*, «Суспільне» 2024, 28 May. URL: https://suspilne.media/culture/756053-u-pare-viznali-so-rosia-zdijsnue-kulturnij-genocid-na-ukrainskih-teritoriah/. [Accessed: 29/06/2024].

41 URL: https://www.cambridge.org/core/blog/2023/01/24/transferring-of-the-ukrainian-children-to-russia-as-genocidal-fct/. [Accessed: 25/06/2024].

The Parliamentary Assembly of the Organization for Security and Co-operation in Europe (OSCE PA), in its resolution of 29 June 2024, unequivocally identified Russia's actions in Ukraine as the crime of genocide. At the same time, the OSCE PA resolution called for „the creation of an effective international instrument to prosecute crimes of the Russian Federation's war of aggression against Ukraine, in particular, through the establishment of a Special Tribunal for the Crime of Aggression against Ukraine[42]."

Having analysed the crimes committed by the Russian army in the temporarily occupied territories of Ukraine, the Verkhovna Rada of Ukraine adopted a statement in which it emphasized that „The deliberate destruction of Ukrainian museums, historical monuments, places of worship, destruction of Ukrainian books, and the banning of the use of the Ukrainian language in the territories controlled by the occupiers is an attempt to erase cultural, historical, and linguistic features that characterize and unite the Ukrainian nation. Such actions prove the existence of intent to physically destroy the Ukrainian nation. Thus, these facts taken together provide grounds to believe that the actions of the Russian Federation during the armed aggression are aimed at the destruction of the Ukrainian nation and therefore amount to genocide" [26].

Perhaps the best summary of the above considerations will be a quote from a staunch champion against the crime of genocide and the author of its concept, Raphael Lemkin, who in 1953, at a meeting devoted to the anniversary of the Great Famine, stated:

> As long as Ukraine retains its national unity, as long as its people continue to think of themselves as Ukrainians and to seek independence, so long Ukraine poses a serious threat to the very heart of Sovietism. It is no wonder that the Communist leaders have attached the greatest importance to the Russification of this independent-minded member of their ‚Union of Republics', have determined to remake it to fit their pattern of one Russian nation.

When assessing Putin's policy towards Ukraine, these words remain relevant to this day.

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[42] *Парламентська асамблея ОБСЄ визнала дії Росії геноцидом українського народу*, „Укрінформ" 2024, 30 June. URL: https://www.ukrinform.ua/rubric-polytics/3880350-parlamentska-asamblea-obse-viznala-dii-rosii-genocidom-ukrainskogo-narodu.html Дата доступу 09 липня 2024 року

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Volodymyr Pylypenko

Attacks Against the Civilian Population and Civilian Objects as War Crimes Committed by Russia in Ukraine

Introduction

Unpunished evil is reborn with new strength. The aggression of the Russian Federation (the RF) against Moldova, Chechnya, Georgia, the occupation of the Autonomous Republic of Crimea and the separate city of Sevastopol (the ARC and Sevastopol) and the RF's support for terrorist groups in eastern Ukraine and around the world have not yet been met with an adequate response from the international community. For decades, the crimes of concern to the international community perpetrated by the Russian Federation have been hushed up as part of an "appeasement" policy, but the short-lived illusion of peace ultimately led to the bloodiest armed conflict in Europe since World War II – a full-scale Russian invasion of Ukraine, accompanied by hundreds of thousands of international crimes.

As noted by the well-known Ukrainian international law expert Oleksandr Zadorozhniy, the flagrant nature of the actions of the Russian Federation, as well as the systematic, consistent and deliberate nature of its violations of international legal norms, indicate that the country is pursuing a strategy of "transforming modern international law – «international law of cooperation» – into the «law of the strongest»".[1]

On 24 February 2022, the Russian Federation launched armed aggression against Ukraine and unleashed a full-scale war against our country. The war of aggression that Russia has been waging against Ukraine since 2014 has already

1 О. Задорожній, *Анексія Криму – міжнародний злочин*, Київ 2015, p. 427.

claimed the lives of not only thousands of heroic defenders of our Homeland, but also civilians, forced several million people to leave their homes, caused losses in buildings and infrastructure facilities destroyed as a result of military operations, and ruined the economy of our country, hitting primarily the most vulnerable groups of the population. Above all, however, the war described here is accompanied by massive and gross violations of fundamental human and civil rights and freedoms, as well as international humanitarian law throughout the territory of Ukraine. Noteworthy, however, the significance of armed aggression and full-scale war against Ukraine comes not only from the above elements and the direct threat to the European region, a general threat to peace, humanitarian, economic, political and social considerations; the aggression analysed here undermines the contemporary international legal order, which is based on universally recognized principles of international law, the UN Charter, the Final Act of the Conference on Security and Co-operation in Europe and other international legal instruments.

There is no doubt that the use of force by the Russian Federation against Ukraine, which has been taking place since 2014, violates international law and should be treated exclusively as armed aggression in the context of the resolution on the definition of aggression adopted at the 29th session of the UN General Assembly in 1974[2] and the 2010 Amendments to the 1998 Rome Statute of the International Criminal Court[3] (the Rome Statute of the ICC, Statute of the ICC). It is clear from these instruments that aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state. The Russian Federation has committed almost all acts of aggression set out in the above instruments, waging a war of aggression against our country. As a result of the events mentioned above, since 24 February 2022, an international armed conflict has been taking place in the territory of Ukraine, to which, with a view to protecting the parties to the armed conflict, and especially the civilian population, international humanitarian law should be applied, in particular the four Geneva Conventions of 1949.[4] The Armed Forces of Ukraine and other

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2 General Assembly Resolution 3314. Definition of Aggression. 14 December 1974. Access: https://legal.un.org/avl/ha/da/da.html

3 Римський статут Міжнародного кримінального суду від 17.07.1998. Access: https://zakon.rada.gov.ua/laws/show/995_588#Text

4 Конвенція про захист цивільного населення під час війни від 12.08.1949. Access: https://zakon.rada.gov.ua/laws/show/995_154; Конвенція про поводження з військовополоненими від 12.08.1949. Access: http://zakon5.rada.gov.ua/ laws/show/995_153; Конвенція про поліпшення долі поранених і хворих у діючих арміях від 12.08.1949 р. Access: https://zakon.rada.gov.ua/laws/show/995_151; Конвенція про поліпшення долі поранених, хворих

Ukrainian military units are repelling the aggression of the Russian Federation and are actively involved in military operations. Both their actions and the activities of the state bodies of Ukraine are currently regulated by the Ukrainian law "On the legal regime of martial law"[5] and other legislative and executive instruments.

The aggressive invasion of Ukraine by the Russian Federation poses a significant challenge to the entire international community, as its main goal is to destroy the international legal order based on the principles of international law. The illegality of the armed aggression of the Russian Federation against Ukraine has been repeatedly raised by international organizations; as early as on 27 March 2014, the UN General Assembly strongly supported the territorial integrity of Ukraine and recognized the referendum of 16 March 2014 as invalid and as one that cannot be accepted as the basis for changing the status of the ARC or Sevastopol.[6] Subsequently, it has repeatedly adopted resolutions condemning human rights violations in the temporarily occupied territories[7] and the militarization of these territories, just as the militarization of parts of the Black Sea and the Sea of Azov.[8]

As hybrid warfare transitioned into a full-scale open military invasion by the Russian Federation, the UN Security Council in its resolution S/RES/2623 of 27 February 2022 decided to convene an extraordinary special UN General Assembly, which adopted resolution of 2 March 2022 condemning the declaration of a "special military operation" and demanding that the Russian Federation immediately cease the use of force against Ukraine and refrain from further unlawful threats or use of force, as well as withdraw troops from all internationally recognized territories of Ukraine. Then, on 24 March 2022, another resolution was adopted on the humanitarian consequences of aggression against Ukraine, condemning the Russian Federation's attacks on the civilian population and civilian objects, among others. Further, on 7 April 2022, a resolution was adopted on

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та осіб, які зазнали корабельної аварії, зі складу збройних сил на морі від 12.08.1949 р. Access: https://zakon.rada.gov.ua/laws/show/995_152.

5 On the legal regime of martial law, see: Закон України від 12.05.2012. (в редакції від 18.05.2024). Access: https://zakon.rada.gov.ua/laws/show/389-19#Text

6 Территориальная целостность Украины: Резолюция A/RES/68/262, принятая Генеральной Ассамблеей ООН 27 марта 2014 г. Access: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/455/19/PDF/N1345519.pdf?OpenElement

7 See for example: A/RES/71/205; A/RES/72/439; A/RES/73/263; A/RES/74/168; A/RES/75/192; A/RES/76/179. Access: http://www.undocs.org

8 See for example: A/RES/73/194; A/RES/74/17; A/RES/75/29; A/ RES/76/70. Access: http://www.undocs.org

the suspension of the Russian Federation's membership in the UN Human Rights Council.[9] Currently, before the hostilities finally end, it is virtually impossible to estimate the extent of the damage caused by the Russian Federation, though there is no doubt that the scale and severity of these losses are unprecedented.

The Office of the High Commissioner for Human Rights (OHCHR) report on the human rights situation in Ukraine, covering the period from 1 December 2023 to 29 February 2024, based on the work of the UN Human Rights Monitoring Mission in Ukraine (the HRMMU), confirms that since the outbreak of the full-scale armed attack by the Russian Federation on 24 February 2022, at least 10,675 civilians have been killed in armed-related violence (5,079 men; 3,124 women; 311 boys; 250 girls; as well as 28 children and 1,883 adults of unknown gender) while 2,080 civilians have been wounded (6,634 men; 4,631 women; 595 boys; 425 girls; as well as 291 children and 7,504 adults of unknown gender). During this period, the OHCHR also documented the destruction of or damage to 1,055 educational facilities and 444 health care establishments as a result of war operations. Between 14 April 2014 and 29 February 2024, the OHCHR documented a total of 14,085 conflict-related civilian casualties.[10] During this period, the OHCHR also documented the destruction of or damage to 1,055 educational facilities and 444 health care establishments as a result of war operations. 39. Between 14 April 2014 and 29 February 2024, the OHCHR documented a total of 14,085 conflict-related civilian casualties (7,057 men; 4,313 women; 449 boys; 323 girls; and 1,915 adults and 28 children of unknown gender).

As of January 2024, the value of direct damage to Ukraine's infrastructure during the war amounted to almost $155 billion. These estimates also include the damage caused to Ukraine on 6 June 2023, when the invading army blew up the dam of the Kakhovka hydroelectric power plant.[11]

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9 *Генасамблея ООН засудила вторгнення Росії і закликала негайно вивести війська з України*, „Європейська правда" 2022, 2 March. Access: https://www.eurointegration.com.ua/news/2022/03/2/7135096/

10 *Доповідь Управління Верховного комісара з прав людини (УВКПЛ) щодо ситуації з правами людини в Україні, що охоплює період із 1 грудня 2023 року до 29 лютого 2024 року* (п.п. 38-39). Access: https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2024/2024-03-26-ohchr-38th-periodic-report-ukr.pdf

11 *Загальна сума збитків, завдана інфраструктурі України, зросла до майже $155 млрд — оцінка KSE Institute станом на січень 2024 року*, Kyiv School of Economics, 12 February 2024. Access: https://kse.ua/ua/about-the-school/news/zagalna-suma-zbitkiv-zavdana-infrastrukturi-ukrayini-zrosla-do-mayzhe-155-mlrd-otsinka-kse-institute-stanom-na-sichen-2024-roku/

This is an estimate of direct physical damage made by a research team of the Kyiv School of Economics (KSE). The estimates are kept as part of the "Russia Will Pay" project, operated by the KSE Institute together with the Ministry for Communities, Territories and Infrastructure Development, the Ministry of Health, the Ministry of Economy and in cooperation with other relevant ministries and the National Bank of Ukraine. The incremental rise in the total number of losses is due to the increase in the count of damaged and destroyed infrastructure facilities, residential buildings, as well as industrial, energy, educational and healthcare establishments.

Housing stock comes first in terms of damage. As a result of military operations and regular shelling, the number of damaged and destroyed residential buildings is growing every day; in January 2024, the count was over 250,000. Of these, 222,000 are private homes, over 27,000 are multifamily blocks of flats, and 526 are student dormitories. The direct value of damage to such objects is estimated at $58.9 billion. Compared to the report as at the end of 2023, this amount increased by $4.8 billion. The increase is due, among other things, to the switch to another source of information for some regions (Register of Damaged and Destroyed Property, the RDDP). The regions with the largest number of destroyed residential buildings include Donetsk, Kyiv, Luhansk, Kharkiv, Chernihiv and Kherson oblasts.

By early 2024, the estimated value of damage to infrastructure had reached $36.8 billion, while losses in the industry and business sector had amounted to $13.1 billion. The latest data show that 78 small, medium and large private enterprises, as well as 348 state-owned enterprises, have been destroyed or damaged.

The ongoing war continues to increase direct losses from infrastructure destruction in the energy sector to $9 billion and in the agricultural sector to $8.7 billion. In addition, since the beginning of this year, losses in the housing and utilities sector have increased by $1.4 billion to $4.5 billion, and in the health care sector by another $1.4 billion to $3.1 billion.[12]

Since the outbreak of Russia's full-scale invasion of Ukraine, at least 160,000 pieces of agricultural machinery, 16,000 public transport vehicles, 3,800 educational institutions, 1,800 cultural institutions, 580 buildings of state and local authorities, 426 hospitals, 348 religious institutions, 50 administrative services centres, 48 social centres, 31 boarding schools, 31 shopping malls and other objects have been damaged, destroyed or seized.[13]

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12 Ibid,

13 Ibid,

Noteworthy, almost from the first days of Russian aggression against Ukraine, the world has been shocked by the impudence of the crimes committed, that is, war crimes perpetrated by the leadership and military personnel of the armed forces of the aggressor state. The most widespread of these are the Russian Federation's systematic violations of the laws and customs of war, consisting in the wilful killing of civilians; torture or inhuman treatment of civilians; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; unlawful restriction of civil liberties; intentionally directing attacks against the civilian population as such or against individual civilians; intentionally directing attacks against civilian objects, that is, objects which are not military objectives; intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians; attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; killing or wounding treacherously individuals belonging to the hostile nation or army; compelling the population of the occupied territories party to take part in the operations of war directed against their own country; employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering among civilians and are the subject of a comprehensive prohibition under Articles 121 and 123 of the Rome Statute; utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; intentionally using starvation of civilians as a method of warfare, including wilfully impeding relief supplies as provided for under the Geneva Conventions. War crimes are also manifested in the commission of mass atrocities by the armed forces of the Russian Federation in the temporarily occupied territories of Ukraine (in particular, in the cities of Bucha, Irpin, Mariupol, Borodianka, Gostomel and many other localities in the territory of Ukraine), in numerous cases of killing, abduction, cruel deprivation of liberty, torture, rape and outrages upon the dignity of the bodies of the killed and tortured. For example, on 3 April 2022, the first data were made public on mass killings, torture, and rape of civilians in Bucha, Kyiv Oblast, committed by Russian troops during the occupation of the city. According to the Prosecutor General, the situation with the mass killings committed by the Russian military

in Borodianka in the Kyiv Oblast is even worse. There is ample evidence that the killings of civilians were carried out on the orders of the military command.[14]

An analysis of the unlawful actions of the Russian Federation and its agents since February-March 2014 at the latest in the context of the main ways of conduct of the aggressor state and its war strategy shows that these are not just sporadic instances of "collateral damage" of the armed conflict, but intentional and wilful actions. As Alexander Lanoszka and Jordan Becker emphasize, "the open armed attack by the Russian Federation on another sovereign state, Ukraine, which the aggressor state calls a "special military operation",[15] clearly meets the criteria for crimes of aggression, genocide, crimes against humanity and war crimes.

Even before the full-scale invasion, in its final report (2020) on the preliminary examination of the situation in Ukraine, the ICC Office of the Prosecutor pointed out that the actions of Russian agents in the occupied territories constituted war crimes and/or crimes against humanity. Each of these acts can be qualified in different ways. These include, in particular, wilful killings, intentional attacks on the civilian population and civilian objects, torture, unlawful deprivation of liberty, abductions, forced mobilization, intentional deprivation of the right to a fair trial, sexual violence, deportations and forced displacements, confiscation and destruction of property, including the destruction of cultural heritage.[16]

After 24 February 2022, at the international level, not only the ICC, but also the Joint Investigation Team, the UN Independent International Commission of Inquiry on Ukraine[17] (established on 4 March 2022) and the OSCE Moscow Mechanism began fact-finding and investigating international crimes in Ukraine. Based on their outcomes, it can be claimed that Russians are committing at least several international crimes in Ukraine, including the crime of aggression that led to an armed conflict. Moreover, the military units of the Russian Federation systematically violate the basic laws and customs of war; this applies in particular to the principle of distinction (between civilians and combatants), proportionality

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14 М. Мигаль, *Венедіктова назвала місто Київщини, яке найбільше постраждало від дій окупантів*, "Главком" 2022, 22 April. Access: https://glavcom.ua/kyiv/news/naybilshe-vido-kupantiv-postrazhdala-borodyanka-venediktova--835509.html; *Армія РФ має прямий наказ розстрілювати цивільних українців*, Ukraine Crisis Media Center, 8 March 2022. Access: https://uacrisis.org/uk/voyenni-zlochyny-rf-15

15 A. Lanoszka, J. Becker, *The art of partial commitment: the politics of military assistance to Ukraine*, "Post-Soviet Affairs" 2023, vol. 39, no. 3, p. 173.

16 А. Кориневич, *Про Звіт Офісу Прокурора Міжнародного кримінального суду щодо діяльності з попереднього вивчення за 2020 рік*, "Українська правда" 2020, 15 December. Access: https://www.pravda.com.ua/columns/2020/12/15/7277010/

17 United Nations General Assembly Resolution adopted on 4 March 2022, A/HRC/RES/49/1.

(the military advantage must outweigh the damage caused), precautions (it is necessary to ensure that the chosen targets are military objectives) and humanitarian principles (the prohibition of using methods that can cause excessive suffering).

This study aims to determine the ways to investigate war crimes, collect evidence and hold perpetrators to account, as this is a critical part of pursuing justice in times of war. This is why it is important to first understand how international law defines crimes and how the investigation process works. In addition, the purpose of this study is also to present the actions that have been taken so far by the ICC Office of the Prosecutor and national law enforcement authorities in relation to the most serious crimes of concern to the international community committed in the territory of Ukraine by Russian military personnel, and to verify whether the measures recently taken by the ICC are sufficient, given both the scale of the crimes committed and the fact that Russian aggression continues to this day.

1. The Norms of International Humanitarian Law Governing the Protection of Civilians and Civilian objects, the Violation of which Constitutes a War Crime

It should be first noted at this point that international humanitarian law, also known as the law of armed conflict, is a branch of international law whose norms and principles limit the use of violence during armed conflicts, imposing the following conditions on the belligerents: a) sparing those who do not take or have ceased to take direct part in hostilities; b) limiting violence to the extent necessary to achieve the objectives of the conflict, which may consist (regardless of the reasons for which the conflict began) only in weakening the military capabilities of the enemy.[18] The main sources of international humanitarian law are international treaties and international customs. International treaties have become the main source of international humanitarian law since the second half of the 19th century, when the process of codification of the laws and customs of war began. The laws and customs of war is a legal term that refers to those aspects of international law that describe the right to wage war (*ius ad bellum*)

[18] M. Sassòli, A. Bouvier, A. Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, vol. I, Geneva 2011, p. 93.

and principles of military conduct during warfare (*iust in bello,* or international humanitarian law).[19]

A grave breach of international humanitarian law during the armed aggression of the Russian Federation against Ukraine in 2022 was not only the violation of the principles of protection of the civilian population, but also the use of prohibited means and methods of warfare against the civilian population and non-military objects. The full-scale armed aggression of the Russian Federation against Ukraine not only violates the prohibition of military action against the civilian population, but also uses prohibited means and methods of warfare, which further complicates the situation of civilians.

International humanitarian law establishes the obligations of a belligerent party not only in respect of persons, but also in respect of objects; in particular it establishes the prohibition of attacking civilian objects (Article 23 of the 1907 Hague Convention, Article 1 of the 1907 Hague Convention IX, Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949, Article 52 of Protocol I Additional of 1977); the prohibition of attacking undefended localities (Article 25 of the 1907 Hague Convention, Article 1 of the 1907 Hague Convention IX, Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949, Article 59 of Protocol I Additional of 1977); the prohibition of attacking neutral zones (Article 15 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War); prohibition of attacking hospital and safe zones and localities and demilitarized zones (the 1907 Hague Convention, Article 23 of Geneva Convention I of 1949, Article 14 of Geneva Convention III of 1949, Article 60 of Protocol I Additional of 1977); prohibition of attacking stationary and mobile medical units and facilities (Geneva Convention of 1864, Articles 6-8 of the Geneva Convention of 1906; Articles 6-8 of the Geneva Convention of 1906, the 1907 Hague Convention, Geneva Convention I of 1929, Geneva Conventions of 1949 and Articles 21-30 of Protocol I Additional of 1977); prohibition of attacking civil defence units (Articles 61-62, 67 of Protocol I Additional of 1977); prohibition of attacking cultural property and places of worship (Article 27 of the 1907 Hague Convention, Article 5 of the 1907 Hague Convention IX, Articles 25-26 of the 1923 Hague Convention on the Conduct of Air Warfare), Article 1 of the 1935 Washington Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Article 4 and 9 of the 1954 Hague Convention, Article 53 of

[19] В. Семенов, *Закони та звичаї війни*, [in:] *Юридична енциклопедія*, ed. Ю. Шемшученко et al., vol. 2: Д – Й, Київ 1998.

Protocol I Additional of 1977, Article 1 of the 1945 UNESCO Constitution, Articles 6, 11 of the 1972 Paris Convention concerning the Protection of the World Cultural and Natural Heritage); prohibition of attacking objects essential to the survival of the civilian population (Article 54 of Protocol I Additional of 1977); prohibition of causing significant damage to the natural environment (the 1972 Paris Convention concerning the Protection of the World Cultural and Natural Heritage, UN Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques of 1976, Articles 35, 55 of Protocol I Additional of 1977); prohibition of attacking works and installations containing dangerous forces (dams, dykes, nuclear electrical generating stations) (Articles 52, 56 of Protocol I Additional of 1977, Organization of African Unity Convention on the Establishment of a Nuclear-Weapon-Free Zone in Africa of 1995, UN General Assembly Resolution 45/58 of 4 December 1990).[20]

The works and installations containing dangerous forces, i.e. dams, dykes and nuclear electrical generating stations, should not be the object of attack even if they constitute military objectives, if such an attack could result in the release of dangerous forces and lead to heavy casualties among the civilian population. Therefore, the seizure of nuclear power plants and the destruction of facilities containing nuclear materials may be grounds for qualifying the actions of the Russian Armed Forces as terrorist activity and recognizing the Russian Federation as a terrorist state. Noteworthy, Russia's violation of the International Convention for the Suppression of the Financing of Terrorism is now under consideration by the International Court of Justice.[21]

Considering the above, the civilian population enjoys a special status and the main objective of international humanitarian law is to protect them from the effects of armed conflicts. Breaches of international humanitarian law give rise to the responsibility of both states and individuals through the use of both international and national legal instruments. The international armed conflict in Ukraine is perceived as a new type of armed conflict that requires a new approach

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20 В. Базов, *Теорія та принципи міжнародного гуманітарного права: дис.* ... д-ра юрид. наук: 12.00.11, Інститут законодавства Верховної Ради України, Київ 2021, p. 134.

21 Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (UKRAINE v. RUSSIAN FEDERATION); Request for the Indication of Provisional Measures Order of 19 April 2017; Reports of Judgements, Advisory Opinions and Orders Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (UKRAINE V. RUSSIAN FEDERATION) preliminary objections judgement of 8 November 2019.

to both its resolution and responsibility for breaches of the laws and customs of war, especially those that have caused inconceivable suffering to the civilian population of Ukraine. Changes in the nature of conflict have led to the emergence of new methods of hybrid warfare, such as disinformation campaigns aimed at destabilizing or gradually demoralizing the adversary, as have been observed in Ukraine since 2014.

2. The Concept of War crimes in Contemporary International Law

Despite the fact that for the vast majority of its centuries-long history, humanity has functioned and developed in a state of war, it is a state of peace, not a state of war, that is considered normal and appropriate for the safe human existence. Meanwhile, the criteria for proper (lawful, permissible) and punishable (unlawful, prohibited) action in peacetime are qualitatively different from those in wartime. In the latter case, there is the commission of crimes accompanying the conduct of armed (combat) operations in the territory of a specific state (states), as a result of which at least one of the belligerents violates legally sanctioned laws and customs of war, which constitute a more or less systematized set of legal norms. Going beyond the boundaries of these norms is most often identified with war crimes, as the most dangerous antisocial (socially dangerous) acts in the context of armed conflict that entail criminal liability (usually particularly severe). Such cases comprise a category of crimes that are commonly referred to as war crimes. This concept is well-established in the doctrine of both international and national criminal law. War crimes are characterized by an increased threat to society, as they usually result in the violation of the civilian population's rights to life and health, cause mass migration of people both within the state (internally displaced persons) and outside it (refugees), raise social tensions, deprive members of a community of the opportunity to carry out their previous life activities, etc. Therefore, as the analysis of the directions of legislative developments on war crimes in various countries shows, liability for committing this category of socially dangerous acts is particularly severe, with punishability by long-term imprisonment, up to capital punishment (in some countries). All these crimes are judicially prosecuted both at international and national levels.

Currently, the most comprehensive definition of war crimes is provided in Article 8 of the 1998 Rome Statute of the ICC, where they are understood as grave

breaches of the Geneva Conventions of 12 August 1949 or other grave breaches of the laws and customs applicable in international and non-international armed conflicts under international law, namely any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention.[22]

The concept of grave breaches is set out in detail in: 1) the Geneva Conventions of 1949,[23] which codified international humanitarian law after World War II and contain the first-ever list of war crimes; 2) certain other instruments of international law (Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 5 of the Convention on the Prohibition of the Use of Environmental Modification Techniques for Military or Any Other Hostile Purposes of 1976, as well as in the founding documents of international criminal justice bodies, in particular the statutes of international and hybrid military and *ad hoc* criminal tribunals, the Rome Statute of the ICC.[24]

Noteworthy, all the types of war crimes defined in the Geneva Conventions are not complementary, as each of them contains its own list of grave breaches, thus creating a unified system. War crimes described in these Conventions include: wilful killing; torture and inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other

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22 Римський статут Міжнародного кримінального суду від 17.07.1998. Access: https://zakon.rada.gov.ua/laws/show/995_588#Text

23 These are the four Geneva Conventions of 1949: 1) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field obliges the parties to take the wounded and sick of the enemy from the battlefield and provide them with appropriate care; at the same time, it prohibits any discrimination against the wounded and sick on the grounds of sex, race, nationality, political views or religion. All wounded and sick in enemy power must be registered, and their details reported to the country on whose side they fought. Medical facilities, medical personnel and transport of the wounded, sick and medical equipment are protected, and attack on these is prohibited; 2) Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea establishes the principles of treatment of the sick and wounded during hostilities at sea, similar to those provided for in the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 3) Convention relative to the Treatment of Prisoners of War specifies the principles of treatment of prisoners of war and obliges all parties to the conflict to comply; 4) Convention relative to the Protection of Civilian Persons in Time of War ensures humane treatment of the population in occupied territory and protects their rights.

24 В. Репецький, В. Лисик, *Поняття та ознаки воєнних злочинів*, «Альманах міжнародного права» 2009, vol. 1, p. 121.

protected person to serve in the forces of a hostile power; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of protected civilians; taking of hostages.[25]

The above list of war crimes was supplemented by Protocol I Additional of 1977, which extended it to include the following grave breaches of international humanitarian law: conducting certain medical experiments; making the civilian population, civilian individuals or demilitarized and safe zones objects of attack; launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; perfidious use of the distinctive emblem of the red cross, red crescent or other protective signs; the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; unjustifiable delay in the repatriation of prisoners of war or civilians; practice of apartheid; directing attacks against historical monuments, and many others.[26]

War crimes, in terms of their legal qualification, also have a number of specific (immanent) features:

1) conditions of commission: during an armed conflict (international or non-international) and in connection with it;
2) targeted breach: first, against the procedure for conducting an armed conflict (international or non-international) established by international law, and second, against the security interests of persons (individuals) protected by international law, entangled in armed conflict (international or non-international);
3) serious nature of the breach: its consequences for the interests protected by international humanitarian law (laws of armed conflict) through international criminal law;

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25 М. Гнатовський, Т. Короткий, А. Кориневич, В. Лисик, О. Поєдинок, Н. Хендель, *Міжнародне гуманітарне право. Посібник для юриста*, ed. Т. Короткий, Київ – Одеса 2016–2017. Access: https://www.helsinki.org.ua/publications/mizhnarodne-humanitarne-pravo-posibnyk-dlya-yurysta-2/

26 Додатковий протокол до Женевських конвенцій від 12 серпня 1949 року, що стосується захисту жертв міжнародних збройних конфліктів. URL: https://zakon.rada.gov.ua/laws/show/995_199#Text [Protocols Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), done at Geneva on 8 June 1977].

4) characteristics of the *mens rea*: in addition to the intent (as regards the act) and knowledge (as regards the possible consequences of the act), characteristic of all crimes against the peace and security of humanity, it is also necessary to establish an additional analytical element concerning the perpetrator's perception of the existence of a state of armed conflict. The occurrence of the above elements provides a basis for a conceptual definition of war crimes and for conducting a scientific distinction between them and other crimes (against peace and security of humanity, as well as general crimes), which is essential in the qualification process.

Considering war crimes in the context of the contemporary approach in general, it is quite reasonable to define them as grave breaches of international humanitarian law, applicable in armed conflicts of an international and/or non-international character, and entailing individual criminal responsibility under international criminal law. This definition, although not detailed, as it does not indicate all the essential features of the prohibited acts analysed, may constitute a starting point for their conceptual understanding, distinguishing them from other crimes and be used in this context in international law.

3. The Statute of the ICC as the Main Source of the Catalogue of Existing War Crimes

Currently, the key international body with the jurisdiction to investigate war crimes and prosecute war criminals (Article 5 of the Rome Statute of the ICC) is the ICC, which is the most authoritative international institution in this field. An analysis of the provisions of the Rome Statute of the ICC, in particular Article 8 "War Crimes", leads to the conclusion that it includes four categories of war crimes:

1) grave breaches of the Geneva Conventions of 12 August 1949 (Article 8 (2) (a) of the ICC Statute);
2) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law (Article 8(2)(b) of the ICC Statute);
3) serious violations of Article 3 common to the four Geneva Conventions of 12 August in the event of non-international armed conflict (Article 8(2)(c) of the ICC Statute);
4) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law (Article 8(2)(e) of the ICC Statute).

Based on the above, one can distinguish two groups of war crimes:

1) crimes committed in an international armed conflict;
2) crimes committed within the framework of a non-international armed conflict.

Let us examine the elements of war crimes in the form of grave breaches of the 1949 Geneva Conventions, as set out in Article 8 of the Rome Statute of the ICC, concerning the civilian population and civilian objects. As mentioned above, the international character of armed conflict is the main objective condition for the application of this group of principles. In other words, grave breaches include intentional attacks of a criminal nature committed by an individual in the course of an international armed conflict against persons or property protected by the four 1949 Geneva Conventions.

3.1. Wilful killing (Article 8(2)(a)(i) of the Rome Statute of the International Criminal Court).

In all international legal instruments related to the establishment of the laws of war, the most serious war crime is the wilful killing of persons protected by international humanitarian law, including prisoners of war and civilians.

All four Geneva Conventions prohibit killing and recognize this prohibition as one of the principal guarantees set out in Article 75 of Protocol I Additional. In fact, it is a truism to say that killing is the most serious war crime, since human life is recognized as the most precious interest protected by law in all civilized states and societies. However, concepts such as "war" and "armed conflict" are associated with inevitable human casualties, both among military personnel and civilians. Obviously, both of these concepts cover the two categories of persons referred to in the Geneva Conventions and other international legal instruments.

What is considered a war crime when it comes to killing? First, the victim of killing can be any person in an international armed conflict who is under the power of the adversary. Second, the relevant articles of the Rome Statute and the Geneva Conventions refer to killing in the singular, which consequently means that death may be inflicted not only on many but also on a single person. Third, the killing has to be deliberate (intentional), foreseen, wilful, i.e. where the perpetrators are aware of the status of the victim(s) but cause their death nonetheless. Thus, under the provisions of the Rome Statute, wilful killing as a war crime means that the perpetrator's acts intentionally caused or resulted in the death of one or more persons. Therefore, in order for killing to be considered a war crime, from a legal point of view, it is not necessary to prove the "large-scale" of killings.

For the crime to be ascertained (as well as other cases of intentional injury to body or damage to property), any circumstances must be ruled out as specified in the provisions which could constitute grounds for exclusion of criminal responsibility (Article 31 of the Rome Statute). The most important among those is the state of self-defence or defence of another person, or acting "under duress" resulting from a threat of imminent death or of continuing or imminent serious bodily harm to the perpetrator. Thus, cases of intentionally causing death and serious (significant) bodily harm in a state of necessary defence or in other situations while under duress (generally extreme ones) are not considered war crimes.

3.2. Torture or inhuman treatment, including biological experiments (Article 8(2)(a)(ii)).

Persons in the power of the adversary in an international armed conflict may also be victims of these acts.

According to Article 11(1) of Protocol I Additional, "the physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty [...] shall not be endangered by any unjustified act or omission."

The definition of torture corresponds to the definition contained in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, according to which "torture" means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or third-person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[27]

One of the judgements of the International Criminal Tribunal for the former Yugoslavia emphasized that torture is one of the crimes where wilfulness if

[27] Code of conduct for law enforcement officials. GA Res. 34/169 of 17 December 1979. Access: https://digitallibrary.un.org/record/10639 [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly on 10 December 1984. Access: https://www.amnesty.org.pl/wp-content/uploads/2016/04/Konwencja_w_Sprawie_Zakazu_Stosowania_Tortur.pdf].

pronounced most, and in the context of a war crime, to find a person guilty of torture, the following elements must be established:

a) torture consists of the infliction of severe pain or suffering, whether physical or mental;
b) the act must be intentional;
c) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
d) it must be linked to an armed conflict;
e) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.[28]

3.3. Wilfully causing great suffering or serious injury to body or health (Article 8(2)(a)(iii)).

The prohibition of committing the above acts against persons in the power of the adversary is also recognized as a fundamental guarantee, set out in Article 75 of Protocol I Additional. However, if the injury to bodily or health of such persons resulted from torture or other inhuman treatment, then, by virtue of established tradition, the act is qualified under both norms.

