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Russian Aggression Against Ukraine: The Fall and Rise of International Law

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THE EVOLUTION OF MODERN WARFARE THROUGH THE PRISM OF THE RUSSIAN-UKRAINIAN CONFLICT: A COMPREHENSIVE ANALYSIS

1. INTRODUCTION

In the era of rapid technological change and globalisation, war is being transformed, moving beyond traditional understandings and incorporating a complex interplay of technology, geopolitics, and international law. This creates the need for a deep and comprehensive analysis of modern warfare, using the Russian-Ukrainian conflict as an illustrative example to illuminate the multifaceted nature of modern military conflicts. In the context of such research, special attention should be paid to the transformative role of technological advances that radically change the nature of warfare. The integration of artificial intelligence into military decision-making, the emergence of cyber warfare, and the role of telecommunications in conflict situations all present new challenges that require a scientific and legal analysis. An important aspect to explore is the dual nature of telecommunications technologies, which can be used both to maintain peace and security as well as to wage war. This creates a need to develop comprehensive legal mechanisms to regulate their use in conflict zones. The issues of responsibility and complicity of arms exporting countries in violations of humanitarian law as well as the need to create reliable international mechanisms for regulating arms exports are both awaiting resolution.

This diversity of new emerging challenges highlights the need for interdisciplinary approaches in understanding and addressing the complexities of modern warfare, to bridge the gap between theory and practice, and to provide valuable information for scholars, policymakers, and practitioners in the field.

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2. THE EVOLUTION OF MILITARY CONFLICTS – TECHNOLOGICAL ADVANCES AND ETHICAL SILEMMAS

The trajectory of warfare throughout human history is marked by a continuous evolution, shaped by the interplay of technological innovation and strategic adaptation. From the rudimentary weapons of early civilisations to the sophisticated arsenals of the modern era, the tools and tactics of war have undergone profound transformations. This progression reflects not only advancements in technology, but also shifts in societal norms and the geopolitical landscape. The modern battlefield has transcended physical domains, extending into the digital expanse of cyberspace, thus symbolising the fusion of technology with conventional warfare modalities. The ongoing Russian-Ukrainian conflict epitomises this evolution, showcasing a blend of traditional military engagements with the emergent domain of cyber operations.

The transformation of air and land warfare tactics in recent decades has been particularly significant. The development and deployment of advanced targeting technologies has introduced unprecedented precision and strategic complexity to military operations. Modern combat strategies emphasise not only the magnitude of force, but also the accuracy with which it is applied. The capacity to pinpoint specific targets with minimal collateral damage is a critical aspect of contemporary military doctrine, reflecting a paradigm shift towards more discriminate and proportionate use of force.

However, the integration of such technologies into the arsenal of modern militaries is not without its challenges and ethical quandaries. Autonomous weapon systems, long-range precision-guided munitions, and unmanned aerial vehicles (drones) have revolutionised the conduct of warfare, yet they also provoke significant debate regarding the locus of moral and legal responsibility. The attribution of blame in instances of civilian harm caused by these systems is complex, involving a multitude of actors, including operators, military commanders, state authorities, and defence manufacturers. These issues underscore the ethical and legal implications inherent in the use of advanced weapon systems and the need for rigorous scrutiny and accountability mechanisms.

The role of artificial intelligence (AI) in military decision-making processes represents another frontier in the evolution of warfare. The potential of AI to further revolutionise military operations is immense, with systems capable of executing tasks with speed and efficiency beyond human capabilities. However, the delegation of critical decisions to AI systems, particularly those involving life and death, raises profound ethical and legal questions. The capacity of AI to adhere to the principles of distinction, proportionality, and necessity, as mandated by international law, remains a subject of intense debate. The challenges presented

by AI in warfare are multifaceted, encompassing technical, ethical, and legal dimensions that demand a comprehensive analysis and policy responses.

The narrative of modern warfare expands further with the advent of cyber warfare. The Russian-Ukrainian conflict has been marked by the involvement of "civilian hackers", a phenomenon that illustrates the changing nature of combatants and the battlefield. Cyber warfare, while devoid of direct physical violence, can inflict substantial disruption and strategic damage. The ability to undermine critical infrastructure, disrupt communications, exfiltrate sensitive data, and propagate disinformation through cyber means has profound implications for national security and the stability of states.

The legal status of civilian hackers engaged in cyber operations during armed conflicts presents a legal conundrum within the framework of International Humanitarian Law (IHL). Traditional laws of armed conflict are challenged by the unconventional nature of cyber warfare, highlighting the necessity for legal frameworks to evolve in response to these emerging modalities of conflict. The determination of the combatant status of civilian hackers, their potential targeting, and the applicability of IHL principles to cyber operations are areas that require rigorous legal analysis and the development of normative guidelines.

The evolution of warfare, characterised by the integration of advanced technologies and the emergence of cyber warfare, presents a complex narrative of adaptation and ethical challenges. The Russian-Ukrainian conflict, with its amalgamation of conventional and novel forms of warfare, underscores the multifaceted and dynamic nature of contemporary conflicts.

3. THE ROLE OF TELECOMMUNICATIONS IN CONFLICT AND THE PROTECTION OF CIVILIANS – AN IN-DEPTH ANALYSIS

In the intricate structure of modern conflicts, telecommunications have emerged as a pivotal force, fundamentally altering the conduct and strategic underpinnings of warfare. The introduction of satellite Internet services by entities such as Starlink has redefined the operational landscape, transforming these companies from mere civilian service providers to critical actors in the theatre of war. These services have become indispensable for maintaining real-time communication, enabling strategic coordination, and ensuring access to essential information, even in the most austere environments.

The dual-use nature of telecommunication technologies in conflict zones presents a paradoxical scenario. While they are instrumental in facilitating humanitarian assistance, public health initiatives, and crisis communication, they simultaneously offer a platform for exploitation by combatants. The potential for these technologies to be used for propaganda dissemination, cyber warfare, and

the coordination of military operations introduces a complex array of ethical and legal challenges that must be navigated with care.

The rapid advancement of telecommunications technologies has outpaced the development of corresponding legal frameworks, resulting in a regulatory lacuna that poses significant risks for misuse and abuse in conflict settings. This gap underscores the urgent need for the establishment and enforcement of comprehensive legal mechanisms that can effectively regulate the use of telecommunications in accordance with international humanitarian law and other pertinent legal instruments.

The principle of civilian protection, enshrined in IHL, intersects with the use of telecommunications in conflict zones, highlighting the heightened vulnerability of civilian populations in the digital era. The indiscriminate nature of cyber warfare, the potential for disinformation to exacerbate hostilities, and the targeting of communication infrastructure all pose grave threats to civilian safety and security.

To address these unique challenges, there is a pressing need for a thorough evaluation and potential reform of legal mechanisms at both the national and international levels. Such reforms must encompass not only the protection of civilians from physical harm, but also the safeguarding of data privacy, the prevention of cyber-attacks on civilian infrastructure, and the containment of the spread of harmful misinformation.

The role of international organisations, such as the International Telecommunication Union (ITU) and the International Committee of the Red Cross (ICRC), is increasingly critical in this context. These bodies must mediate between the technological capabilities of state and non-state actors and the existing legal frameworks that govern armed conflicts. Collaborative efforts are required to develop and enforce guidelines that ensure the responsible and ethical use of telecommunication technologies in conflict situations.

Furthermore, the integration of telecommunications into conflict scenarios necessitates a re-evaluation of core principles such as neutrality, distinction, and proportionality within the realm of cyber operations. The legal definitions of combatants and military objectives must evolve to reflect the realities of digital warfare, with a focus on ensuring that civilians and their data are protected from hostilities to the maximum extent feasible.

The role of telecommunications in conflict and the imperative of civilian protection are inextricably linked, forming a complex and evolving challenge that must be addressed with rigour and foresight. The Russian-Ukrainian conflict serves as a poignant reminder of the necessity for effective legal protections for civilians in an age where digital technologies play a central role in warfare. As the discourse progresses, the continuous development and stringent application of legal frameworks governing the use of telecommunications in armed conflicts will be crucial in safeguarding civilian lives and upholding the sanctity of international humanitarian principles.

4. EXPORTING WEAPONS – VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND LIABILITY

As we delve further into the complexities of modern warfare, one aspect arises with a particularly profound resonance, namely the role of arms exports in conflicts. The act of exporting arms, on the surface, may appear as a detached endeavour, confined to the realm of economic transactions and strategic diplomacy. However, its implications seep into the harsh realities of the battlefield, often contributing, albeit indirectly, to violations of IHL. The Russian aggression against Ukraine serves as a striking example of this indirect yet consequential relationship.

Arms exports play a pivotal role in shaping the dynamics of a conflict. The provision of conventional weapons or small arms and light weapons can significantly alter the balance of power, escalate the intensity of violence, and, in certain instances, prolong the duration of the conflict. This, in turn, can lead to a heightened number of civilian casualties and increased human suffering. Thus, the act of arms export transcends the domain of commerce and strategic alliances, intertwining with the ethical, legal, and humanitarian dimensions of warfare.

The involvement of arms-exporting nations in IHL violations perpetrated with their supplied weapons raises potent questions about responsibility and complicity. When does an act of arms export become an act of aiding and abetting war crimes? How do we delineate the boundaries of accountability under international law? Do arms-exporting nations bear any moral obligation towards the victims of the conflict? These questions challenge the traditional notions of accountability and complicity, highlighting the ambiguities in the existing legal frameworks.