The concept of "causing great suffering" should, obviously, be understood as the development of a mental illness in a person in the power of the adversary, caused by the acts of the perpetrator. Noteworthy, however, many judgements of international tribunals emphasize that the term "serious injury" refers only to bodily injury.[29]

3.4. Extensive destruction and misappropriation of property not justified by military necessity (Article 8(2)(a)(iv)).

This act is the most serious of all crimes committed against property, which includes movable and immovable property. Its unlawfulness means a violation of Article 53 of the Fourth Geneva Convention, according to which "any destruction

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[28] Prosecutor v. Ante Furundzija. Case № IT-95–17/1-T. 10 December 1998. Article 162. Access: https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf

[29] Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo. Case № IT-96–21-T. 16. November 1998. Article 709. Access: https://www.refworld.org/cases,ICTY,41482bde4.html.

by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

The provision prohibiting the extensive and wanton destruction or misappropriation of property has been developed and expanded in the Protocols Additional to the Geneva Conventions. They define the limits of "imperative military necessity" that allows for the exclusion of certain property from the application of the Geneva Conventions and their Protocols Additional.

Under Article 54 (2) of Protocol I Additional, "it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether to starve out civilians, to cause them to move away, or for any other motive. This prohibition may be waived if an object under the control of the adversary is no longer used exclusively for the survival of the civilian population, or is used by the adversary exclusively for defensive purposes within its territory.

Noteworthy, from a legal point of view, the "extensive" destruction or misappropriation of property poses the most difficulty as far as its legal definition is concerned. Since neither the Rome Statute nor the 1949 Geneva Conventions nor Protocols I and II Additional contain criteria for the "extent" or "gravity" of the acts, these elements are determined on a case-by-case basis.[30]

As defined in Protocol I Additional, grave breaches of the laws and customs of war include endangering the physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of armed conflict, by any unjustified act or omission. This includes, in particular: physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation, as well as any medical procedure which is not indicated by the state of health of the person concerned and which is inconsistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty (Article 11 of Protocol I Additional).

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[30] Prosecutor v. Tihomir Blaskic. Case № IT-95–14-T. 3 March 2000. Access: https://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf.

Grave breaches also include acts committed intentionally and causing death or injury to body or health (Article 85(3) Protocol I Additional), i.e. "making the civilian population or individual civilians the object of attack; launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; making non-defended localities and demilitarized zones the object of attack; the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs".

The following acts also constitute grave breaches, when committed intentionally and in violation of the Geneva Conventions of 1949 and Article 85(4) of Protocol I Additional: "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; unjustifiable delay in the repatriation of prisoners of war or civilians; practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives; depriving a person protected by the Conventions or Protocol I Additional of the rights of fair and regular trial".

All the above-listed breaches were the subject of war crimes trials after World War II.[31] They are also included in the Statute of the ICC and, even if they are not repeated in the same wording, they are, in fact, embedded in the text, as evidenced by the Elements of Crimes for the International Criminal Court. For example, the war crime of "attacking medical or religious personnel, medical units or transports" reflects some aspects of the war crime contained in Article 8(2) (b) (i) and (xxiv) of the Statute of the ICC. The definition of these violations as war crimes in the ICC Statute did not give rise to any discrepancies. Attacking

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[31] K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press 2003, p. 32.

persons *hors de combat* and the perfidious use of protective emblems or signs is included among the grave breaches of Protocol I Additional. There is also a practice of extensive interpretation of these war crimes to cover the perfidious use of protective signals.

4. Examples of Russian Acts that may be Classified as War Crimes under Article 8 of the Rome Statute

Since 24 February 2022, Ukrainian law enforcement agencies have been investigating crimes associated with Russia's full-scale aggression against Ukraine. According to the Prosecutor General's Office, as of 14 March 2023, 71,147 war crimes committed by Russians were recorded during the year since the start of the full-scale military operation.[32] The data from the General Prosecutor's Office show that 200 new war crimes are committed every day. Nearly 300 Russians have been accused of committing war crimes, which in practice means that 293 people have been identified and found to be involved in committing war crimes. Indictments were brought against 105 persons and, as a result, to date, Ukrainian national courts have passed 29 sentences in war crimes cases. In addition, there is a huge "main case" concerning the crime of aggression, in which Ukraine is trying to document the participation of the highest military and political leadership of the Russian Federation. There are approximately 176 aggression-related proceedings pending before the courts. We have about 18 sentences for members of the State Duma of the Russian Federation.[33] To date, more than 20 countries have already initiated war crimes proceedings against the Russian Federation in Ukraine under their national legislation.

In total, since the outbreak of the full-scale invasion, the National Police of Ukraine has opened 117,297 criminal cases for crimes committed by the Russian military. According to an infographic published by the National Police, 3,856 of the total number of criminal cases were initiated on suspicion of collaboration, while 255 for high treason. As of 21 April 2024, 101 sites of detention and torture have been discovered in the occupied territories, most of which are located in the Kharkiv region. 96 criminal proceedings have been initiated for acts of sexual

32 Н. Ізвощікова, Н. Галка, В Україні зареєстрували понад 71 тисячу воєнних злочинів з початку вторгнення РФ – Офіс генпрокурора, „Суспільне" 2023, 14 March. URL: https://suspilne.media/413421-v-ukraini-zareestruvali-ponad-71-tisacu-voennih-zlociniv-z-pocatku-vtorgnenna-rf-ofis-genprokurora/

33 Ibid.

violence committed by the Russian military. The acts of the occupiers have led to the death of at least 545 children and the wounding of 1,300, while more than 2,000 children have been reported missing.[34]

According to data from the General Prosecutor's Office, as of 7 June 2024, 133,582 cases concerning war crimes or crimes of aggression have been registered. In particular, these include such crimes as violation of the laws and customs of war (Article 438 of the Criminal Code of Ukraine); planning, preparation or unleashing and waging of a war of aggression (Article 437 of the Criminal Code of Ukraine); war propaganda (Article 436 of the Criminal Code of Ukraine); other crimes. A total of 2,128 acts against national security have been registered, including 1,429 crimes of violating the territorial integrity and inviolability of the borders of Ukraine (Article 110 of the Criminal Code); 390 crimes of high treason (Article 111 of the Criminal Code); 56 crimes of sabotage (Article 113 of the Criminal Code); and 253 other crimes. In the main case of Russian aggression, there are 696 suspects. These are representatives of the military and political leadership of the Russian Federation: ministers, deputies, military commanders, officials, heads of law enforcement agencies, warmongers and Kremlin propagandists.[35]

As noted in the report of the Office of the High Commissioner for Human Rights (OHCHR) on the human rights situation in Ukraine for the period from 1 December 2023 to 29 February 2024,[36] the war continued to inflict devastating damage on the civilian population during the reporting period. In December 2023 and January 2024, large-scale attacks using missiles and loitering munitions by the Russian Armed Forces in Ukraine resulted in a sharp increase in civilian casualties compared to previous months, reversing the overall downward trend in civilian casualties that was observed throughout 2023. Of the 1,804 civilian casualties verified by OHCHR during the reporting period, 712 were caused by such attacks using missiles and loitering munitions. One of the hardest-hit cities was Kharkiv, whose city centre was repeatedly attacked, with civilians killed and wounded, and civilian property and infrastructure destroyed. Active military

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34 О. Ярема, З початку повномасштабного вторгнення Нацполіція відкрила понад 117 тис. кримінальних проваджень щодо воєнних злочинів росіян, „Детектор Медія" 2024, 23 April. Access: https://detector.media/infospace/article/225808/2024-04-23-z-pochatku-povnomasshtabnogo-vtorgnennya-natspolitsiya-vidkryla-ponad-117-tys-kryminalnykh-provadzhen-shchodo-voiennykh-zlochyniv-rosiyan/

35 Prosecutor's General Office Access: https://gp.gov.ua/

36 *Доповідь Управління Верховного комісара з прав людини (УВКПЛ) щодо ситуації з правами людини в Україні, що охоплює період із 1 грудня 2023 року до 29 лютого 2024 року*, pp. 38-39. Access: https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2024/2024-03-26-ohchr-38th-periodic-report-ukr.pdf

operations were also taking place along the front line, and as a result, the areas around Kupiansk (Kharkiv region), Avdiivka (Donetsk region) and Kherson (Kherson region) were affected most severely. Military operations in these areas also caused significant civilian casualties, with artillery shelling and multiple launch rocket system (MLRS) attacks on front-line towns accounting for 58 percent of all verified civilian casualties during the reporting period. Attacks using explosive weapons with wide area effects caused significant damage to civilian property and infrastructure, and several villages and towns along the front-line were razed to the ground. Attacks close to the front lines targeted humanitarian aid warehouses and resulted in the death of aid workers, significantly hampering the delivery of humanitarian aid. As the situation along the front line deteriorated, Ukrainian authorities issued mandatory evacuation orders from some areas at risk. Damage to energy infrastructure meant that many towns along the front line were left without electricity and heating during the winter months. During the reporting period, there were also attacks that caused a significant number of civilian casualties in the occupied territories. The deadliest attack in terms of civilian casualties in the occupied territory documented by OHCHR as of 24 February 2022 took place on 21 January 2024, when several artillery shells hit two marketplaces and at least one residential building in the Kirov district of Donetsk, killing 25 civilians and wounding 11.

OHCHR documented that between 1 December 2023 and 29 February 2024, conflict-related violence in Ukraine resulted in at least 429 civilian deaths (232 men, 181 women, 10 boys and 6 girls) and 1,375 wounded (717 men, 576 women, 50 boys and 32 girls), a slight increase compared to the previous three months. Civilian casualties during the reporting period included 8 media workers (5 women and 3 men wounded), 9 medical workers (1 woman killed, 5 men and 3 women wounded) and 7 humanitarian aid workers (2 men killed, 4 men and 1 woman wounded).

During the reporting period, civilian casualties could be said to reflect certain trends previously identified by OHCHR: the majority of casualties (87%) were claimed in government-controlled areas, with the remainder (13%) in Russian-occupied territories; the vast majority of casualties were caused through explosive weapons with wide area effects in populated areas; unexploded ordnance and landmines accounted for 2 percent of civilian casualties; and elderly people accounted for a disproportionately large share of those killed and wounded, particularly in areas close to the front line. Attacks using explosive weapons with wide area effects during the reporting period also caused significant damage to civilian property and civilian infrastructure: OHCHR documented the destruction of or

damage to 106 educational facilities and 28 health care establishments as a result of war operations.

Intensified attacks by Russian armed forces using missiles and loitering munitions in December and January resulted in an increase in civilian casualties during that period. On 29 December 2023, Russian armed forces launched what appeared to be the largest attack with missiles and loitering munitions since the beginning of the full-scale armed attack, with similar attacks continuing through 23 January 2024. Such attacks killed at least 128 civilians (60 men, 58 women, 8 boys, 2 girls) and injured 584 (268 men, 265 women, 29 boys, 22 girls) in the reporting period, accounting for 39 per cent of the civilian casualties, compared with 26 percent of civilian casualties resulting from such attacks in the previous period. The highest number of civilian casualties from missiles and loitering munition attacks was recorded by OHCHR on 29 December 2023, followed by significant numbers on 2, 8 and 23 January 2024. The increased number of civilian casualties from missiles and loitering munition attacks also meant that civilians were killed and injured across the country, not just near the front lines. OHCHR verified civilian casualties in 14 regions of Ukraine, including Cherkasy, Dnipropetrovsk, Donetsk, Kharkiv, Kherson, Khmelnytskyi, Kirovohrad, Kyiv, Lviv, Mykolaiv, Odessa, Sumy, and Zaporizhia, as well as in Kyiv city. The increase in missiles and loitering munition attacks far from the front line also contributed to an increase in the number of casualties among children. Currently, there are relatively fewer families in front-line communities as many have evacuated. Twenty-nine children were killed and injured by missiles and loitering munitions in January 2024 compared to 6 in November 2023. The majority of missiles and loitering munitions were intercepted by Ukrainian armed forces, and some of the civilian casualties were caused by falling debris from such interceptions (sections 17-23 of the Report).[37]

Kharkiv city was one of the locations most targeted by missile and loitering munition attacks launched by the Russian armed forces. Between 29 December 2023 and 10 February 2024, OHCHR staff in Kharkiv city registered the sound of 84 explosions. Of these, 50 occurred in January 2024, compared to a previous monthly peak of 35 in October 2022. In their official statements, Russian authorities claimed that the attacks targeted military objectives within the city. Some attacks on the city were justified with attempts to link them to reports of

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[37] Доповідь Управління Верховного комісара з прав людини (УВКПЛ) щодо ситуації з правами людини в Україні, що охоплює період із 1 грудня 2023 року до 29 лютого 2024 року (sec. 38-39). Access: https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2024/2024-03-26-ohchr-38th-periodic-report-ukr.pdf

a significant number of civilian casualties in the Russian city of Belgorod, from an attack which, according to Russian propagandists, was carried out by Ukrainian armed forces from the Kharkiv region. Several of the attacks on Kharkiv struck residential areas in central parts of the city, killing and injuring multiple civilians. OHCHR staff visited 10 impact sites in Kharkiv, including a building located next to the OHCHR office in Kharkiv, which was significantly damaged by a loitering munition on 31 December 2023.

On 23 January 2024, OHCHR visited a residential area in Kyivsky district shortly after several missiles had struck the area that morning. OHCHR documented the impact sites of five missiles, including two that struck a residential building, two that struck a boarding school, and one that struck a private home. In addition to destroying these structures, the attack shattered windows in hundreds of flat buildings within a radius of several hundred meters from the impact sites. OHCHR verified that the attack killed 11 civilians and injured 55. In total, the attacks in Kharkiv killed at least 24 civilians (11 women, 9 men, 3 boys and 1 girl) and injured 177 (91 women, 74 men, 7 girls, 5 boys). Two of the attacks directly struck two different hotels, injuring four journalists (three women and one man) who stayed in the hotels. OHCHR also documented that the attacks in Kharkiv damaged or destroyed eight educational facilities and three healthcare facilities (sections 24-27 of the Report).[38]

In times of ongoing war, nuclear and radiation safety is of particular concern. In addition to the Chernobyl Nuclear Power Plant, which was closed in 2000, there are four other nuclear power plants with 15 nuclear reactors operating in the territory of Ukraine. In addition, the country has three spent nuclear fuel storage facilities (near the Kharkiv NPP and Zaporizhia NPP), a research reactor of the Nuclear Research Institute of the National Academy of Sciences of Ukraine (Kyiv), a nuclear facility "Neutron Source" (Kharkiv), six interregional specialized radioactive waste storage facilities, five mining plants and two hydrometallurgical plants for uranium processing, as well as many other facilities using radioactive substances, radioisotope devices and sources of ionizing radiation. All these works and objects containing dangerous forces, as stated in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, "shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works

38 Ibid.

or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population." Meanwhile, Russian troops, cynically ignoring international law, in the very first days of the invasion of Ukraine seized the Chernobyl nuclear power plant, spent fuel storage facilities, radioactive waste disposal plants and other nuclear facilities, and took their personnel hostage.[39]

During almost a month of Russian occupation of the Chernobyl Exclusion Zone, military operations disconnected these facilities from external power supply, increased radiation levels, and disturbed the soil cover in areas contaminated with nuclear radiation. In addition, Russian military personnel ransacked the radiological laboratory and destroyed the power plant archives. Then, in early March 2022, Russian armed forces, while taking over Europe's largest nuclear power plant in Zaporizhia, shelled its administrative building. As a result of the shelling, a fire broke out in the building, which was fortunately quickly extinguished by Ukrainian firefighters. Reactor Unit No. 1, near which Russian occupation forces detonated shells that failed to explode during the attack on the power plant, was also shelled. Fortunately, according to available data, no radioactive materials were released. It should be emphasized, however, that the occupiers switched off several power units of the plant and mined the embankment of the Kakhovka Reservoir adjacent to the power plant. The Kharkiv Institute of Physics and Technology, where the Neutron Source nuclear reactor is located, was repeatedly shelled by the invaders. The facility's power supply was interrupted and the substation, cooling system, buildings and heating grid were seriously damaged. According to the State Nuclear Regulatory Inspectorate, "the shelling and seizure by the Russian military of nuclear facilities and other objects containing radioactive materials and radionuclide sources of ionizing radiation located in the territory of Ukraine grossly violate all applicable norms of international law, nuclear and radiation safety rules, and have nothing to do with ensuring nuclear and radiation safety in Ukraine. These are simply mutually exclusive."[40] The statement issued by the National Commission for Radiation Protection of Ukraine emphasizes that

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39 Законодавче забезпечення формування та реалізації державної політики України в умовах воєнного стану, vol. 4: Відповідальність за вчинення злочинів під час вторгнення Російської Федерації в Україну. Міжнародно-правовий і національний спекти, ed. A. Коваленко, Київ 2022, pp. 275-278.

40 *Позиція Держатомрегулювання щодо заяви РФ про домовленості між МАГАТЕ та Росатом щодо співробітництва для забезпечення максимальної безпеки ядерних об'єктів в Україні*, від 04.04.2020 р. Державна інспекція ядерного регулювання України Access: https://snriu.gov.ua/news/poziciya-derzhatomregulyuvannya-shchodo-zayavirf-pro-domovlenosti-mizh-magate-ta-rosatom-shchodo-spivrobitnictva-dlyazabezpechennya-maksimalnoyi-bezpeki-yadernih-obyektiv-v-ukrayini

Russian aggression and occupation of the territory of a sovereign state, loss of regulatory control over nuclear power plants, spent fuel storage facilities, shelling of nuclear facilities and occupation of near-surface disposal facilities for radioactive waste "can lead to an unprecedented release of radiation into the environment and a nuclear catastrophe on a global scale".[41]

Russia's war against Ukraine, which is criminal in nature under international law, is accompanied by numerous barbaric crimes committed by the Russian army, which are defined in the Rome Statute, the Geneva Conventions and other instruments of international law. In terms of the scale of crimes against the civilian population, destruction of civilian property and cultural heritage, the war against Ukraine has, in fact, turned into genocide of the Ukrainian nation.

5. Individual Criminal Responsibility of Russians for Crimes Committed in the Territory of Ukraine: National and International Levels

In international practice, there are several variants of the jurisdictional mechanism created to investigate and prosecute war crimes cases. The first option envisages the priority use of national jurisdictional mechanisms. In practice, this means that the bodies in charge of the investigation are the relevant law enforcement agencies of the state that exercise their powers in that jurisdiction (possible options include the police, security services or prosecution services, etc.). This approach is based on Article 49 of the First, Article 50 of the Second, Article 129 of the Third and Article 146 of the Fourth Geneva Conventions, which impose a direct obligation on States Parties to take all appropriate measures to search for and prosecute those responsible for war crimes, including handing them over to the judicial authorities of the state concerned. Under this approach, perpetrators of war crimes are to be brought before domestic courts of the state party to the Geneva Conventions.

The other approach provides for the application of domestic jurisdiction with the simultaneous involvement of international judicial bodies, both permanent and established *ad hoc*. An *ad hoc* international judicial body may request the jurisdiction of a participating State to examine a case concerning war crimes and give it priority by deciding it in accordance with the procedures established

[41] Заява Національної комісії з радіаційного захисту населення України, від 14.03.2022 р. Access: http://nkrzu.gov.ua/18-katoholoshennia/1602-zaiava-natsionalnoi-komisii-z-radiatsiinoho-zakhystunaselennia-ukrainy

for such a judicial body. This option was pursued by the International Criminal Tribunal for the former Yugoslavia, which was established *ad hoc*.

The third option is to involve a permanent judicial body – the International Criminal Court – in prosecuting a person guilty of committing war crimes included in the list of crimes specified in the Rome Statute of the ICC. The main criterion for distinguishing between the options of the jurisdictional mechanism for investigating and prosecuting war crimes is the ability of a State to prosecute war criminals within its own jurisdiction. At the same time, there is a combination of domestic and international law enforcement in the practice of both investigations and criminal trials of war crimes. When applying domestic law, national courts refer to the instruments of international law in reliance on the principle of complementarity. At the same time, international courts also rely on evidence that is mainly collected by national investigation authorities.

Organizing war crimes investigations at the national level falls within the exclusive competence of law enforcement agencies, depending on their jurisdiction established in the Code of Criminal Procedure. As a rule, these categories of crimes are investigated by state security agencies, most often in conjunction with the prosecution services and/or the national police. For example, the Ukrainian mechanism for prosecuting war crimes provides that, in accordance with Article 216 of the Code of Criminal Procedure of Ukraine, investigations into crimes under Articles 436, 437-447 of the Criminal Code of Ukraine are conducted by investigators of the Security Service of Ukraine. In some cases (depending on the subject matter), such crimes may be investigated by the State Bureau of Investigation. If the investigation indicates that some of the related crimes fall under the jurisdiction of the SSU, and others fall under the jurisdiction of the National Police or another body conducting the pre-trial investigation, then the scope of jurisdiction is determined by the prosecutor (Part 10, Article 216 of the Criminal Code of Ukraine).[42]

Therefore, the primary burden of bringing justice to the victims of international crimes and bringing all perpetrators to justice will rest with the national judicial system. Noteworthy, however, the Ukrainian judicial system is not fully prepared to process all cases effectively falling under the category of "international crimes" (genocide, crimes against humanity, war crimes and crimes of aggression).[43]

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42 Кримінальний процесуальний кодекс України від 13 квітня 2012 р. № 4651-VI, «Відомості Верховної Ради України» 2013, no. 9–10, no. 11–12, no. 13, Article 88.

43 *Виклики, які постають перед судами при розгляді справ про міжнародні (воєнні) злочини, обговорили на міжнародній конференції*. Вища рада правосуддя, 26 October 2023. Access:

According to information from the Prosecutor's General Office, the number of registered war crimes currently amounts to over 129,720 (as of 10 April 2024). The main challenges facing the General Prosecutor's Office in investigating war crimes are as follows:[44]

1. Normative problems: The Criminal Code of Ukraine is not aligned with the Rome Statute of the ICC. There is no such category as "crimes against humanity" in the Code; during the nine years of war, the main articles on war crimes have not been not changed; the Criminal Code of Ukraine and the Rome Statute feature different categories of crimes.
2. Personnel problems: Currently, out of 4,966 judges, about 800 are not authorized to handle international cases. The outflow of judicial personnel continues; in 2023 alone, 278 judges resigned from their functions (an average of 35 judges per month). Noteworthy, the recruitment of new judges will certainly not be as rapid as their resignations. The most severe is the significant shortage of criminal lawyers, with the situation being worse in the courts of appeal. It is necessary to introduce a separate specialization of judges to deal with this category of cases and to conduct training for all judges appointed in that specialization for handling international crimes cases.[45]
3. Organizational problems: Ukraine is now in a huge need for court premises where trials could take place in a way that ensures the safety of all participants, with adequate conditions for storing case files. Currently, there are 595 active courts in Ukraine. No court proceedings are held in 79 of these. 96 court buildings have been damaged and 12 have been destroyed. During the war, the jurisdiction coverage of 112 courts was changed. Only 10 courts were restored to service. There is a pressing need to ensure effective pre-trial investigation of cases (speed, independence, impartiality, thoroughness and adequacy); an effective legal aid system for defendants (free legal aid, which is particularly important in the case of trials in absentia); and the availability of lay judges for trials.
4. Financial problems: The practice of the Balkan countries shows that the transition period is a long and costly process for the justice system, but it nevertheless reflects the institutional capacity of the state to bring perpetrators to justice. The war in the Balkans ended 20 years ago, but investigations and

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https://hcj.gov.ua/news/vyklyky-yaki-postayut-pered-sudamy-pry-rozglyadi-sprav-pro-mizhnarodni-voyenni-

44 Ibid.

45 Ibid.

trials for international crimes are still ongoing. Therefore, the state, recognizing this goal as its strategic goal, must decide on the priority financing of the whole range of related issues. We could certainly use help from our international partners.

Over the course of nine years (as of 5 February 2023), only 31 verdicts have been issued under Article 438 "Violations of the laws and customs of war", of which 18 were issued in absentia and 9 were issued in summary proceedings, without examining the evidence in accordance with Article 349 of the Criminal Code of Ukraine. As a result, only 4 verdicts were issued by the courts during a full trial with the participation of the defendants and with an examination of the evidence.

Ukrainian law enforcement agencies are fully aware that this category of criminal proceedings attracts attention not only in Ukraine but also abroad. That is why they make every effort to ensure that this process is of the highest quality, as eventually, the question about the capabilities of the national justice system will arise. "It is about impartiality as Ukraine, as a party to the armed conflict, can be seen as biased and conducting poor-quality investigations – these are the concerns most often expressed by our international partners. To avoid similar accusations, we started promoting quality standards for conducting war crimes investigations as soon as possible, already in spring 2022. Our international colleagues also helped us with this: The Prosecutor General's Office has established a group of advisers – the Atrocity Crime Advisory Group for Ukraine (ACA). It gathers experts from the UK, USA, EU and other countries with experience in investigating war crimes and participating in war crimes tribunals. These people have helped us a lot to find the right vector instead of having to invent our own *know-how*...."[46]

Moreover, Ukraine has been perseveringly using international mechanisms to hold both the Russian Federation as a state and its citizens as individuals to account for all unlawful acts and crimes committed as part of the Russian armed aggression that began back in 2014. The latest attempts include the institution of proceedings before the International Court of Justice regarding the violation by the Russian Federation of the Convention on the Prevention and Punishment of the Crime of Genocide.[47]

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[46] *Воєнні злочини – рік розслідування*, Антикорупційний штаб, 6 February 2023. Access: https://shtab.net/analytics/view/voenni-zlochini---rik-rozsliduvannya/

[47] A summary of the procedural steps taken by the International Court of Justice in the pending proceedings available in: Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 states

Although Ukraine is not a State Party to the Rome Statute, it has twice exercised its prerogative to accept the jurisdiction of the Court over alleged crimes under the Rome Statute committed in its territory, in accordance with Article 12(3) of the Statute. The first application[48] submitted by the Government of Ukraine recognized the jurisdiction of the ICC over alleged crimes committed in the territory of Ukraine between 21 November 2013 and 22 February 2014. The second application[49] extended that period indefinitely to cover alleged crimes committed in the territory of Ukraine starting from 20 February 2014.

As early as on 17 March 2023, in connection with the situation in Ukraine, Pre-Trial Chamber II of the ICC issued arrest warrants for two individuals: Vladimir Vladimirovich Putin, President of the Russian Federation, and Maria Alexeyevna Lvova-Belova, Presidential Commissioner for Children's Rights. Based on the Prosecutor's applications filed on 22 February 2023, Pre-Trial Chamber II considered that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children.

On 5 March 2024, Pre-Trial Chamber II of the ICC issued arrest warrants for two individuals in connection with the situation in Ukraine: Sergei Ivanovich Kobylash, Lieutenant General of the Russian Armed Forces, who at that time was commander of the Long-Range Aviation of the Aerospace Force, and Viktor Nikolayevich Sokolov, Admiral in the Russian Navy, who at that time was the commander of the Black Sea Fleet. Based on the Prosecutor's applications of 2 February 2024, Pre-Trial Chamber II found that there were reasonable grounds to believe that each of the suspects was responsible for the war crime of attacking civilian objects, the war crime of causing excessive loss of life among the civilian population or damaging civilian objects, and the crime against humanity of inhumane acts.[50]

Considering the action that the ICC took in this context, one could agree with some experts who argue that the issuance of these few arrest warrants can hardly be considered sufficient. "Every day there is new evidence of crimes committed

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intervening), International Court of Justice, Report of ICJ – 1 August 2022-31 July 2023, General Assembly Official Records Seventy-eight session, supplement no. 4, A/78/4.

48 International Criminal Court. Access: https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf

49 International Criminal Court. URL: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine

50 Ibid.

by the aggressor state, which, in addition to acts in breach of international humanitarian law of armed conflict and other crimes defined in international law, constantly shells civilian objects, including critical infrastructure, causing civilian deaths. It is thus difficult to imagine that the ICC Prosecutor's Office, in cooperation with Ukrainian prosecutors, did not find sufficient grounds to issue arrest warrants for other individuals, including the military command of the Russian Federation. Therefore, given the action taken by the ICC in the light of the evidence collected in Ukraine so far, there are significant doubts whether the ICC can actually effectively prosecute the perpetrators who committed crimes in the territory of Ukraine after 24 February 2022, in view of the scale of these acts and the fact that the armed conflict is still ongoing and part of the territory of Ukraine is occupied by the aggressor state, where it enjoys complete impunity.[51]

Conclusions

From the outbreak, the full-scale Russian armed aggression against Ukraine has been accompanied by the commission in the territory of our country of numerous crimes of concern to the international community, which are not subject to a statute of limitations. There is no doubt that there are clear signs of both war crimes and genocide being committed in Ukraine.

Executions of civilians, torture, forced deportation of children to the territory of the Russian Federation, mass destruction of civilian infrastructure, shelling of churches, hospitals, theatres where civilians were taking shelter, deliberate destruction of entire settlements, video recordings of executions of unarmed Ukrainian soldiers, missile attacks on shelters with children – all these acts are still taking place in our country. Violations of the laws and customs of war by individual Russian servicemen or their groups constitute a separate category, their number being the highest among all crimes under international law committed in Ukraine. In the course of the investigation, the ICC is working hand in hand with the Prosecutor General's Office of Ukraine, national authorities, the Joint Investigation Team (JIT) and Eurojust. There are plans to open a field office of the ICC OTP not only in Kiev, but also in other regions of the country. Further, in 2022, the Code of Criminal Procedure of Ukraine was supplemented with a separate section to regulate the procedure for cooperation between the competent bodies of Ukraine and the ICC.

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51 Expert opinion of Iryna Kozak-Balaniuk.

The first decisions of the ICC regarding the situation in Ukraine have already been made, and they are very encouraging.

For a long time, until 2014, Ukrainian law enforcement agencies had not applied the provisions of Ukrainian criminal law for war crimes or other crimes under international law. At the same time, as a result of the occupation of the Autonomous Republic of Crimea, as well as the armed aggression of the Russian Federation and the full-scale invasion of our country by Russian troops in 2022, the number of war crimes has been constantly growing. Although the current Criminal Code of Ukraine provides for liability for such crimes, it is not fully harmonized with the provisions of international humanitarian law or international criminal law regarding liability for these. This in turn has negative consequences for at least two reasons: First, the Ukrainian state cannot fully prosecute perpetrators of war crimes under international humanitarian law and international criminal law, and second, Ukraine, being a party to a number of international treaties providing for liability for war crimes, does not fulfil all of its obligations to fully criminalize at the national level acts classified as war crimes under international law. After the ratification of the Rome Statute, the Criminal Code of Ukraine should be supplemented with new crimes, in particular the crime of taking hostages from among the civilian population of one party to an armed conflict by the other party. Another crime that should be introduced into the Criminal Code of Ukraine is forcing a person to renounce Ukrainian citizenship and obtain citizenship of the occupying state in the temporarily occupied territories of Ukraine.

To conclude, it is an important task ahead for the Ukrainian state authorities, especially the parliament, to adapt the Ukrainian legislation on criminal liability to the requirements of international criminal law and international humanitarian law, as well as to develop the practice of their transposition into the national legal system, which will require broader and deeper changes. Obviously, it is around this task that the joint efforts of all levels of state authorities in Ukraine should be consolidated.

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Додатковий протокол до Женевських конвенцій від 12.08.1949 р., що стосується прийняття додаткової відмітної емблеми (Протокол III), від 08.12.2005. URL: http://zakon2.rada.gov.ua/laws/show/995_g74

Другий протокол до Гаазької конвенції про захист культурних цінностей у разі збройного конфлікту 1954 року від 26.03.1999. URL: https://zakon.rada.gov.ua/laws/show/995_001-99#Text

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Evghenia Gugulan

Crime of Ecocide in Ukraine – Environmental Consequences of Russian Military Aggression

Introduction

Since ancient times, humans have sought to shape nature, respecting its strict laws for survival. However, over the past two centuries, human behaviour and attitudes have increasingly reflected an attempt to dominate nature, harnessing natural resources for personal gain. This shift has exacerbated the conflict between the natural cyclical processes of the biosphere and the linear processes driven by human-created technologies, culminating in what is now termed an "ecological crisis."

The causes of this crisis are primarily attributed to the industrial civilization that emerged in the mid-19th century, which brought about profound and rapid environmental changes. Natural resources were increasingly exploited, cultivated areas expanded, agricultural systems altered, massive deforestation occurred for timber and new farming land, pasturelands were intensively used, and subsoil exploitation grew. Concurrently, industrial civilization facilitated and necessitated rapid population growth, which led to intense urbanization, concentrating large human populations in increasingly confined spaces, placing humans in entirely new living conditions.

Initially, humans did not consider the need for rational and balanced conditions for life and development when acquiring the ability to transform nature. Over time, however, it became evident that humans are both creators and creations of their surrounding environment, which is essential for biological and intellectual existence. The irrational exploitation of renewable resources (e.g., forests, flora, and fauna) and non-renewable resources (e.g., mineral wealth) has amplified the harmful impact of human actions on nature.

Ecocide offences represent severe ecological crimes, either global or regional in scale, with irreversible consequences for both nature and humanity. These offences threaten human security and, as such, are prioritized within legal frameworks.

A paradox of humanity lies in the fact that, while humans are part of nature, they also pose the greatest threat to the environment. The misconception that the environment is indestructible has led to widespread neglect; in reality, nature mirrors and absorbs the negative impacts of human activity on a global scale. Unlike humanity, *"flora, fauna, water, and air"* recognize no national or customs borders.

In this context, the proposed study aims to clarify the historical evolution of ecocide as a criminal offence, its legal recognition, and the current approach to military aggression as a negative factor causing harm to the environment and its ecosystems.

Russia's military aggression against Ukraine has resulted in losses not only in human, social, territorial, and financial terms, but also in ecological terms. It must be internationally recognized that the environmental damage caused by military actions leads to the irreversible disappearance of certain flora and fauna species. By establishing a causal link between the aggressor's military actions and environmental damage, we can assert with certainty that these consequences will inevitably harm not only Ukraine's territorial jurisdiction but also have cross-border ramifications affecting neighbouring states.

Furthermore, this study aims to analyse the impact of Russia's military aggression in the context of environmental damage, qualifying it as an international crime, specifically the crime of ecocide.

1. The Conceptualization of the Crime of Ecocide through the Prism of International Provisions in the Field of Environmental Protection

Specialists in environmental law argue that the new world order will either be ecological or not exist at all. The media echoes similar concerns, warning that the world is at the beginning of an ecological crisis. Increasing industrialization, the retention of outdated equipment, the lack of *modern* water purification and waste disposal systems, the uncontrolled emission of substantial amounts of carbon dioxide into the atmosphere, the significant reduction of green spaces, and the impact of new technologies on food security, ozone layer depletion, and the loss of fertility in many lands gradually turning into wastelands, as well as the

disappearance of numerous species from the world's flora and fauna, are making it nearly impossible to protect and manage the environment globally.

One of humanity's paradoxes lies in the fact that, while being part of nature, humanity destroys the environment while endlessly admiring it. Unlike human activity, the five essential components of nature (flora, fauna, air, water, and soil) do not recognize any customs borders. Consequently, the ecosystem is plagued by a deadly virus, for which humanity is currently unprepared to find a cure.

In the system of legal norms designed to protect the environment, criminal law plays a crucial role. Among the myriad offences committed against the environment, ecocide stands out as the most dangerous crime. By threatening the security of all humanity, this crime has attained the status of a transnational offence, with its consequences unequivocally leading to destructive and irreversible global outcomes for nature and human existence.

The issue of ecocide as an international crime emerged during the Vietnam War, when American aviation practically wiped out all living organisms in several regions of the country using pesticides and other chemicals. The danger of ecocide lies in the fact that upsetting the ecological balance in one region can lead to negative consequences in other regions far from the disaster site ((e.g., the Chernobyl disaster). To combat such crimes, the European community has taken a series of measures to establish a legal framework for the criminal prosecution of ecocide.

Since ancient times, actions have been known within communities to protect the environment. These actions later took the form of legal prohibitions, which eventually evolved into universal bans: protection of flowing waters, air, soil, and the establishment of noise limits., etc.

Sources of the criminalization of environmental offences, from which ecocide has emerged as an extension of their severity, include the following acts:

- Convention on the Preservation of Wild Animals, Birds, and Fish in Africa, the first multilateral international environmental agreement concluded in 1900;
- Paris Convention for the Protection of Useful Birds in Agriculture, dated March 19, 1902;
- Convention for the Preservation and Protection of Fur Seals, signed in Washington on July 7, 1911;
- Convention on the Conservation of Flora and Fauna in their Natural State, signed in London on November 8, 1933;
- Convention for the Protection of Flora, Fauna, and Natural Beauty of the Countries of the Americas (Washington, October 12, 1940);

- Protocol between Belgium and France concerning the establishment of a permanent commission for polluting waters (April 8, 1950);
- International Convention for the Protection of Plants, dated December 6, 1951;
- International Convention for the Protection of New Varieties of Plants, dated December 2, 1961.
- London Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972);
- Convention on Environmental Impact Assessment in a Transboundary Context, dated February 25, 1991;
- Agreement on Cooperation in the Field of Ecology and Protection of the Natural Environment, dated February 8, 1992;
- Convention on the Protection and Use of Transboundary Watercourses and International Lakes, dated March 17, 1992.

In 1977, the *International Convention for the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* was signed. This document serves as the primary framework against the crime of ecocide, although it does not explicitly use this term.

The role of the law in this context is pivotal. Offences repeated periodically become habits, gradually transitioning into another crime: that of the gradual destruction of nature, a tactic of human existence.

The Council of Europe, the United Nations, and other international organizations provide member states with various instruments that recognize and guarantee the fundamental right of humans to a healthy and balanced environment. The provisions of these acts establish a fair balance between the imperatives of environmental protection. They are oriented towards safeguarding and managing the natural environment, defining concepts of planning and development, conservation, and the sustainable use of the environment and human habitat. By habitat, we mean the geographic environment where a population, group of plants, and animals live under homogeneous conditions.

By adopting international acts, the global community has demonstrated its concern regarding the protection of humanity in relation to the serious environmental pollution crisis. In a unique component, flora, fauna, soil, water, air, land, and minerals form the biological habitat of humans. To prevent its destruction, humanity needs to reconsider its existence by projecting its actions and ideas into a spiritualized ecosystem. However, this should not remain at the level of abstract declarations disconnected from realities and must include the most effective judicial protection at national, regional, and international levels.

This warning can also be interpreted as a relativization of knowledge, which today surprises the community with projects and programs involving genetic mutations, transplants, cloning, and planetary processes that have exceeded moral implications and rational control. Among these are projects where the premises for re-establishing human-world commitments are raised to cosmic, universal dimensions, somewhat surpassing the limits of the concept of ecology in its modern sense, often leading to confused and less productive derivatives.

The more recent term *"ecocide"* is used to refer to the destructive impact of humanity on its natural environment. As a group of complex organisms, we engage in the exploitation of the planet's natural resources. The geological epoch in which we live is known as the Anthropocene, named because human activity influences the Earth's natural state in a manner unprecedented in history. The most widespread example is atmospheric pollution through emissions of post-combustion gases such as carbon dioxide, methane, etc. Activist *Patrick Hossay* argues that the human species commits ecocide through the effects of industrial civilization on the global environment.[1]

The term "*ecocide*" was coined by the American biologist and bioethicist *Arthur W. Galston* (1920–2008) at the *Conference on War and National Responsibility in Washington* (1970). He proposed to use this term to describe the catastrophic consequences of the application of the herbicide Agent Orange during the war in Vietnam, when the American military spread about 200 mln gallons of this defoliant during the period from 1962 to 1970. It was used for the destruction of forests to reveal the positions and routes of the Vietnamese army. *Arthur W. Galston* argued that the wide-scale spread of the defoliant destroys the important ecological niches of the region.

In 1972, at the *Stockholm Conference on the Human Environment*, *Olaf Palme*, in his opening speech, referred to the Vietnam War as an ecocide.[2]

According to Article 8, Section 2, point b (IV) of the Rome Statute and Article 35(3) of the first Additional Protocol Additional to the Geneva Conventions of 8 June 1977 consider *ecocide*, namely the intentional launch of an attack in the knowledge that it will cause *"widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated"*, a war crime.

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1 P. Hossay, *Unsustainable: A Primer for Global Environmental and Social Justice*, ED Books 2005.

2 T. Bjork, *The Emergence of Popular Participation in Global Politics, United Nations Conference on the Human Environment,* 1972.

In 1978, various draft articles discussing state responsibility and international criminality included ecocide as an international crime, capable of resulting in serious breaches of international obligations crucial for the protection and conservation of the natural environment, such as through massive pollution of the atmosphere or seas.[3]

In 1985, ecocide continued to be addressed as an international crime. Consequently, the Sub-Commission on the Promotion and Protection of Human Rights commissioned a Special Report addressing the prevention and punishment of ecocide, prepared by *Benjamin Whitaker*.[4]

In 1987, discussions on international crimes persisted at the International Law Commission (ILC), where ecocide was proposed for inclusion in the list of international crimes, reflecting the need to protect and conserve the environment.[5]

The 1991 ILC *"Draft Code of Crimes against the Peace and Security of Mankind"* included 12 offences, one of which was "intentional environmental degradation (Article 26).

By March 29, 1993, the Secretary-General had received responses from 23 member states and one non-member state: Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Costa Rica, Ecuador, Greece, the Netherlands, the Nordic countries (Denmark, Finland, Iceland, Norway, Sweden), Paraguay, Poland, Senegal, Sudan, Turkey, the United Kingdom, the United States of America, Uruguay, and Switzerland. Only three countries – the Netherlands, the United Kingdom, and the United States of America – opposed the inclusion of an environmental offence. The issue of incorporating a high intent requirement was of interest; Austria commented, *"Since perpetrators of this offence typically act for profit motives, intent should not be a condition for liability to punishment"*. Belgium and Uruguay also took the position that no intent element was necessary for the crime of serious environmental damage (Article 26).[6]

In 1996, Canadian lawyer *Mark Gray* published his proposal for an international crime of ecocide, based on establishing international law in the fields of

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3 Sub-Commission on Prevention of Discrimination and Protection of Minorities. *Study on the Prevention and Punishment of the Crime of Ecocide*. July 4, 1978. E/CN.4/Sub.2/416, p.124 and p.130.

4 Whitaker, Benjamin C.G. UN. *Special Rapporteur on Prevention and Punishment of the Crime of Ecocide* E/CN.4/Sub.2/1985/6. https://digitallibrary.un.org/search?ln=en&as=0&p=subjectheading:[REPORT+PREPARATION]

5 Yearbook of the International Law Commission, p. 56 para.l 38. A/CN.4/SER.A/1987. UNITED NATIONS PUBLICATION. ISBN 92-1-133312-1https://legal.un.org/ilc/publications/yearbooks/english/ilc_1987_v1.pdf

6 http://legal.un.org/ilc/publications/yearbooks/english/ilc_1993_v2_p1.pdf

human rights and the environment. He argued that states, and undoubtedly individuals and organizations, causing or permitting harm to the natural environment constitute a massive violation. *Gray* proposed that such violations, when identified as deliberate, reckless, or negligent, resulting in severe, widespread, or long-term ecological damage, should attract international consequences and liabilities.[7]

In 2010, the proposal for an ecocide crime was presented at a private event at the United Nations. Subsequently, in 2011, a mock ecocide trial was conducted in the UK Supreme Court through a simulation organized by the Hamilton Group.

In the years 2013 and 2014, a citizens' initiative was developed to criminalize ecocide, aimed at prohibiting the market access of products causing significant environmental damage through ecosystem destruction. Three Members of Parliament publicly supported the initiative by signing it. Although the initiative aimed to gather 1 million signatures, it did not reach this goal; however, the issue was discussed in the European Parliament.[8]

However, the precision of such a definition is still being discussed internationally. At the latest report, the European Law Institute (ELI) published its final report on ecocide.[9] The report not only defines ecocide, it also contains Model Rules for an EU Directive and a Council Decision that ELI hopes will both *"contribute to the inter-institutional negotiations in the EU on the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law"* and will *"inspire legislative developments beyond the EU"*; worth to mention that the definition of ecocide proposed by ELI faced a certain criticism, in particular, for the "overly narrow"[10] definition.

The most recent definition of ecocide, elaborated by the Independent Experts Panel "Stop Ecocide International", was presented to the international community in 2021 to have it adopted and introduced into the Rome Statute.[11] The panel proposed an entirely new article, "art. 8 ter," which may be directly adopted and incorporated into the Rome Statute. The proposed article reads as follows:

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7 M. A. Gray, *The International Crime of Ecocide*, "California Western International Law Journal" 1996, *Vol. 26, No. 2.*

8 https://en.wikipedia.org/wiki/Ecocide

9 *ELI Report on Ecocide Model Rules for an EU Directive and a Council Decision.* Available: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Ecocide.pdf

10 Kevin Jon Heller, *ELI's Overly Narrow Definition of Ecocide*, Opinio Juris, February, 23, 2023. Available: https://opiniojuris.org/2023/02/23/elis-overly-narrow-definition-of-ecocide/

11 I. Kozak, *Crime of ecocide in Ukraine – environmental consequences of Russian military aggression*, "Studia Prawnicze KUL" 2023, Vol. 4 (96).

„1) For the purpose of this Statute, ecocide means unlawful or wanton acts committed with the knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.

2) For the purpose of paragraph 1:
   1. *"Wanton"* means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
   2. *"Severe"* means damage which involves grave adverse changes, disruption, or harm to any element of the environment, including grave impacts on human life or natural, cultural, or economic resources;
   3. *"Widespread"* means damage that extends beyond a limited geographic area, crosses state boundaries or is suffered by an entire ecosystem or species or a significant number of human beings;
   4. *"Long-term"* means damage that is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
   5. *"Environment"* means the earth, its biosphere, cryosphere, lithosphere, hydrosphere, and atmosphere, as well as outer space.[12]

According to the commentary published by the Panel, the first threshold requires *that "there must exist a substantial likelihood that the conduct (act or omission) will cause severe and either widespread or long-term damage to the environment"*, while the second threshold requires *"proof that the acts are unlawful or wanton."*[13]

At the same time, the issue of criminal liability for crimes against the natural environment was raised at the Council of Europe. In 1998, the Committee of Ministers of the Council of Europe adopted the Convention on the Protection of the Environment through Criminal Law.[14] The Convention established in Article 2 that: *"each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law"*. Ukraine is a Member State of the Council of Europe. The crimes against the environment were defined in Article 2 of the Convention as follows:

"(a) the discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water which: (i) causes death or serious injury to any person,

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12 The text of the definition is available on the following website: https://www.stopecocide.earth/legal-definition [access: 12.05.2024].

13 Stop Ecocide Foundation, Independent Expert Panel for the Legal Definition of Ecocide. Commentary and Core Text, Amsterdam 2021. https://ecocidelaw.com/definition/

14 Convention on the Protection of the Environment through Criminal Law, adopted on 4 November 1998, European Treaty Series no. 172 (hereinafter: the Convention on the Protection of the Environment).

or (ii) creates a significant risk of causing death or serious injury to any person; (b) the unlawful discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants; (c) the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (d) the unlawful operation of a plant in which a dangerous activity is carried out and which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants, when committed intentionally".[15]

Even though the Convention is not universally binding and does not introduce individual criminal liability at the international level, it identifies actions that may cause severe environmental damage and establishes fundamental standards for environmental protection.

2. The Criminalization of the Offences of Ecocide in the Criminal Legislation of Various States

Taking into account the evolution of the crime of ecocide, we deduce that its criminalization has followed a complex and arduous path. In this section, we present a comparative analysis of the legal framework of different countries regarding the national codification of the crime of ecocide.

In some States, the crime of ecocide is regulated by criminal legislation, either as a separate offence or by addressing only specific actions and consequences of ecocide that exhibit the characteristics akin to genocide.

Among the countries that expressly regulate the crime of ecocide are Ukraine, Moldova, Georgia, where it is categorized as a crime against humanity. In contrast,

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[15] Article 2 of the Convention on the Protection of the Environment. https://huespedes.cica.es/gimadus/06/THE%20CONVENTION%20ON%20THE%20PROTECTION%20OF%20THE%20ENVIRONMENT%20THROUGH%20CRIMINAL%20LAW.htm

Uzbekistan and Ecuador classify ecocide as an ecological crime or a crime against the environment.

2.1. The Legal-Penal Framework of the Republic of Moldova Regarding the Crime of Ecocide

Article 136 of the Penal Code of the Republic of Moldova[16] establishes defines ecocide as: *"Deliberate mass destruction of flora and fauna, poisoning the atmosphere or water resources, and the commission of other acts that may cause or have caused an ecological disaster shall be punished by imprisonment for 10 to 15 years."*.

The term derives from Greek 'oikos' (household) and Latin 'cida' (to kill). The concept of ecocide translates to killing the house. Ecocide offences are severe ecological crimes, with global or regional proportions and irreversible consequences for nature and humanity. For these reasons, and because they threaten human security, ecocide is placed at the forefront of criminal concerns.

The international community has developed a series of conventions that recognize and guarantee the fundamental right of humans to a healthy and balanced environment. By ratifying conventions such as the Convention on the Conservation of European Wildlife and Natural Habitats (adopted in Bern, 1979), the Convention on Environmental Impact Assessment in a Transboundary Context (adopted in Espoo, 1991), and the World Charter for Nature (adopted in New York, 1982), Moldova has demonstrated its commitment to these principles. The nation recognizes that environmental destruction leads irreversibly to the destruction of human existence.

Environmental issues are a primary concern for the state and society. Article 137 of the Constitution of the Republic of Moldova proclaims the right to a healthy environment: *"1) Every person has the right to an ecologically safe environment for life and health, as well as to food and household items that are harmless..."*

The objective aspect of ecocide is achieved through intentional mass destruction of flora or fauna; pollution of the atmosphere or aquatic resources; and other actions that can or have caused an ecological catastrophe.

The conceptual essence of intentional mass destruction of flora or fauna involves deliberate actions to eliminate species of animals or plants existing in

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[16] The Criminal Code of the Republic of Moldova No. 985 dated 18.04.2002. Published: 14.04.2009 in the Official Gazette No. 72-74. https://sherloc.unodc.org/cld/uploads/res/document/criminal-code-of-the-republic-of-moldova_html/Republic_of_Moldova_Criminal_Code.pdf

a particular environment or region, in quantities or proportions that endanger their perpetuation.

The notion of pollution of the atmosphere or aquatic resources encompasses actions that contaminate the air and waters with chemicals, waste, exhaust gases, and industrial, agricultural, municipal, or automotive residues that exceed the limits and norms established by legislation.

An ecological catastrophe refers to a tragic event of regional or global proportions, irreversible for nature and human beings (such as the Chernobyl disaster).

In determining the amount of compensation for damages caused to nature, the provisions of the Forestry Code, Land Code, Water Law, Subsoil Code, Animal Kingdom Law, etc., will be applied. The subjective aspect of the crime of ecocide is realized through direct or indirect intent. The perpetrator of the offence can be any responsible individual who has reached the age of 16.

2.2. The Legal and Criminal Framework of Ukraine Regarding the Crime of Ecocide

For this research, it would also be beneficial to examine how crimes against the natural environment are defined in the Ukrainian Criminal Code, focusing on similarities with definitions in other jurisdictions. Chapter 7 of the Code outlines criminal responsibility for individuals who engage in environmental crimes within Ukraine's territory.[17]

According to the Criminal Code of Ukraine the following, among others, constitute a crime against the environment: violation of environmental safety rules, failure to take measures to eliminate the consequences of environmental pollution, concealment or misrepresentation of information about the environmental status or morbidity of the population, contamination or damage to land, air pollution, sea pollution, destruction or damage to flora and fauna.

Additionally, according to Article 441 of the Criminal Code of Ukraine, *"ecocide"* means: *"mass destruction of flora or fauna, poisoning of the atmosphere or water resources, as well as other actions that may cause an environmental disaster"*. This definition does not explicitly address widespread or long-term damage or the intent behind such crimes.

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17 Кримінальний кодекс України, Відомості Верховної Ради України (ВВР), 2001, no. 25–26, p. 131.

However, the full-scale Russian military aggression has heightened Ukraine's focus on ecological issues, now viewed as critical to Ukrainian national security.[18]

2.3. The legal framework of ecocide in Vietnam

The Criminal Code of Vietnam[19] crimes undermining peace, humanity, and war crimes does not explicitly regulate ecocide as a separate crime. However, Chapter 24 addresses crimes undermining peace, humanity, and war crimes. In this sense, the article 342 "Crimes against mankind" states as follows: *"Those who, in peace time or wartime, commit acts of annihilating en-mass population in an area, destroying the source of their livelihood, undermining the cultural and spiritual life of a country, upsetting the foundation of a society with a view to undermining such society, as well as other acts of genocide or acts of ecocide or destroying the natural environment, shall be sentenced to between ten years and twenty years of imprisonment, life imprisonment or capital punishment".*

2.4 The Legal Framework Establishing the Crime of Ecocide in Uzbekistan

As in the case of Vietnam, the Criminal Code of Uzbekistan[20] does not explicitly define the crime of ecocide. The criminalization of acts against the environment can be found in a set of articles of the Criminal Code that fall under Section 4, chapter 14: "Crimes related to environment protection and conservancy". In this light, criminal law states the following:

– Article 196. Pollution of the Natural Environment

„Pollution or damage to land, water, or atmospheric air, resulted in mass disease incidence of people, death of animals, birds, or fish, or other grave consequences – shall be punished with a fine from one hundred to two hundred minimum monthly wages or deprivation of certain right up to five years, or correctional labour for up to three years. The same acts resulted in the death of a person – shall be punished with arrest from three to six months, or imprisonment up to three years and deprivation of certain rights ".

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18 I. Kozak, *Crime of ecocide in Ukraine – environmental consequences of Russian military aggression*, "Studia Prawnicze KUL" 2023, Vol. 4 (96).

19 *The Criminal Code of Vietnam*, Ha Noi, day 21month 12 year 1999. (No.15/1999/QH10) https://wwwex.ilo.org/dyn/natlex2/natlex2/files/download/56207/VNM56207%20Eng.pdf

20 *The Criminal Code of the Republic of Uzbekistan*. Tashkent, September 22, 1994 No. 2012-XII https://adsdatabase.ohchr.org/IssueLibrary/UZBEKISTAN_Criminal%20Code.pdf

– Article 197. Violation of Requirements of Use of Land, Mineral Resources, or Requirements of Protection thereof

"Violation of requirements of use of land, mineral resources, or requirements of protection thereof, resulted in grave consequences – shall be punished with fine from fifty to one hundred minimum monthly wages, or correctional labour up to three years, or imprisonment up to three years".

–Article 198. Damage and Destruction of Crops, Forest, or other Plants

„Damage or destruction of crops, forest, or other plants as the result of negligent dealing with fire, resulted in large damage or other grave consequences – shall be punished with a fine up to fifty minimum monthly wages, or correctional labour up to one year, or arrest up to three months.

Illegal felling of timber or other plants, resulted in large damage – shall be punished with a fine from fifty to seventy-five minimum monthly wages, or correctional labour from one year to two years, or arrest from three to six months, or imprisonment up to three years. Intentional damage or destruction of crops, forest, or other plants, resulted in large damage – shall be punished with a fine from seventy-five to one hundred minimum monthly wages, or correctional labour from two to three years, or imprisonment up to three years. In the instance of treble compensation for the pecuniary damage, the penalty of imprisonment shall not be applied".

2.5 The legal framework establishing the crime of ecocide in Kazakhstan

Unlike Vietnam and Uzbekistan, the crime of ecocide is explicitly recognized by the Criminal Code of Kazakhstan[21]. Although the definition of the crime of ecocide is narrow, it is significant that Kazakhstan explicitly addresses ecocide, unlike the implicit references in other countries' legislation.

As a result, the crime of ecocide is incorporated into Chapter 3. "Crimes Against the Constitutional and Other Rights and Freedoms of a Man and a Citizen", article 161. Ecocide:

"Mass destruction of flora or fauna, poisoning the atmosphere, land, or water resources, as well as the commission of other acts which cause or are capable of causing an ecological catastrophe, shall be punished by imprisonment for ten to fifteen years."

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21 *Law no. 167 of 16 July 1997 of the Republic of Kazakhstan*. Available: https://www.vertic.org/media/National%20Legislation/Kazakhstan/KZ_Criminal_Code.pdf.

2.6. The Legal Framework Establishing the Crime of Ecocide in Georgia

Compared to other states, Georgia has established an explicit definition of the crime of ecocide, also listing actions that cause environmental damage. The crime of ecocide is governed by the Criminal Code[22], Section 14 "Offence against humankind", Chapter XLVII – "Crime against Humanity, Peace and Security, and International Humanitarian Law". Article 409 of the Criminal Code, titled *Ecocide*, stipulates the following:

1." *Ecocide, i.e., contamination of the atmosphere, soil, water resources, mass destruction of fauna or flora, or any other act that could have led to an ecological disaster, – shall be punished by imprisonment for a term of twelve to twenty years.*
2. *The same act committed during armed conflicts, - shall be punished by imprisonment for a term of fourteen to twenty years or by life imprisonment".*

2.7. The Legal Framework Establishing the Crime of Ecocide in France

In the context of military aggression, the French government has taken steps to adjust the legal framework enshrining ecocide. In accordance with the Act No. 2021-1104[23] of 22 August 2021, aimed at combating climate change and building resilience to its effects, The National Assembly and the Senate adopted the Constitutional Council Decision to amend the legal provisions on ecocide:

1. Art. L. 231-3. - The offence provided for in Article L. 231-1 constitutes ecocide when the acts are committed intentionally.
2. The offences set out in Article L. 231-2, committed intentionally, when they result in serious and lasting damage to the environment, shall also constitute ecocide. Committed intentionally, when they result in serious and lasting damage to health, flora, fauna or the quality of the air, the soil or the environment, of air, soil or water.

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22 The Criminal code of Georgia. https://policehumanrightsresources.org/content/uploads/2016/08/Criminal-Code-Georgia.pdf?x54919

23 Loi no 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets (1) NOR : TREX2100379L L'Assemblée nationale et le Sénat ont adopté, Vu la décision du Conseil constitutionnel no 2021-825 DC du 13 août 2021. Available: https://www.legifrance.gouv.fr/download/pdf?id=x7Gc7Ys-Z3hzgxO5K-gI0zSu1fmt64dDetDQxhvJZNMc

3. The prison sentence provided for in articles L. 231-1 and L. 231-2 is increased to ten years' imprisonment.
4. The fine provided for in the same articles L. 231-1 and L. 231-2 is increased to 4.5 million euros, with the possibility of this amount being increased to ten years' imprisonment.
5. This amount may be increased up to ten times the benefit derived from the commission of the offence.
6. Harmful effects on health or damage to flora, fauna or the quality of soil or surface water are considered to be lasting, damage to flora, fauna or the quality of soil or surface or groundwater that is likely to last for at least seven years.
7. The limitation period for public prosecution of the offence referred to in the first paragraph of this article runs from the time the damage is discovered, from the discovery of the damage.

Additionally, Article 296 of the Decision established: "The Government should report to Parliament no later than one year after the promulgation of this law regarding efforts to ensure that ecocide is recognized as a crime that can be prosecuted by international criminal courts."

2.8. The Legal Framework Establishing the Crime of Ecocide in EU[24]

Constructive steps have been taken at the EU level to revise the Directive of the European Parliament and the Council on environmental protection through criminal law, replacing Directives 2008/99/EC and 2009/123/EC. Under these circumstances, the following amendment to the Directive has been proposed:

„(21) Criminal offences relating to intentional conduct listed in this Directive can lead to catastrophic results, such as widespread pollution, industrial accidents with severe effects on the environment or large-scale forest fires. Where such offences cause the destruction of, or widespread and substantial damage which is either irreversible or long-lasting to, an ecosystem of considerable size or environmental value or a habitat within a protected site, or cause widespread and substantial damage which is either irreversible or long-lasting to the quality of air, soil, or water, such offences,

[24] The European Parliament, The Council. Brussels, 13 March 2024. (OR. en) 2021/0422 (COD) PE-CONS 82/23. Subject: DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC. https://data.consilium.europa.eu/doc/document/PE-82-2023-INIT/en/pdf

leading to such catastrophic results, should constitute qualified criminal offences and, consequently, be punished with more severe penalties than those applicable in the event of other criminal offences defined in this Directive. Those qualified criminal offences can encompass conduct comparable to "ecocide", which is already covered by the law of certain Member States and which is being discussed in international fora."

3. Analysis of Environmental Impacts on the Territory of Ukraine – Consequences of Russia's Military Aggression

Russia's aggression against Ukraine is not only an assault on the Ukrainian people but also on the environment. Daily, grim reports emerge about Russian military forces damaging Ukraine's environment with toxic and harmful weapons. In some heavily bombarded cities, air and soil pollution levels have reached critical thresholds. The war will have serious, profound, and lasting consequences for Ukraine's air, soil, and water quality.

Since the onset of Russia's aggression in Ukraine, public and private institutions, along with civil society organizations monitoring the environmental impact of military actions, have reported over 2,900 cases of what is termed 'ecocide'. Crimes against the environment have been documented, and these cases will be brought before international courts with claims for reparations.

As mentioned, the consequences of Russian military actions have and will continue to have transboundary repercussions, already confirmed in Bulgaria and Romania where the waves of the Black Sea have brought clear evidence of imminent ecological disaster ashore. In the Republic of Moldova, just a few tens of kilometres from the ongoing conflict zones, clear signs of environmental degradation are also being observed.

3.1. Air Quality Impairment

Polluted air knows no boundaries. Emissions into the atmosphere caused by the Russian Federation's military aggression in Ukraine are carried by the wind, settle in various areas, and affect the territories of other states, sometimes thousands of kilometres away. Soils in European countries have been contaminated with heavy metals. In Ukraine alone, approximately two million hectares of farmland were destroyed during the first 12 months of the war. In Ukraine, there are over 20,000 industrial facilities and 3,000 storage sites containing highly toxic waste. These

locations are precisely the targets of the aggressor. Hundreds of tons of pollutants from burning have entered the environment following the devastating attack on the Kremenchuk oil refinery and fuel storage depots.

The facilities of the oil refineries in Odesa and Luhansk have been damaged. According to Ukraine's State Environmental Inspectorate, by the summer of 2023, the aggressor had caused damages exceeding $52 billion to soil, aquatic resources, and the atmosphere. Environmentalists believe that the damage to ecosystems will be long-lasting and may exceed the damage inflicted on infrastructure. The ecological consequences of the crimes committed by the Russian aggressor will have long-term effects on the entire European ecosystem: poisoned lands, polluted air, burnt forests. Moreover, Russian "ecocide" has endangered rare bird and animal species listed in the Red Book.

3.2. Global Risks to Food Supply – a Consequence of Russian Ecocide

Military actions have destroyed Ukraine's forests, which have severely destructed global food security. Another major issue is the presence of mined areas. The detonation of landmines contaminates the soil with heavy metals such as lead, strontium, titanium, cadmium, and nickel, making the soil hazardous.

In eastern and southern Ukraine, forest coverage is low, but these forests serve critical protective roles. The destruction and damage to forest belts have triggered massive soil erosion processes. Particularly in southern Ukraine, the consequences include wind erosion and desertification.

These actions have significantly impacted agriculture. Hazardous substances can penetrate soil, water, and cultivated plants, eventually entering the bodies of people consuming these products. This impact was confirmed by a study conducted by the Institute of Microbiology and Virology.

Expert *Liudmila Beliavskaia*[25] notes: *„The flight of a missile over a field reduces fertility as toxic fuels are released. Fuel residues can settle, for example, on wheat. Consequently, manufactured products may contain toxic substances. In this situation, grains can no longer be used as food",* explains the scientist.

Ekaterina Polianskaia, an ecologist with the organization *„Ecology. Law. Human",* collected over a hundred soil samples from various regions of Ukraine where conflicts occurred, to determine the chemical changes in the soil. It was

[25] https://anticoruptie.md/ro/investigatii/social/razboiul-lui-putin-impotriva-naturii-in-ucraina-bomba-ecologica-cu-ceas-pentru-europa

found that soil from a shell crater in the courtyard of a school in the Mykolaiv region contains over 600 milligrams of lead per kilogram, exceeding the maximum permissible concentration by approximately 20 times.

3.3. Greenhouse Gases – a Global Environmental Threat

The constant movement of military vehicles, which consume far more fuel than regular cars, significantly contributes to atmospheric pollution through greenhouse gas emissions. Data released by a group of researchers led by Dutch expert *Lennard de Klerk* at a climate summit in Bonn suggests that the total figure could be more than three times higher than estimated.

Greenhouse gas emissions caused by military actions in just the first twelve months of the war amounted to 120 million tons of CO2. According to an updated estimate by the War-related Greenhouse Gas Accounting Initiative, this amount is equivalent to Belgium's total annual greenhouse gas emissions. This is one of the war's effects that affects not only Ukraine but also other countries, including those in the Global South and especially the least developed states, which are often the most vulnerable to climate change. Such an impact results in both a direct increase in the risks of catastrophic consequences of climate change (such as rising temperatures, extreme heatwaves, droughts, heavy rains, and other natural disasters, biodiversity loss, etc.) and a potential risk of redirecting financial resources away from emissions reduction and decreasing climate change vulnerability towards increased militarization. While countries and companies worldwide seek solutions to reduce greenhouse gas emissions, Russia's aggression continues to generate millions of tons of CO2 emissions every month.

The deterioration of gas facilities has led to the release of pressurized gas into the environment, causing numerous fires in the Odesa region. The Kyiv region has also suffered greatly from fires, and the capital was recognized in 2022 as the most polluted city globally.

In July 2023, a conference on the environment and health took place in Budapest. Representatives of 28 countries signed a declaration condemning "ecocide", namely the environmental war crimes committed by the Russian aggressor. The signatories referred specifically to the explosion at the Kakhovka hydroelectric plant and the irreparable environmental.

„We condemn Russia's aggressive war against Ukraine, which directly contradicts the goals of our conference and poses a threat to climate sustainability, biodiversity, and ecological purity. It creates cross-border dangers and risks and risk that demand

immediate action", stated the press service of the Ministry of Health of Ukraine in their declaration.

Due to the destruction of the Kakhovka hydroelectric plant by Russia, at least 32 gas stations, oil depots, and refineries were flooded, causing leaks of chemicals, oil, and petrol.

In the initial days, at least 150 tons of motor lubricant ended up in the water. Particularly severe pollution occurred due to the flooding of industrial areas, from where chemicals were washed downstream into the Black Sea. As the water recedes, there is a risk of massive pollution with petroleum products, industrial chemicals, and household chemicals. *"Contamination with heavy metals also needs to be investigated",* commented chemist *Manfred Santen* from Greenpeace Germany.

According to data cited by the Minister of Health of Ukraine, last summer the pollution level of the Dnieper River exceeded permissible norms by over 28,000 times.

As a result, numerous sewage systems, wastewater drainage basins, and animal burial sites were flooded. Contaminated water entered the aqueduct network, leading to outbreaks of acute infectious diseases.

According to the Environmental Protection Group of Ukraine, due to the destruction of the dam, large quantities of fuel and lubricants entered the water, which is toxic to aquatic organisms and can form a film on the water's surface. Moreover, the flooding of settlements, including landfills, agricultural lands, gas stations, etc., means an unusually large volume of pollutants has entered the water, potentially affecting entire ecosystems, from plankton to cetaceans in the Black Sea, the group writes.

3.4. Cross – border Risks from Southern Ukraine – to Europe

The polluted water from the Dnieper River bed has flowed towards the Black Sea. The torrent of muddy water, containing sediment, fertile soil, and remnants from the flooded towns, merged with the marine currents in the northwest part of the Black Sea and moved southwards towards the coasts of Romania and Bulgaria. The Southern Kherson region is home to the largest concentration of protected areas in Ukraine. This area is crucial for waterbirds in the northern Black Sea region, protected internationally under the Ramsar Convention and included as part of Europe's Emerald Network.

According to the Environmental Protection Group of Ukraine, due to the disaster at Nova Kakhovka, wildlife across an area of at least 5,000 km^2 will be severely affected.

3.5. Impact on Nesting Colonies

In the flooded areas, significant nesting sites for waterbirds and shorebirds were destroyed, affecting tens of thousands of individuals. Specifically, in the lower Dnieper River basin, the largest colonies of herons and other nesting birds were concentrated. The disaster occurred during the breeding season and just as the first chicks were starting to appear, leaving the birds without time to establish new colonies or attempt repeated nesting. Herons, ducks, coots, mute swans, ibises, and other birds have lost their usual nesting sites.