The existing arms control treaties, such as the Arms Trade Treaty, aim to regulate the global trade of conventional arms and prevent their diversion to illegal use. However, their effectiveness is often compromised by inconsistent implementation, the lack of transparency, and divergence in interpreting treaty provisions. The lacunae in these regulatory mechanisms underscore the urgent need for a more robust and comprehensive international mechanism to oversee arms exports, one that ensures stricter compliance, enhances transparency, and institutes an effective system of accountability for violations.

This exploration into the realm of arms exports dovetails into the broader, more complex issue of accountability for crimes against civilians. The establishment of accountability is not merely a legal obligation; it represents a cornerstone of justice, a fundamental prerequisite for reparation and closure for victims, and a powerful deterrent against future crimes. It reinforces the rule of law, upholds the principles enshrined in IHL, and asserts the fundamental human rights of individuals, particularly in situations of armed conflicts.

However, the pursuit of accountability is often fraught with formidable challenges. Jurisdictional constraints, political considerations, evidentiary difficulties, and the intricate nature of international law often pose significant barriers to the prosecution of war crimes and crimes against humanity. The Russian-Ukrainian conflict, which has witnessed numerous crimes against civilians, underscores these challenges. Amid these hurdles, the clarion call for justice from the international community remains resolute, underscoring the necessity of addressing these crimes and holding the perpetrators to account.

It is important to recognise that the impacts of warfare are not confined to the immediate parties involved. The reverberations of conflicts echo across the geopolitical landscape, influencing regional and global power dynamics, altering alliances, and reshaping international relations.

5. THE GEOPOLITICAL IMPLICATIONS AND THE ROLE OF NEUTRAL STATES IN CONTEMPORARY CONFLICT DYNAMICS

The ongoing conflict between Russia and Ukraine has precipitated a seismic shift in the geopolitical landscape, with implications that ripple across the international system. The conflict has not only redefined the power dynamics within the Eastern European region, but also has had a profound impact on global strategic alliances, economic networks, and the architecture of international security. Ukraine's accelerated integration with the European Union is indicative of a broader geopolitical realignment, potentially signifying a substantial shift in the regional balance of power and the strategic calculus of nations within and beyond the vicinity.

The European Union's imposition of sanctions on Russia represents a salient example of the intricate nexus between international law and geopolitical strategy. These sanctions, while serving as instruments of foreign policy aimed at inducing behavioural change in the target state, also have broader implications. They affect not only the economies of the imposing states but also the global economic system, raising questions about the long-term ramifications of such punitive measures on international trade, energy security, and diplomatic relations.

In this complex geopolitical milieu, the role of neutral states becomes increasingly salient. Neutral states, guided by historical precedents such as the Alabama Claims, have a significant role in the management of international conflicts and the promotion of adherence to international law. Their position, however, is fraught with inherent challenges as they strive to balance their obligations under the law of neutrality with the moral imperatives of the contemporary international order.

The principle of non-interference, a fundamental tenet of neutrality, requires these states to abstain from actions that could be perceived as favouring any

party to the conflict. Yet, the imperative to uphold international legal standards, particularly those pertaining to human rights and humanitarian norms, may compel neutral states to adopt positions that could be seen as compromising their neutral status.

The traditional concept of neutrality, as codified in instruments such as the Hague Conventions, is increasingly challenged by the complexities of modern warfare, which often involves non-state actors, cyber operations, and other asymmetric tactics. Neutral states are thus tasked with interpreting and applying these legal instruments within the context of a rapidly evolving international landscape, ensuring that their policies do not inadvertently perpetuate conflict or contravene the principles of international law.

Furthermore, neutral states must navigate the intricacies of globalisation and the interconnectedness of the global economy. Economic sanctions, while targeted, can have unintended consequences for neutral states, compelling them to reconcile their commitment to neutrality with the realities of economic interdependence. Additionally, transnational challenges such as mass migration, resulting from conflicts, add layers of complexity to the responsibilities of neutral states, necessitating nuanced policy responses that reconcile humanitarian concerns with the imperatives of state sovereignty and security.

The geopolitical implications of the Russian-Ukrainian conflict and the intricate role of neutral states within this context underscore the complex interplay of international relations, law, and politics. As neutral states navigate their strategic choices, their decisions bear significant weight on the trajectory of the conflict and the broader international order.

6. CONCLUSION

In conclusion, the Russian-Ukrainian conflict presents a complex, interwoven narrative that spans multiple disciplines and perspectives. The evolution of warfare, the rise of cyber warfare, the indirect violations of International Humanitarian Law through arms exports, the quest for accountability, the geopolitical implications, the role of neutral states, the unexpected role of telecommunications, and the protection of civilians – these are the threads that make up the intricate tapestry of modern conflicts. By delving deeper into each thread, we gain a more comprehensive understanding of the multifaceted nature of contemporary conflicts, underscoring the critical need for interdisciplinary approaches in navigating and addressing these complexities.

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AIR WARFARE OVER UKRAINE AND INTERNATIONAL HUMANITARIAN LAW

Abstract. The Russian aggression against Ukraine involves extensive use of air power, proving that without the sufficient level of air control, the combat operations on the ground face significant operational challenges. The use of air power raises questions regarding the legality of the aerial actions conducted over Ukraine. This conflict in the air domain is characterised by separate campaigns. The first one was a battle over the air superiority of Ukraine, which was relatively short in time (February–April 2022), albeit intense, and lost by the Russian Air Force due to the inability to destroy Ukrainian air defence assets and Ukrainian military aviation. The second one, still in progress at the moment this article is being written, looks to become an unresolved contest of attrition, as both belligerents vastly increased their air disruption capabilities. In particular, during the last period of the first phase, it is believed that many of the Russian air strikes were, in fact, indiscriminate or deliberately directed against civilian objectives. The aim of the article is to analyse the overall conduct of the air war over Ukraine and pinpoint the legal challenges in assessing the legality of such air operations. In the context of available information, the paper will seek to understand the legal framework concerning the destruction of the An-225 at the Hostomel airport during the first phase of hostilities, the use of certain aerial weapons, and the selection of targets.

Keywords: Russian aggression against Ukraine, international law, international humanitarian law, air bombardment, use of air power

WOJNA POWIETRZNA NAD UKRAINĄ W ŚWIETLE MIĘDZYNARODOWEGO PRAWA HUMANITARNEGO

Streszczenie. Rozpoczęta 24 lutego 2022 roku agresja rosyjska przeciwko Ukrainie objęła jako kluczowy element walki zbrojnej działania lotnictwa wojskowego. Od 1939 roku celem każdej strony w konflikcie zbrojnym jest zdobycie przewagi w powietrzu jako czynnika warunkującego sukces operacji lądowej. Kampania nad Ukrainą może być podzielona na dwa etapy. Pierwszy to

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walka o przewagę powietrzną, odbywająca się w lutym – kwietniu 2022 roku, która zakończyła się porażką rosyjskiego lotnictwa niezdolnego do zniszczenia zasobów powietrznych lotnictwa ukraińskiego oraz ukraińskiej obrony przeciwlotniczej. W ramach walk miejskich jakie miały miejsce podczas tej fazy uważa się, że wiele z bombardowań powietrznych wykonywanych przez lotnictwo rosyjskie nosiło znamiona naruszających zakaz bombardowań bez rozróżnienia, bądź bezpośrednio wymierzonych w ludność cywilną. W dalszej części konfliktu, przeszedł on od fazy wojny manewrowej do statycznego konfliktu na wyniszczenie, w którym żadna ze stron nie jest w stanie wystarczającej przewagi nad drugą. Zjawisko wojny powietrznej jest regulowane odpowiednimi normami międzynarodowego prawa humanitarnego (prawem wojny powietrznej). Artykuł ma na celu zbadać przebieg kampanii powietrznej nad Ukrainą w kontekście prawnym, wskazując na wyzwania i trudności związane z praktycznym stosowaniem prawa wojny powietrznej, analizując wybrane przypadki takie jak zniszczenie An-225 na lotnisku Hostomel w pierwszych chwilach konfliktu, dobór broni stosowanych przez strony oraz wybór celów.

Słowa kluczowe: Rosyjska agresja przeciwko Ukrainie, prawo międzynarodowe, prawo wojny powietrznej, bombardowania lotnicze, lotnictwo

1. OPENING REMARKS

The aerial campaign over Ukraine is governed by the laws of air warfare, which are applicable on the full spectrum during international armed conflict. Not all spheres of air warfare are regulated by treaty law. While the Additional Protocol I to the Geneva Conventions of 1977 (AP I) is applicable to air-to-ground operations (including bombardment), air-to-air encounters are regulated by customary law reflecting the AP I (Venturini 2021, 365). Many other rules of customary character are a reflection of the Hague Rules of Air Warfare of 1923 (e.g. the status of military aircraft) (Gestri 2006, 140). Despite the lack of a dedicated treaty concerning air warfare, the accepted standpoint of the *de lege lata* of what constitutes the law of air warfare is contained in manuals, namely the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, and, notably, the HPCR Manual on International Law Applicable to Air and Missile Warfare (Robertson 1998, 124).