3.6. Impact on Internationally Protected Areas

In this area lie internationally important protected natural areas. The consequences of the terrorist attack have negatively impacted the Emerald Network, including The Kakhovka dam, the Lunca Mare Natural National Park, the Bazavluk River, and the wetland area of the "Bolshie i Maliye Kuchugury" archipelago.

During summer, this region hosted the largest breeding colonies in the area, numbering tens of thousands of birds, including rare species. These areas played a crucial role in maintaining populations of rare species across Europe. During migration, birds stopped here for rest and food, particularly along the shores of the Black Sea and Sivash. In the southern part of the region, many populations of waterbirds from Northern Europe wintered here.

The altered living conditions have had a devastating effect on the lakes and marshlands, leading to their rapid degradation. How many of the birds that once wintered in these lands will survive and return to Northern Europe?

The flooded area includes, in whole or in part, nine natural areas that are part of Europe's Emerald Network, established by Council of Europe resolutions between 2009 and 2020. The loss of the specific natural characteristics of these areas has jeopardized Ukraine's commitment to preserving these ecologically valuable territories intact for the benefit of all of Europe.

3.7. Proceedings in International Courts to Demand that Russia Pay for Environmental Damages

A method of calculating environmental damages is based on determining the land area that can no longer be used for its intended purpose. When building materials, linoleum, or paints burn, toxic substances are emitted into the air. In lakes, various toxic compounds, such as formaldehyde and nitrogen oxides, can

form, which endanger life and cause cancer. International environmental experts believe that documenting war crimes is a top-priority task.

Investigating environmental crimes is necessary primarily to protect Ukrainians, prevent the commission of similar crimes, and ensure that the perpetrators of these offences are brought to justice. The first step in obtaining compensation is establishing the fact of causing harm. Investigating war crimes against the environment in Ukraine could prevent "ecocide" during armed conflicts or wars in the future.

According to estimates from the State Environmental Inspectorate of Ukraine, each day of Russian aggression results in environmental damages amounting to 4 billion hryvnias.

3.8. Statistical Data on Military Crimes against the Environment Committed in Ukraine as a Result of Russian Aggression

According to monitoring by the Ministry of Environmental Protection and Natural Resources of Ukraine, the following environmental crimes have been reported so far[26]:

- damage to nuclear facilities, posing a potential threat of radiation and nuclear danger;
- destruction and damage to infrastructure and industrial facilities, leading to significant pollution;
- emergence of so-called "military waste" and chemical pollution as a result of hostilities;
- destruction of nature reserves and other protected areas;
- mining and contamination of waterways.

In this study, we provide updated statistical data on the commission of military crimes („ecocide") affecting Ukraine's environment as of June 28, 2024.[27]

From Table No.1, it can be inferred that military crimes against the environment have been committed, targeting the following:

- Water contamination – 76 offences – 9%;
- Military waste – 27 offences – 3.2%;
- Industrial object impairment – 183 offences – 21.6%;
- Damage to radiological facilities – 22 offences – 2.6%;

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[26] H. Bazhenova, *The War in Ukraine: Crimes against the Environment (Part 1)*, Instytut Europy Środkowej – IEŚ Commentaries 2022, no. 605 (117). ISSN 2657-6996. Available: https://ies.lublin.pl/wp-content/uploads/2022/06/ies-commentaries-605-117-2022.pdf

[27] Available: https://www.saveecobot.com/ua/ro/features/environmental-crimes

Table No. 1: Military crimes against the environment in Ukraine as of June 28, 2024.

- Soil contamination – 46 offences – 5.4%;
- Forest land impairment – 122 offences – 14.4%.
- Impairment of other environmental components – 372 offences – 43.9%.

Analysing Table No. 2, we can deduce that the most affected areas by military offences are:

- Kyiv – 197 offences;
- Dnepropetrovsk – 107 offences;
- Kharkhov – 81 offences;
- Zaporizhia – 79 offences;
- Lviv – 48 offences;
- Poltava – 46 offences;
- Odessa – 41 offences;
- Donetsk – 38 offences;
- Mykolaiv – 29 offences;
- Vinnytsia – 20 offences, etc.

To recover damages caused to Ukraine by Russia's military actions, it is essential to establish a robust evidence base and ensure proper documentation

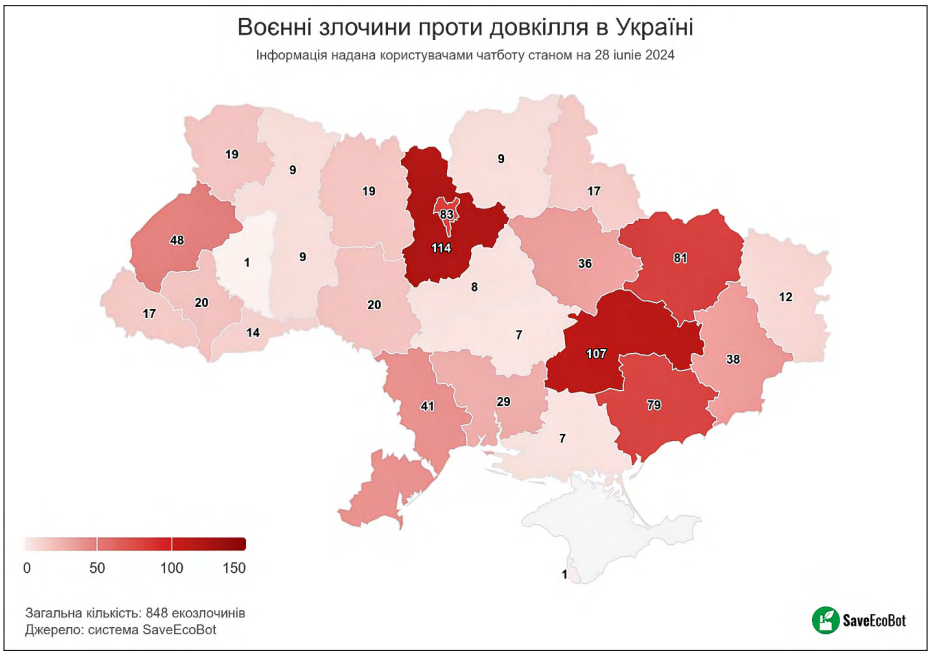

Table No. 2: Military crimes against the environment in Ukraine, status as of 28 June 2024

by competent authorities. Environmental crimes have the characteristic of not manifesting immediately but over a long period, with consequences felt over years, decades, and even centuries.

Conclusions

Ecocide thus presents specific characteristics in terms of severity, both in its spatial and temporal dimensions. It corresponds to severe and extensive harm to one or more ecosystems, or their destruction, which can have consequences spanning multiple generations.[28]

In fact, it expresses a concerning reality, especially since numerous significant instances of pollution and degradations caused by economic activities can qualify as such. Removed from its original military context (the term was first used

[28] Mircea Duțu. *Criminal law: between ecoterrorism and ecocide*. https://www.juridice.ro/essentials/6335/dreptul-penal-intre-ecoterorism-si-ecocid

to characterize the devastation of forests in Vietnam due to the massive use of "Agent Orange" by the American military from 1961 to 1971), ecocide generally threatens the balance of the biosphere and jeopardizes the safety of the planet and the survival of its human and non-human inhabitants.

It is an undeniable fact but must also be recognized legally as the most severe offence against the environment, resembling the concept of genocide in environmental law, targeting intentional, systematic, or widespread harm that endangers planetary safety.

Since the 1970s, debates on the autonomy of ecocide as a crime have continued to intensify, both internationally and within states. Its criminal translation as the ultimate sanction, in domestic and international law, could be a response to the stakes related to climate change by recognizing the interdependencies between biosphere ecosystems and the unified nature of all living things.

The whole European and international community harshly condemns the actions of the Russian aggressor, particularly because the committed military crimes seriously affect not only the territorial circumscription of Ukraine but also the entire European territory. Extremely dangerous actions by Russia continue to persist, especially for all EU Member States.

At the same time, the intentional destruction of the human population, ecosystems, natural resources generate unprecedented situations of increased danger for the whole Universe. In the present research we have tried to draw the attention of all national and international authorities to one of the multiple problems causing irreversible damage to the environment, and as a consequence for mankind.

We believe that the improvement and adjustment of the national and international normative framework to regulate ecocide as a criminal offence will strengthen a foundation for the establishment of a coherent procedural mechanism to hold Russia accountable as the criminal offender and aggressor!

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Małgorzata Sztolf

Cyberwar: Cyberattacks Under International Law

Introduction

The beginning of the third millennium marks a period of dynamic technological advancement, heralded by the Fourth Industrial Revolution, which significantly advanced the development of artificial intelligence, robotics, and access to the virtual world. The turn of the 20th and 21st centuries is not only a time of progress in electronics and information technology but also a substantial increase in the intensity of information flow, forming the foundation of modern economies and shaping the realities of social life. Phenomena such as globalization, technological development, and widespread use of the Internet have led to the creation of cyberspace—a digital space for processing and exchanging information. This space is made up of all telecommunication and information systems, the connections between them, and the relationships between them, their users, and between the users themselves.

Cyberspace has become a domain of activity not only for individuals but also for institutions and states. A natural consequence of this is the emergence of negative phenomena that follow the reality shifting into the online world. Cyberspace protection has therefore become one of the fundamental strategic objectives in the security policies of every state. Until recently, conflicts in cyberspace were largely the domain of science fiction films. Nowadays, no one doubts that what happens in virtual reality has a real impact on our lives. The free movement of people, goods, information, and capital largely depends on the ability of states to create effective mechanisms to prevent threats to the digital space and combat their effects. As a result, states and institutions are investing increasingly substantial

resources into developing both defensive and offensive capabilities in cyberspace to achieve specific strategic outcomes[1].

Recent statistics indicate a significant increase in crimes committed in cyberspace. In 2021, compared to 2020, there was a rise of 125%[2]. In the first half of 2022, there were nearly 240,000,000 ransomware attacks[3]. Generative artificial intelligence (GenAI) is predicted to play a major role in future cyber threats. Hyperrealistic audio and video content are expected to drive a new wave of breaches. A report by the British intelligence agency GCHQ, dated January 24, 2024, indicates the growing importance of GenAI in conducting cyberattacks. The greatest threat stems from the fact that the capabilities offered by artificial intelligence do not require special technical skills from cybercriminals. It is important to note, however, that cybercrimes are not a new phenomenon, although their significant intensification has occurred in the 21st century. Cyberattacks affect not only individuals but also institutions and states. The development of cyber technology has prompted a revision of the classic definition of war has been revised, and the actions of aggressors have partially shifted online, as seen in the conflicts in Iran and Georgia. Among the largest attacks were those experienced by Japan during its conflict with South Korea in 2010, as well as by the governments of Canada, Singapore, the United States, Germany, Romania, Sri Lanka, the United States, Australia, and Poland.

For several years, Ukraine has been a cyber testing ground where Russia has been practising its digital capabilities, which is part of the so-called Gerasimov Doctrine, also known as the Russian concept of new generation war[4]. During the six months of the war, 1,123 cyberattacks were documented[5]. Simultaneously, attacks are being carried out against Ukraine's allies, with Poland being a prime example. On June 29, 2024, Prosecutor Piotr Skiba, spokesperson for the District Prosecutor's Office in Warsaw, announced the initiation of an investigation into the dissemination of disinformation aimed at causing serious disruptions in the political system or economy of the Republic of Poland. This was carried out by an

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1 M. Górka, *Bajty zamiast* pocisków, tekst dostępny na stronie: https://forumakademickie.pl/wokol-nauki/bajty-zamiast-pociskow/, stan na 30.06.2024 r.

2 Ch. Griffiths, *The Latest 2024 Cyber Crime Statistics (updated June 2024)*, tekst dostępny na stronie: https://aag-it.com/the-latest-cyber-crime-statistics/, stan na 30.06.2024 r.

3 *Ibidem.*

4 J. Meissner, *Rosyjska koncepcja wojny nowej generacji*, „Roczniki Nauk Społecznych" 2022, Tom 14, p. 133.

5 A. Warchoł, *Rola cyberprzestrzeni w wojnie Rosji z Ukrainą*, „Nowa polityka wschodnia" 2023, nr 4, p.70.

unknown person or persons involved in foreign intelligence activities, or acting on their behalf, by gaining unauthorized access to the editing system of the Polish Press Agency S.A. in liquidation and twice publishing false, disinformation press dispatches on May 31, 2024, at 14:00:53 and 14:17:15 in PAP's Daily Information Service, falsely reporting the announcement of partial mobilization in Poland[6]. On December 12, 2023, Ukraine's largest mobile network, Kyivstar, fell victim to a cyberattack that disrupted the operation of alarm sirens and prevented Ukrainians from receiving alerts warning of a Russian air attack[7]. In April 2024, cybersecurity experts and investigators from the Security Service of Ukraine identified Russian hackers from the SandWorm group, which is a regular unit of the Russian Main Intelligence Directorate[8].

These examples confirm that the topic of this analysis is crucial, not only due to the need for an in-depth examination of cyberattacks but also due to the current global situation. Just as the 20th century is called the century of genocide, the first quarter of the 21st century may be labelled the age of cybercrime. Statistics show that in one year, nearly 1,000,000,000 emails were disclosed, affecting 1 in 5 Internet users[9]. In 2022, data breaches cost companies an average of $4.35 million. In the first half of 2022 alone, there were approximately 236,100,000 ransomware attacks worldwide, and 1 in 2 American Internet users experienced an account breach. Moreover, 38% of British companies reported being victims of a cyberattack in 2022. Nearly 53,350,000 U.S. citizens were affected by cybercrime in the first half of 2022. Literature indicates that cyberwar poses a real threat. John Michael McConnell even stated that we have entered a new era of danger, and cyberattacks can harm our way of life as destructively as nuclear weapons[10]. Notably, Poland ranks first among all nations globally in the National Cyber Security Index, scoring 90.83, which measures a country's ability to fend off and handle cyber threats.

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6 P. Sikora, Cyberatak na Polską Agencję Prasową. Jest śledztwo w sprawie dezinformacji, tekst dostępny na stronie: https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/9536029,cyberatak-na-polska-agencje-prasowa-jest-sledztwo-w-sprawie-dezinform.html, stan na 30.06.2024 r.

7 Y. Verbruggen, Cyberattacks as war crimes, tekst dostępny na stronie: https://www.ibanet.org/Cyberattacks-as-war-crimes, stan na 30.06.2024 r.

8 I. Hirnyk, SBU: zidentyfikowaliśmy rosyjskich hakerów, którzy zaatakowali Kyivstar, tekst dostępny na stronie: https://www.pap.pl/aktualnosci/sbu-zidentyfikowalismy-rosyjskich-hakerow-ktorzy-zaatakowali-kyivstar, stan na 30.06.2024 r.

9 Ch. Griffiths, *The Latest 2024 Cyber Crime Statistics (updated June 2024)*, tekst dostępny na stronie: https://aag-it.com/the-latest-cyber-crime-statistics/, stan na 30.06.2024 r.

10 J. Michael McConnell, *Cyberwar Is The New Atomic Age*, "New Perspectives Quarterly" 2009, Vol. 26, Issue 3, p. 72.

This paper attempts to provide a comprehensive understanding of the concept of cyberattacks in the context of international humanitarian law and to establish a definition of such actions while taking into account the specificity of cyberspace. The primary focus of this analysis focuses on the research subject of cyberattacks and the interpretation of applicable norms when they occur. It is important to emphasize that there is currently no international convention regulating cybercrime. The aim of the article is to present cyberattacks against the background of the established concept of attacks in international law, with particular attention to the differences stemming from cyberspace.

1. Principles of applying international law in cyberspace

The rapid development of digital technologies impacts not only individuals but also the entire international community. The Internet brings many opportunities for growth but also presents threats to security and even state sovereignty. Increasingly, there is talk of hybrid warfare, which is taking place in Ukraine, and discussions about aggression in cyberspace are now a subject not only of academic research but also of the international forum. According to the Warden Model, developed in the 1990s, cyberspace is one of the strategic domains of combat along with land, sea, air, and space[11]. However, it is essential to emphasize that conflicts in cyberspace have not replaced or eliminated traditional forms of warfare. A significant challenge is to determine the threshold for cyberwar that would warrant a military response. As a result, new areas of research are emerging in the field of security studies.

In the literature, it is pointed out that cyberspace was first used as a battlefield in 1999 during the armed conflict in Kosovo. Hackers allied with NATO carried out attacks on telecommunications systems in Serbia, which was met with a counter-response in the form of NATO server blockades[12]. While both attacks had a marginal impact on the course of the war, they undoubtedly caught the attention of the international community, highlighting the fact that warfare in cyberspace would play an integral role in future armed conflicts.

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[11] P. Sienkiewicz, *Wizje i modele wojny informacyjnej*, tekst dostępny na stronie: https://winntbg.bg.agh.edu.pl/skrypty2/0095/373-378.pdf, stan na 30.06.2024 r.

[12] A. Warchoł, *Rola cyberprzestrzeni w wojnie Rosji z Ukrainą*, „Nowa polityka wschodnia" 2023, nr 4, p.68.

The issue of cybersecurity has not remained outside the scope of the interest of the United Nations (UN). In its Resolution 74/247[13], adopted on December 27, 2019, the UN General Assembly decided to establish an intergovernmental committee of experts, representing all regions, to develop a comprehensive international convention on combating the use of information and communication technologies for criminal purposes. However, progress in regulating cyberspace laws was interrupted by the COVID-19 pandemic, and work resumed in 2021. The next step toward codifying law in cyberspace was Resolution 75/282, titled „Counteracting the Use of Information and Communication Technologies for Criminal Purposes", adopted by the UN General Assembly on May 26, 2021[14]. The ad hoc committee held six negotiation sessions, a concluding session, and five intersessional consultations. During these consultations, disputes arose regarding the scope of the treaty, human rights guarantees, the methods to remove legal gaps in national legislation, and harmonization with existing norms[15]. Additionally, Russia's aggression against Ukraine disrupted work on the convention. The debriefing session took place in New York from January 29 to February 9, 2024. However, it was decided to suspend work and resume at the next concluding meeting in New York from July 29 to August 9, 2024. If the treaty is adopted, it will be the first international document comprehensively addressing cyberspace, potentially providing a crucial legal framework for international cooperation to prevent cybercrime. Therefore, it is vital to precisely define the scope of protection and terms used in the treaty, due to the significant risk that incorrect interpretation of its norms could pose to human rights. Issues such as the restriction of freedom of speech in cyberspace or illegal access to personal data must be considered.

Before universal treaties regarding cyberspace are adopted and come into force, some comments should be made about the application of international law. It is worth noting that cyberspace lacks a uniform definition, which is undoubtedly due to its rapid development.

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13 Rezolucja Zgromadzenia Ogólnego ONZ z dnia 27 grudnia 2019 r., A/RES/74/247, tekst dostępny na stronie: https://documents.un.org/doc/undoc/gen/n19/440/28/pdf/n1944028.pdf?token=UVrA9boFp5dcpoeccm&fe=true, stan na 21.06.2024 r.

14 Rezolucja Zgromadzenia Ogólnego ONZ z dnia 26 maja 2021 r., A/RES/75/282, tekst dostępny na stronie: https://documents.un.org/doc/undoc/gen/n21/133/51/pdf/n2113351.pdf?token=4K53jj04lVxuGSZsXO&fe=true, stan na 21.06.2024 r.

15 I. Wilkinson, *What is the UN cybercrime treaty and why does it matter?*, tekst dostępny na stronie: https://www.chathamhouse.org/2023/08/what-un-cybercrime-treaty-and-why-does-it-matter, stan na 22.06.2024 r.

Under Polish law, cyberspace is defined as the space for processing and exchanging information created by telecommunications systems, as specified in Article 3(3) of the Act of February 17, 2005, on the Computerization of Public Sector Entities (Dz.U. 2024, item 307), together with the connections between them and their relationships with users, as stipulated in Article 2(1b) of the Act of August 29, 2002, on Martial Law and the Competence of the Commander-in-Chief of the Armed Forces and the Principles of His Subordination to the Constitutional Authorities of the Republic of Poland (Dz.U. 2022, item 2091).

Cyberspace is a broader concept than the Internet. As emphasized in the literature, it is a domain of human activity that largely relies on the internet[16], but extends beyond it. Importantly, cyberspace is non-territorial space, meaning it lacks physical boundaries, but this does not contradict the established legal view that cyberspace is not an unregulated area. Existing international law norms are applicable to cyberspace, a position confirmed by the UN, NATO, the European Union, and numerous countries, including Poland[17]. The application of international law to cyberspace, especially concerning aggression, the right to self-defence, state responsibility, and due diligence[18], has been clarified in various international forums.

It is important to highlight that the principle of sovereignty, which is a fundamental principle of international law, applies to cyberspace, implying an obligation to govern and protect its users as well as the technical infrastructure. As correctly emphasized in Poland's official position on the application of international law to cyberspace, a violation of state sovereignty can occur through an attack on both state and private infrastructure.

Actions in cyberspace must respect Article 2(4) of the UN Charter, which prohibits the threat or use of force. To determine whether actions in cyberspace have reached the threshold of force, it is essential to assess the effects of those actions. A cyberattack, under certain circumstances, may have effects comparable

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16 J. Worona, *Cyberprzestrzeń a prawo międzynarodowe. Status quo i perspektywy*, Białystok 2017, p. 24.

17 Stanowisko Rzeczypospolitej Polskiej dotyczące zastosowania prawa międzynarodowego w cyberprzestrzeni z dnia 29.12.2022 r.

18 J. Kulesza, o *wojnie w cyberprzestrzeni Polska zadecyduje sama,* tekst dostępny na stronie: https://www.wpia.uni.lodz.pl/aktualnosci/szczegoly/o-wojnie-w-cyberprzestrzeni-polska-zadecyduje-sama?fbclid=IwZXh0bgNhZW0CMTAAAR0DNh5kG0alpX6dKy-wTkPHl-7W9edswClcboM56UwWdyff-Vw2L51Ruyic_aem_TTrubX6He-ZUyGh0J6PSVw, stan na 30.06.2024 r.

to a kinetic attack, thus reaching that threshold. Each case, however, must be evaluated casu.

It should also be noted that actions in cyberspace may constitute unlawful interventions in the internal affairs of a state, violating Article 2(7) of the UN Charter[19] and the Declaration on Principles of International Law[20]. Under certain conditions outlined by international regulations, these actions may also breach the prohibition on the use of force.

Another critical issue regarding cyberspace in the context of cyberattacks is the application of norms relating to the right to self-defence. States are responsible for actions that violate international law. A cyberattack, depending on its consequences, may be considered an armed attack. The implications of such findings are serious, as they could potentially activate Article 5 of the North Atlantic Treaty. This issue was recently raised by NATO Military Committee Chairman Admiral Rob Bauer during the Shangri-La Dialogue in Singapore[21]. It is also important to note that the response of the state or the international community to a cyberattack does not necessarily have to involve the same means as the attack itself. For example, a response to a cyberattack could involve the use of traditional military methods[22].

The principles of international humanitarian law also apply to cyberspace, particularly those expressed in the Geneva Conventions of 1949, the Additional Protocols of 1977, and customary international law.

Regardless of the conclusions formulated in the above section, the need to establish an international treaty addressing cyberspace is undeniable. Over the past two decades, there has been an unprecedented evolution in methods of

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19 Karta Narodów Zjednoczonych, Statut Międzynarodowego Trybunału Sprawiedliwości i Porozumienie ustanawiające Komisję Przygotowawczą Narodów Zjednoczonych, przyjęta w San Francisco z dnia 26 czerwca 1945 r., Dz. U. z 1947 r. Nr 23, poz. 90 z późn. zm.

20 Deklaracja zasad prawa międzynarodowego dotyczących przyjaznych stosunków i współdziałania państw zgodnie z Kartą Narodów Zjednoczonych (Rezolucja Zgromadzenia Ogólnego ONZ z dnia 24 października 1970 r nr 2625(XXV), tekst dostępny na stronie: https://documents.un.org/doc/resolution/gen/nr0/348/90/pdf/nr034890.pdf?token=SHEOg8daFtjxo2YOjE&fe=true, stan na 17.06.2024 r.

21 D. Cygan, *Kiedy NATO może uruchomić artykuł 5? Jest poważna deklaracja*, tekst dostępny na stronie: https://dorzeczy.pl/swiat/593445/nato-moze-uruchomic-artykul-5-w-przypadku-ataku-hakerskiego.html, stan na 22.06.2024 r.

22 Pogląd ten wyrażony we wspomnianym wcześniej Stanowisku Rzeczypospolitej Polskiej dotyczącym zastosowania prawa międzynarodowego w cyberprzestrzeni z dnia 29.12.2022 r. zasługuje na aprobatę. Strona konfliktu może bowiem nie mieć technicznych możliwości odpowiedzi w cyberprzestrzeni, a zatem przeciwny pogląd pozbawiłby ją prawa do obrony gwarantowanej Kartą Narodów Zjednoczonych.

committing illegal acts, and the property damage suffered by individuals and legal entities is difficult to estimate. It is emphasized that the main features of cyberspace are its global reach, efficiency, universality, and affordability[23], which undoubtedly causes subsequent areas of social life to move to the virtual world, cybercriminals follow suit.

2. Cyberattack

The concepts of „cyberattack," „cybercrime," and „cyberwarfare" are often mistakenly used interchangeably. Among these, „cyberattack" has the narrowest scope. For many years, the term „cyberattack" has been used in the literature, despite lacking a legal definition. This absence raises numerous problems, not only semantic but also legal, contrary to the principle of *nullum crimen sine lege certa*. Although attempts have been made to define the term, a precise specification of its elements first appeared in the *Tallinn Manual,* an expert handbook commissioned by NATO. The legal gap regarding the definition of a cyberattack has been filled by legal scholars, who have taken steps to clarify its elements. These scholars have no doubt that the laws of armed conflict should apply to cyberattacks as well. In this regard, *soft law* is being developed by institutions such as NATO, as evidenced by the two editions of the already mentioned *Tallinn Manual* on international law applicable to cyber armed conflicts. In 2021, the *Tallinn Manual* 3.0 project was launched, which is expected to last five years. It is important to note, however, that the *Tallinn Manual* does not constitute binding international law but is rather an expert compilation of proposed solutions[24]. Nevertheless, the creation of a comprehensive international regulation addressing cyberspace, particularly cyberattacks, remains necessary.

For a thorough analysis, it is important to note that cybercrimes, including cyberattacks, can be divided into *cyber-dependent crimes* (those that can only be committed using information technology, such as ransomware) and *cyber-enabled crimes* ('traditional' crimes that have undergone transformation[25] due to cyber

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[23] T. Hoffmann, *Główni aktorzy cyberprzestrzeni i ich działalność,* [w]: *Cyberbezpieczeństwo wyzwaniem XXI wieku*, T. Dębowski (red.), Łódź – Wrocław 2018, p. 12.

[24] R. Tarnogórski, *Prawo konfliktów zbrojnych a cyberprzestrzeń*, „Biuletyn Polskiego Instytutu Spraw Międzynarodowych" 2013, nr 31, p. 2.

[25] I. Wilkinson, *What is the UN cybercrime treaty and why does it matter?*, tekst dostępny na stronie: https://www.chathamhouse.org/2023/08/what-un-cybercrime-treaty-and-why-does-it-matter, stan na 22.06.2024 r.

reality). A potential cyberattack may involve adversary software, information systems, or hardware[26].

Although the Rome Statute[27] does not explicitly regulate cyberattacks, this does not exclude the possibility of holding perpetrators accountable for such acts. Crimes committed in cyberspace may fall under the jurisdiction of the International Criminal Court (ICC) if the requirements of the Rome Statute are met. Karim Khan, the ICC Prosecutor, emphasized that cyberspace can be used for war crimes, crimes against humanity, genocide, and even state-led aggression[28]. International justice must, therefore, adapt to these new realities. Although no provisions of the Rome Statute explicitly address cybercrime, such actions could potentially meet the elements of several key international crimes already defined in the Statute[29].

According to Rule 92 of the *Tallinn Manual*, a cyberattack is defined as a cyber operation, both offensive and defensive, that can reasonably be expected to cause injury or death to persons or damage or destruction of property[30]. This provision correlates with Article 49(1) of the Additional Protocol to the Geneva Conventions of August 12, 1949, which states that the term ‚attacks' is defined as acts of violence directed at the adversary, including both offensive and defensive measures[31]. Thus, international humanitarian law applies to cyber activities when they meet the conditions for being recognized as an attack[32]. The literature stresses that it is not relevant whether the conflict is international or non-international[33].

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26 T. Szubrycht, *Cyberterroryzm jako nowa forma zagrożenia terrorystycznego*, „ Zeszyty Naukowe Akademii Marynarki Wojennej" 2005, nr 1, p.180.

27 Rzymski Statut Międzynarodowego Trybunału Karnego sporządzony w Rzymie dnia 17 lipca 1998 r., Dz.U. 2003 nr 78 poz. 708.

28 K. Khan, *Technology Will Not Exceed Our Humanity*, tekst dostępny na stronie: https://digitalfrontlines.io/2023/08/20/technology-will-not-exceed-our-humanity/, stan na 30.06.2024 r.

29 *Ibidem.*

30 M.N. Schmitt (red.), Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations Prepared by the International Groups of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, Cambridge 2017, rule 92.

31 Protokoły dodatkowe do Konwencji genewskich z 12 sierpnia 1949 r., dotyczący ochrony ofiar międzynarodowych konfliktów zbrojnych (Protokół I) oraz dotyczący ochrony ofiar niemiędzynarodowych konfliktów zbrojnych (Protokół II), sporządzone w Genewie dnia 8 czerwca 1977 r., Dz.U. 1992 nr 41 poz. 175.

32 A. Małecka, *Cyberoperacje w świetle prawa międzynarodowego*, „Colloquium Pedagogika – Nauki o polityce i administracji" 2022, nr 3(47), p. 153.

33 D.M. Bielecki, *International Humanitarian Law of armed conflict and Space Law*, [w:] *Międzynarodowe prawo humanitarne. Antecedencje i wyzwania współczesności*, J. Nowakowska-Małusecka (red.), Bydgoszcz-Katowice 2010, p. 410.

It is important to define the concept of attack in accordance with the meaning assigned to this term in the law of armed conflicts.

It is also crucial to highlight that the *Tallinn Manual* clearly states that a cyberattack occurs only if the act involves an element of violence. Therefore, actions devoid of violence, such as psychological operations or cyber espionage[34], do not meet the criteria for a cyberattack.

When characterizing cyberattacks, it is important to note that while violence is a necessary element for such an act to occur, this does not limit the concept to kinetic actions alone. This principle is regulated in the law of armed conflict, which recognizes that chemical, biological, and radiological attacks typically do not have kinetic effects on their targets, yet are universally accepted as forms of attack under the law. The defining factor of an attack is the outcome it produces. By analogy, when assessing cyberattacks in the context of international humanitarian law, the consequences of actions in cyberspace[35] must be considered. To better illustrate this criterion, consider a cyberattack that manipulates an SCADA system (Supervisory Control and Data Acquisition) controlling an electrical grid, leading to a fire. It is not necessary to damage the system itself; the attacker could, for example, cause the release of dam waters by manipulating the SCADA system, resulting in massive destruction downstream without damaging the system itself. If such an operation were conducted using kinetic means, such as bombing the dam, there would be no doubt that it would be considered an attack. There is no justification for arriving at a different conclusion in the cyber context[36]. A cyberattack is thus a resultant crime, the consequences of which are bodily injuries, deaths, or the destruction of property.

While the primary goal of a cyberattack may be to cause physical harm or property damage, this should not exclude cyber operations targeting data from being classified as attacks. Furthermore, as emphasized in the *Tallinn Manual,* operations against data that are critical to the functionality of physical objects may, in some cases, constitute an attack[37].

Interpretative issues may arise when comparing the definition of a cyberattack to Article 49(1) of the First Additional Protocol to the Geneva Conventions of

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34 M.N. Schmitt (red.), Tallinn Manual 2.0, rule 92.

35 A. Kacała-Szwarczyńska, *Cyberatak w świetle międzynarodowego prawa humanitarnego konfliktów zbrojnych,* „Journal of Modern Science" 2019, tom 2, p. 171.

36 M.N. Schmitt (red.), Tallinn Manual 2.0., rule 92.

37 M.N. Schmitt (red.), Tallinn Manual on the International Law Applicable to Cyber Operations Prepared by the International Groups of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, Cambridge 2013, rule 30

August 12, 1949, due to the phrase „against the adversary." This interpretation could suggest that destructive operations must be directed against an enemy to qualify as cyberattacks. However, the International Group of Experts who prepared the *Tallinn Manual* rightly concluded that this interpretation would not make sense in the light of prohibitions on attacks targeting civilians and civilian objects. Experts agreed that it is not the status of the target that qualifies an act as an attack, but rather its consequences. Therefore, acts of violence directed at civilians or civilian objects, if fulfilling other criteria, should be classified as cyberattacks.

The objective elements of cyberattacks can also raise doubts. As has been repeatedly stated, the definition includes injuries, death, and property damage. However, *de lege ferenda*, it would be reasonable to expand and clarify this definition by replacing „causing injuries" with „causing serious bodily harm or mental health impairment," similarly to the elements of crimes like genocide. This concept is well-established in legal doctrine, and its interpretation raises fewer concerns. This proposal is further justified by adopting an analogy to Article 51(2) of the First Additional Protocol to the Geneva Conventions (August 12, 1942), which confirms that acts and threats of violence aimed at terrorizing the civilian population are prohibited. This formulation fully justifies the assumption that the hallmarks of a cyberattack *per analogiam* should include health impairment.

The subject of discourse in the legal doctrine is whether interference with the functionality of an object qualifies as damage or destruction[38] within the meaning of a cyberattack. While some experts disagree, the majority opinion holds that interference qualifies as damage if restoring functionality requires the replacement of physical components. Additionally, a contentious issue arises in cases where no physical damage occurs, but functionality can be restored by reinstalling software. Given the potential impact, it seems reasonable to conclude that actions requiring a system reinstall should also be considered a cyberattack.

The principles of international humanitarian law apply in the event of a cyberattack[39]. These include the principles of proportionality, distinction, humanity, and military necessity. In the context of cyberattacks, it should be noted that attempts are also punishable. Legal scholars emphasize that an attack that has been successfully intercepted and did not cause actual harm is still considered an attack under the law of armed conflict. By analogy, a cyber operation that was blocked by a firewall or antivirus software still qualifies as an attack if, without those defences, it would likely have caused the intended consequences.

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38 *Ibidem.*

39 A. Kacała-Szwarczyńska, *op. cit.*, p. 172.

It is worth noting that cyber operations can be an integral part of a broader military operation. For instance, a cyberattack could disable a defence system, thereby enabling a kinetic attack[40].

A mistaken but justified belief in the legality of a target does not exclude the possibility of criminal liability. However, if the planners or decision-makers of the attack, in accordance with Article 57(2) of the First Additional Protocol to the Geneva Conventions, did everything practically possible to verify that the targets were not civilians or civilian objects and that they were military targets not protected under the Protocol, their actions would be considered legal.

The literature emphasizes that, regardless of the passive entity's awareness or recognition of a cyberattack, the perpetrator's conduct, if meeting the criteria, qualifies as an attack in cyberspace and is subject to the law of armed conflict.

The *Tallinn Manual* also highlights the importance of conducting thorough investigations to avoid wrongfully accusing individuals who may unknowingly spread malicious software without the intent of committing a cyberattack. It clarifies that a perpetrator may include not only those preparing and executing the cyberattack at any stage, but also anyone who knowingly distributes malicious software.

As previously noted, cyberattacks are governed by the principle of distinction, which obligates parties to a conflict to make a clear distinction between civilians (non-combatants) and combatants, and to refrain from targeting the former. This principle is related to the requirement of protecting civilians, as expressed in Article 51(1) of the First Additional Protocol to the Geneva Conventions, which states that civilians and civilian populations enjoy general protection against the dangers of military operations. This principle also applies to cyberattacks: parties to a conflict must always distinguish between civilians and combatants, as well as civilian assets and military targets, directing their operations only against military objectives, as expressed in Article 48 of the First Additional Protocol and the statutes of International Tribunals.

Another key principle that applies to cyberattacks is the prohibition against causing unnecessary suffering. It is forbidden to use methods and means of warfare that are intended to, or are expected to, cause widespread, long-term, and severe damage to the natural environment (Article 35(3) of the First Additional Protocol to the Geneva Conventions). The goal of criminalizing cyberattacks is to protect

40 M.N. Schmitt (red.), Tallinn Manual 2.0., rule 92.

persons and property from the effects of armed conflicts, not to eliminate this method of warfare entirely during military operations[41].

The principle of civilian protection is further expanded in the *Tallinn Manual,* which asserts that civilians and civilian populations cannot be the target of cyberattacks. In cases of doubt regarding a person's status, they must be treated as civilians[42]. In the context of a cyberattack, it is easier to violate this principle because distinguishing between civilians and combatants in cyberspace is significantly more challenging.

Cyberattacks, or the threat thereof, whose primary purpose is to spread terror among the civilian population, are explicitly prohibited.

2.1. Cyber Attacks directed against civilians

When analyzing cyberattacks, it is essential to address issues related to the passive entity. As already indicated, attacks against the civilian population are prohibited. However, the *Tallinn Manual* also recognizes that civilians are not forbidden from directly participating in cyber operations that constitute acts of warfare. During the period in which they participate, they lose their protection from attacks. The legal participants in hostilities are combatants, as defined by international humanitarian law.

A combatant is a person entitled to fight under international law. This right is an authorization granted by the state[43]. In addition to combatants, the armed forces include non-combatants, such as medical personnel or chaplains, who are to be treated as non-combatants in accordance with the rules of international law[44]. It is important to note, however, that non-combatants do not receive the same protection as civilians, despite performing roles that do not involve direct participation in hostilities. This is consistent with the First Additional Protocol

41 M. Gąska, A. Ciupiński, *Międzynarodowe prawo humanitarne konfliktów zbrojnych. Wybrane problemy*, Warszawa 2001, p. 22.

42 W doktrynie zdania co do tego w jaki sposób należy zweryfikować przynależność do danej grupy są podzielone. Wskazuje się, iż wyłącznie istotne wątpliwości, istniejące mimo uzyskania informacji z wszelkich możliwych źródeł uzasadniają zastosowanie domniemania (doktryna angielska). z kolei z orzecznictwa Międzynarodowego Trybunału Karnego wynika, iż wątpliwości mają być uzasadnione. Konkluzją obu tych stanowisk jest to, iż wątpliwości natury ogólnej nie wystarczają dla zastosowania ochrony prawnej. Zob. A. Kacała-Skwarczyńska, *op. cit.,* p. 173.

43 P. Łubiński, *Status kombatanta, ochrona i uprawnienia jeńców wojennych i innych osób zatrzymanych*, w: *Międzynarodowe Prawo Humanitarne Konfliktów Zbrojnych*, Z. Falkowski, M. Marcinko (red.), Warszawa 2014, p. 186.

44 *Ibidem*.

to the Geneva Conventions. They also do not receive general protection from the dangers of military operations and are not protected from attack in the same way as civilians or civilian populations. It is also important to note that the presence of non-combatants in military facilities does not impose an obligation on the attacking party to take special precautions. Attackers are not required to distinguish between combatants and non-combatants within the armed forces, except for medical personnel and clergy, who cannot be attacked[45]. The literature also emphasizes the legality of cyberattacks on non-combatants if justified by military necessity[46]. The *Tallinn Manual* specifies that cyberattacks may be directed against members of armed forces, members of organized armed groups, civilians directly participating in hostilities, and members of the militia during an international armed conflict.

The term members of the armed forces includes both combatants and non-combatants who belong to all organized armed forces, groups, and units under responsible command. It is the state's[47] responsibility to clarify the issue. This also applies to armed forces in the process of formation[48]. Additionally, armed forces in a broad sense also include militias, volunteer units, and paramilitary or armed *law enforcement units*[49].

An organized military group, as distinguished in the list of passive entities, should be understood in line with Article 4A(2) of the Geneva Convention Relative to the Treatment of Prisoners of War (April 12, 1949). This defines such a group as one led by a responsible commander, wearing a recognizable and visible distinctive sign, openly carrying arms, and following the laws and customs of war, or at least distinguishable from the civilian population. A key debate within the doctrine concerns whether mere membership in such a group justifies conducting a cyberattack against an individual member, or whether this rule should only apply to those performing combat roles. Analogous to civilians, it is reasonable to conclude that if a member of an armed group engages in hostilities, they lose their civilian status. Furthermore, in groups with both military and political or social wings, only the military wing qualifies as an organized military group[50].

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45 *Ibidem*, p. 192.
46 A. Kacała-Skwarczyńska, *op.cit.*, p. 174.
47 P. Łubiński, *op.cit.,* p. 187.
48 A. Kacała-Skwarczyńska, *op.cit.*, p. 174.
49 K. Ipsen, *Combatants and non-combatants*, [w:] *The Handbook of Humanitarian Law in Armed Conflicts,* D. Fleck (red.), Oxford 1999, p. 85.
50 M.N. Schmitt (red.), Tallinn Manual..., rule 34.

According to international humanitarian law, civilians participating directly in a cyberattack lose their protected status for the duration of their participation (see Article 52(3) of the First Additional Protocol to the Geneva Conventions of August 12, 1949, and Article 13(3) of the Second Additional Protocol to the Geneva Conventions of August 12, 1949). The consequence of this is the loss of protection and the lack of combatant status, which could result in criminal liability for illegal participation in hostilities[51].

The interpretation of direct participation has been subject to debate, especially due to the ambiguity surrounding the term „directly[52]." The International Group of Experts who drafted the *Tallinn Manual* agreed on three cumulative criteria for qualifying an act as direct participation, in line with the guidelines of the International Committee of the Red Cross . In the context of cyber operations, no doubt arises that cyberattacks in connection with an armed conflict qualify as direct participation. Direct participation also includes activities that facilitate an attack, such as identifying vulnerabilities in security systems or creating malicious software for the purpose of exploiting those vulnerabilities. Gathering information on enemy operations via cyber means and transmitting it to military forces for use in DDoS attacks also constitutes direct participation. However, the mere creation of *malware* and making it publicly available, even if it is later used in an attack, does not meet the requirement for direct participation. Similarly, owning equipment capable of conducting such attacks does not fulfil this criterion. Whether creating malware and providing it to individuals who are known to use it for cyberattacks qualifies as direct participation is still a matter of debate.

Another point of discussion is determining the time frame during which civilians lose their protection and status. It is generally accepted that this period includes the time directly before and after the attack. A broader view suggests that a person who collects data for a cyberattack loses their civilian status from the moment they begin gathering the data. This period covers the entire time spent collecting data, conducting the attack, and potentially preparing for subsequent attacks. Delayed effects of a cyberattack, such as activation of malware at a later time, should not be considered as direct participation unless the perpetrator remains actively involved.

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51 A. Kacała-Skwarczyńska, *op.cit.*, p. 175.

52 J-M. Henckaerts, *Studium poświęcone zwyczajowemu międzynarodowemu prawu humanitarnemu: wkład w zrozumienie i poszanowanie zasad prawa dotyczących konfliktu zbrojnego*, Warszawa 2006 , p. 21.

The *Tallinn Manual* also addresses the staff of private companies. Generally, such personnel qualify as civilians unless they directly participate in hostilities. However, questions arise in cases where companies provide support or substitute services aimed at increasing military efficiency. Most legal scholars agree that such a company qualifies as an organized armed group belonging to the conflict party[53]. Civilian government employees conducting cyber operations as members of intelligence agencies may also be targeted in accordance with this rule if their group qualifies as an organized armed group.

The last group discussed in the *Tallinn Manual* includes members of a levée en masse. Residents of unoccupied territory who engage in cyber operations as part of a levée en masse enjoy combatant immunity and the status of war prisoners. Therefore, they may be targeted for the entire period of their participation in the uprising. For the purposes of attacks, members of a levée en masse are not treated as civilians directly participating in hostilities, which means the criterion of „for the duration of participation" does not apply.

2.2 Cyberattacks against facilities

International humanitarian law prohibits attacks against civilian objects, as stated in Article 52 of the First Additional Protocol to the Geneva Conventions and reiterated in the *Tallinn Manual*. Computers, computer networks, and cyber infrastructure may be targeted if they qualify as military objectives. Whether a facility is civilian and protected from attack or a military target must be determined on a case-by-case basis. A key principle in the *Tallinn Manual* is that a cyberattack against a civilian object is illegal, regardless of whether it was successful or not.

According to Article 52(2) of the First Additional Protocol, objects serve military purposes, by their nature, location, purpose, or use, contribute to effective military action and whose destruction, capture, or neutralization brings a definite military advantage. Military objectives may include computers, computer networks, and cyber infrastructure. Conversely, civilian objects are those that do not meet this criterion of military purposes as stated in Article 52(1) of the Additional Protocol to the Geneva Conventions.

The concept of „object" also needs clarification. According to the Commentary to the 1987 Additional Protocols of the International Red Cross, an object is something „visible and tangible." Therefore, computers, networks, and other physical components of cyber infrastructure qualify as objects. However, the

[53] M.N. Schmitt (red.), Tallinn Manual..., rule 34.

assessment of what data is, given its intangible nature, remains a controversial issue. The current doctrine suggests that data itself cannot be treated as an object, though a cyber operation targeting data may qualify as an attack if it affects the functionality of computers or systems. Given the importance of data, this interpretation should be reconsidered. The destruction of critical data—such as medical, banking, or tax records—often poses a greater threat than the destruction of physical hardware. It has been proposed that source code, which has irreplaceable operational value[54], should also be protected.

Similar conclusions apply to dematerialized shares. In terms of *de lege ferenda*, it would be appropriate to develop a catalogue of intangible assets to which the protection arising from Article 52 of the First Additional Protocol to the Geneva Conventions should be extended. A revision of the interpretation from the 1980s is necessary to align with the evolving cyber society.

The criteria for recognising objects as military objectives are nature, location, purpose, or use. "Nature," according to the interpretation contained in the Tallinn Manual, encompasses the inherent characteristics of the object and typically refers to those that are fundamentally military and designed to contribute to military actions. Military computers and military cyber infrastructure are examples of objects that meet the criterion of nature. The fact that civilians (whether government employees or contractors) may operate these systems is irrelevant to whether they qualify as military targets.

The second factor determining whether an object qualifies as a military target is location. This generally refers to a geographic area of particular military significance. Considering the subject of this expertise, it should be noted that an IP address (or block of IP addresses) is not a location (although it is associated with cyber infrastructure that may qualify as a military target). The determinant for recognising an area as a military objective is not its actual use, but the fact that its location effectively contributes to the enemy's military operations.

When a civilian object or infrastructure is used for military purposes, it becomes a military target under the criterion of "use." Military objectives do not lose their status simply because civilians, such as government employees or contractors, may operate or maintain them. This applies even when the network is still used for civilian purposes. It should be emphasized that the entire computer network does not qualify as a military target simply because an individual router qualifies as such. If military use ceases, civilian objects that became military targets through their use can revert to civilian status. They then regain protection against attack.

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[54] A. Kacała-Szwarczyńska, *op.cit.*, p. 179.

This rule does not apply if the break in use is only temporary, and the civilian object will be used for military purposes again in the future. It should also be noted that the mere fact that a civilian object was once used for military purposes is not sufficient to establish that it will be used for such purposes in the future.

The last of the mentioned criteria, namely "purpose," refers to intended future use of the object, meaning that the object is not currently being used for military purposes but is expected to be used in such a manner in the future. The qualification of an object as a military target occurs immediately when such a purpose for the object is undertaken.

The mere belonging of a given object to one of the four categories analysed above does not suffice to qualify the object as a military target. It must also contribute to ‚effective support of military actions.

The final element for verifying the legality of an attack is gaining military advantage. Such an advantage must be assessed in relation to the attack considered as a whole, not just in relation to individual parts of the attack. The use of the term "military advantage" is crucial here, as it excludes advantages that are not military in nature, such as economic, political, or psychological ones.

Conclusions

The rapid development of digital technologies has led to increasing reliance on cyberspace by the international community. The digitization of data, the shift to cashless transactions, the improvement of e-government, and the management of critical infrastructure are all examples of this trend. Alongside the benefits of the Fourth Industrial Revolution, there are negative aspects, including the rise of new challenges in the form of cyberattacks.

In recent decades, we have witnessed a significant increase in cyber activities by both state and non-state entities, threatening the stability and security of nations and individuals. Cybertechnology is proving effective in enhancing military power by utilizing real-time data to deliver precise strikes[55]. The international community faces the enormous challenge of assessing the legality of these actions under international law. So far, no state subjected to harmful cyber activities has officially recognized them as acts of cyber warfare, likely due to fears of escalating

[55] M. Górka, *Bajty zamiast* pocisków, tekst dostępny na stronie: https://forumakademickie.pl/wokol-nauki/bajty-zamiast-pociskow/, stan na 30.06.2024 r.

the conflict. This is contrary to conflicts such as those in Ukraine or Gaza and Turkey, where the consequences of cyberattacks are openly acknowledged.

The ongoing conflict in Ukraine, referred to as a hybrid war with Russia, illustrates that cyberattacks often complement kinetic attacks. However, cyberattacks occur more frequently and are more effective in their impact on kinetic infrastructure. Their effects vary—from blocking access to essential services, stealing data, disinformation using AI and *deep fake*, intimidating populations, preventing counterattacks, to even blocking alerts that threaten people's health and lives. As emphasized in the literature, an analysis of the Russian-Ukrainian war reveals that, while cyberattacks do not have a direct influence on its course, they indirectly contribute to the destruction of the enemy's strategic resources[56]. Russia's information operation was aimed to justify the invasion of Ukraine, destabilize the state and cause governmental paralysis, which was ultimately unsuccessful. It remains unclear whether the failure of Russian operations was due to limited offensive capabilities or effective Ukrainian defences[57]. Experts, however, caution that the destructive impact of cyberattacks cannot be fully assessed in real time[58], and any evaluation of their effectiveness must be postponed. Nevertheless, lessons from this ongoing conflict should serve as a guide for discussions on international security, military policy, and the concepts of warfare.

Cyberspace has rapidly evolved, and its characteristics—anonymity, global reach, and immense impact potential—present significant challenges for legislators. The pressing need for international cooperation in regulating cyberspace, particularly in addressing cyberattacks, has become even more urgent as conflicts escalate. The actions of international organizations, particularly NATO, which is currently working on the third edition of the *Tallinn Manual*, deserve recognition. Efforts by individual countries, including Poland, are also crucial, as collaboration in key areas of international law helps increase legal certainty and transparency.

The lack of international treaty standards specifically addressing military operations in cyberspace remains a significant legal gap, which has not been filled by the *Tallinn Manual* developed under the auspices of NATO. There is a shared belief held by experts that proper utilization of cyberwar could mitigate

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56 A. Warchoł, *Rola cyberprzestrzeni w wojnie Rosji z Ukrainą*, „Nowa Polityka Wschodnia" 2023, nr 4, p.72.

57 J. Meissner, *Rosyjska koncepcja wojny nowej generacji*, „Roczniki Nauk Społecznych" 2022, t. 14, p. 141.

58 D. Dziwisz, B. Sajduk., *Rosyjska inwazja na Ukrainę a przyszłość cyberwojny – wnioski w rocznicę „specjalnej operacji wojskowej*, w: *The War Must Go On. Dynamika wojny w Ukrainie i jej reperkusje dla bezpieczeństwa Polski*, A. Gruszczak (red.), Kraków 2023, p. 45.

the effects of traditional armed conflicts. On the contrary, the absence of regulation may lead to the escalation of conflicts[59]. The international community must renew its efforts to ensure that the evolving nature of war will not outpace justice. Cyberspace, particularly cyberattacks, must be systematically addressed through an international treaty. In parallel, the development of *soft law* is also necessary, as its flexibility and dynamic nature can keep pace with the rapidly advancing „digital tanks" and „disinformation bombs."

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[59] P. Łuczuk., *Cyberwojna. Wojna bez amunicji?,* Kraków 2017, p. 176.

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https://www.wpia.uni.lodz.pl/aktualnosci/szczegoly/o-wojnie-w-cyberprzestrzeni-polska-zadecyduje-sama?fbclid=IwZXh0bgNhZW0CMTAAAR0DNh5kG0alpX6dKy-wTkPHl7W9edswClc-boM56UwWdyff-Vw2L51Ruyic_aem_TTrubX6He-ZUyGh0J6PSVw
https://www.komputerswiat.pl/artykuly/redakcyjne/pierwszy-w-historii-cyfrowy-napad-na-bank-rosyjscy-hakerzy-zdolali-wykrasc-10-mln-dol/4g3wfb1
https://www.komputerswiat.pl/aktualnosci/internet/sad-byl-bezlitosny-dla-hakera-iceman-dostal-13-lat/5hlxlyg
https://dorzeczy.pl/swiat/593445/nato-moze-uruchomic-artykul-5-w-przypadku-ataku-hakerskiego.html
https://forumakademickie.pl/wokol-nauki/bajty-zamiast-pociskow/
https://aag-it.com/the-latest-cyber-crime-statistics/
https://www.chathamhouse.org/2023/08/what-un-cybercrime-treaty-and-why-does-it-matter
https://www.gov.pl/web/po-zielona-gora/postepowanie-dotyczace-cyberataku-na-media-i-uczelnie-wyzsze

Sergiy Balaniuk

Economic Losses Resulting from Crimes Committed by Russia

Introduction

Russia's armed aggression, now in its ninth year, has caused extensive damage to Ukraine's critical infrastructure, energy sector, industry, and economy. The most severe impact was felt following the full-scale military invasion that began on 24 February 2022. According to preliminary estimates from Ukraine's Ministry of Economy, the country's GDP declined by 30.4%[1] in 2022, though a year later it saw a 5.3% increase.[2] The World Bank offers similar estimates, reporting a 29.2% drop in Ukraine's GDP in 2022.[3] The broader economic toll of Russia's aggression, including long-term losses, exceeds these estimates, as Ukraine continues to lose its citizens—both soldiers and civilians—who are either victims of missile attacks or are forced to leave the country. Russia's attacks on civilian infrastructure not only target residential areas and homes but also critical infrastructure, such as buildings, facilities, and installations that provide essential services for the state and society and enable the proper functioning of administration and institutions.

1 Мінекономіки попередньо оцінює падіння ВВП в 2022 році на рівні 30.4%, 05.01.2023: https://www.kmu.gov.ua/news/minekonomiky-poperedno-otsiniuie-padinnia-vvp-v-2022-rotsi-na-rivni-304, 22.04.2024.

2 Official commentary of the National Bank of Ukraine, https://bank.gov.ua/ua/news/all/komentar-natsionalnogo-banku-schodo-zmini-realnogo-vvp-u-2023-rotsi, 09/04/2024.

3 Russia's Invasion of Ukraine and Cost-of-Living Crisis Dim Growth Prospects in Emerging Europe and Central Asia: https://www.worldbank.org/en/news/press-release/2023/04/06/russian-invasion-of-ukraine-and-cost-of-living-crisis-dim-growth-prospects-in-emerging-europe-and-central-asia, 06.04.2024.

Moreover, Russia is deliberately striking cultural, medical, administrative, educational, and scientific institutions and facilities. The natural environment has also suffered significant damage, with substantial costs for demining and clearing unexploded ordnance. According to the Ministry of Environmental Protection and Natural Resources, these costs are already estimated at UAH 10 billion.[4] Accurate estimation of all economic losses is crucial, as this data can serve as evidence in international proceedings for compensation. It is important to note that Russia's actions are not solely aimed at gaining military advantage but are also intended to threaten the very existence of the Ukrainian nation, as evidenced by its deliberate targeting of critical infrastructure. In the early weeks of Russia's full-scale invasion, most attacks were directed at military targets. However, when it became clear that full military success was unattainable due to the resistance of Ukraine's defence forces and civilian population, Russia shifted to a tactic of 'missile terror,' launching strikes on civilian objects. These actions, prohibited under international humanitarian law, can be classified, at the very least, as war crimes. Missiles were deliberately fired at residential buildings, shopping malls, railway stations, seaports, and other civilian sites . According to Ukraine's General Prosecutor's Office, the primary aim of these attacks on civilians and civilian infrastructure was to intimidate the population, foster continuous tension within society, and pressure Ukrainian authorities into making territorial and political concessions to the Russian Federation.[5] The Russian Federation's long-term aim is the partial extermination of the Ukrainian nation by inflicting living conditions intended to bring about physical destruction. Since the beginning of autumn 2022, Russia's missile attacks have been primarily targeted at energy facilities, including thermal and hydroelectric power plants, substations, and power lines. Such actions ahead and during the heating season aimed to destroy Ukraine's economy and create difficult living conditions for its civilians. According to the Kyiv School of Economics, direct damage to Ukraine's infrastructure—calculated using the replacement cost method—amounted to USD 144 billion as of

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4 Міндовкілля попередньо оцінює збитки надрам України через війну в 10 трильйонів гривень, 28.03.2023 р.: https://www.radiosvoboda.org/a/news-mindovkillia-zbytky-nadram/32338768.html, 14.04.2024.

5 Офіс Генерального прокурора, Ракетні удари по будинку в Дніпрі, ТЦ в Кременчуці та інших цивільних об'єктах, 24.01.2023 р.: https://www.gp.gov.ua/ua/posts/raketni-udari-po-budinku-u-dnipri-tc-u-kremencuci-ta-insix-civilnix-objektax-povidomleno-pro-pidozru-komandiru-rosiiskogo-aviapolku, 10.04.2024.

March 2023.[6] However, the actual damage is far greater, as the replacement cost method offers only a baseline estimate of the value needed to replace destroyed assets. It does not capture economic losses resulting from lost opportunities such as job displacement, business closures, and the migration of the labour force and economically active population abroad. As World Bank President David Malpass stated, the projected cost of rebuilding the infrastructure destroyed in Ukraine as a result of Russian armed aggression amounts to approximately USD 350 billion as of the end of 2023.[7]

The study aims to examine and estimate the economic losses resulting from Russia's attacks on Ukraine's critical infrastructure, which is protected from targeting in armed conflicts, under international law. To achieve this aim, it is essential to provide an overview of critical infrastructure destroyed in missile attacks, evaluate the extent of the destruction, and identify the resulting economic losses and their impact on Ukraine's civilian population. This analysis will demonstrate that the actions of the Russian Federation are deliberately designed to create life-threatening conditions targeting a specific national group, and as such they qualify as genocide under Article 6(c) of the Statute of the International Criminal Court.[8]

Several methods are employed in the study. These are: an analytical method to identify damaged infrastructure, a synthesis method to summarize the data, a statistical method to collect, process, and analyse financial information on damage to critical infrastructure, and abstract-logical and generalization methods to organize the theoretical findings and draw conclusions.

1. Critical infrastructure facilities damaged or destroyed as a result of Russia's missile attacks

Since 24 February 2022, Russia has carried out nearly 5,000 missile strikes (including those from S-300 and S-400 systems) on civilian targets in Ukraine, along with approximately 3,500 airstrikes and 1,100 unmanned aerial vehicles (UAV) launches. These figures, as of 23 February 2023, were provided by General Oleksii

6 https://kse.ua/ua/about-the-school/news/za-rik-povnomasshtabnoyi-viyni-rosiya-zavdala-zbitkiv-infrastrukturi-ukrayini-na-mayzhe-144-mlrd/, 13.04.2024.

7 Critical to ‚front-load' aid to Ukraine as costs rise - IMF's Georgieva, https://www.reuters.com/markets/imfs-georgieva-sees-rising-cost-keep-ukraines-economy-going-2022-12-01/, 23.04.2024.

8 Statute of the International Criminal Court, adopted in Rome on 17 July 1998, Journal of Laws of 2003, No. 78, item 708.

Hromov, Deputy Head of the Main Operational Directorate of the General Staff of the Armed Forces of Ukraine.[9] The majority of these attacks targeted residential buildings and critical infrastructure. The term 'infrastructure' was first used in research publications of economists in the 1940s. P. Rosenstein-Rodan introduced it to describe a set of main sectors of the economy, such as roads, railways, dams, sewage systems, and other public utilities.[10] P. Nurkse believed that the main purpose of infrastructure was to ensure a rational and uninterrupted process of production, distribution, exchange and consumption in the national economy.[11] Infrastructure was also seen as a tool to meet the needs of the country's population.[12] As for the concept of critical infrastructure, the Cybersecurity and Infrastructure Security Agency of the US identifies 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital that their incapacitation or destruction would have a debilitating effect on security, economy, health or social life.[13] The Ukrainian Law "On Critical Infrastructure" defines critical infrastructure as the infrastructure that is of critical importance for the economy, national security and defence, the disruption of which could harm vital national interests.[14] Critical infrastructure includes the energy sector, healthcare facilities, communications and telecommunications, food production and distribution, transport, water supply and sewerage, pharmaceutical industry, financial sector, civil defence and emergency services. It can be assumed that destroying or damaging critical infrastructure threatens the survival of the country's civilian population, especially those who directly depend on it.

Russia's missile attacks on Ukraine's critical infrastructure are a clear violation of international humanitarian law. Article 48 of the Additional Protocol to the Geneva Conventions on the Protection of Victims of International Armed

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9 Росія за рік задала майже 8,5 тисячі ракетних та авіаційних ударів, Укрінформ, 23.02.2023 р.:https://www.ukrinform.ua/rubric-ato/3674032-rosia-za-rik-zavdala-po-ukraini-majze-85-tisaci-raketnih-ta-aviacijnih-udariv.html, 28.04.2024.

10 P. Rosenstein-Rodan, *Notes on the Theory of the "Big Push*, [in:] *Economic Development for Latin America International Economic Association Series*, red. H. S. Ellis, London, 1961, p. 57.

11 R. Nurkse, *Problems of Capital Formation in Underdeveloped Countries*, Oxford, 1966, p. 163.

12 W. W. Rostow, *The Stages of Economic Growth*, Cambridge, 1962, p. 324.

13 Cybersecurity and Infrastructure Security Agency of the USA. Critical Infrastructure Sectors: https://www.cisa.gov/topics/critical-infrastructure-security-and-resilience/critical-infrastructure-sectors, 01.05.2024 r.

14 Закон України Про критичну інфраструктуру, Відомості Верховної Ради (ВВР), 2023, № 5, ст.13.

Conflicts of 8 June 1977[15] requires that parties to the conflict at all times distinguish between civilian objects and military objectives and accordingly direct their operations only against military objectives.[16] International humanitarian law also prohibits "attacking or destroying, withdrawing or rendering useless objects essential to the survival of the civilian population."

According to data from the *Damaged in UA* project, which collects information from citizens, the government and local authorities on losses and damage across the country, 207,500 private cars, 153,900 residential buildings, 16,000 public transport units, 3,170 educational institutions, 1,216 health facilities and 1,800 cultural institutions were destroyed during the first year of the full-scale war.[17] In addition, 340 bridges and other road structures and 25,000 kilometres of local and national roads were destroyed or damaged.

The largest attack on Ukraine's critical infrastructure involved missile strikes on energy infrastructure facilities that began on 11 September 2022. Russia launched 12 Kalibr and X-101 cruise missiles, which hit the Zmiyiv Thermal Power Plant (one of the largest in Ukraine), the Kharkiv Thermal Power Plant and three high-voltage substations. It should be added that since 4 March 2022, the Zaporizhzhia Nuclear Power Plant, which is the largest nuclear power plant in Europe with 6 power units with a total capacity of 6,000 MW, has been controlled by the Russian armed forces. Consequently, it can no longer supply electricity to the integrated energy system of Ukraine. On 10 October 2022, the first massive missile attack on Ukraine's energy infrastructure took place, with 84 cruise missiles launched. As a result, 11 critical infrastructure facilities in 8 regions and in the country's capital were damaged.[18] Following the attack, Ukraine's national

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15 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted in Geneva on 12 August 1949, Journal of Laws of 1956, No. 38, item 171, annex; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted in Geneva on 12 August 1949, Journal of Laws of 1956, No. 56, item 171, annex; Geneva Convention for the Protection of Prisoners of War, adopted in Geneva on 12 August 1949, Journal of Laws of 1956, No. 38, item 171, annex; Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted in Geneva on 12 August 1949, Journal of Laws of 1956, No. 38, item 171, annex.

16 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted in Geneva on 8 June 1977, Journal of Laws of 1992, No. 41, item 175, annex.

17 Оцінка матеріальних втрат України: https://damaged.in.ua/damage-assessment, 09.05.2024.

18 Російські військові пошкодили 11 важливих інфраструктурних об'єктів: https://biz.censor.net/news/3372646/rosiyiski_viyiskovi_poshkodyly_11_vajlyvyh_infrastrukturnyh_obyektiv_u_8_regionah_ta_kyyevi_shmygal, 09.05.2024.

electricity company Ukrenergo introduced emergency power cuts in Ukraine and placed restrictions on electricity exports to the European Union. The most massive and destructive missile attacks, however, were launched between 15 and 23 November 2022, disabling almost half of the energy system in Ukraine. The main missile attacks targeted high-voltage substations and power lines, causing emergency systems to be activated at all nuclear power plants controlled by Ukraine, and leading to automatic shutdown of power units and closure of most thermal and hydropower plants. According to energy experts, Ukraine experienced its first-ever power blackout.[19] Some cities and regions were entirely cut off from electricity, and the energy system faced a significant capacity shortage, forcing Ukraine's National Electricity Company Ukrenergo to introduce planned power outages in all Ukraine over the following months. Although strikes on critical infrastructure did not decrease in 2023 and the Russian army continued to target objects prohibited under international law, Ukrenergo did not introduce regular and long-term power outages during the 2023/2024 heating season.

According to data available from the official websites of the General Staff of the Armed Forces of Ukraine, the Air Force Command of the Armed Forces of Ukraine and other official open sources, 908 cruise missiles of the X-101, X-555, X-59, X-22, X-32, Kalibr, Iskander, Tornado, Oniks types were fired between 11 September 2022 and 9 March 2023. 648 of them (74%) were intercepted and shot down by the Air Defence Forces. The remaining ones caused considerable damage to both energy infrastructure and other civilian critical infrastructure.

In 2023, Russia slightly reduced the intensity of missile attacks on critical infrastructure (including energy facilities), shifting its focus to Ukraine's seaports and port infrastructure. On 17 July 2023, the Russian Federation officially announced its withdrawal from the Grain Deal and immediately escalated its aggression, launching missile strikes and deploying Iranian Shahed-136 drones. In fact, Russia began attacking ports even before it withdrew from the Grain Deal, with a 22-kamikaze drone attack on a port in the Odessa region on 11 July 2023, which led to a fire at a grain and fuel terminal.

On 19 July 2023, a massive strike on the ports of Odessa and Chornomorsk (an important grain transportation hub) damaged port infrastructure, quays, and grain silos, resulting in the destruction of 60,000 tons of grain. The attack damaged almost 40% of the grain export infrastructure in the port of Chornomorsk and destroyed the facilities of Ukraine's agricultural companies: Kernel, Viterra,

[19] Україна пережила перший блекаут в історії: чому зупинились атомні енергоблоки та чим це загрожує: https://www.epravda.com.ua/publications/2022/11/28/694331/, 10.05.2024.

CMA CGM Group, and others.[20] On 20 July 2023, Russia fired Kalibr missiles and Shahed drones at Odessa and the Odessa Oblast, destroying grain storage facilities. Then it attacked the Danube ports, which had served as an alternative route for exporting Ukrainian grain to Africa and Asia. On the night of 24 July 2023, an attack was launched on the port of Reni, resulting in the destruction of port infrastructure, warehouses, oil and fuel tanks, administration buildings and a civilian ship. According to Ukraine's Minister of Communities, Territories and Infrastructure Development, 26 port infrastructure facilities and 5 civilian ships were damaged or partially destroyed during 9 days of Russian attacks.[21]

According to Forbes, between 18 July and 24 July 2023, Russia fired 75 Kalibr missiles and about 100 Shahed drones at the Odessa region, destroying 460,000 tons of grain and the grain infrastructure. The UN human rights monitoring mission said 47 people had been killed or injured in these attacks.

The destruction of the Kakhovka Hydroelectric Power Station is one of Russia's gravest international crimes. In the morning of 6 June 2023, the Kakhovka Power Station, which had been controlled by the Russian armed forces, was blown up from within. This caused massive destruction and damage to Ukrainian civilians, infrastructure, and the environment. It can be stated that Russia is responsible for one of Europe's largest ecological disasters, which constitutes the crime of ecocide under international law.[22] As a result of the dam breach and rising water levels, over 3,600 houses in 80 villages across the Kherson region were flooded. The flooding affected approximately 600 square kilometres, with an average water level of 5.61 meters. The draining of much of the Kakhovka reservoir had a devastating impact on numerous species, including 18 that are endangered. Moreover, it led to the closing of over 30 irrigation systems which had provided water for about 200,000 hectares of agricultural land in the Dnieper, Kherson and Zaporizhzhia regions. As a result of the flood, 150 tons of machine oil were spilt into the Dnieper River, which, according to Ukraine's National Security and Defence Council, will negatively affect numerous species in the Black Sea.