It is essential that an important remark be made at the beginning of this article. So far, no international institutions, including the Organization for Security and Cooperation in Europe (OSCE), the International Criminal Court (ICC), and the United Nations' (UN) inquiry commission, has had full access to the military records and targeting data of both Ukrainian and Russian armed forces. There is a strong indication and enough credible evidence to call the Russian Federation conduct during the aggressive war against Ukraine a systematic breach of international humanitarian law.[1] However, this article refers

[1] "The Commission has concluded that Russian armed forces committed indiscriminate and disproportionate attacks, in violation of international humanitarian law, some of which amounted to the war crime of excessive incidental death, injury, or damage." Independent International Commission of Inquiry on Ukraine, A/HRC/52/CRP.4

to the potential violation of the "Law of the Hague" and the current shape of the international jurisprudence and doctrine discussion highlighting the significant difficulties in formulating categorical statements regarding the war crimes related to the indiscriminate bombardment.[2] Three aspects need to be highlighted in this regard. Firstly, war crimes are committed only intentionally, and honest mistakes in the targeting process invalidate the required *mens rea*.[3] Secondly, international humanitarian law only mitigates the calamities of the armed conflict, meaning that in specific circumstances some level of harm done to civilian population and civilian infrastructure might not be unlawful due to the proportionality rule (Bellar, Casey-Maslen 2022, 152–153). Thirdly, the review of the military operations, air bombardment included, needs to assess the situation from the *ante factum* perspective, not *post factum* as per the "Rendulic rule" (DeSon 2016, 116). While one cannot be deluded by the explanation commonly offered by the Russian military that every strike against objects, infrastructure, or buildings has military justification, the courts and prosecution authorities need to carefully examine the circumstances surrounding the attacks from the air, including the technical, intelligence, and battlefield data (Piątkowski 2021, 523–524).

2. *ORDRE DE BATAILLE* AND THE STATUS OF MILITARY AIRCRAFT

It has been estimated that on February 24th, 2022, the Ukrainian Air Force possessed circa 20 Su-24s (bombers), 31 Su-25s (tactical bomber), 34 Su-27s (multi-role fighter), and 37 MiG-29s (fighter), which were inherited by Ukraine after the collapse of the USSR. The Ukrainian Air Force's most precious assets were withdrawn from fighting in eastern Ukraine (2014–2015) and since then have been preserved for the protection the Ukrainian airspace in the central and western regions. The Russian Air Force potential includes over 300 fighters and multi-role planes (planes based on the Su-27 airframe family) and approximately 245 bomber aircraft. Russian aviation possesses different kinds of air armament in their inventory, and while many of them are considered to be precision-guided munitions, such as Kalibr (CEP 2–3 meters), Kh-59 (CEP 3 meters), or Kh-47 Kinzhal missiles (CEP 10 meters), Russian aircraft extensively use non-guided bombs, such as FAB-500 or FAB-1000, which are wide-blast radius aerial bombs.

[2] E.g. ICTY, Prosecutor v. Gotovina et al. (IT-06–90), Appeals Chamber Judgement November 16th, 2012.

[3] Article 32(1) of the Rome Statute of the International Criminal Court. "For example, the war crimes of intentionally directing attacks against the civilian population or against civilian objects require knowledge that the persons or objects subject to attack are civilian. An honest mistaken belief that these persons or objects are not civilian would therefore negate the mental element of the crime. The standard is purely subjective; there is no requirement that the belief be both honest and reasonable" (Milanovic 2023).

Both parties generally adhered to the customary conditions required for a status of military aircraft.[4] However, during the air assault against Hostomel on February 24th, 2022, one of the downed Russian helicopters Ka-52 bore no Russian military markings.[5] On another occasion, Russian attack Su-25 aircraft had their markings covered by the letter "Z" – a tactical identification of the Russian forces during the aggression against Ukraine.[6] On the other hand, the ex-Slovakian MiG-29 was delivered to the Ukrainian Air Forces flown through the border with removed national markings of Slovakia and without any corresponding markings of the Ukrainian armed forces.[7] These incidents are isolated; however, flying in unmarked (or in improperly marked) aircraft creates a significant operational risk for the crew, as markings are "sufficient indication of combatant status" and, therefore, a violation of customary rule of international law implying the responsibility of a state (HPCR 2009, 317). The practice of the belligerent to mark the military aircraft has also been reported in the context of unmanned aircraft, although it is not clear why some small UAVs are not marked, while the significantly larger UAVs (e.g. Orion or Bayraktar) bear the emblems of the Ukrainian and Russian air forces. Under the definition of military aircraft, such a distinction had no justification behind it (small and large UAVs are aircraft in legal terms); however, it is possible to assume that a rise of the "possible emerging interpretation of existing rule" may be observed, formulating another deviation from the customary rule to mark military aircraft (Piątkowski 2022).

3. THE BEGINNING OF THE HOSTILITIES

The ominous sign of the incoming invasion was the NOTAM (Notice to Airmen) issued by the Russian civil aviation authorities in the early hours of February 24th, 2022, closing the airspace for civilian traffic in the southern section of Russia, citing "special activities airspace." Immediately, the same NOTAM was issued by the Ukrainian authorities, which ceased all the commercial activities above Ukraine.[8] The closure of the airspace in the area of air operations was successful and could be used as a template for the eventual future armed conflicts. The belligerents are especially obliged to abstain from harming the commercial, civilian aviation (despite the fact that AP I to the Geneva Convention of 1977 does

[4] "Military aircraft means an aircraft operated by commissioned units of the armed forces of a State having the military marks of that State, commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline" San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 1994, Rule 13(j).

[5] https://twitter.com/EuromaidanPR/status/1499119413009817603/photo/1 (accessed: 14.12.2023).

[6] https://twitter.com/MPiatkowski1/status/1531559251805618177/photo/1 (accessed: 14.12.2023).

[7] https://twitter.com/i/status/1639086379203461121 (accessed: 14.12.2023).

[8] https://twitter.com/flightradar24/status/1496667700151599107/photo/1 (accessed: 14.12.2023).

not refer to air-to-air operations, under customary law its provisions are equally applicable in air-to-air encounters) (Schmitt 2014, 124; Grzebyk 2018, 168). The Ukraine experience is based on a bitter consequence stemming from the Malaysia Airlines MH-17 tragedy over eastern Ukraine on July 17th, 2014. There have been some ongoing discussions as to whether the Ukrainian civilian aviation authority's failure to close the airspace over Donbass (the airspace was closed only partially) and the area of hostilities between the Russian-backed forces of so-called Donetsk and Lugansk territorial entities contributed to the destruction of the Malaysian aircraft.

The air belligerent operations started as soon as the FORTE12, the USAF Global Hawk, left the Ukrainian air space on 4:15–4:30 A.M. CET February 24th, 2022. The reports indicated that the Russian special operations activities and the first border crossing occurred even earlier (between 1:00 A.M.–3:00 P.M.). The air operations in Ukraine started with the opening salvo of the Russian Air Force and missiles: cruise missiles "Kalibr" and ballistic missiles "Iskander" (Popmer, Tuganov 2023, 73–76). The first Russian strikes were conducted against the bases of the Ukrainian aviation: the Ozerne Air Base, the Ivano-Frankovsk Air Base (MiG-29),[9] the Khemelnitsky Air Base, the Lutsk Air Base, the Melitopol Air Base, the Myklaiv Air Base (Su-25), the Myrhord Air Base (Su-27), the Starokonstaintyniv Air Base (Su-24), the Vasylkiv Air Base (MiG-29). Some of those attacks destroyed Ukrainian military aircraft (such as Su-27 on the Ozerne Air Base[10]), but overall inflicted moderate damage to the airport infrastructures. Some of the destroyed Ukrainian aircraft were already obsolete and in reserve due to their lack of air-worthiness. The majority of the opening attacks were directed against the radar installations and the anti-aircraft positions. Nevertheless, the main bulk of the Ukrainian air defence, including the S-300 surface-to-air missile (SAM), survived the initial attacks and alongside Ukrainian fighters successfully defended the Kiev airspace during the first phase of the war. On February 24th, 2022, the Russian Air Force was involved in multiple dogfights against the Ukrainian Air Force fighter fleet consisting of Su-27s and MiG-29s. Despite the attacks directed against the air force infrastructure, most of the Ukrainian Air Force assets survived the initial wave of missile and air strikes (Bronk, Reynolds, Watling 2022, 14).

As observed by the co-author of this article, many interesting conclusions may be drawn relating to the fate of the Kherson-Chornobaivka Air Base, home to the 11th Separate Army Aviation Regiment. Two facts are important. Firstly, the Chornobaivka Air Base is, in fact, part of the Kherson International Airport, an airport which operates regular commercial flights to Kiev. Secondly, most of the precious assets of the 11th Separate Army Aviation Regiment had been relocated

[9] https://m.facebook.com/watch/?v=503212311154165&_rdr (accessed: 14.12.2023).