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20 Спалений коридор. Росія зупинила «зернову угоду» і почала обстрілювати порти, що працювали в її межах: https://forbes.ua/money/rosiya-znishchue-porti-ukraini-20072023-14931, 14.05.2024.

21 За останні 9 днів атак РФ пошкоджено та частково знищено 26 об'єктів портової інфраструктури та п'ять цивільних суден: https://interfax.com.ua/news/general/925319.html, 14.05.2024.

22 Stop Ecocide Foundation, Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text, Amsterdam 2021.

In March 2024, Russia resumed massive missile attacks on Ukraine's energy sector. On 22 March 2024, Ukraine's Minister of Energy stated that Russia had carried out the largest attack on the critical infrastructure of the Ukrainian energy sector in history.[23] During this attack, a total of 63 Shahed kamikaze drones and 88 missiles of various types were launched. The Ukrainian Defence Forces successfully neutralized 55 drones and 37 missiles through their air defence systems. At least 50 missiles and 8 kamikaze drones hit energy infrastructure facilities in the Vinnytsia, Ivano-Frankivsk, Lviv, Khmelnytskyi, Zaporizhzhia, Odessa, Dnipro, and Kharkiv regions. As a result, emergency blackouts for households and businesses were introduced in several regions of Ukraine. Another attack targeted the Dnipro Hydroelectric Power Plant, consisting of two stations (HPP-1 and HPP-2), with a total of eight missiles fired. One missile struck an HPP-2 tower, causing extensive damage. The large-scale attack triggered an emergency shutdown of 10 power units in Ukraine's integrated energy system, impacting numerous energy infrastructure facilities. In total, as a result of the missile attack, Ukraine's energy grid lost 2,000 megawatts of generating capacity, with 1,500 megawatts now covered by costly emergency support from European countries. Kharkiv's energy infrastructure is in the most critical condition. According to the city's mayor, missile attacks have destroyed Kharkiv's thermal power plant along with all transformer substations.[24]

2. Economic losses caused by attacks on Ukraine's critical infrastructure

The replacement cost method is commonly used to estimate economic damage resulting from attacks on critical infrastructure. It allows for calculating direct economic losses by estimating the cost of constructing a facility that will be equal or equivalent to the destroyed one in terms of its properties, as defined in the Ukrainian National Standard No. 1 'General Principles of Property and Property Rights Valuation.'[25] A similar method, known as the cost approach, is recommend-

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23 Путін знову хоче занурити Україну в темряву. Яких втрат зазнала енергетика через найбільшу за весь час атаку: https://www.epravda.com.ua/publications/2024/03/22/711517/, 15.05.2024.

24 У Харкові зруйновані ТЕЦ та усі трансформаторні підстанції: https://www.epravda.com.ua/news/2024/03/24/711550/, 05.05.2024.

25 Постанова Кабінету Міністрів України Про внесення змін до Національного стандарту № 1 Загальна засади оцінки майна і майнових прав, від 10 вересня 2003 р., N 1440.

ed when relevant market documentation is unavailable, to ensure that the injured party is returned to their pre-damage position. This approach is also suggested by the European Group of Valuers' Association.[26] The replacement cost method is employed by the Kyiv School of Economics to estimate economic losses resulting from attacks on Ukraine's critical infrastructure. According to these estimates, as of March 2023, approximately USD 144 billion would be needed to rebuild damaged or destroyed critical infrastructure facilities. This includes rebuilding residential infrastructure (USD 53.6 billion), transport infrastructure (USD 36.2 billion), and industry (USD 11.3 billion).

As of June 2023, the Kyiv School of Economics raised its estimate of direct losses to USD 150.5 billion. Indirect losses, including lost income in different economic sectors, additional costs arising from Russian aggression, and anticipated future economic impacts, are projected at USD 265.6 billion. The largest indirect losses affect business infrastructure and industry (USD 51.5 billion),

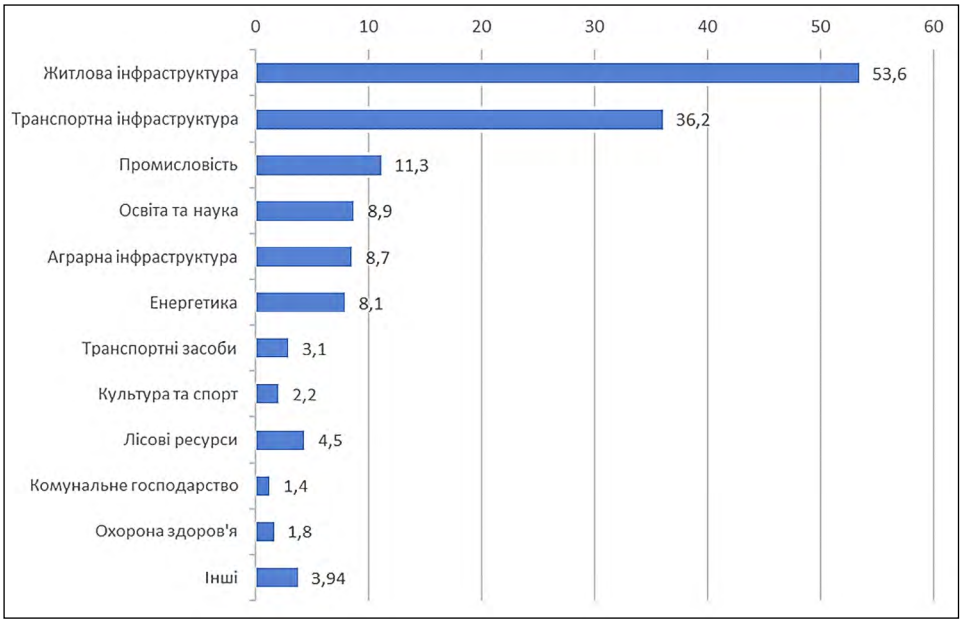

Figure 1 – Direct losses to Ukraine's infrastructure according to the replacement cost method (USD billion).

[26] The European Group of Valuers' Associations (TEGOVA) Guidance on Applying EVS in Wartime Circumstances: https://tegova.org/static/19db5ee736f546123a600ae5e4f0a903/TEGOVA-EVSB%20Guidance%20on%20Applying%20EVS%20in%20Wartime%20Circumstances%2020.12.2022.pdf, 07.05.2024.

agriculture and land (USD 40.3 billion), retail trade (USD 33.85 billion), and fuel and energy (USD 27.2 billion). The regions that suffered the most extensive damage to critical infrastructure include Donetsk Oblast (USD 38.8 billion), Kharkiv Oblast (USD 31.08 billion), Luhansk Oblast (USD 17.03 billion), and the Zaporizhzhia Oblast (USD 13.37 billion).

According to the Kyiv School of Economics, since January 2024, the amount of direct damage to Ukraine's infrastructure caused by Russian aggression has increased to USD 155 billion and continues to grow.[27]

For comparison, examining the financial needs resulting from economic damage during the first four months of the full-scale Russian armed aggression is worthwhile. The comparison is interesting as during this period the Russian armed forces focused primarily on military targets rather than launching large-scale attacks on Ukraine's critical infrastructure, a strategy that has intensified since the autumn of 2022.

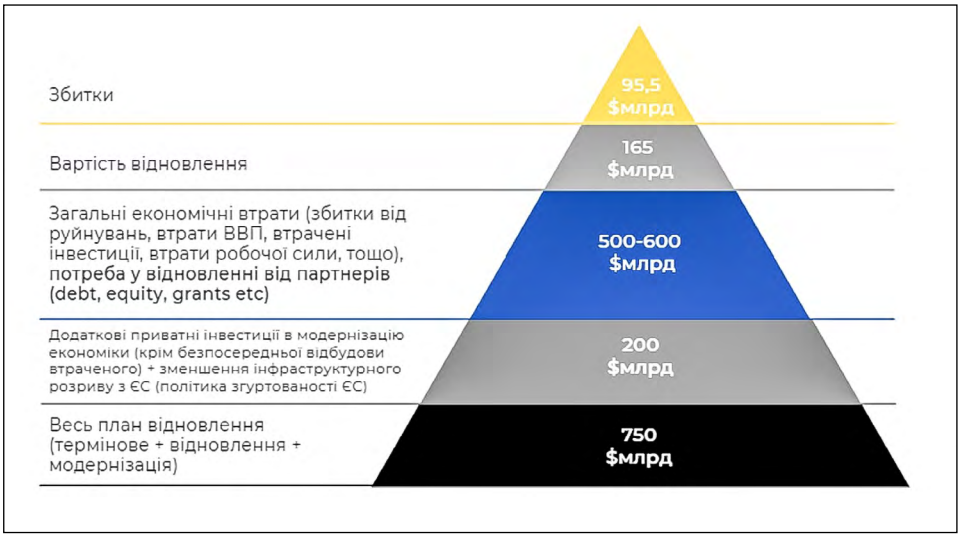

Figure 2 – Financial support needed to cover economic losses (in USD billions) in the period between 24 February 2022 and 13 June 2022.[28]

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27 Загальна сума збитків, завдана інфраструктурі України, зросла до майже USD155 млрд:https://kse.ua/ua/about-the-school/news/zagalna-suma-zbitkiv-zavdana-infrastruktu-ri-ukrayini-zrosla-do-mayzhe-155-mlrd-otsinka-kse-institute-stanom-na-sichen-2024-roku/, 04.05.2024.

28 Київська Школа Економіки спільно з Міністерством розвитку громад і територій, у співпраці з іншими органами державної влади, за координації Міністерства реінтеграції тимчасово окупованих територій, *Звіт про прямі збитки інфраструктури, непрямі*

As shown in Figure 2, losses incurred during the first four months of full-scale Russian military aggression are estimated at USD 95.5 billion. The total cost to restore these losses amounts to USD 165 billion. In contrast, a comprehensive restoration plan—including reconstruction and modernization efforts—is projected to require a total of USD 750 billion.

According to the estimates, Ukraine's direct economic losses increased from USD 54.3 billion as of March 2022 to USD 157.2 billion by January 2024.

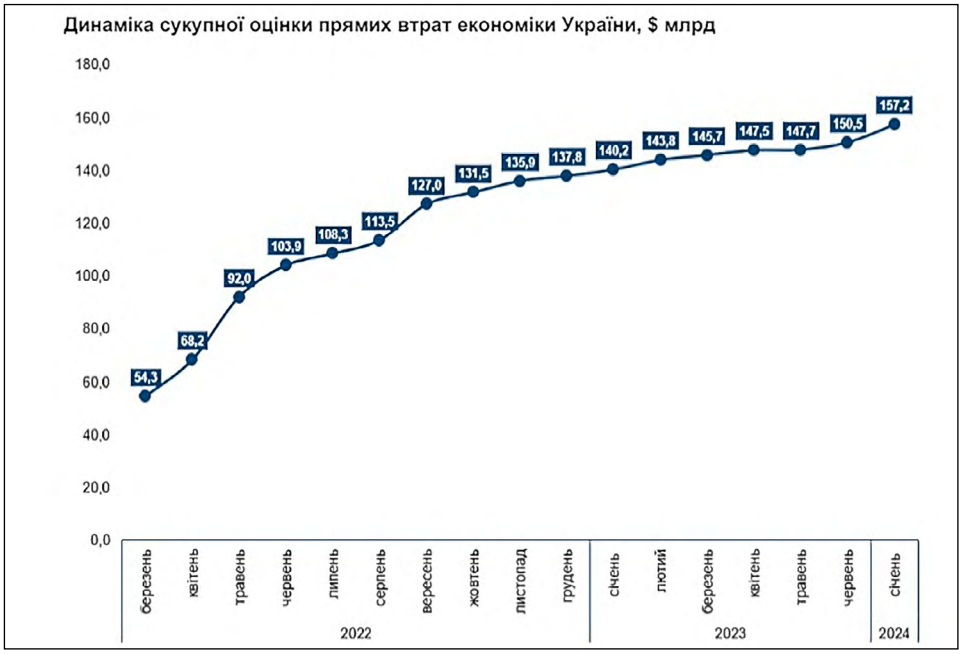

Figure 3 – Ukraine's direct economic losses over the period from March 2022 to January 2024 (USD billions).[29]

At this stage, accurately estimating damage to critical infrastructure remains difficult, primarily due to the ongoing Russian aggression and continued missile strikes across Ukraine. Damage estimates available from open sources are based

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втрати економіки від руйнувань внаслідок військової агресії росії проти України, та попередня оцінка потреб України у фінансуванні відновлення, Київ 2022.

29 Київська Школа Економіки спільно з Міністерством розвитку громад і територій, у співпраці з іншими органами державної влади, за координації Міністерства реінтеграції тимчасово окупованих територій, Звіт про прямі збитки інфраструктури від руйнувань внаслідок військової агресії Росії проти України станом на початок 2024 року, Київ 2024.

on the statements made by Ukrainian government officials, political leaders, and heads of international organizations. As part of the Plan for the Reconstruction of Ukraine, the National Council for the Recovery of Ukraine from the War prepared a report entitled "Audit of Damage Suffered as a Result of the War."[30] According to the report, the total economic losses caused by Russian aggression and infrastructure destruction (including losses from the reduced GDP, decreased foreign direct investment, labour outflows, and increased defence and social support costs) are estimated at between USD 564 billion and USD 600 billion. By comparison, Ukraine's gross national product in 2021, the year before the war, was only USD 200.1 billion according to the World Bank.[31] However, this amount was calculated in July 2022 when the report was published, so it is not relevant now, as Russia has escalated its missile attacks and destruction since then.

If we take into account economic losses in Ukraine's infrastructure caused by Russia's attacks on the energy system during the heating season, the total losses in the energy sector exceed USD 10 billion, according to the United Nations Development Program (UNDP)[32]. Transformer substations and power plants were most affected by the attacks. According to preliminary estimates by Ukraine's national hydropower company, Ukrhydroenergo, the losses caused by missile attacks on hydroelectric facilities amount to approximately UAH 40 billion.[33] DTEK-energy, a private energy company, estimates the damage caused by Russia's missile strike that destroyed DTEK's thermal power plants at UAH 6 billion.[34] Ukraine's National Electricity Company Ukrenergo and National Nuclear Energy Company Energoatom have yet to release final data on losses from missile attacks. In addition to direct damage to energy infrastructure, it is also important to consider lost revenue from electricity production by both state and private companies, reduced income from green energy sources, lower revenues for Ukrenergo and

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30 Аудит збитків, понесених внаслідок війни: https://www.kmu.gov.ua/storage/app/sites/1/recoveryrada/ua/audit-of-war-damage.pdf, 04.05.2024.

31 Data Commons. Ukraine: https://datacommons.org/place/country/UKR?utm_medium=explore&mprop=amount&popt=EconomicActivity&cpv=activitySource%2CGrossDomesticProduction&hl=en, 06.05.2024 r.

32 Ukraine Energy Damage Assessment: https://www.undp.org/ukraine/publications/ukraine-energy-damage-assessmen, 04.05.2024.

33 «Укргідроенерго» оцінює збитки через ракетні удари Росії на 40 млрд грн: https://finbalance.com.ua/news/ukrhidroenerho-otsinyu-zbitki-cherez-raketni-udari-rosi-na-40-mlrd-hrn, 09.05.2024.

34 В ДТЕК Енерго оцінюють збитки від російських атак у 6 млрд грн: https://forbes.ua/news/v-dtek-energo-otsinyuyut-shkodu-vid-rosiyskikh-atak-mayzhe-v-6-mlrd-grn-22032023-12562, 28.04.2024.

regional operators due to decreased electricity distribution, and lost income from energy exports. Therefore, the actual economic losses are significantly higher than those estimated solely from the damage to facilities targeted by missile attacks.

Power outages and restrictions placed across Ukraine had a detrimental influence on the national economy. According to the National Bank of Ukraine, the late spring and summer of 2022 showed initial signs of economic recovery following the shock of the full-scale invasion. However, this recovery was abruptly halted by an electricity shortage, which forced many companies, organizations, and entrepreneurs to either fully suspend their operations, or reduce production and services. Consequently, the electricity shortage caused by Russian attacks on energy infrastructure led to the GDP drop of 31.4% year-on-year in the fourth quarter.[35] It should be noted that some Ukrainian businesses and citizens have gradually adapted to power outages by purchasing generators, inverters, and other independent power sources. In 2022, generator imports to Ukraine surged more than fiftyfold, with a total of 669,400 units officially imported.[36]

When estimating the economic losses from attacks on Ukraine's critical infrastructure, it is necessary to include the costs of mine clearance and removal of unexploded ordnance from critical infrastructure facilities and the surrounding areas. This is in line with the methodological guidelines of the European Valuation Standards Board. According to the CASE Ukraine project, funded by the International Solidarity Fund as part of Poland's development cooperation program by the Ministry of Foreign Affairs, the mined area in Ukraine covers an area between 132,000 and 300,000 square meters 132,000 and 300,000 square meters. These figures are not yet final. Given the extent of the mined territory, the estimated cost for full demining ranges from USD 400 billion to USD 900 billion.[37]

Attacks on Ukraine's port infrastructure have led to losses for the Ukrainian Sea Ports Authority exceeding UAH 1 billion, with nearly 200 port facilities and seven civilian vessels destroyed. Kernel Holding, Ukraine's largest grain producer and exporter, estimated losses from the initial large-scale missile attacks on the ports of Odessa and Chornomorsk at approximately USD 60 million, with an additional USD 8 million in grain losses. During the port blockade in 2022,

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35 Коментар Національного банку України щодо зміни реального ВПП в 2022 році: https://bank.gov.ua/ua/news/all/komentar-natsionalnogo-banku-schodo-zmini-realnogo-vvp-u-2022-rotsi, 29.04.2024.

36 Імпорт генераторів в Україну зріс у понад 50 разів: https://biz.censor.net/news/3391662/import_generatoriv_v_ukrayinu_zris_za_rik_u_ponad_50_raziv, 17.05.2024.

37 Ціна розмінування: до USD900 млрд і десятки років: https://cost.ua/tsina-rozminuvannya-do-900-mlrd-i-desyatky-rokiv, 29.04.2024.

Ukraine faced daily losses nearing USD 170 million. In 2023, despite ongoing missile attacks and damage to port infrastructure, Ukraine successfully restored its maritime corridor, bringing sea exports closer to pre-invasion levels.

The damage inflicted by Russia on the Kakhovka Hydroelectric Power Station has resulted in severe losses for the Ukrainian economy. Preliminary analyses conducted by the Ministry of Economy of Ukraine and the KSE Institute estimate losses in the housing sector at approximately USD 950 million, primarily due to the flooding of residential buildings and private homes in the Kherson region. The transport infrastructure has also suffered, with losses estimated at USD 311 million (290 kilometres of roads were destroyed). Industrial losses are projected to reach nearly USD 105 million, largely due to the flooding of 28 major industrial facilities. Furthermore, the estimated losses from the depletion of natural resources stand at nearly USD 1.5 billion, primarily due to the leakage of 150 tons of petroleum products during the flood.[38]

According to the UN and Ukrainian government estimates, the overall value of losses from the Kakhovka dam destruction amounts to USD 14 billion.[39] The cost of rebuilding the hydroelectric plant and restoring it to operational condition is projected at USD 5.04 billion. Moreover, the flooding caused extensive damage to many residential buildings, infrastructure, and cultural sites, including historical buildings and museums. The UN report indicates that the most significant long-term damage was inflicted on the natural environment, with the estimated value of lost natural resources (wildlife, plant life, agricultural land, and drinking water) exceeding USD 11 billion.

3. Impact of attacks on critical infrastructure on the living conditions in Ukraine

Russia's ongoing attacks on civilian infrastructure and residential buildings constitute a gross violation of international treaties and actively contribute to conditions that may force Ukrainian citizens to abandon their homes. The destruction of residential buildings, educational, medical, and cultural institutions, along with

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38 У Мінекономіки розповіли про прямі збитки України від руйнування Каховської ГЕС: https://www.radiosvoboda.org/a/news-kakhovska-hes-zbytky-ukrayiny-minekonomiky/32483617.html.

39 Руйнування греблі Каховської ГЕС завдало Україні збитків на 14 мільярдів доларів США: звіт Уряду України та ООН: https://ukraine.un.org/en/248860-post-disaster-needs-assessment-report-kakhovka-dam-disaster, 02.05.2024.

energy infrastructure, does not give the Russian Federation a military advantage. Instead, it aims to make living conditions unbearable and ultimately destroy the Ukrainian population. The actions against the Ukrainian people can be classified as crimes under international law, as evidenced by many factors (mass killings of civilians because of their nationality, deportations of children, and deliberate missile attacks on critical infrastructure).[40] These crimes meet at least two criteria for the crime of genocide. Under the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly in 1948, genocide is defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such:

- killing members of the group
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.[41]

The Convention defines genocide but does not specify who is authorized to prosecute genocide at the international level. The document that provides for jurisdiction and classifies genocide as one of the most serious crimes under international law is the Statute of the International Criminal Court (Rome Statute). Crimes committed by Russian soldiers, in particular attacks on critical infrastructure and other civilian objects, meet the following criteria defined in Article 6 of the Rome Statute: an act committed with intent to destroy, in whole or in part, any national, ethnic, racial or religious group as such by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.[42] It is important to note that the crime of genocide is not only the intentional act itself, but also the intent to destroy a group in whole or in part. Obviously, attacks on critical infrastructure inflict the conditions that can lead to the physical destruction of not just one group, but the Ukrainian nation. The deliberate nature of these attacks is evident, their precise targeting rules out coincidence. It should be emphasized that all attacks were launched in

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40 Чому війна Росії проти України є геноцидом українського народу: https://lcf.ua/thought-leadership/litigation/chomu-vijna-rosiyi-proti-ukrayini-ye-genotsidom-ukrayinskogo-narodu/, 02.05.2024.

41 Convention relating to the Status of Refugees, adopted in Geneva on 28 July 1951, Journal of Laws of 1991, No. 119, item 516.

42 Statute of the International Criminal Court adopted in Rome on 17 July 1998, Journal of Laws of 2003, No. 78, item 708.

the autumn-winter period when their impact was most severe. Their scale and timing clearly indicate their intent—to create living conditions aimed at the partial destruction of the Ukrainian population. The daily lives of many Ukrainians were transformed into a struggle for survival as a result of missile attacks on critical infrastructure.

Russia's ongoing missile attacks on cities and civilian infrastructure, along with the destruction of Ukraine's energy system during the heating season, constitute violations of numerous international agreements. By targeting critical infrastructure, Russia is intentionally killing Ukrainians, applying psychological pressure, and creating living conditions designed to destroy the population partially. In areas under its control, Russia engages in systematic repression, mass killings, torture, violence against civilians, forced deportation of Ukrainian children, theft of grain and agricultural products, destruction of agricultural machinery, and exploitation of farmland. All these actions serve as clear evidence of the aggressor's intent to destroy the Ukrainian nation.

It is estimated that Russia has spent approximately USD 7.5 billion on extensive missile attacks against Ukraine[43] and around USD 115 billion overall on its full-scale armed aggression.[44] While comprehensive estimates of total losses from the destruction of Ukraine's critical infrastructure—through aerial bombardment and artillery strikes on residential areas in cities—are unavailable, the scale and intensity of these attacks demonstrate that Russia employed substantial financial and technical resources to achieve its goal, i.e., to create living conditions for Ukrainians designed to result in their partial destruction. Economic losses from attacks on critical infrastructure are estimated at USD 500-600 billion. Despite this damage, Ukraine's economy has not collapsed (GDP decline during the war has been about 30%), and the state has managed to maintain its budgetary functions and support its Defence Forces, due in large part to substantial aid from allies.

The main goal of Russia's attacks and destruction is to inflict conditions of life designed to physically destroy part of the Ukrainian nation. Data from Ukraine's Ministry of Development of Communities and Territories shows that over 2.4 million Ukrainians lost their homes due to Russian armed aggression. The number of applications for compensation for property damage resulting

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43 РФ за 5 місяців витратила на удари по Україні USD7.5 млрд: https://focus.ua/uk/voennye-novosti/554103-rf-za-5-mesyacev-potratila-na-udary-po-ukraine-7-5-mlrd-analitiki, 02.05.2024.

44 Росія витратила на війну з Україною майже USD155 млрд і всі танки, які підготувала перед вторгненням. Розрахунки Forbes: https://forbes.ua/war-in-ukraine/rosiya-vitratila-na-viynu-z-ukrainoyu-mayzhe-115-mlrd-i-vsi-tanki-yaki-mala-pered-vtorgnennya-rozrakhunki-forbes-24022023-11970, 02.05.2024.

from this aggression, submitted via the 'DIIA' app and regional administrative service centres, now exceeds 300,000 in the area of 23 square kilometres.[45] Due to ongoing military operations and the need to prioritize defence spending, Ukraine is currently unable to address the full scope of damage to partially or completely destroyed residential buildings. An additional issue arising from Russia's attacks on critical infrastructure concerns internally displaced persons (IDPs) who remain within Ukraine's borders. According to the Ministry of Social Policy, 4.9 million Ukrainian citizens have been officially recognized as internally displaced due to military actions and missile strikes. This substantial number of IDPs places an additional strain on both the state and local budgets to address their social needs, including housing support for those unable to secure their own accommodation.[46] Undoubtedly, the major challenge for the Ukrainian nation and Ukraine is the mass migration of Ukrainian citizens abroad. According to official statistics from Ukraine's Border Guard Service, 8,174,189 people have left Ukraine, out of which 5,044,033 registered under the temporary protection system in the EU countries.[47]

This exodus of Ukrainian citizens due to Russia's full-scale armed aggression has led to a significant population decrease and a loss of workforce and skilled professionals. Research by the Economic Strategy Center, in collaboration with Kyivstar, a Ukrainian mobile operator, and the National Bank of Ukraine, indicates that 87% of those who left Ukraine are women with children. Of the citizens who left, 65% are of working age, and 70% hold higher education degrees.[48] Some of those who left the territory of Ukraine do not intend to return to Ukraine after the attacks cease and the aggression ends. It should be added that as Ukrainian citizens integrate into foreign labour markets and educational systems, they are less likely to return to their country. Russia's deliberate targeting of the infrastructure critical to the survival of the Ukrainian people constitutes an attempt to partially destroy the nation itself. Every nation's future depends on its development within its own borders. The large number of internally displaced persons, migration of

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45 2.4 мільйони українців втратили домівки за час війни: https://www.epravda.com.ua/publications/2022/11/7/693516/, 02.05.2024.

46 Міністерство соціальної політики України. Внутрішньо переміщені особи: https://www.msp.gov.ua/timeline/Vnutrishno-peremishcheni-osobi.html#, 04.05.2024.

47 Operation data portal. Ukraine refugee Situation: https://data.unhcr.org/en/situations/ukraine, 04.05.2024.

48 Наскільки масштабною буде демографічна криза в Україні і як повернути біженців: https://texty.org.ua/fragments/109074/yakym-ye-masshtab-majbutnoyi-demohrafichnoyi-kryzy-v-ukrayini/

millions abroad, and humanitarian crisis in many regions of Ukraine constitute a significant obstacle to Ukraine's economic growth.

The demographic crisis due to the mass exodus of Ukrainian citizens caused by military operations and attacks on residential buildings and critical infrastructure may, in the long term, have more dire economic consequences for the Ukrainian nation than the direct damage resulting from the destruction of infrastructure. Ukraine is losing its citizens, its workforce and skilled professionals. Therefore, the rapid restoration of critical infrastructure, the energy system, and housing damaged by Russian missile attacks, alongside demining efforts, are vital to establishing safe living and working conditions in Ukraine. These efforts are essential to encourage the return of Ukrainian citizens, prevent a drastic demographic crisis, and counteract the destruction of the Ukrainian nation that Russia intends.

By deliberately targeting seaports and grain storage facilities, Russia sought to halt Ukraine's agricultural exports, driving up global food prices and potentially causing famine in parts of Africa. The scale of destruction caused by the Russian armed forces increased dramatically after 6 June 2023, when they caused an explosion at the Kakhovka hydroelectric power plant dam, unleashing severe environmental damage across the region.[49] This incident, given its impact, could be classified as ecocide—a calculated act by Russian forces aimed at creating destructive living conditions for the Ukrainian population in the Kakhovka area. According to UN estimates, this explosion directly affected approximately 100,000 people across the Kherson, Dnipro, and Zaporizhzhia regions.

Conclusions

Attacks on Ukraine's critical infrastructure have inflicted vast economic losses and put the lives and health of millions of Ukrainians at risk, which may lead to the partial destruction of the Ukrainian nation. Direct losses due to these attacks, based on the replacement cost method, exceed USD 114 billion. Total losses, as estimated by Ukrainian analytical centres, government authorities, and international financial organizations, range from USD 500 to USD 600 billion. Over the course of one year of Russian aggression, 207,500 private cars, 153,900 residential buildings, 16,000 public transport units, 3,170 educational institutions, 1,216 health care facilities, and 1,800 cultural institutions were destroyed. One

[49] Information available on the following website: https://www.ukrinform.ua/rubric-other_news/3720776-pidriv-rosianami-kahovskoi-ges-usi-novini.html, 15.05.2024.

of the most extensive attacks on Ukrainian infrastructure were missile strikes on the energy system that commenced on 11 September 2022. Targeted strikes on thermal and hydroelectric power plants, substations, and power lines left some cities and regions entirely without electricity and caused a significant shortfall in the energy grid, forcing the Ukrainian authorities to introduce planned power outages in all regions. These attacks on the energy system have severely damaged Ukraine's economy. The primary aim of Russia's attacks appears to be to create unlivable conditions and to exert psychological pressure on the Ukrainian people. Those whose homes or property were destroyed by missile attacks have been forced to relocate within Ukraine (obtaining the status of internally displaced persons) or to seek temporary protection abroad.

The attacks on critical infrastructure not only violate many international agreements, including international humanitarian law, but given their aim and target group, they may also meet the criteria for genocide under Article 6(c) of the Rome Statute. They are intended to destroy the Ukrainian nation. Through missile strikes on critical infrastructure, Russia is deliberately causing civilian casualties and creating unlivable conditions, placing immense psychological pressure on the Ukrainian population.

Through its deliberate attacks on critical infrastructure, Russia has inflicted not only substantial economic damage but also contributed to a humanitarian crisis in many regions of Ukraine. Ukraine's economic situation is further strained by the fact that 2.4 million citizens have lost their homes. Moreover, approximately 4.9 million Ukrainians have been forced to leave their place of residence and move to other parts of Ukraine, obtaining the status of internally displaced persons. Over 8 million people have left the territory of Ukraine altogether. This large-scale displacement may lead to a future demographic crisis in Ukraine. Therefore, it is essential to rebuild critical infrastructure, energy facilities and destroyed houses, as well as to clear the territory of mines to ensure safe living and working conditions in the country. It should also be borne in mind that some parts of Ukraine are currently under Russian occupation, which makes it impossible to estimate economic losses there. Furthermore, it is impossible to assess the scale of destruction or the situation of Ukrainian citizens who live in the occupied territory.

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Part III

Status of Russian Crimes and the Justification of Establishing a Special International Criminal Court

Iryna Kozak-Balaniuk

The Status of Russian Crimes in the Territory of Ukraine

Introduction

As part of Russia's armed aggression, the Russian army is committing the gravest international crimes against the Ukrainian people. In addition to the crimes stipulated in the Rome Statute (such as genocide, crimes against humanity, and war crimes), the Russian army has committed the crime of ecocide (a crime against the natural environment in Ukraine) and has carried out a number of cyberattacks that have a huge impact on the civilian population.

1. Acts Constituting the Crime of Genocide

In 1946, the UN General Assembly passed a resolution stating that: "Genocide is a denial of the right to existence of entire groups of people, just as murder is a denial of the right to life of individual human beings (...)." As J. Siekiera aptly recalls in his expert analysis, in the indictment against the main war criminals before the Nuremberg Military Tribunal, the following the charge of genocide was formulated: "The accused committed systematic, intentional genocide, that is, the extermination of racial and national groups of the civilian population in the occupied territories in order to destroy specific races, social classes, nations, peoples, national, and religious groups, including, above all, Jews, Poles, and Romani people"[1].

[1] Expertise of Joanna Siekiera available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 10.10.2024.

The element of *mens rea* in the crime of genocide, which distinguishes it from other crimes under international law, is the intention to destroy, in whole or in part, a specific group protected under international regulations such as the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute. Genocide, along with crimes against humanity and war crimes, is one of the three crimes subject to universal jurisdiction because their prohibition is a *jus cogens*[2] norm. The groups protected under these international documents include national, ethnic, racial, and religious groups. Therefore, an act directed against any other group cannot be classified as the crime of genocide. In the case of Russian armed aggression against Ukraine, it can be clearly stated that all Russian crimes are directed against the civilian population in Ukraine, some of these acts, due to specific circumstances, may be classified as the crime of genocide. Moreover, it should be remembered that in the case of genocide, the intention to destroy must also be proven, which P. Fris highlights in his analysis[3]. Specifically, the current Kremlin regime pursues a similar policy to Stalin's- denying the existence of the Ukrainian nation and taking actions aimed at creating conditions calculated to destroy it. Although it is impossible under current circumstances to starve a part of the nation (millions of Ukrainians) as was done during the 1932-33 genocide "Holodomor," similar outcomes can be achieved using other methods. The intention to commit the crime of genocide is also evidenced by the statement of the Kremlin regime about Ukraine[4] as a state and the Ukrainian nation . The most obvious examples of genocide committed by the Russians are the atrocities in Bucha and Izyum and the deportation of Ukrainian children (citizens of Ukraine).

The murders, among others, in Bucha and Izyum, are probably the cruellest acts committed in Europe since the armed conflict in the territory of the former Yugoslavia. According to the document "Elements of a Crime", which provides additional interpretation of the definitions of crime in the Rome Statute, the elements of genocide include:

a) the perpetrator killed one or more persons;
b) the person(s) belonged to a specific national, ethnic, racial, or religious group;

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2 Y. M. Dutton, *Prosecuting Atrocities Committed in Ukraine: New Era for Universal Jurisdiction?*, "Case Western Reserve Journal of International Law" 2023, Vol. 55, p. 399-400.

3 Expertise of Pavlo Fris available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 10.10.2024.

4 D. Azarov, D. Koval, G. Nuridzhanian, V. Venher, *Genocide Committed by the Russian Federation in Ukraine: Legal Reasoning and Historical Context*, "SSN Papers" 2022, Vol. 27.

c) the perpetrator intended to destroy, in whole or in part, this national, ethnic, racial, or religious group as such;
d) the conduct took place in the context of a clear pattern of similar conduct directed against that group, or was the conduct that could itself cause such destruction[5].

During the aforementioned crimes, more than one person was killed. It is estimated that over 400 Ukrainian citizens were killed in Bucha, although the final number has not been confirmed. In Izyum, hundreds of Ukrainian citizens were murdered, with estimates reaching up to 1,000, and over 400 bodies[6] were found in one mass grave. All the victims belonged to a single group protected by the definition of a national group. The fact that both crimes are not the only ones committed by Russians against Ukrainians indicates that the murders in Bucha and Izyuma demonstrate a clear pattern of similar conduct directed against the Ukrainian nation. This confirms that the perpetrator intended and still intends to destroy the Ukrainian nation in part.

Another act that meets the criteria of genocide is the forced transfer and deportation of Ukrainian children. Although the ICC issued arrest warrants for V. Putin and M. Lvova-Belova based on reasonable grounds to believe that both are responsible for the war crime of deporting and forcibly transferring Ukrainian children[7], these acts also fulfil the criteria for genocide. According to the definition contained in the "Elements of Crimes" document, the crime of genocide in the form of forced transfer of children from one group to another must meet the following criteria:

a) the perpetrator forcibly transferred one or more persons;
b) the person(s) belonged to a specific national, ethnic, racial, or religious group;
c) the perpetrator intended to destroy, in whole or in part, that national, ethnic, racial, or religious group as such;
d) the transfer occurred from that group to another group;
e) the person(s) were under the age of 18 ;

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5 Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03. V.2 and corrigendum), part II.B (hereinafter – Elements of Crime).

6 Information on the website: https://web.archive.org/web/20220915215245/https://www.reuters.com/world/europe/mass-grave-more-than-440-bodies-found-izium-ukraine-police-2022-09-15/ [dostęp z: 09.09.2024].

7 Press release available on the following website: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and. Furter information about the investigation into the situation in Ukraine available on the website: https://www.icc-cpi.int/situations/ukraine, 09.09.2024.

f) the perpetrator knew or should have known that the person(s) were under the age of 18;
g) the conduct took place in the context of a clear pattern of similar conduct directed against that group, or was the conduct that could itself cause such destruction[8].

Most of the elements listed above are indisputable, while the intention to destroy the national group in part and the fact that the forced transfer of Ukrainian children occurred in the context of a clear pattern of similar conduct directed against the national group should be understood in a sense as common. The Ukrainian authorities have received over 20,000 reports of the kidnapping/abduction of Ukrainian children[9] — transferred both from one part of the Russian-occupied Ukrainian territory to another, and deported from occupied Ukrainian territory to Russia. The first case is considered forced transfer since it occurred within the territory of one state (albeit occupied by Russia), while the second case constitutes deportation due to crossing the state border. In the expert opinion of V. Pylypenko[10], the Author cites the statement of the Commissioner for Human Rights under the Verkhovna Rada of Ukraine, according to which during the full-scale armed aggression of the Russian Federation against Ukraine, which began on February 24, 2022, numerous violation of the fundamental rights of the child were identified: the right to safety, life, education, health, personal development, preservation of identity, citizenship, family ties, privacy, family life, inviolability of the home, care, and protection by the state. It is also emphasized that Ukrainian children die and become victims of mutilation, deportation, abduction and illegal detention.

As V. Pylypenko presents, based on estimates by the Ukrainian Commissioner for Children's Rights, since May 2, 2022, more than 181,000 children have been illegally transported to Russia. According to official data from the aggressor state, 183,168 children were transferred from Ukraine to Russia during this period. In summer 2022, the Russian military command reported that over 307,000 Ukrainian children had been taken to Russia. Statistics also indicate that 4,177 children from childcare facilities were evacuated from Ukrainian territory,

8 Elements of crime, p. 3.
9 Information available on the following website: https://www.hrw.org/news/2023/04/06/investigation-launches-forcible-transfer-children-ukraine, 09.09.2024.
10 Expertise of Volodymyr Pylypenko available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 10.10.2024.

including 2,382 orphans or children deprived of parental care[11]. For such children, especially orphans, there is a risk of further illegal adoption in Russia, bypassing the established international adoption procedures in Ukraine. For such children, especially orphans, there is a risk of further illegal adoption within Russian territory, bypassing the established international adoption procedures in Ukraine. It should also be emphasized that Ukrainian children who fall victim to these acts are subsequently subjected to a forced process of "Russification" aimed at erasing their Ukrainian identity[12]. The high numbers of affected children indicate two significant aspects: firstly, the forced transfer and deportation of Ukrainian children are systematic and carried out on a large scale, confirming the perpetrator's intent to partially destroy the national group and affect its future demographics. Secondly, the forced transfer and deportation of Ukrainian children have occurred and continue to occur within a clear pattern of similar behaviour directed against the national group. As V. Pylypenko points out, the scale of forced transfer and deportation of Ukrainian children is extensive, covering the Kharkiv, Zaporizhzhia, Chernihiv, and Kherson regions. The children, victims of these acts, are then subjected to "russification," and in some cases, even pass through so-called "filtration centres." The experiences of Ukrainian child victims of forced transfer and deportation unequivocally show that the perpetrator acts with genocidal intent, as the perpetrator's actions aim to erase the children's Ukrainian nationality and identity, which is not typically the case with war crimes or crimes against humanity.

2. Acts Constituting Crimes Against Humanity

Russian forces are also committing some of the most cruel crimes against humanity against the civilian population in the territory of Ukraine. It is important to note that Russian troops had already perpetrated crimes against humanity against the Ukrainian civilian population even before the full-scale armed aggression on February 24, 2022. The actual invasion of Crimea by Russian soldiers, its subsequent occupation and unlawful annexation, and the armed conflict in the eastern part of Ukraine enabled Russia to prepare for a full-scale military invasion. This

11 A. Frantsuz, N. Stepanenko, D. Shevchenko, *Abduction of Ukrainian Children during Full-Scale Invasion*, "Journal of International Legal Communication" 2023, Vol. 9, No. 2, p. 19.

12 L. Muelrath, *Never again" yet another genocide: Russia's unlawful forced transfer and adoption of Ukrainian children*, "Wisconsin International Law Journal" 2024, Vol. 41, No. 2, p. 221.

preparation included intimidating the Ukrainian civilian population through acts that qualify as crimes against humanity.

It is necessary to attempt to summarize the number of civilians who have fallen victim to Russian crimes during the Russian armed aggression. Unfortunately, data presented by international institutions and organizations likely do not reflect the actual numbers, primarily due to the occupation of large parts of Ukraine's sovereign territory by the aggressor state. According to data compiled by the UN Office of the High Commissioner for Human Rights, 11,520 civilians, including 633 minors, died due to the armed actions of Russian aggression.

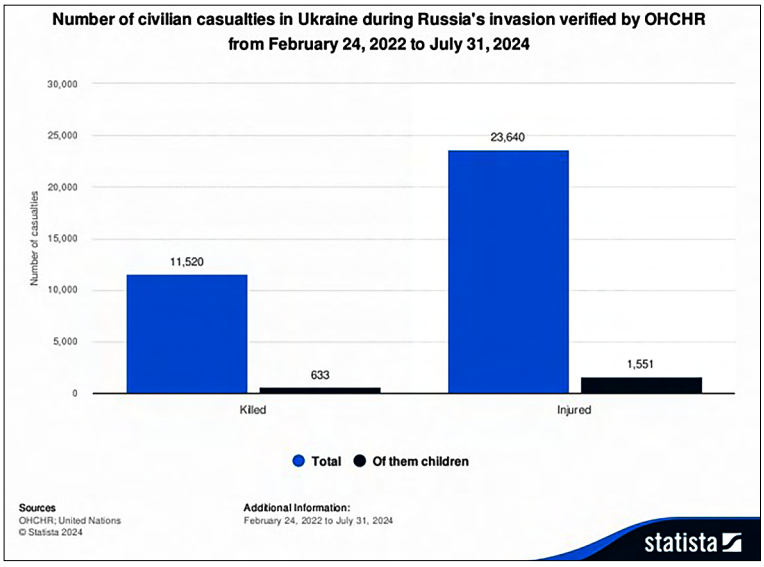

Chart 1: Data showing the number of civilian casualties from February 24, 2022, to July 31, 2024[13].

In K. Masło's expert analysis, the Author refers to the findings of the Independent International Commission of Inquiry on Ukraine. According to these findings, Russian military forces frequently commit the following acts that constitute crimes against humanity as defined by the Rome Statute:

1. The Russian armed forces have unlawfully detained civilians, with victims including men, women of all ages, and children (in many cases, the detention was prolonged).

[13] Data available on the following website: https://www.statista.com/statistics/1293492/ukraine-war-casualties/, 02.10.2024.

2. Russian soldiers have inflicted torture and inhumane treatment on civilians and prisoners of war. The purpose of this was to obtain information about the Ukrainian armed forces, coerce testimonies, force victims to collaborate, or impose punishment. Torture was also inflicted on civilians detained during home searches.
3. The Russian armed forces have committed acts of sexual violence and gender-based violence, particularly during searches in victims' homes and detention centers. Rape was carried out with extreme brutality, often accompanied by torture, such as beating and strangulation. A common act was the forced stripping of women and inappropriate touching during crossings through checkpoints set up by Russian forces in occupied territories[14].
4. The aggressor state's soldiers have carried out and continue to carry out illegal deportations of civilians from Ukrainian territory to Russia and forced relocations, affecting both men and women.

In the case of crimes against humanity, it is crucial to show that the victims of specific acts constituting crimes against humanity are civilians, regardless of their nationality, ethnic affiliation, or race. Crimes against humanity may, but do not necessarily have to, be committed during armed conflict (international or non-international). Some crimes against humanity may also qualify as war crimes. Russian armed aggression against Ukraine, besides grossly violating not only international law but also fundamental principles of civilization, poses many challenges for international criminal law, particularly in qualifying certain acts committed by Russian forces. K. Masło accurately points out that so-called "indiscriminate attacks" are a distinctive form of prohibited acts. In the context of Russian armed aggression, the target of these indiscriminate attacks was Ukrainian energy infrastructure. Such systematic and intense attacks have not been observed in previous armed conflicts. According to K. Masło, these attacks were directed at civilian objects. Even if one were to consider energy infrastructure as a potential military target, the anticipated incidental harm and damage to civilians would be clearly excessive compared to the expected military advantage. The attacks on energy infrastructure were recurrent and specifically aimed at the civilian population. They were carried out as part of Russia's policy, representing a large-scale attack on civilians with a widespread and systematic nature. Consequently, these acts can be classified as crimes against humanity in the form of other inhumane acts (Article 7(1)(k) of the Rome Statute). It is also important to note that attacks on Ukraine's energy infrastructure are particularly severe for the civilian

[14] M. Khater, *Sexual violence against women during armed conflicts: Russian aggression against Ukraine as an example*, "Access to Justice in Eastern Europe" 2022, Special Issue, p. 109.

population, especially during the heating season. Additionally, the lack of electricity has a direct impact on businesses and the entire economic sector. S. Balaniuk argues in his expert analysis[15] that the long-term effects of massive and systematic missile or drone attacks on Ukraine's critical infrastructure may create living conditions in selected localities or even regions of Ukraine aimed at partially destroying the group—the Ukrainian nation—as provided for in Article 6(c) of the Rome Statute.

3. Acts Constituting War Crimes

The definition of war crimes is the most extensive, covering over 100 acts that may be classified as war crimes. As J. Siekiera aptly notes in his expert analysis, war crimes must be committed in connection with an armed conflict[16]. The definition of war crimes can be divided into four categories: acts constituting serious violations of the Geneva Conventions of 1949, acts constituting serious breaches of laws and customs applicable to international armed conflicts, acts constituting serious violations of Article 3 common to the four Geneva Conventions in the case of non-international armed conflict, and acts constituting serious breaches of laws and customs applicable to non-international armed conflicts. War crimes arise directly from international humanitarian law and are associated with its violation. To classify an act as a war crime, it must be committed in connection with an armed conflict, meaning the crime must have an undeniable link to the conflict. In his expert analysis,[17] V. Pylypenko distinguishes three stages of the application of international humanitarian law. The first stage occurs directly during armed hostilities and concerns the means and methods of warfare. The second stage is the legal regulation of the situation in occupied territories. The third stage applies when hostilities have ended, but their consequences persist, such as prisoner exchanges, the return of refugees, and internally displaced individuals.

Since the beginning of the Russian full-scale military invasion, as of March 2023, the Prosecutor General's Office of Ukraine has been conducting over 71,147 criminal investigations under the Ukrainian Criminal Code on the commission of war crimes by Russian soldiers in the territory of Ukraine. According to the

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15 Expertise of Sergiy Balaniuk available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 10.10.2024.

16 Expertise of Joanna Siekiera available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 10.10.2024.

17 Expertise of Volodymyr Pylypenko available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 10.10.2024.

data from the Prosecutor General of Ukraine, as of June 7, 2024, the number of war crime proceedings increased to over 133,582. The most common war crimes committed by the aggressor state's armed forces include: intentional killing of civilians and prisoners of war; torture and inhumane treatment of civilians and prisoners of war; wilful destruction not justified by military necessity; unlawful deportation or forced transfer; including the deportation of individuals under 18 years old; deliberate targeting of civilians or civilian objects not classified as military targets; bombarding defenseless cities, towns, residential houses, and buildings not used for military purposes.

It is crucial to emphasize that acts constituting war crimes committed by Russian forces in the territory of Ukraine have been and continue to be committed on a large scale as part of a deliberate plan. Russian military operations include daily missile strikes and drone attacks on civilian objects, critical infrastructure, and residential buildings across almost every region of Ukraine.

The arrest warrants issued by the International Criminal Court (ICC) for V. Putin, M. Lvova-Belova, S. Kobylash, and V. Sokolov concerned war crimes, including the deliberate targeting of civilian objects. At the time of the alleged acts, S. Kobylash served as the commander of long-range aviation in the Russian Air Force, and V. Sokolov was the commander of the Black Sea Fleet. Notably, for the first time, the arrest warrant acknowledged the existence of reasonable grounds to assert that the suspects were responsible for committing crimes against humanity in the form of other inhumane acts, by intentionally causing great suffering or serious injury to mental or physical health[18]. This legal classification in the arrest warrant confirms that some acts, depending on the elements of *mens rea*, may be categorized as either war crimes or crimes against humanity.

4. Russian Armed Aggression Against Ukraine as a Crime of International Law

The definition of the crime of aggression in Article 8 bis of the Rome Statute reflects the one adopted by the UN General Assembly on December 14, 1974[19]. According to Article 8 bis, the crime of aggression can only be committed by a person in a position to exercise effective control over or direct the political or

[18] Information available on the website: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and, 15.09.2024.

[19] UN General Assembly Resolution 3314, adopted on 14 December 1974.

military actions of a state. This is referred to in international law as the "leadership clause."[20] Therefore, unlike other crimes under the ICC's jurisdiction, the crime of aggression cannot be committed by lower-ranking military personnel who do not exercise effective control over the actions of the state. The crime is typically perpetrated by senior state officials or top military commanders. Additionally, unlike other crimes under the ICC's jurisdiction, the crime of aggression cannot be committed against individuals, such as civilians or prisoners of war, but against a state as an entity in international law, particularly targeting its sovereignty, territorial integrity, or political independence.

The political and military decision by the highest Russian authorities to initiate a military operation on the territory of another sovereign state clearly meets the *mens rea* elements of the crime of aggression. Furthermore, in the context of Russian armed aggression, the aggressor has committed virtually all enumerated acts constituting aggression, as defined. These acts include: armed assault on Ukrainian territory, bombardment across all of Ukraine[21], blockading Ukrainian ports and coasts, attacking Ukraine's land, sea, and air military units, misusing the Russian Black Sea Fleet, contrary to the agreements on its stationing in Sevastopol (not to mention the illegal annexation of Crimea), sending irregular units and mercenaries during ongoing hostilities since 2014 in Donbas and Crimea, who engaged in acts of armed violence.

All elements of the crime of aggression specified by the Rome Statute and the "Elements of Crimes" document have been met, including the perpetrator planned, prepared, initiated, or executed an act of aggression, the perpetrator held a position enabling control or direction of the state's political or military actions, the act of aggression involved the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the UN Charter, the perpetrator was aware of factual circumstances indicating that such use of armed force violated the UN Charter, the act of aggression, due to its nature, gravity, and scale, constituted a manifest violation of the UN Charter[22], the perpetrator was aware of the factual circumstances leading to this Charter violation. In this context, the perpetrator is undoubtedly the President of Russia, along with other state officials, particularly the top military command.

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20 N. R. Hajdin, *Attributing Criminal Responsibility for the Crime of Aggression*, "Georgia Journal of International and Comparative Law" 2022, Vol. 51, No. 1, p. 5.

21 M. D. Bollo Arocena, *Russian Aggression against Ukraine, International Crimes and International Criminal Court*, "Anuario Español de Derecho Internacional" 2023, Vol. 39, No. 101, p. 107.

22 Elements of Crime, p. 43.

The definition of the crime of aggression also includes the involvement of a third state. It is therefore necessary to appropriately assess Belarus's role in Russian armed aggression against Ukraine. According to Article 8bis (2)(f) of the Rome Statute, a state's act of permitting its territory to be used by another state to carry out an act of aggression against a third state also constitutes a crime of aggression. Russian forces carried out specific military operations against Ukraine from Belarusian territory, including launching artillery attacks on Ukrainian cities. Moreover, Belarus provided logistical support and supply lines[23] to the Russian military. Consequently, under the Rome Statute, Belarus is also responsible for the crime of aggression, even though it did not directly engage in hostilities against Ukraine.

The Rome Statute of 1998 initially provided only a provisional definition of the crime of aggression and suspended the exercise of jurisdiction by the ICC in this respect until the Statute was amended. This occurred at the revision conference held on June 10-11, 2010[24], during which, the definition of the crime of aggression and the procedure for initiating proceedings were established. Unfortunately, Article 15 bis of the Rome Statute imposes significant limitations on exercising jurisdiction over the crime of aggression. The ICC cannot exercise jurisdiction over the crime of aggression concerning citizens of non-party states under the Rome Statute, or over the acts of aggression committed on the territory of non-party states. As a result, in practice, the ICC cannot exercise its jurisdiction over the most severe breaches of international law, as they are often committed by citizens of states that are not parties under the Rome Statute. The Russian armed aggression against Ukraine is undeniably a gross violation of international law; however, since Russia is not a party to the Rome Statute, the ICC remains powerless to act against this aggression committed by its citizens.

5. Crimes Against the Natural Environment

The jurisdiction of the International Criminal Court (ICC) includes acts against the environment; however, they are not categorized as a distinct crime of ecocide but rather as a war crime. Specifically, it involves the deliberate attack knowing that such an attack would cause incidental loss of life or injury to civilians, damage to civilian objects, or widespread, long-term, and severe damage to the natural

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23 A. Dyner, *The Situation in Belarus in the Context of the Russian Invasion of Ukraine*, "PISM Bulletin" 2022, No. 67, p. 127.

24 P. Hofmański, H. Kuczyńska, *Międzynarodowe prawo karne*, Warszawa 2020, p. 142-143.

environment, which would be clearly excessive compared to the concrete, direct and overall anticipated military advantage[25]. This classification is based on the First Additional Protocol to the Geneva Conventions of 1949, which introduces the principle that "during warfare, care must be taken to protect the natural environment against widespread, long-term, and severe damage. Protection includes the prohibition of the use of methods or means of warfare that are intended or may be expected to cause such damage to the natural environment and thereby endanger the health or survival of the population."[26]

One challenge in addressing environmental acts within the definition of war crimes is the fact that the ICC can only prosecute such acts if they are committed during an international armed conflict, as environmental damage falls under the category of war crimes, which constitute other serious violations of the laws and customs of international armed conflict. Therefore, there has been a persistent need to develop a distinct definition for such acts and include them in the jurisdiction of the ICC as a separate crime of ecocide, given their severity and potential long-term consequences affecting not only the current but also future generations. Moreover, in the doctrine of international law, it is argued that criminalizing acts against the environment as a distinct crime of ecocide under the Rome Statute would ensure that potential environmental damages are more thoroughly considered, not only by parties in armed conflict but also by individuals responsible for actions within large corporations[27]. Including ecocide in international treaties, especially the Rome Statute, would compel the corporate sector (both private and state-owned corporations) to consider potential environmental damages resulting from their activities[28] since such damages would no longer be subject only to domestic jurisdiction. Given the ongoing human activities, not limited to armed conflicts, leading to the destruction and degradation of ecosystems[29] and biodiversity, such criminalization would be a significant preventive measure for catastrophic long-term impacts.

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25 Art. 8 ust. 2 lit. b pkt iv Statutu Międzynarodowego Trybunału Karnego, sporządzonego w Rzymie dnia 17 lipca 1998 r., Dz.U. z 2003 r., nr 78, poz. 708 (dalej – Statut Rzymski).

26 Art. 55 Protokołu dodatkowego do konwencji genewskich z 12 sierpnia 1949 r. dotyczący ochrony ofiar międzynarodowych konfliktów zbrojnych, sporządzony w Genewie 8 czerwca 1977 r., Dz.U. z 1992 r., nr 41, poz. 175.

27 A. Jaina, C. Sonib, *Ecocide: a new international crime*, "Jus Corpus Law Journal" 2022, vol. 2, issue 2, p. 631.

28 D. Yadav, *Ecocide: The Missing Convention*, "International Journal of Law Management and Humanities" 2022, vol. 5, p. 453.

29 C. T. Banungana, *Towards including Ecocide in the Rome Statute*, "Canadian Yearbook of International Law" 2021, vol. 59, p. 265.

The UN International Law Commission has proposed a definition of environmental crime, suggesting its inclusion in the Rome Statute of the ICC. According to the proposed definition, environmental crime is "the intentional and severe destruction of the natural environment" as one of the most serious international crimes[30]. The core of this definition was to encompass "[...] extensive, long-lasting, and severe damage to the natural environment[...]"[31] aiming to capture the long-term character of damage that may affect not only the generation alive at the time of the crime but also future generations. Despite heated discussion, the definition was not incorporated into the Rome Statute text. A more comprehensive definition of ecocide was developed by the Independent Expert Panel of Stop Ecocide International, which recommended including it as a new "article 8 ter" in the Rome Statute. This expert definition reads as follows:

1. For the purposes of this Statute, ecocide means unlawful or intentional acts committed in the knowledge that there is a substantial likelihood of causing severe and either widespread or long-term damage to the environment.
2. "Unintentional" means reckless disregard for damage, which would be clearly excessive in relation to the anticipated social and economic benefits.
3. "Severe" refers to damage that involves grave adverse changes, disruption, or harm to any element of the environment, including significant impacts on human life or natural, cultural, or economic resources.
4. "Widespread" means damage that extends beyond a limited geographical area, crossing state boundaries, or affecting an entire ecosystem, or species, or numerous people.
5. "Long-term" refers to damage that is irreversible or cannot be repaired naturally within a reasonable period.
6. "Environment" encompasses the Earth, its biosphere, cryosphere, lithosphere, hydrosphere, atmosphere, and outer space[32].

Currently, crimes against the natural environment are prosecuted under national laws, similar to other international crimes. However, there is a growing need to incorporate environmental crimes into the Rome Statute due to their serious consequences, which can negatively impact future generations. Additionally,

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30 Report of the ILC on the work of its 47th session, UN Doc A/50/10, 21 July 1995, Art. 26, paras 119-121.

31 Report of the ILC on the work of its 47th session, UN Doc A/50/10, 21 July 1995, Art. 26, paras 119-121.

32 The text of the definition is available on the following website: https://www.stopecocide.earth/legal-definition, 01.10.2024.

experts argue that damages caused by ecocide hinder the peaceful use[33] of specific areas by their residents.

During Russian armed aggression against Ukraine, environmental crimes have reached a significant scale. E. Gugulan reported in her analysis that there were 2,900 instances of environmental crimes committed by Russian forces on Ukrainian territory that could qualify as ecocide[34]. Although these crimes can be prosecuted under Article 441 of Ukraine's Criminal Code, the vast number of cases is a considerable challenge for a nation at war and under constant attack, and therefore requires collaboration with the ICC[35].

Russian military forces have targeted objects highly sensitive to environmental damage that are not military targets, leading to a high risk of extensive environmental harm[36]. These facilities include: Chernobyl Nuclear Power Plant, Zaporizhzhia Nuclear Power Plant, Kyiv Hydroelectric Power Plant, Avdiivka Coke Plant, Azovstal Metallurgical Plant, Toretsk Coal Mine, South Ukraine Nuclear Power Plant, Dnieper Hydroelectric Power Plant, Khmelnytskyi Nuclear Power Plant, and Kakhovka Hydroelectric Power Plant. The most significant environmental damage was caused by the explosion at the Kakhovka Hydroelectric Power Plant on June 8, 2023, which was provoked by the deliberate actions of Russian forces occupying the plant. The explosion released a wave over 5 meters high, flooding more than 80 cities and settlements in the region, causing long-term environmental changes. The primary long-term damages include:

- prolonged flooding of areas near the Kakhovka reservoir,
- chemical contamination from the spillage of over 150 tons of oil,
- bacterial contamination of waters,
- irreversible changes to the region's ecosystem,
- water shortages,
- disruption of the irrigation system dependent on the Kakhovka reservoir[37].

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33 H. J. de Santana Gordilho, F. Ravazzano, *Ecocídio e o tribunal penal internacional*, "Justiça do Direito" 2017, vol. 31, no. 3, p. 689-690.

34 Expertise of Evghenia Gugulan available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 14.10.2024.

35 S. Joubert, *Can Crimes of Ecocide Committed during the Conflict in Ukraine Be Legally Punished?*, "Law & world" 2023, vol. 28, p. 113; N. Malysheva, *International Environmental Crimes of the Russian Federation on the Territory of Ukraine and the Prospects of Criminal Responsibility for Their Committing*, "Law Review of Kyiv University of Law" 2022, vol. 233, p. 235.

36 I. Kozak, *Crime of ecocide in Ukraine – environmental consequences of Russian military aggression*, "Studia Prawnicze KUL" 2023, nr 4, p. 108.

37 V. Vishnevskiy, S. Shevchuk, V. Komorin, Y. Oleynik, P. Gleick, *The destruction of the Kakhovka dam and its consequences*, "Water International" 2023, vol. 48, no. 5, p. 638.

Research is ongoing regarding the future of the dried-up reservoir and its ecosystem. Causing the explosion in the Kakhovka reservoir meets the criteria of ecocide, as defined by the expert panel, given the perpetrator acted knowingly, causing widespread, long-term, and severe damage to the environment.

6. Russian Cyberattacks as a Crime Under International Law

Most countries, particularly developed ones, are becoming increasingly dependent on information technology for both civilian and military purposes. From the perspective of international law, any actions in cyberspace may constitute unlawful interference in the internal affairs of another sovereign state, violating, among others, Article 2(7) of the United Nations Charter[38]. In the event of conducting any actions against another state, including military actions as part of an armed conflict, cyberspace provides the opportunity to carry out inexpensive, remote, and effective attacks with minimal risk[39]. As a result, states and non-state entities are increasingly using cyberspace to conduct military operations, even though most cyberattacks are aimed to destabilize state or banking information systems. However, in the context of armed conflicts, it is crucial to distinguish whether a cyberattack targets government (state) or civilian objects (information systems). As demonstrated by the actions of Russian armed aggression, cyberattacks are often directed against critical infrastructure reliant on computer systems, such as airports, hydroelectric and nuclear power plants, dams, and hospitals[40].

Although cyberattacks are not yet under the jurisdiction of the International Criminal Court (ICC), there is increasing discussion on their inclusion due to their serious implications for states, state information systems, and civilian populations. M. Sztof's expert analysis[41] supports this discussion, citing a continuous increase in cybercrime: a 125% rise in 2021 compared to 2020, with nearly 240 million *ransomware* attacks in the first half of 2022. Unfortunately,

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38 Karta Narodów Zjednoczonych, sporządzona w San Francisco z dnia 26 czerwca 1945 r., Dz. U. z 1947 r. Nr 23, poz. 90 z późn. zm.

39 M. Gervais, *Cyber-Attacks and the Laws of War*, "Berkeley Journal of International Law" 2012, vol. 30, s. 528.

40 A. Sharma, *Cyber-Warfare: A Challenge for International Law*, "International Journal of Law Management and Humanities" 2021, vol. 4, p. 1113.

41 Expertise of Małgorzata Sztolf available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 13.10.2024.

cyberattacks are increasingly becoming a tool of foreign policy, aimed at exerting pressure.

ICC Prosecutor Karim Khan has highlighted the severity of the threats posed by cyberattacks, proposing that the jurisdiction of the Court be expanded to include actions constituting cyberattacks, which he believes meet the criteria of crimes already defined in the Rome Statute[42]. The ICC Prosecutor argues for the inclusion of cyberattacks under the jurisdiction of the ICC, most likely not as a separate international crime, but by extending the list of acts already defined as crimes in the Rome Statute. The initiative of the Prosecutor of ICC suggests that cyberattacks constitute a new type of crime targeting states and nations, which should be prosecuted at the international level. Furthermore, during the conference on January 22, 2024, the Prosecutor of the ICC stated: "The purpose of the conference was to examine the practical implications of the misuse of cyberspace in committing or facilitating serious crimes under the Rome Statute, such as war crimes and crimes against humanity. Cyberattacks, particularly those targeting civilian infrastructure, can have a profound impact on human lives. In my introductory remarks, I emphasized that the practice of international criminal law is, by its nature, often concerned with the past; however, we must also look to the future and ensure that we are no less prepared to address future crimes. We must ensure that we do so for all types of victims and communities affected by actions prohibited by the Rome Statute"[43].

According to the data presented in the expert opinion by M. Sztolf, during the first six months of Russian military aggression, 1,123 cyberattacks were recorded against Ukrainian infrastructure. It is crucial to note that cyberattacks have no territorial or temporal limits, especially no geographical constraints. Therefore, although Russian military aggression is confined to Ukrainian territory, cyberattacks are also being carried out on its allies, including Poland. In his expert opinion, M. Sztolf cites an example of the Warsaw District Prosecutor's Office, which initiated an investigation into a disinformation campaign aimed at causing severe disruptions to the political system or economy of the Republic of Poland. This involved unauthorized access to the IT editing system of the Polish Press Agency S.A. under liquidation and the subsequent publication of two false, misinforming press dispatches in the PAP Daily News Service on May 31, 2024,

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42 Information available on the website: https://digitalfrontlines.io/2023/08/20/technology-will-not-exceed-our-humanity/, 01.11.2023.

43 Text available on the website: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-conference-addressing-cyber-enabled-crimes-through, 23.09.2024.

at 14:00:53 and 14:17:15, falsely claiming that a partial mobilization[44] had been announced in Poland. Another example of similar actions was a cyberattack on December 12, 2023, targeting *Kyivstar,* Ukraine's largest mobile network, which disrupted air raid sirens and prevented Ukrainians from receiving alerts about incoming Russian airstrikes[45]. Ukrainian Security Service specialists identified the Russian hacker group *Sand Worm,* a regular unit of the Russian Main Intelligence Directorate[46], as responsible for most of these cyberattacks. Cyberattacks often precede other hostile actions against a specific country. The full-scale Russian military aggression was also preceded by a series of cyberattacks on Ukraine's state IT structures, with the largest attack occurring on January 14, 2022, targeting Ukrainian government websites[47], resulting in the suspension of the Ukrainian government website, several ministries, and the "Diia" application. A Microsoft spokesperson stated that on January 13, 2022, the company discovered malware used to attack Ukraine's IT systems. In addition to government websites, the attack also targeted the sites of numerous Ukrainian non-governmental organizations and IT companies. Each cyberattack that temporarily disables websites or spreads false information raises questions about the intent behind such actions. The primary aim is always to destabilize, undermine the credibility of specific institutions, and instil fear, suggesting that individuals' data is now in foreign possession and could be misused. Notably, the January 14, 2022, cyberattack on Ukrainian government websites aligns with Russian broader hybrid operations aimed at destabilizing and undermining the credibility of authorities in Kyiv, continuing the aggression initiated in 2014. The goal is not only to target the state's authorities but also to affect civilians, who, under international criminal law, are intended to feel fear and uncertainty due to the cyberattack.

Cyberattacks also pose a significant threat to the overall international legal order, as seen in attacks on the IT systems of major international institutions. A recent example is the cyberattack on the ICC's IT systems in September 2023. The Court issued a statement saying that, after analysis by cybersecurity experts,

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44 P. Sikora, Cyberatak na Polską Agencję Prasową. Jest śledztwo w sprawie dezinformacji, tekst dostępny na stronie: https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/9536029,cyberatak-na-polska-agencje-prasowa-jest-sledztwo-w-sprawie-dezinform.html, 30.06.2024.

45 Expertise of Małgorzata Sztolf available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 15.10.2024.

46 I. Hirnyk, *SBU: zidentyfikowaliśmy rosyjskich hakerów, którzy zaatakowali Kyivstar*, tekst dostępny na stronie: https://www.pap.pl/aktualnosci/sbu-zidentyfikowalismy-rosyjskich-hakerow-ktorzy-zaatakowali-kyivstar, 30.06.2024.

47 Information available on the website: https://www.bbc.com/ukrainian/news-59936067, 24.09.2024 r.

the attack was determined to be an espionage attempt to obtain data from the ICC's IT systems and undermine its mandate, authority, and credibility[48].

Given the above, could a cyberattack be considered a distinct form of international crime under the jurisdiction of the ICC? The answer appears affirmative, as the ICC Prosecutor suggests. Cyberattacks, as actions directed against states and nations, including civilians, meet the elements of crimes against humanity or war crimes, depending on the fulfilment of the *mens rea* criteria defined for each of these crimes.

Conclusions

It seems obvious that Russian armed aggression is an enormous challenge for the Ukrainian armed forces, the Ukrainian economy, and, above all, Ukrainians who are defending themselves against the attack. In the international context, the Russian crime of aggression and other serious international crimes committed by the Russian army in Ukraine require, in addition to the ICC, the launch of new international mechanisms of prosecution by establishing a special criminal court. In addition, steps should be taken to amend the Rome Statute and extend its jurisdiction to crimes such as ecocide or cyberattacks, which, due to the impact they have on the civilian population, should be prosecuted at the international level.

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[48] Text available on the website: https://www.icc-cpi.int/news/measures-taken-following-unprecedented-cyber-attack-icc, 24.09.2024.