[10] https://twitter.com/josephhdempsey/status/1498958500097048576 (accessed: 14.12.2023).

before the initial Russian strikes. Only the helicopters that were obsolete and unworthy to fly were left.[11] Here the legal question arises: can obsolete, damaged or non-airworthy military aircraft be targeted? This requires an in-depth analysis of the military objective definition as provided by the art. 52(2) of the AP I (Marcinko 2019, 404). Two elements constitute what could be targeted during the hostilities: "nature, location, purpose or use" of the objective effectively contributing to military action and the existence of the 'definite military advantage' emanating from destruction, capture or neutralisation" (Mauri 2022, 144). Military aircraft are natural military objectives ("by nature") (Oeter 2013, 171). However, if one considers that the targeted air assets of the Ukrainian Air Forces parked on the airstrips across Ukraine were obsolete, damaged, or in bad technical condition, it seems problematic to accept that those aircraft "were contributing to military action" and had real military value at the time of the attack. On the other hand, in the context of a long-term air campaign, even the obsolete airframe has a potential to be refurbished. This piece of deliberation will be expanded in detail in the paragraph concerning the An-225.

4. FIRST STRIKES AND THEIR COMPLIANCE WITH IHL

Despite the forecasts, the Russian initial strikes were quite limited in scope and range. Their goal was, rather, to create the impression of overwhelming advantage over Ukrainian Air Forces, but, in fact, the strikes did not significantly degrade the abilities of the Ukrainian forces. Since 1939, every major military conflict has been initiated through air strikes against the enemy's air force's infrastructure (Cooling 1994). The list of the strikes during the initial phase of almost every initial air operation is the same: military airfields, air assets, radar sites, and air defence systems. The neutralisation of such objectives is a precondition to victory, as air superiority efficiently lends support to the ground or naval operations. Clearly, military aircraft, air forces bases or air strips, anti-aircraft installations, and radar sites are lawful military objectives under art. 52(2) of the AP I. It is generally understood that the Russian Air Forces failed to achieve this goal, as the first strikes did not degrade the capabilities of either Ukrainian air forces and anti-aircraft defence (Gordon 2023).

The interesting case is the question of international airports as lawful military targets. In 2003, it was criticised that the Coalition planes commenced an air attack against the Baghdad International Airport, as it was unjustified under the "assumption of its potential value for Iraqi military aviation: as it was impossible for this force to use military airfields" and under the denial of escape of the

[11] Personal information's from the author (Professor Sotula), who was in Cherson in February–March 2022.

Iraqi leadership (Bartolini 2006, 239). Most of the known publications on this subject highlight that airfields are by nature lawful military targets. However, Y. Dinstein only relates it to "military airfields" (Dinstein, 2002, 147). Van Boogaard underlines that purely civilian airfields are targetable only if there is credible intelligence indicating that the military is intending to use such a facility, especially after the military airstrip was hit (Van Boogaard 2023, 164). But there is another possibility. It must be emphasised that in many cases, air bases are located close to international airports. In such circumstances, the air base uses the same sets of taxiways and highways as the airport uses for commercial operations, which is a pure example of a dual-use facility. The example of such an airport is the Kherson International Airport, which is also home to the Ukrainian Air Force detachment. While usually the buildings and objects of a military air base are clearly separated from the buildings of commercial aviation, the runway and the taxiways are used both for combat aviation and civil aircraft. Under Art. 52(2) of the AP I, only military airfields are military objectives by "nature", while the civilian airport classification depends on the actual "use" or "purpose" of the facility. If the taxiways, runways, repair shops, fuel supply stations are used or are intended to be used for military purposes, they become a lawful military objective (Dahl 2016, 10). W.H. Parks highlighted that airports are potentially very useful in accommodating military aircraft, and thus "an airport is a legitimate target if it meets the definitional test for a military objective, even if also employed for civilian use" (Parks 2007, 105). More ambiguous is the status of the main building of a commercial airport: usually such infrastructure is not used by the military. Unless the building changes its purpose (becomes a staging point for troops, area of military concentration), it should be immune to attacks, and damage to it should be avoided. Of course, the corresponding location of the objective is also important: if the terminal is located so close to the military infrastructure that it is unable to physically be spared, it will become unavoidable collateral damage, subject to estimation during the assessment of the proportionality rule. G. Solis interestingly observed that the civilian airports which share their infrastructure with an air force base are military objectives by "location", and the whole area is subject to lawful attack during conflict (Solis 2010, 525).

5. THE HOSTOMEL AIRFIELD AND AN-225

The Hostomel airfield is home to the Antonov company, a Ukrainian-state owned air manufacturer, famous for building large cargo planes (Miller 2023, 265). The airport was not host to any elements of the Ukrainian Air Force. However, it is believed that due to close proximity of the airport to the Ukrainian capital Kiev and its long runways, the Hostomel airfield was labelled a strategic target for the Russian armed forces. The initial plan was to seize the airfield through air assault

of the VDV units (Russian Air Assault), which was actually successful at first: the Russian paratroopers captured the airport without significant resistance from the Ukrainian military, aiming to establish an airlift in order to bring reinforcements and quickly redeploy towards the Ukrainian capital. The "decapitation strike" against the Ukrainian leadership failed, as the Ukrainian reserves responded and contained the first wave of attackers, denying access to the runway (Collins, Kofman, Spencer 2023).[12] The first battle of Hostomel was over; however, the battle reignited while the VDV units linked up with the incoming forces of Russian ground troops marching from Belarus.

At the time of the VDV assault, the biggest transportation plane in the world – Antonov An-225 – was parked in the hangar, as the aircraft was considered non-operational due to ongoing repairs. After the failed operation of February 24th, 2022, the area of the airport became a place of contested battlefield, as the Russians were trying to establish a forward operating base at the Hostomel Airport, while the Ukrainian forces fiercely resisted. It is believed that during those clashes, the hangar containing the An-225 was hit and the plane was destroyed. It is unknown which party to the conflict was responsible for the destruction, as the airport zone was a area of heavy fighting. The destruction occurred after February 24th, 2022.[13]

The destruction of the aircraft raises questions concerning the legality of the act. The An-225 was not a military aircraft but a cargo one, owned and operated by a private company. The main feature of the plane was the unprecedented capabilities of heavy lifting. On the other hand, the An-225 could be quickly utilised for military purposes such as troop transportation, vehicle shipment or supply missions, and in the past the aircraft was involved in such activities (e.g. the delivery of the Iron Dome equipment for Israel air defence in August 2020).[14] The definition of the military objective requires that objectives by "nature", "location", "use" or "purpose" must provide a "contribution" to military activity and their neutralisation (destruction) need to offer a "definitive military advantage." The practice of the states signals that labelling a military objective by nature classifies it immediately as a lawful military

[12] "The battle for Hostomel Airport was the first major battle of the Russo-Ukrainian War (2022–present) and a decisive event in the war. This battle started on the morning of February 24 and lasted less than 36 hours. In the opening hours of the Russo-Ukrainian war Russian forces sought to seize a key airfield just 12 miles from the capital's center. Additional airborne battalions would follow on transport planes. They would rapidly deploy, seek to take control of the city, and overthrow the government or make the leadership flee. Russia ultimately gained control of the airport but failed to achieve the objective of the assault" (Collins, Kofman, Spencer 2023).

[13] Footage from the Russian paratroopers filmed on February 24th, 2022, indicated that the aircraft was not destroyed during the initial air assault.

[14] https://www.timesofisrael.com/the-antonov-worlds-largest-plane-lands-at-ben-gurion-airport/

objective (ILA 2017, 329).[15] However, as it was already highlighted, obsolete tanks, airplanes or other military equipment located in junk yards or as a historic display do not "contribute to the military activity" at all, and their destruction is unlawful (Crawford, Pert 2020, 170). As we said, the An-225 was not a military objective by "nature" but, rather, the potential ability of the aircraft to lift heavy military hardware classifies the An-225 as a military objective by "purpose." Yet, one cannot forget that the An-225 during the whole duration of the battle of Hostomel (until the feral day of destruction) was immobilised due to a technical malfunction (the aircraft was awaiting an engine swap).[16] We could accept that the An-225 was a military target by "purpose", although we are not convinced whether the aircraft at the time of the attack contributed to the military activity. In our opinion, what needs to be also considered is that the plane was located in a area of fighting, and the ability to perform maintenance works or even fly from Hostomel was extraordinarily limited due to constant shelling of the runways. In fact, the Hostomel Airport, during the whole period of the Russian presence in the Kiev region since February 24th, 2022, was excluded from its primary function, so any aerial asset located within limits was virtually immobilised. This is also relevant in the light of the possibility that the aircraft was destroyed either by the Ukrainian or Russian military.

However, if we accept that the Ukrainian military bears responsibility for the attack, there is another possibility to justify the destruction of the aircraft. As it was highlighted multiple times above, the Hostomel Airport became an area of fierce combat, as the Ukrainian forces clashed with Russian paratroopers in a high-intensity battle for control over the airstrip. The stakes of the fighting were very high, especially given the strategic value of Hostomel in the Russian advance towards Kiev. Art. 52(2) indicates that "location" might be a precondition to classify a certain object or land/area as a military objective. This, however, cannot be understood as a blanket authorisation of the "area bombing" style operations, which are explicitly prohibited under art. 51(5)(a) of the AP I (ILA 2017, 8). The classical requirements of precaution and proportionality are applicable in the case of such an event, but it cannot be overlooked that the value of the area, the density of the combat operations, and the large number of military objectives by nature (combatants, armoured vehicles) made the Hostomel area a high value target itself.

[15] "For example, a weapon system or a missile launching site are objects that make an effective contribution to military action by their very nature. It is not only a question of use because the qualification of military objective by nature may remain even if the object is not actually used at the time of the attack (a military plane in a hangar remains a military objective)" (ILA 2017).