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Iryna Kozak-Balaniuk

The Need for a Special Criminal Tribunal for the Russian Crime of Aggression

Introduction

The full-scale Russian armed aggression against Ukraine has proven that, although the ICC effectively prosecutes and convicts perpetrators of the most serious crimes under international law, its jurisdiction is significantly limited over crimes committed by the highest state officials – the crime of aggression. This circumstance has given rise to discussions on the establishment of a special international criminal tribunal with jurisdiction over the Russian crime of aggression.

1. The ICC's Role in Addressing Russian Armed Aggression Against Ukraine

The International Criminal Court (ICC) has jurisdiction over crimes committed by Russian forces on Ukrainian territory as part of the Russian armed aggression. The ICC Prosecutor responded immediately to the onset of the full-scale armed aggression against Ukraine, an unusually swift action in practice[1]. However, there are arguments that the provisions of the Rome Statute are insufficient to effectively prosecute those responsible for crimes on Ukrainian territory amid Russian aggression. Notably, Russian aggression did not begin on February 24,

[1] C. Tarfusser, G. Chiarini, *Without specific declaration of jurisdiction and ratification: procedural weaknesses of the international criminal court's investigation into the russo-ukrainian war*, "Texas Tech Law Review" 2023, Vol. 56, No. 1, p. 172.

2022, but in 2014. The ICC's effectiveness should be assessed from the earliest acts by Russia that constituted aggression, starting with the deployment of armed irregular units and mercenaries to Crimea.

The ICC Prosecutor's Office has been addressing the situation in Ukraine since 2014, investigating violations related to the annexation of Crimea and subsequent Russian military actions in Donbas. Based on Ukraine's declaration, preliminary proceedings were initiated on April 24, 2014. By 2020, the investigation concluded that there were reasonable grounds to believe that war crimes and crimes against humanity under the ICC's jurisdiction[2] had been committed on Ukrainian territory. The findings encompassed three categories of crimes: (i) crimes committed in the context of hostilities, (ii) crimes during detentions, and (iii) crimes in Crimea[3]. However, no further procedural actions or arrest warrants were issued at that time.

The situation changed drastically on February 28, 2022, when the ICC opened a preliminary examination following the start of full-scale Russian armed aggression. Just over a year later, the ICC issued its first two arrest warrants, including one against a sitting head of state, followed by two more against military commanders. These actions counter the criticism that the ICC only initiates cases against African nationals[4]. This progress marks a significant step forward compared to the previous six years of preliminary proceedings without issuing any arrest warrants. The lack of further actions from 2014 to 2020 demonstrates the ICC's limited effectiveness in prosecuting serious international crimes, even when the Prosecutor confirmed sufficient evidence to believe that such crimes had occurred. Although the ICC acknowledged reasonable grounds to believe that international crimes were committed, it did not identify perpetrators or issue arrest warrants until a separate investigation was launched linked to the full-scale invasion of Ukraine. This is particularly thought-provoking given the evidentiary and procedural capabilities available to the Tribunal, as noted in the expert analyses of J. Dzierżanowska and I. Bień-Węgłowska[5]. Furthermore, a Joint Investigation Team (JIT) was established by the European Union Agency

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2 Text available on the following website: https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine, 01.10.2024.

3 M. Płachta, B. Zagaris, *Atrocity Crimes in Ukraine*, "International Enforcement Law Reporter" 2022, Vol. 38, No. 3, p. 91.

4 J. Floyd, J. Abbe, *International criminal tribunals: dispensing justice or injustice?*, "Revue Quebecoise de Droit International" 2010, Vol. 23 (Special Issue), p. 309.

5 Expertises of Iwona Bień-Węgłowska i Joanna Dzierżanowska available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 14.10.2024.

for Criminal Justice Cooperation, including Ukraine, Poland, and Lithuania[6]. The JIT, established under the EU Convention on Mutual Assistance in Criminal Matters(2000[7]), aims to combat cross-border crime within the EU territory through collaboration among several EU states. The primary purpose of the JIT is to facilitate investigations and international judicial cooperation. Expanding the JIT to include non-EU states is possible through a separate agreement, which occurred in Ukraine's case. On the one hand, using the JIT to investigate crimes on the territory of a state engaged in an international armed conflict while granting that state the role of leading the JIT's operations may be seen as controversial. On the other hand, the composition of the JIT is already limited, considering that various EU member states are conducting their own investigations into crimes committed on Ukrainian territory. From the perspective of the actions undertaken by the ICC in response to international crimes committed as part of Russian armed aggression, it is noteworthy that based on the agreement between the ICC Prosecutor's Office and the JIT, the ICC Prosecutor has become a participant in the JIT's work and actively takes part in its meetings[8].

The ICC's arrest warrants, particularly those against Vladimir Putin, highlight the limitations of the court's jurisdiction as defined by the Rome Statute. Specifically, the charges against the Russian President relate to war crimes involving the deportation and forced transfer of Ukrainian children, despite his evident role in initiating the full-scale armed aggression on February 24, 2022. Putin termed this invasion a „special operation" in a sovereign country without its consent. He participated in planning, preparing, and carrying out the act of aggression, exercising effective control over Russia's political and military actions. The aggression, involving the use of military force against Ukraine's sovereignty, territorial integrity, or political independence, was clearly a violation of the UN Charter. These elements indicate a crime of aggression.

While there is no doubt about President Putin's involvement in the deportation of Ukrainian children, limiting his criminal responsibility before the ICC

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6 Information available on the website: https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes oraz https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint, 25.10.2023.

7 Akt Rady z dnia 29 maja 2000 r. ustanawiający, zgodnie z art. 34 Traktatu o Unii Europejskiej, Konwencję o wzajemnej pomocy w sprawach karnych pomiędzy Państwami Członkowskimi Unii Europejskiej, Dz.U.2007.135.950.

8 Due to the fact that the Prosecutor of the ICC is an independent and impartial body, he could not become a member of the JIT, but only a participant in the work of the Team in order to ensure proper cooperation between the Team and the ICC.

to this crime reflects the constraints imposed by the Rome Statute, particularly Article 15 bis (5). This provision states that „the Court shall not exercise its jurisdiction over the crime of aggression committed by a national of a State that is not a party to this Statute." Legal scholars argue that non-state parties to the Rome Statute are not obliged to comply with its provisions. However, under certain circumstances, nationals of such states could still be subject to ICC jurisdiction, allowing the Court to issue arrest warrants against them[9]. Thus, even though Russia is not a party to the Rome Statute—despite originally signing the Statute in 2000[10]—charges can be brought against Russian nationals, its citizens, and the sitting President for acts constituting crimes under the ICC's jurisdiction, except for the crime of aggression. The wording of Article 15 bis (5) of the Rome Statute is intended to eliminate any doubts regarding whether citizens of a state that is not a party to the Rome Statute can be charged before the ICC for committing acts constituting the crime of aggression.

Given this limitation, the ICC is effectively powerless in prosecuting acts of armed aggression[11] by non-state parties to the Rome Statute, such as Russia. The creation of a permanent criminal court in 1998 did not enable the Prosecutor to charge nationals of countries like Russia, China, Israel, Belarus, Turkey, or the United States with the crime of aggression. Although the latter two do not pose a major threat to international peace and security, the others may evade accountability for armed invasions of sovereign states. China, for instance, has increasingly signalled its potential use of military force against Taiwan. The U.S. has gone further, challenging the ICC's jurisdiction over non-state party nationals under Article 12(2), claiming that the Court lacks the authority to investigate or prosecute U.S. citizens for alleged crimes anywhere.

In the context of Russian aggression against Ukraine, ICC actions and efforts to prosecute perpetrators of serious international crimes can be divided into two areas: (1) prosecuting genocide, crimes against humanity, and war crimes, and (2) prosecuting the crime of aggression. In the first area, the ICC has taken concrete action, issuing arrest warrants based on its findings. However, the scope of charges is often debated, as they do not encompass all prohibited acts. In the

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9 J.A.Y. Sekulow, R. W. Ash, *The Issue of ICC Jurisdiction over Nationals of Non-Consenting, Non-Party States to the Rome Statute: Refuting Professor Dapo Akande's Arguments*, "South Carolina Journal of International Law and Business" 2020, Vol. 16, No.1, p. 5.

10 M. Scharf, L. Graham, *Bridging the Divide between the ICC and UN Security Council*, "Georgetown Journal of International Law" 2021, p. 979.

11 Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment, 1986 I.C.J. Rep. 14, par. 195.

second area, the ICC is entirely ineffective in addressing Russian aggression, as the Rome Statute prevents the initiation of preliminary examinations for the crime of aggression against a non-state party and its nationals. While domestic courts, including those in Ukraine, theoretically have the authority to prosecute crimes of aggression, in practice, this is unlikely. The International Court of Justice (ICJ) in the *Arrest Warrant* case affirmed that heads of state, diplomats, and government officials enjoy immunity from criminal proceedings in foreign jurisdictions[12]. Consequently, under current international law, Russia and its key political and military leaders remain immune from criminal accountability before the ICC for acts constituting the crime of aggression.

2. Special Criminal Tribunal for Russian Crime of Aggression

The idea of establishing a special criminal tribunal for Russia's crime of aggression against Ukraine emerged with Russia's initiation of full-scale military aggression, quickly gaining support from a significant majority of states and international organizations[13]. If a special tribunal were established now, it is crucial to remember that the full extent of Russia's armed aggression against Ukraine—in terms of casualties, destruction, and losses—is not yet fully known or even estimable. However, it is clear from the aggressor state's actions that there is an unequivocal intent to annihilate Ukraine[14] and create conditions calculated to eradicate at least part of the Ukrainian nation.

The large-scale Russian military aggression constitutes the use of force on a scale that violates Article 2(4) of the UN Charter. This level of force is aimed at either eliminating a state as a subject of international law or achieving a significant territorial conquest[15]. Russia's imperialist and territorial ambitions are no surprise

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12 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Reports, Separate Opinion of President Guillaume [12]; Declaration of Judge Ranjeva [6]; Separate Opinion of Judge Koroma [9]; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal [51], [52].

13 А. Кориневич, *Робота по створенню спеціального трибуналу щодо злочину агресії проти України: події та факти*, „Український Часопис Міжнародного Права" 2022, No. 2, p. 7.

14 C. McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine*, "Journal of Conflict & Security Law" 2023, Vol. 28, No. 2, p. 206-207.

15 M. Koskenniemi, *The Future of Statehood*, "Harvard Journal of International Law" 1991, Vol. 32, No. 2, p. 397.

Map 1. Status of Front Line as of 01.10.2024[16]

to the international community, particularly its neighbors[17]. Nevertheless, this is the first time (though the Russian invasion of Georgia in 2008 should not be forgotten) that we are witnessing such overt armed aggression aimed from the outset at "capturing" the capital of another sovereign state and consequently establishing full control over it. The occupation of certain parts of Ukraine's sovereign territory indisputably confirms Russia's intent to "conquer" and effectively control Ukraine's territory. Unfortunately, as mentioned in an earlier subsection, the ICC remains legally powerless regarding Russia's crime of aggression against Ukraine. Therefore, it is necessary to consider the establishment of a special tribunal for the crime of aggression, which Russia began as early as 2014. It should also be noted that the establishment of a special tribunal would not conflict with the functioning or jurisdiction of the ICC[18].

In legal doctrine, there are three proposed models for establishing a special tribunal for Russia's crime of aggression. The first is a tribunal established by an

16 Map available on the website: https://liveuamap.com/uk.

17 O. Yurkova, *Ukraine: At the Forefront of Russian Propaganda Aggression*, "SAIS Review of International Affairs" 2018, Vol. 38, No.111, p. 112.

18 A. Hrynevych, T. Korotkiy, *The Special Tribunal for the Crime of Aggression against Ukraine: Realpolitik versus the Inevitability of Punishment for the Crime of Aggression*, "Ukrainian Journal of International Law" 2022, Vol. 33, p. 35.

agreement between Ukraine and the UN General Assembly[19]. The second is a tribunal formed by the Council of Europe. The third is a tribunal created by an agreement between Ukraine and a coalition of willing states (the "Nuremberg model")[20]. Given the circumstances, the latter model is likely the most appropriate. The special criminal tribunal for Russian aggression would be established under different circumstances than previous *ad hoc* criminal tribunals. First, no permanent international criminal tribunal existed when previous ad hoc tribunals were established. Therefore, forming *ad hoc* tribunals was the only means to bring perpetrators of the most serious international crimes in former Yugoslavia and during the Rwandan genocide to justice. Second, *ad hoc* tribunals were established through UN Security Council resolutions, which is currently impossible since a representative of the aggressor state, responsible for the armed aggression against Ukraine, is a permanent member of the Security Council. Discussions are ongoing regarding possible amendments to the UN Charter and Security Council reforms, yet this seems a distant prospect, if feasible at all. Therefore, the only viable option is to establish a special criminal tribunal through an international agreement among states that agree to cooperate with the tribunal, including in areas such as arresting and handing over individuals under arrest warrants issued by the tribunal. Third, ad hoc tribunals were created to prosecute those responsible for international crimes during the internal conflict in Rwanda and the armed conflict in former Yugoslavia. This conflict, at different times, could be classified as an ethnic conflict, independence struggle, or outright armed rebellion. In contrast, Russia's armed aggression against Ukraine constitutes clear military aggression against another sovereign state (involving a third state), resulting in an international armed conflict on the territory of the attacked state. As noted in several submitted expert reports, Russian armed aggression should be divided into two phases: from 2014 to February 24, 2022, and the phase that began on February 24, 2024, which continues. Unfortunately, it is currently impossible to specify a date or event that might bring an end to the ongoing international armed conflict resulting from Russia's military aggression.

An essential issue would be determining the tribunal's jurisdiction. According to legal doctrine, the special tribunal's jurisdiction should take precedence over

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19 R. Topolevskyi, *Legal responsibility for human rights violations and war crimes caused by the Russian Federation's aggression against Ukraine: background and perspectives*, "Law of Ukraine: Legal Journal (Ukrainian)" 2023, Vol. 6, p. 91-92.

20 R. Hamilton, *Ukraine's Push to Prosecute Aggression Implications for Immunity Ratione Personae and the Crime of Aggression*, "Case Western Reserve Journal of International Law" 2023, Vol. 55, p. 52.

national courts[21]. If the tribunal's subject-matter jurisdiction is limited to the crime of aggression, precedence over national courts is clear. National courts cannot prosecute top state officials due to immunity protections, that under customary international law, do not shield them from prosecution before an international tribunal. The tribunal's jurisdiction should therefore be limited to the crime of aggression, with the crime's definition in the tribunal's statute matching the definition in Article 8 bis of the Rome Statute. Thus, the tribunal's jurisdiction regarding Russian crimes in Ukraine would complement rather than duplicate or restrict the ICC's jurisdiction. The ICC can still prosecute war crimes, crimes against humanity, or genocide, while the special tribunal would be competent to prosecute the crime of aggression committed by a state not party to the Rome Statute.

Personal jurisdiction, in turn, should include individuals exercising effective control in Russia over political and military decisions, but it should not be limited to them. The facilitation by Belarus, allowing Russia to use its territory to conduct attacks on Ukrainian cities and other military actions, also constitutes a crime of aggression by permitting another state to use its territory to commit aggression against another state. Therefore, the tribunal's personal jurisdiction should include not only Russian citizens but also Belarusian nationals. Furthermore, the tribunal's statute should stipulate that state officials' personal immunities would not protect them from prosecution.

The issue of temporal jurisdiction is more complex. Based on the definition of the crime of aggression contained in the Rome Statute, Russia's armed aggression against Ukraine did not begin on February 24, 2022, but nearly eight years earlier in 2014. At that time, Russia began deploying "little green men" to Crimea and provided military, logistical, and even partial command support to separatist groups that initiated armed conflict in the Donetsk and Luhansk regions. From the perspective of international law, February 24, 2022, marked the beginning of another, more advanced phase of Russian armed aggression—launching a full-scale invasion that targeted much of Ukraine's territory. A potentially appropriate start date for the jurisdiction of a special tribunal could be February 26, 2014, when Russian soldiers were transported in two trucks to Yalta, Crimea, an event recorded by journalists and subsequently shared online. In 2014, Russian forces repeatedly and deliberately violated Ukraine's territorial integrity through incursions, taking

[21] M. Berent, *Unveiling the necessity for a new international criminal court (ICC) . A personal perspective amidst 21st century international law crimes in Ukraine linked to Russian Federation aggression*, "Studia Prawnicze KUL" 2023, Vol. 4, No. 96, p. 44.

over or blockading various airports and other strategic locations, and ultimately occupying and annexing Crimea[22]. This act significantly infringed upon Ukraine's sovereignty, territorial integrity, and political independence. However, determining an end date for temporal jurisdiction would likely follow the precedent set by the ICTY, marking a future event beyond which acts are no longer subject to the tribunal's jurisdiction. If the tribunal is established during the ongoing international armed conflict triggered by Russia's aggression.

Territorial jurisdiction should primarily cover Ukraine's sovereign territory, including areas still occupied and illegally annexed by Russia in 2014[23], as the act of aggression occurred on Ukrainian territory. Due to Belarus's involvement, territorial jurisdiction should also cover its territory to prevent a situation where the aggressor evades accountability because the act cannot be proven to have occurred within the tribunal's jurisdiction. An interesting aspect of the tribunal's territorial jurisdiction is Ukraine's self-defence actions and the activities of the Ukrainian Armed Forces on Russian territory, including the Kursk region, to hinder or block Russian offensives toward the Ukrainian cities of Sumy and Kharkiv. Should a special criminal tribunal, whose subject-matter jurisdiction is limited to the crime of aggression, extend its territorial jurisdiction to the aggressor state's territory? While political and military decisions for the aggression were made in Russia, the acts constituting aggression were, and continue to be, committed on Ukrainian soil.

As M. Berent notes in his expert analysis, one of the key limitations of the ICC that significantly impacts its low effectiveness is the inability to conduct trials in absentia[24]. Therefore, the special tribunal should be authorized to try cases in absentia, considering the challenge of bringing the accused before the tribunal.

The crime of aggression also differs from other crimes in terms of its victims. Aggression primarily targets the state as an international legal entity—its sovereignty, territorial integrity, and political independence. Civilian residents of the state are undoubtedly victims too, but aggression primarily targets the state itself. Consequently, the state has an inherent right to self-defence under the UN Charter in the face of aggression[25]. Furthermore, some states maintain

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22 J. Kestenbaum, *Closing Impunity Gaps for the Crime of Aggression*, "Chicago Journal of International Law" 2016, Vol. 17, No. 51, p. 54.

23 See more on the status of occupied territories in the expertise of George Goradze available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 16.10.2024.

24 Expertise of Marcin Berent available on the website: https://www.agresjarosyjska.info/ekspertyzy-prawne, 29.10.2024.

25 M. C. Adler, *The inherent right to self-defense in international law*, Dordrecht 2013, p. 22.

that there is a right to anticipatory self-defence in response to potential acts of aggression. While Ukraine's right to self-defence is not central to establishing a special tribunal, it may be relevant to the overall assessment of the situation.

It is important to emphasize that the crime of aggression committed against a state gives rise to an obligation to pay reparations. However, this obligation does not arise at the level of the individual perpetrator but rather at the level of the aggressor state. The perpetrator of an act of aggression is typically the person exercising effective control over the state's political and military decisions. The issue of reparations in the case of Russia's armed aggression is particularly complex for two reasons: first, the aggressor state's military actions are ongoing, and second, the aggressor state still occupies a significant portion of Ukraine's territory, which is inaccessible to Ukraine's Armed Forces. Any estimates of damage are likely to be incomplete, reflecting only the losses incurred in areas of Ukraine under the effective control of authorities in Kyiv. Given the large number of civilian casualties, the scale of destruction, and the extensive losses resulting from Russian armed aggression, the matter of reparations, will be a critical issue if a special tribunal is established. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) did not award reparations to victims, as neither had the mandate[26] to do so. However, the ICC is empowered to award reparations to victims. One of the highest compensation awards granted by the ICC was in the case of *Prosecutor v. Bosco Ntaganda*. In that case, the ICC made the following observations regarding reparations:

1. The reparations phase is a critical point in the pursuit of justice. In connection with victims' rights to truth, justice, and reparations, this phase is an integral part of their right to effective remedy.

2. Reparations serve two main purposes: they hold those responsible for the most serious crimes accountable for repairing the harm they have caused and enable the Court to ensure that perpetrators answer for their actions.

3. Reparations aim to mitigate, to the extent possible, the suffering caused by the crimes, ensure justice for victims by addressing the consequences of the unlawful acts committed by the convicted individual, deter future violations, and restore victims' dignity[27].

If a special criminal tribunal for the Russian crime of aggression were to be established, the possibility of awarding reparations should be carefully considered,

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[26] M. Brzozowska-Pasieka, *Compensation for Russian Crimes in Ukraine - How to Sue Russia*, "The Journal of Law in Society" 2023, Vol. 23, No. 74, p. 76.

[27] *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2659, Reparations Order, par. 1-3.

particularly since the tribunal would be exclusively focused on prosecuting perpetrators of the crime of aggression.

Conclusions

In view of the above, it is justified to establish, probably by means of an international agreement, a special international criminal tribunal that would have jurisdiction to prosecute individuals, in this case the highest state officials, responsible for the crime of aggression against Ukraine. The ICC may issue an arrest warrant against the highest state officials, as it did in the case of President V. Putin, but the charges will never cover the crime of aggression. As a result, impunity for this particular crime and the lack of an appropriate response from other participants in the international community may encourage other states to achieve their political goals through armed aggression against other sovereign states, which in the future may lead to irreversible changes in the international political and legal order.

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Statement from ICC Prosecutor Fatou Bensouda on the Conclusion of the Preliminary Examination in the Situation in Ukraine

ICC Participates in Joint Investigation Team Supported by Eurojust on Alleged Core International Crimes

Statement by ICC Prosecutor Karim A. A. Khan

Summary

The Russian armed aggression against Ukraine has demonstrated that the ICC, despite its jurisdiction over Russian crimes on Ukrainian territory, is unable to issue arrest warrants for perpetrators of the crime of aggression due to limitations within the Rome Statute. Consequently, it is clear that the ICC, because of its voluntary jurisdiction, is unlikely to initiate proceedings for the crime of aggression. This is because states that continue using force internationally and commit acts of aggression are often non-parties to the Rome Statute, precluding their citizens from facing arrest warrants for such acts. For years, Russia has used force to achieve its imperialist aims. The reaction (or lack thereof) from other states has only encouraged such actions, as exemplified by Vladimir Putin's decision to launch a full-scale invasion of Ukraine in 2022, following eight years of international inaction since the 2014 annexation of Crimea.

This invasion has created an international conflict of unprecedented scale on European soil since World War II. For the international legal order, the most alarming aspect is that the act of aggression was committed by a permanent UN Security Council member, a body tasked with safeguarding international peace. However, Russia's repeated vetoes have effectively neutralized this mechanism, leading to a situation in which military invasions might become a political tool for states. Such actions are likely to lead to the collapse of the international legal order that the international community has been rebuilding since World War II.

The research conducted enabled a comprehensive analysis of the war crimes and crimes against humanity most frequently committed by Russian forces, such as deliberate destruction unjustified by military necessity; unlawful deportation or displacement, including deportation of individuals under the age of 18; deliberate attacks on civilians or civilian individuals; deliberate attacks on civilian objects,

that is, objects that are not military targets; attacks or bombardments, using various means, on defenseless towns, villages, residential homes, and structures not serving military purposes; killings, including the killing of prisoners of war; torture and inhumane treatment; unlawful deprivation of liberty, including enslavement; forced disappearances; and sexual violence. The analysis of the status of Russian crimes in Ukraine has also presented arguments supporting the view that specific actions of Russian forces fulfil not only the *actus reus* elements of the definition of genocide but also *the mens rea*. There are justified grounds to claim that the massacres in Bucha, Irpin, and Izium were directed at the nation with the intent to destroy this group in part. Furthermore, arguments have been put forward that certain actions by Russian forces demonstrate the genocidal character of the Russian military aggression against the Ukrainian nation. Additionally, during the course of research, the study addressed the actions and procedural measures undertaken by the ICC concerning Russian armed aggression and the validity of establishing a special criminal tribunal in light of the ICC's jurisdictional limitations. The conclusions indicate that a special tribunal for Russian aggression should be established. Otherwise, the existing legal gap regarding the use of force in international relations would allow impunity for those not bound by the provisions of the Rome Statute.

The act of armed aggression against Ukraine, which effectively began as early as 2014, has led to the outbreak of an international armed conflict that is entirely different from those previously known to the international community. Research conducted in the first area of the commissioned task also contributed to identifying the legal aspects of Russian armed aggression that distinguish it from other armed conflicts. It demonstrated Ukraine's unique challenge in confronting Russian actions on every possible front, not all of which are military fronts. One distinctive feature of Russian actions within its aggression against Ukraine is its attempts, which effectiveness will only be measurable in years to come, to destroy Ukrainian symbols in occupied cities and smaller towns and to erase Ukrainian identity among Ukrainian citizens living in occupied parts of Ukraine. According to accounts from individuals who managed to leave occupied territories, the Russian army operates so-called filtration centers to verify Ukrainian citizens' patriotic views and actions and subjects them to a process of "russification." Additionally, the occupying forces conduct deportations and forcibly transfer Ukrainian children on an unprecedented scale. Depending on their age, these children are adopted by Russian families, subjected to "russification," and raised in the aggressor state's "patriotic" upbringing. Younger children are given completely new birth certificates with altered names, surnames, and dates

of birth, erasing any trace of Ukrainian origin[1]. These actions clearly demonstrate that the Russian authorities possess a genocidal intent to partially destroy the Ukrainian nation, understanding the impact of their actions on Ukraine's future demographics and national trends in the parts of Ukrainian territory currently under Russian occupation.

Russian armed aggression extends beyond military combat on the front lines. The Russian forces consciously carry out missile or drone attacks on other regions of Ukraine—cities and smaller towns, particularly targeting critical infrastructure essential to the livelihoods of residents. The daily bombardment of cities far from the front line has no connection to the front-line combat. Otherwise, what connection could there be between the shelling of the Okhmatdyt Children's Hospital in Kyiv or the market in central Kherson and frontline combat operations? The sole purpose of these actions is to terrorize the civilian population and to destroy critical infrastructure, including energy facilities essential to the survival of Ukrainian residents. One can conclude that Russian aggression has three dimensions: the first is military action on the front (the military dimension); the second is the daily shelling of civilian objects (including residential buildings, schools, hospitals, and public places) directed against the civilian population and unrelated to frontline military actions (the dimension of actions against the civilian population); while the third consists of actions unrelated to warfare but aimed at the planned destruction of the Ukrainian nation and widespread and systematic attacks on the civilian population. Within this last dimension, Russian military actions include: (i) deportation and forced transfer of children; (ii) subjecting Ukrainian citizens, including children, in occupied territories to Russification and forced indoctrination, including patriotic education by the aggressor state; (iii) intentional destruction of all Ukrainian symbols; (iv) deliberate and targeted shelling of cities in eastern Ukraine. This has resulted in cities like Popasna, Vuhledar, Toretsk, and Pokrovsk being 90% destroyed, making it unlikely that their residents will ever return. The final dimension of Russian armed aggression indicates intent, i.e., *the mens rea*, to partially destroy the Ukrainian nation by not only deporting and forcibly transferring Ukrainian children but also subjecting them to a process of russification and patriotic education by the aggressor state to erase their Ukrainian national identity. Consequently, these children may never again identify with the Ukrainian nation and, therefore, may not be part of it.

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[1] A commentary is available on the website: https://disinfodigest.pl/2024/10/18/rosyjska-indoktrynacja-w-szkolach-okupowanej-ukrainy-proba-wymazania-ukrainskiej-tozsamosci/ (dostęp: 27.10.2024).

This outcome justifies initiating discussions on bringing such actions under the ICC's jurisdiction. Forced indoctrination (patriotic education and the erasure of former national identity) of forcibly transferred or deported children by a state knowingly committing an act of armed aggression should constitute a distinct form of international crime.

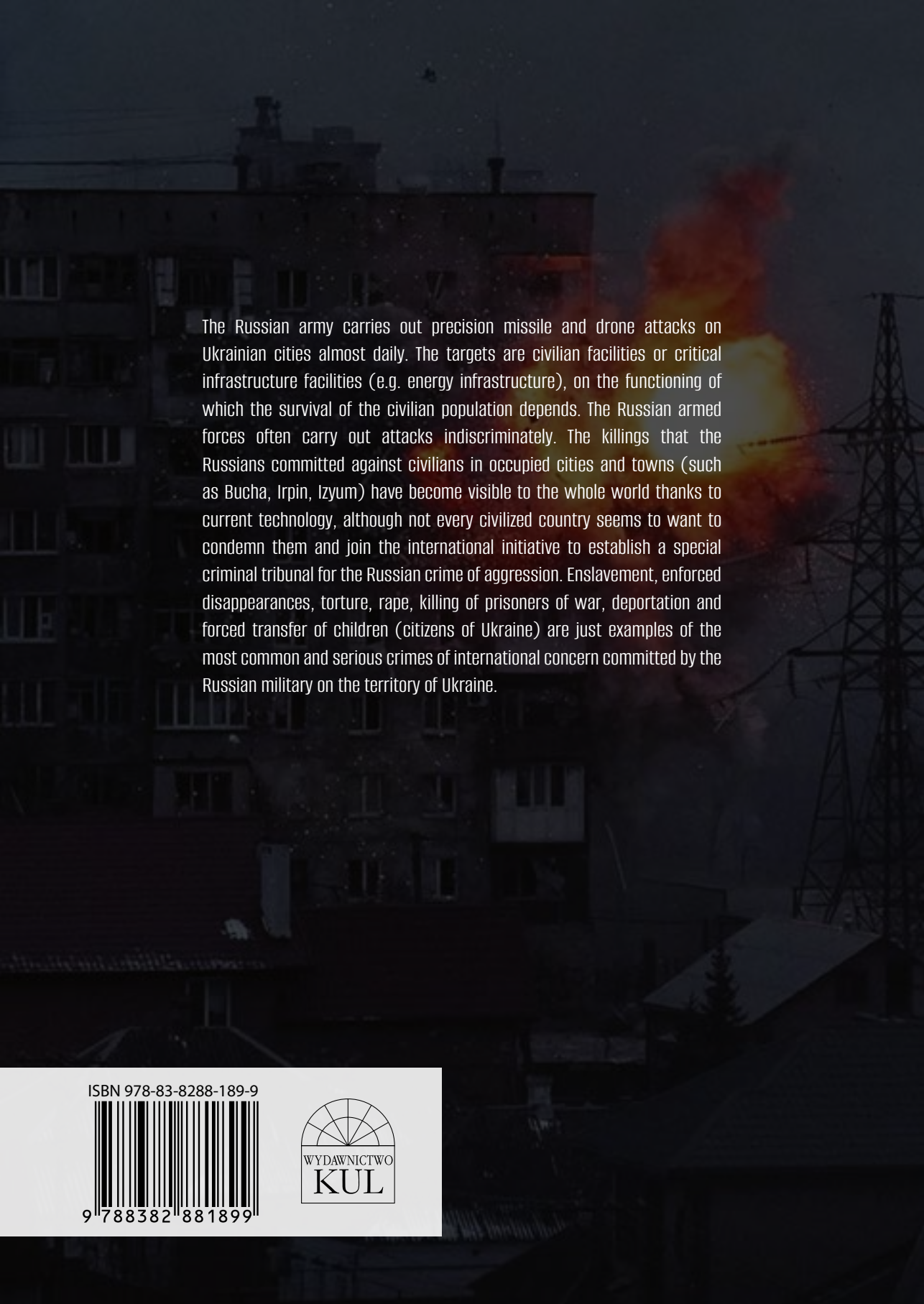
A distinctive feature of Russian military actions is their long-term environmental damage in Ukraine, posing significant threats to the lives and health of not only the current generation directly affected by acts that constitute ecocide in the sense of definitions developed by the international community, but also for future generations. Environmental damage, such as that caused by the explosion at the Kakhovka Hydroelectric Power Plant, is irreversible and leads to substantial changes in the ecosystem. Actions against the environment are carried out with full awareness of their consequences. It is inconceivable that Russian forces, exercising effective control over the Kakhovka Hydroelectric Power Plant, would be unaware of the consequences of an explosion at the dam, releasing water from the Kakhovka reservoir. Furthermore, the vast majority of actions against Ukraine's natural environment, like the shelling of civilian objects hundreds of kilometers away from the front line, have no connection to combat operations. Their goal is to cause maximum destruction in Ukraine, preventing civilians from returning to these areas. Taking control of Ukrainian state-significant facilities, including hydroelectric and nuclear power plants, confirms the intent to terrorize the civilian population and weaken or even destroy Ukraine as an independent state.

Russian services increasingly resort to cyberattacks on Ukraine and other states that support Ukraine, such as Poland. Given the recent number of Russian cyberattacks, the ICC Prosecutor has proposed that cyberattacks, because of their consequences for civilians, be classified as international crimes. This proposal is valid, as even the ICC's own information systems were targeted by a cyberattack last year.

Another significant legal aspect of Russian armed aggression, essential for defining the crime of aggression and international state responsibility, is the fact that some Russian military actions against Ukraine were conducted from the territory of Belarus. In light of the definition of the crime of aggression, senior officials of Belarus and likely its military command may be held responsible for this crime. A special criminal tribunal should include Belarusian citizens within its jurisdiction.

Research indicates that the original aim of Russian armed aggression was to gain full control over Ukraine by "capturing" the capital and likely overthrowing the government in Kyiv. When this initial objective failed, efforts were redirected

towards occupying as much territory as possible and destroying or occupying critical infrastructure and state-significant facilities. Russian armed aggression now aims to weaken Ukraine politically, economically, socially, and demographically. Russian forces deliberately destroy entire towns in eastern Ukraine to prevent their rebuilding. Consequently, many smaller cities and towns in this region will remain deserted and unpopulated, severely impacting the region's demographic situation.



The Russian army carries out precision missile and drone attacks on Ukrainian cities almost daily. The targets are civilian facilities or critical infrastructure facilities (e.g. energy infrastructure), on the functioning of which the survival of the civilian population depends. The Russian armed forces often carry out attacks indiscriminately. The killings that the Russians committed against civilians in occupied cities and towns (such as Bucha, Irpin, Izyum) have become visible to the whole world thanks to current technology, although not every civilized country seems to want to condemn them and join the international initiative to establish a special criminal tribunal for the Russian crime of aggression. Enslavement, enforced disappearances, torture, rape, killing of prisoners of war, deportation and forced transfer of children (citizens of Ukraine) are just examples of the most common and serious crimes of international concern committed by the Russian military on the territory of Ukraine.

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