[16] "According to the director of Antonov Airlines, one of the engines was dismantled for repairs and the plane wasn't able to take off that day, although the appropriate commands were given" (Guy 2022).

6. ATTACKS AGAINST TV STATIONS

Russian aviation additionally targeted the TV tower stations in Kiev (March 1st, 2022) and Kharkiv (March 6th, 2022). In the context of TV stations attacks, there has been a historically extensive IHL discussion since the famous NATO strike against the RVS station in Belgrade, Serbia, in 1999. The case itself gave rise to the famous ECtHR ruling *Bankovic,* in which the ECtHR ruled against the exterritorial applicability of the ECHR in cases of aerial operations. However, the IHL perspective on attacking the broadcast stations and TV towers was analysed in detail by the *ad hoc* expert panel established under the auspices of the Office of the Prosecutor of the International Criminal Tribunal for Former Yugoslavia (ICTY).[17] Article 8(1)(a) of the Hague Convention for Protection of Cultural Property in the Event of Armed Conflict lists a "broadcasting station" as a military objective.[18] In 1956, the ICRC proposal "Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War" contained an annex which labelled TV/radio tower stations as a lawful military objective due to their "military importance" (Sassoli, Cameron 2006, 40). However, those facilities are no longer "considered as military objectives by nature" (although some NATO commanders in 1999 considered that the media as a propaganda tool is a legitimate target) (Dinstein, Dahl 2020, 72; Sassoli 2003, 4). It is believed that the "use" of those objectives will have the priority in assessing the legality of the attacks directed against it.

In the conditions of modern society, TV stations potentially fall into the category of "dual-use" objects, with both military and civilian applications.[19] Moreover, TV/radio stations are also used for expanding and enhancing the circular connection, which was widely used for tactical intelligence, especially in the early period of the conflict, even by non-combatants. This dilemma does not address the question of whether the end-users of the circular connection directly participate in hostilities, although, as K. Macak mentions, such a possibility cannot be excluded (Macak 2023, 978). In fact, the possibility of relaying the data of military character by 5G or the LTE devices would render this type of

[17] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia.

[18] "Are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication" *Convention for the Protection of Cultural Property in the Event of Armed Conflict*; Adopted May 14, 1954, Entered into Force August 7, 1956.

[19] *But see Investigation regarding the attack against Kyiv TV tower on March 1, 2022* "There is no evidence to indicate that the damaged TV tower and adjoining technical buildings were being used for any military objectives. In its assessment of the attack, ECCHR confirmed that the TV tower was neither a military object nor a dual-use object, meaning that there was no lawful basis for the Russians to target it." https://investigations.support/case/8c787441-2942-41e4-81d1-da436c854f52

infrastructure a lawful military objective. In the law of air warfare, it is widely understood that every enemy aircraft could potentially be classified as a military objective if it is "being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance or command, control and communications missions" (HPCR 2009, 14). In consequence, when serving as a platform or in passing the information of military character, the TV tower is subject to attack (OSCE, 2022, 27; ICTY, para. 79).

On March 3rd, 2023, the Ukrainian court sentenced a Russian pilot who had bombed the Kharkiv TV tower using 8 FAB-500 bombs to 12 years. The defendant was found guilty of violations of laws and customs under the Ukrainian criminal code. The authors of the article have no further knowledge or data concerning the details of the case, although the indictment could be based on controversial grounds for the reasons mentioned above.

7. ATTACKS AGAINST URBAN AREAS AND THE USE OF THE UNGUIDED WEAPONS AND WIDE-BLAST RADIUS WEAPONS

When the Russian offensive stalled due to the stiff Ukrainian resistance, the urban areas became an area of intense fighting and shelling. The most affected regions were the area of Kharkiv, numerous towns in the Kiev region, as well the Chernigov and Sumy regions. A full siege had been established around the city of Mariupol. During those battles, the Russian military extensively used close air support aircraft. One of the most shocking incidents was the bombardment of the Dramatic Theatre in Mariupol on March 16th, 2022, and the air strike against maternity hospital on March 9th, 2022. The Russian military offered mixed justification for the bombings: from "staged" Ukrainian false flag operations to claims that the attack was directed against a lawful military objective. Neither of those reasons seems to be reasonable, which is even more apparent in the context of the attack against the Dramatic Theatre in Mariupol, an isolated building in the city centre (Polygraph.info 2022). The attacks were most likely conducted deliberately, making them an example of intentional bombardment of civilian objects, which is a flagrant violation of the principle of distinction and a war crime. Many videos and photographs from March–April 2022 recorded in various places in Ukraine show the extensive damage to the residential areas due to the use of heavy aerial bombs of unguided character.[20] This evidence is substantial enough to question whether the Russian aviation targeted the military objectives in the first place, not to mention the proportionality rule and necessity to exercise due care in

[20] Sumy: https://twitter.com/nexta_tv/status/1501380110397710339 (accessed: 14.12.2023); Czenihov: https://www.youtube.com/watch?v=VWAFNkk-3qg (accessed: 14.12.2023); Okhtyrka: https://twitter.com/i/status/1496888155936792576 (accessed: 14.12.2023).

air operations, according to the precaution's principle (OHCHR 2022).[21] According to N. Hayashi, failure to verify the accuracy of the targeting data is a contravention of the reasonable commander standard formulated in the "Rendulic rule".[22] While one cannot simply assess the legality of the attack based solely only on the *post factum* perspective, there is enough room to doubt the justification provided by the Russian military.

Despite the notable campaign led by the ICRC to at least mitigate the use of wide-area explosives in urban areas, international humanitarian law as it stands does not prohibit either the use of the heavy aerial bombs or unguided missiles and bombs (ICRC 2022). In the past, there was an intense academic discussion about to what extent the customary law required the use of precision-guided munition, but with a rather negative conclusion due to the unclear *opinio iuris* of the states (Piątkowski 2021, 612). Moreover, the Russian-Ukrainian war highlighted the inadequacies and limitations of the arms inventory: in high intensity conflict of symmetric character, there is a significant risk of depleting the reserves of precision weaponry and it is likely that the states in emergency will turn to unguided solutions in this regard. However, it cannot be denied that the tactic involving the use of unguided weapons with great consequences in most cases will be tantamount to carrying out prohibited indiscriminate attacks. The use of the wide-area aerial bombs in urban areas could be described as the following: the greater the payload, the greater the level of care that should be exercised in planning and executing an attack against a military objective (Brehm 2012, 139).[23] The authors of the article do not mean to imply that in all circumstances such a tactic would be unlawful (modern aircraft are equipped with ballistic computers such as CCRP – *Continuously Computed Release Point*). Nevertheless, it is very difficult to imagine that the aerial bombardment of infantry units or armoured

[21] "OHCHR is concerned that, Russian armed forces have engaged broad use of explosive weapons with a wide area effect in populated areas, including shelling from heavy artillery and MLRS, and missile and air strikes. Most civilian casualties and damage to civilian objects recorded by HRMMU were caused by the use of such weapons. Ukrainian armed forces have also engaged in shelling of populated areas in territory controlled by Russian affiliated armed groups." United Nations Office of the High Commissioner, *Ukraine, date on the human rights situation in Ukraine Reporting period: 24 February – 26 March, 2022* para. 8.

[22] "The reasonable commander test becomes important in areas where IHL grants commanders a degree of discretion. Examples include military necessity – such was the case in Hostage – as well as precaution and proportionality in attacks. Actively seeking and verifying information about the status of a target and incidental civilian harm form integral parts of precautionary measures codified in Article 57 of Additional Protocol I. If attackers err in their decisions because of a failure to check the accuracy of available information, they act unreasonably and in bad faith (Hayashi 2023).

[23] "Launching an attack without any effort to direct it at a military objective is undisputedly in violation of IHL, but this leaves unaddressed the rather more pertinent question of what effort would be required under IHL for an attack with unguided bombs, in an area inhabited by civilians, to comply with IHL" (Brehm 2012).

vehicles in densely-populated residential areas, conducted unguided and with heavy aerial bombs would be accurate enough not to be labelled as indiscriminate and contained enough not to be described as disproportionate (ICRC 2022, 84).[24] The International Institute of Humanitarian Law in its Rules of Engagement Handbook pointed out in rule 100C that model ROE (Rules of Engagement) in the context of the air operations in urban areas should not involve the use of non-precision guided weapons.[25] The associated risk of wide-blast heavy aerial bombs such as FAB-500 in many circumstances cannot be counterweighted by the "direct military advantage." The authors agree with the OSCE's report findings that in many circumstances the Russian aerial command acted in total disregard of the principle of precaution (which itself is not a war crime) (OSCE 2022, 41).[26]

On some occasions, the aircraft of both sides (Russian and Ukrainian) performed attacks using the ballistics of unguided missiles to imitate the "aerial" version of the rocket land artillery. The characteristic element is the extraordinary short targeting time, down to a few seconds, due to the danger arising from the anti-aerial systems, e.g. SAM or MANPADS. Such blind bombardment conducted against military objectives in urban areas would be labelled as an indiscriminate method, as it is virtually impossible for the crew to make the necessary target assessment.[27]

8. ATTACKS ON UKRAINE'S ENERGY INFRASTRUCTURE

One of the strategic directions of the Russian military aggression has been air strikes against civilian energy infrastructure in Ukraine. By September–October 2022, due to the inability to show military results at the front, the military and

[24] "When used against targets located in populated areas, there is generally a high risk that they will strike civilians and civilian objects as well as the military objectives, without distinction" (ICRC 2022).

[25] "Use of non-precision air to surface munitions in (SPECIFY areas) is prohibited" (International Institute of Humanitarian Law 2009).

[26] "The Mission cannot believe (assuming that military objectives were targeted; otherwise, the use of any weapon was unlawful) that the extent of civilian deaths, injuries and destruction that had to be expected due to the proven wide area effect of those munitions and their use in densely populated areas, was in each case not excessive compared with the military advantage anticipated" (OSCE 2022, 42).

[27] See the comment of deployment of rocket artillery in urban areas: "The Fact-Finding Mission concludes that during the offensive on Tskhinvali the shelling in general, and the use of GRAD MLRS as an area weapon in particular, amount to indiscriminate attacks by Georgian forces, owing to the characteristics of the weaponry and its use in a populated area. Furthermore, the Georgian forces failed to comply with the obligation to take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects" (Independent International Fact-Finding Mission on the Conflict in Georgia 2009, 340).

political leadership of the Russian Federation came to the conclusion that it was necessary to cause significant damage to the Ukrainian civilian infrastructure. The purpose of the air strikes was to weaken the economy of Ukraine as well as to terrorise the Ukrainian population, which, according to the Russian rulers, as a result of the energy collapse, should have protested against the Ukrainian leadership.

The chronology of events is as follows. Following the significant success of the Ukrainian Armed Forces in the Kharkiv and Kherson regions, the Russian armed forces began launching numerous attacks on the Ukrainian energy infrastructure. In September, the second largest thermal power plant in the country, Kharkiv CHPP-5 (Ritter, Arhirova 2022), as well as the South Ukrainian Nuclear Power Plant in the Mykolaiv region were attacked (Clinton 2022). In October, the number of attacks increased significantly. Nine waves (at least) of large-scale air strikes were aimed specifically at the energy infrastructure of Ukraine (The Economist 2022). Each such wave consisted of 70–100 missiles of various classes (including cruise missiles) or drones, which were fired over several hours. By the end of November, about 40% of Ukraine's energy infrastructure was significantly damaged (President of Ukraine 2022). According to Ukrainian authorities, not a single thermal or hydroelectric power station in the country remained undamaged (Gibbons-Neff, Santora 2022). Russian air strikes have caused widespread blackouts of electricity, water, and heating, which are especially dangerous for the population in winter conditions. As a consequence, access to sanitation, food, health care, and education was limited.[28] These attacks affected millions of people, and hundreds of civilians were killed and injured as a result of Russian air attacks on infrastructure.

On December 8th, 2022, the President of the Russian Federation, Vladimir Putin, publicly stated that numerous attacks deliberately targeted Ukraine's energy infrastructure. In his words, "At the proposal of the Ministry of Defence and in accordance with the plan of the Russian General Staff, a massive strike was launched with high-precision long-range weapons from the air, sea and land against Ukrainian energy, military and communication facilities" (Haltiwanger 2022). On December 10th, the Russian military, using kamikaze drones, launched an air strike on the Odessa power grid, leaving one and a half million people without electricity for an extended period (Starkov 2022).

The United Nations' independent International Commission of Inquiry into abuses in Ukraine has identified four types of weapons whose use in populated areas has led to indiscriminate attacks. These are unguided bombs dropped from aircraft; long-range anti-ship missiles of the Kh-22 or Kh-32 type, which turn out to be inaccurate when hitting ground targets; cluster munitions, which by definition disperse small submunitions over a large area; and multiple launch

[28] Independent International Commission of Inquiry on Ukraine. A/HRC/52/62.

rocket systems that cover a wide area with unguided missiles.[29] Based on the above facts, the International Commission found that attacks on energy infrastructure since October 10th, 2022, have been widespread and systematic. Their goal was to disable the entire country's energy system, with expected consequences for the heating system. International humanitarian law expressly prohibits damage to and destruction of objects essential to the survival of a civilian population "with the express purpose of depriving them of their means of subsistence." It should also be accepted by the Commission's findings that these attacks by Russian armed forces were disproportionate and that they constituted a war crime of excessive incidental death, injury, or damage (AP I, Articles 51(4)-(5), 57(2)(a)(iii)-(b) (prohibition of indiscriminate attacks), and 85(3)(b)-(5) (war crime of causing excessive accidental death, injury, or damage). The attacks were widespread and systematic, and may constitute a crime against humanity or other inhumane acts.

Commenting on the findings of the Commission, it must be underlined that in the past, the energy grid of the adversary was a target in previous aerial campaigns. During World War II, the Allied aviation bombarded the Third Reich power stations (especially during Operation Chastise), but it was not labelled as a priority target. After 1945, it became standard to consider the energy system of the enemy an objective in order to halt the arms production and shut the flow of power to increasingly energy-dependent sophisticated weapons systems. At some point, the civilian usage of the energy vastly surpassed the military applications, and with the progress of civilisation, modern societies are energy dependent on an unprecedented scale. Targeting power plants began to create widespread and severe consequences for the civilian population, even if the subsequent effects were clearly tangible in terms of military advantage, as the energy flow to command centres, SAM sites, or radar placements was interrupted or shut down. The best example is Iraq in 1991, when the destruction of the Iraqi power grid gave a clear advantage to the Coalition forces, while causing a humanitarian crisis. During the NATO bombardment of Serbia in 1999, NATO targeted the Serbian power plants and substations; however, they focused on temporary interruption of their operations by deploying the graphite bombs rather than on physical elimination (Lambeth 2001, 42). Power plants operating exclusively for civilian purposes are not a military objective. The elements of the power grid operating both for military and civilian purposes are "dual-use" targets, which are subject to the examinations and assessments and the proportionality rule (Byron 2010, 183). In Ukraine, power plants not only deliver electricity to households, but also heat. As pointed out by M. Schmitt, the denial of heat exposes civilian population to sickness, which is an essential part of civilian harm to be comprehended as

[29] Report of the Independent International Commission of Inquiry on Ukraine, A/HRC/52/62, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_UA.pdf

required by Article 51(5)(b) of AP I.[30] Moreover, the principle of precautions asks commanders to use the means and methods of attack eliminating or minimising the risks to the civilian population; under this logic, the attacks should focus on targeting substations or power lines rather than the energy production centres (e.g. power plants).

On 5 March 2024, the Pre-Trial Chamber II of the ICC at the request of the Prosecutor issued two arrest warrant[31] for commander of the long-range aviation of the Russian Air Forces and the chief of the Black Fleet for attacks against Ukrainian power grid in winter 2022. After analyzing the data submitted by the Prosecutor, ICC found that those strikes were either directed against civilian objects or have clearly excessive disproportionary effects. However, whether the case would be examined by the ICC in trial depends on the availability of the suspects (Article 63 of the ICC Statute bars trials *in abstentia*).

9. THE UKRAINIAN AIR FORCE'S ACTIVITIES

In the first weeks of the conflict, the Ukrainian Air Forces were acting in defence operations, especially defensive counterair activities aimed to deny the Russian Air Force the opportunity to regain air superiority over Ukraine. During the second stage of the conflict, the Ukrainian close support aircraft, especially Su-25s, were involved in separate combat missions (Trendafilovski 2022). Many of those missions were carried out in low altitudes, facing significant presence of the Russian air defence assets and aircraft, and forcing the crews to lower the accuracy of the bombardment (see the "blind bombardment" aspect highlighted above). Due to the limited strike capabilities, the Ukrainian Air Forces performed a small number of strategic sorties, although the situation changed with the delivery of the Storm Shadow and SCALP missile from the West, which are believed to be responsible for inflicting significant damage to the Russian military infrastructure in the Crimea peninsula (Axe 2023). The targets such as the Command of the Black Fleet and Black Fleet warships are lawful military targets.

[30] "'Injuries' include sickness, as in the case of that caused by water contamination or hunger due to loss of power. With winter approaching, any loss of heating could prove dangerous for the Ukrainian population; foreseeable harm to them would also qualify for the purposes of the rule" (Schmitt 2022).

[31] Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and

10. CONCLUSIONS

International humanitarian law defines the rules governing the conduct of parties to a conflict in order to protect civilians and reduce suffering during hostilities. It also establishes restrictions and prohibitions on the use of certain weapons and tactics. Air warfare is a form of military operations that involves the use of air power to achieve military goals. This may include bombing, air support, reconnaissance, and other airborne activities. Humanitarian law also applies to military action in the air to protect civilians and minimise suffering. For example, it sets rules for the use of air attacks to avoid disproportionate damage to civilian objects and civilian casualties.

The initial Russian airstrikes were directed, at large, against military objectives. However, according to the authors, the legal status of some Ukrainian Air Force aircraft attacked by the Russian Air Force and standing on runways throughout Ukraine is problematic. At the time of the attack, they were obsolete, damaged, or in poor technical condition, and it seems difficult to accept that these aircraft "contributed to combat" and had real military value. The same applies to the status of the An-225 "Mriya" aircraft destroyed at the Gostomel wirfield. However, we cannot deny that in prolonged conflict, even obsolote and damaged airframes have some military potential (through the refurbishment).

As the war progressed, the application of air power by the Russian Air Force became much more brutal. The experience and analysis of the course of later stages of Russian aggression in 2022–2023 have shown that the conduct of the Russian Federation Air Forces in many cases, with great likelihood, contravene the requirement of the law of air warfare, especially the law of the air bombardment. Active search and verification of information about the status of the target and incidental damage to the civilian population are an integral part of the precautionary measures provided for by international legal acts. Omission of such actions could render the act of air bombardment illegal due to the violation of the distinction principle or proportionality rule (for example, when using heavy, high-power bombs such as the FAB-500 in urban areas without any necessary due process in targeting). However, any firm conclusions are impossible to be formulated, without full knowledge of the circumstances surrounding individual decisions (*ante factum*) behind the attacks.

In October 2022, due to the inability to show combat results at the front, the military and political leadership of Russia concluded that it was necessary to inflict significant damage to the Ukrainian civilian energy system through air and missile strikes. The purpose of those actions likely violates the principle of military necessity, as the widespread attacks against the Ukrainian power grid served an abstract and dubious political goal (undermining the morale of

the Ukrainian population) rather than fostering a concrete and specific military advantage.

It is inevitable that the authorities prosecuting for war crimes in the context of the "Law of the Hague", both at the international and national levels, will face a large spectrum of legal dilemmas, involving the necessity to overcome the challenges arising from ambiguities in the practical applications of the principle of distinction, precaution, and proportionality rule in the context of aerial operations occurring in symmetric and full-scale conflicts.

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TARGETING IN THE RUSSIAN-UKRAINIAN WAR: THE CROSSROADS OF LEGAL AND TECHNICAL ASPECTS

Abstract. Article 82 of Additional Protocol I to the Geneva Conventions requires competent legal advisors to be available, when necessary, to advise military commanders at the appropriate level on the application of International Humanitarian Law (IHL). One of the most important fields of IHL application which requires legal advice is attacks on the enemy, which need to follow the principles of military necessity, humanity, distinction, and proportionality, and are also affected by the requirement to undertake all feasible precautions in order to avoid or at least minimise incidental harm to civilians (collateral damage). One of the ways to ensure that attacks on enemy remain compliant with the requirements of IHL is by adopting appropriate targeting procedures and tools facilitating avoidance or minimising collateral damage, such as the Collateral Damage Estimation Methodology (CDEM). Media coverage of the Russian-Ukrainian war has contributed significantly to the misperception of IHL provisions applicable to targeting. During the war in Ukraine, political declarations were made several times that a war crime had occurred in the form of a deliberate attack on the civilian object. However, the legality of a particular strike can rarely be judged based upon the results of the strike or via post-strike Battle Damage Assessment (BDA). The so-called Rendulic rule emphasises that military necessity, proportionality, and precautions are judged *a priori*, based upon by the information available at the time of the decision (circumstances ruling at the time) and not on the basis of information emerging after the decision had been made. Legal Advirsors' role in the targeting process requires them to possess at least the basic knowledge of the Targeting Process and the CDEM, general military expertise in the fields of Tactics, Techniques and Procedures (TTPs), as well as effects of the employment of particular weapon systems in given circumstances. This should be supported by thorough knowledge of IHL, in particular the practical aspects of its application in military operations. It should be about the intersection of legal and technical expertise.

Keywords: International Humanitarian Law, attacks, targeting, incidental harm (collateral damage), Rendulic rule

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TARGETING W WOJNIE ROSYJSKO-UKRAIŃSKIEJ: POŁĄCZENIE ASPEKTÓW PRAWNYCH I TECHNICZNYCH

Streszczenie. Artykuł 82 Protokołu dodatkowego I do Konwencji genewskich wymaga, aby w razie potrzeby byli dostępni kompetentni doradcy prawni, którzy mogliby doradzać dowódcom wojskowym odpowiedniego szczebla w sprawie stosowania międzynarodowego prawa humanitarnego konfliktów zbrojnych (MPHKZ). Jednym z najważniejszych obszarów stosowania MPHKZ, który wymaga doradztwa prawnego, są ataki na przeciwnika, które muszą być prowadzone zgodnie z zasadami konieczności wojskowej, humanitaryzmu, rozróżnienia i proporcjonalności, a także podlegają wymogowi podjęcia wszelkich możliwych środków ostrożności w celu uniknięcia lub przynajmniej zminimalizowania niezamierzonych szkód dla ludności cywilnej (strat pobocznych). Jednym ze sposobów zapewnienia zgodności ataków z wymogami MPHKZ jest przyjęcie odpowiednich procedur targetingu i narzędzi ułatwiających uniknięcie lub minimalizowanie szkód ubocznych, takich jak Metodologia oceny strat pobocznych (Collateral Damage Estimation Methodology – CDEM). Relacje medialne na temat wojny rosyjsko-ukraińskiej znacząco przyczyniły się do błędnego postrzegania norm MPHKZ mających zastosowanie do targetingu. W czasie wojny na Ukrainie kilkakrotnie padały deklaracje polityczne, że doszło do zbrodni wojennej w formie umyślnego ataku na obiekt cywilny, jednak legalność konkretnego uderzenia rzadko można ocenić na podstawie jego rezultatów lub tzw, oceny skutków uderzenia (Battle Damage Assessment – BDA) *post factum*. Tak zwana zasada Rendulica podkreśla, że konieczność wojskowa, proporcjonalność i środki ostrożności są oceniane *a priori* na podstawie informacji dostępnych w momencie podejmowania decyzji (okoliczności danej chwili), a nie na podstawie informacji pojawiających się po podjęciu decyzji. Rola doradców prawnych w procesie targetingu wymaga od nich posiadania co najmniej podstawowej wiedzy na temat procesu targetingu i CDEM, ogólnej wiedzy wojskowej w zakresie taktyki, technik i procedur (TTP), a także skutków użycia poszczególnych systemów uzbrojenia w danych okolicznościach. Powinno to być poparte dogłębną znajomością MPHKZ, w szczególności praktycznych aspektów jego stosowania w operacjach wojskowych. Powinno nastąpić skrzyżowanie wiedzy prawnej i technicznej.

Słowa kluczowe: Międzynarodowe prawo humanitarne konfliktów Zbrojnych, ataki, targeting, niezamierzone szkody (straty poboczne), zasada Rendulica

1. INTRODUCTION

Article 82 of Additional Protocol I to the Geneva Conventions requires competent legal advisors to be available, when necessary, to advise military commanders at the appropriate level on the application of International Humanitarian Law (IHL) and on the appropriate instruction to be given to the armed forces on this subject. One of the most important fields of IHL application which requires legal advice is attacks on the enemy, defined by Art. 49 of Additional Protocol I to the Geneva Conventions (hereafter – AP I) as any acts of violence against the enemy, whether in offence or defence.

This paper shall analyse the intersection of legal and technical expertise in the targeting process, based upon the NATO doctrine, i.e. the Allied Joint Publication 3.9 (AJP-3.9) – Allied Joint Doctrine for Targeting (NATO 2021), and the practice during the Russian-Ukrainian war (NATO AJP 3.9. 2021). First, it will introduce the basic notions and concepts related to the NATO Joint Targeting Process,

followed by the analysis of basic IHL principles on the targeting process, through the introduction of to the so-called Collateral Damage Estimation Methodology (CDEM), to conclude with the role of legal advisors (LEGADs) in the targeting process and summarise certain practical observations from the Russian-Ukrainian war, which began with evident Russian Aggression on 24th February, 2022.

The reason for using the NATO Targeting Doctrine as reference is simple: it is unclassified and publically-available, as opposed to the Russian or the Ukrainian targeting doctrine (however, it can be assumed that Ukraine adopted either NATO or US targeting doctrine). An analysis of the NATO targeting doctrine may aid in answering a number of important questions, including how specific targets are being selected and prioritised for engagement as well as how IHL is (or should be) affecting the targeting process.

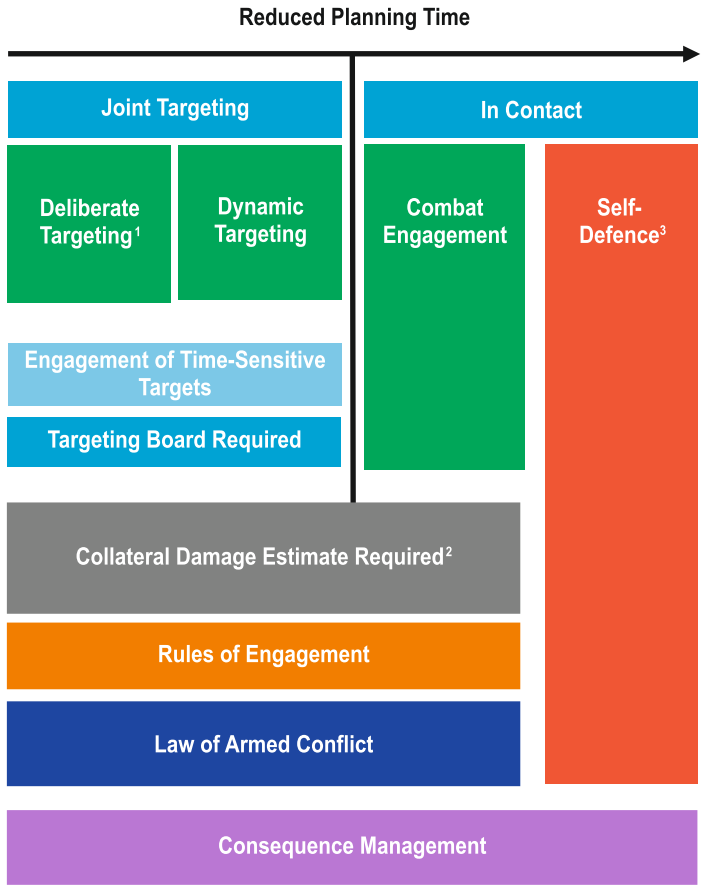
2. NATO'S APPROACH TO TARGETING

In simple terms, targeting is the process of selecting and prioritising targets as well as appropriate means of affecting them in order to achieve a desired effect. Targeting is not only about kinetic actions (bombardment, shelling, etc.) and "putting warheads on foreheads." It also includes non-kinetic actions, generating non-physical effects, in the cognitive and virtual domains, for example through information or psychological operations.

From the NATO doctrinal standpoint, a target can be anything within the "Five-O" construct: a Facility, an Individual, a Virtual entity, Equipment, and an Organisation. While the US Doctrine (JP-3.60) (United States Air Force 2021) considers as targets only such entities which belong to the enemy or support the enemy's military effort thus constituting a threat to own forces, the NATO Doctrine does consider "friendly" entities as targets, but only for information operations, strategic communications (STRATCOM), or influencing. Therefore, the term "target" in the NATO doctrine is not a legal term of art referring to a lawful military objective, but a broader notion with operational and doctrinal meaning.

NATO defines a target as any area, structure, facility, person, or a group of people against which lethal or non-lethal means may be used to produce specific psychological, cognitive, or physical effects (including thinking, thought processes, attitudes, and behaviours) (NATO AJP 3.9. 2021, LEX-17). In NATO's doctrinal approach, the term "target" will also include the attitudes and thought processes of civilians, including the populations of allied countries, although only information operations or strategic communication activities may be used in relation to them. It was not only the US that had raised objections to this definition, as it also deviates from the legal definition of a military objective (lawful target), provided for in Art. 52(2) of AP I: "(…) objects which by their nature, location, purpose or

use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage."



Notes:
1. Deliberate targeting includes scheduled and on-call targets.
2. Collateral Damage Estimation (CDE) for joint targeting will be as specified in the operation plan (OPLAN) Annex II – Targeting. Combat engagement is not a joint targeting activity that uses the formal CDE process. In a combat engagement, the on-scene commander will conduct a basic, non-written collateral damage estimate (in accordance with CJCSI 3160.01), using their best judgement, adhering to IHL/LOAC principles and taking all feasible precautions to minimize collateral damage, give the situation at the time.
3. In accordance with national laws and policy using the principles of Necessity and Proportionality. It is generally accepted within NATO that self-defence encompasses the use of necessary and proportional force, including deadly force, to defend against an attack or imminent attack.

Notably, the US position also recognises as lawful targets those objects/entities that support the so-called war-sustaining effort,[1] i.e. "economic targets",

[1] *The Commander's Handbook on the Law of Naval Operations*, NWP 1–14M/MCWP 5–12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval

and in the Russian-Ukrainian war numerous examples of similar extended interpretation of military objectives have been observed by targeting decisions made by both parties (e.g. oil refineries, oil rigs, grain storage facilities, digital public services providers, banking systems).

The engagement continuum diagram, AJP-3.9, p. 1–11

However, other US publications quote the AP I definition of military objectives as the one the United States subscribes to as contained in Additional Protocols to the Certain Conventional Weapons Convention ratified by the USA (Smith 2020, 68).

Targeting is a comprehensive process that determines what direct and indirect, reasonably predictable effects on the target can be expected. It includes reviewing all types of objectives both separately and as part of a system and determining the actions that need to be taken to achieve operational objectives. A 'full spectrum' approach is used to achieve a consistent range of options and outcomes which aims to optimise military operations by avoiding duplication of effort, countervailing effects and ensuring that the right objectives are 'engaged' in the right order and at the right time with appropriate means.

Effects on targets can be delivered in various ways: planned (deliberate), dynamically, during fire contact (combat engagement aka Troops in Contact – TIC), or in self-defence. While AP-3.9 repeatedly emphasises that targeting activities must remain within the limits of the law, including IHL, it does – in the author's opinion – erroneously "exclude" self-defence actions from the scope regulated by IHL, which has become the subject of reservations on the part of some member states.

Planned (deliberate) targeting is carried out in relation to verified targets that are known to exist and that are to be "engaged" according to a schedule or on order. The planning of the process means that targets are appropriately verified, validated, and placed on the Joint Target List (JTL) or the Restricted Target List (RTL). Planned targeting typically supports an operational command's future operations and future plans (NATO AJP 3.9 2021, 1–12).

Planned targeting also identifies Time-Sensitive Targets (TSTs) that are to be acted upon at a specific time or that are "on call" targets, with planned actions but not a specific action time because, for example, the time of action or their location are not yet known. In such a case, actions against these targets are

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Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007, § 5.3.1; See also United States, Military Commissions Act, 2006, Public Law 109–366, Chapter 47A of Title 10 of the United States Code, 17th October, 2006, p. 120 Stat. 2625, § 950v(a)(1), https://www.govinfo.gov/content/pkg/PLAW-109publ366/html/PLAW-109publ366.htm (accessed: 31.10.2023).

planned in accordance with planned targeting procedures, but usually executed under dynamic targeting procedures.

Dynamic targeting applies to targets that, due to the dynamic operational situation, pose (or will soon pose) a threat to own (allied) forces or to the mission, and whose elimination supports the achievement of the commander's objectives at a given time. Those could be already verified targets from the JTL/RTL that were not indicated for action in the planned targeting process, targets that are being developed (information necessary to service these targets is still being collected on them), or unforeseen targets and, therefore, not included in the JTL/RTL.

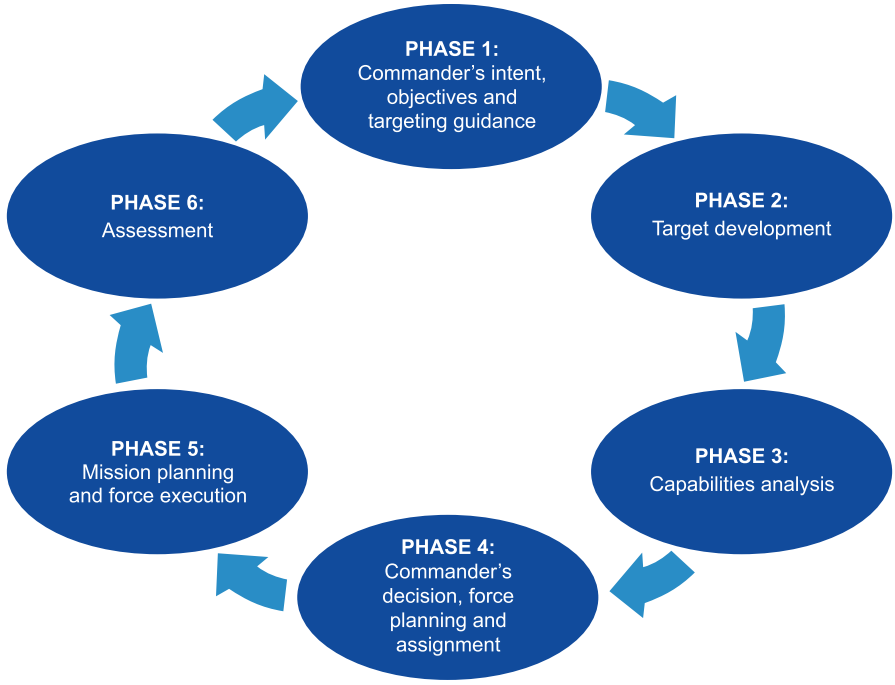
Dynamic targets are typically known to be in the area of operations, have been partially developed, but have not been detected, located, or selected for action in time sufficient for them to become planned targets. Dynamic targeting also applies to unexpected targets that meet the criteria specified in the operational level assumptions. In such cases, additional resources are required to complete target development, validation, and prioritisation.

It may be possible to prosecute dynamic targets by redirecting existing resources in line with the operational commander's intentions and targeting guidelines, as they typically require faster action than planned targets (NATO AJP 3.9 2021, 1–13)

Time-sensitive targets (TSTs) can be serviced in both planned and dynamic modes, depending on the time available. TSTs are prioritised, categorised, and coordinated at the operational and tactical levels. The authority to take action against a TST (the so-called Target Engagement Authority – TEA) is specified in Annex II to the operations plan (OPLAN).

Action against a TST may require accepting a higher level of risk to successfully engage the TST while simultaneously committing the resources of various (sometimes all) components (land, air, maritime, cyber) to detect, locate the target, and evaluate the results of target engagement. In particular, this applies to the Joint ISR (Intelligence, Surveillance Reconnaissance) resources at the operational level, which provide access to data in almost real time to effectively carry out the TST procedure. And, indeed, intelligence is a driving factor for the whole targeting process.

The joint targeting cycle is inextricably linked to the JISR process, and intelligence information (INTEL) is necessary not only to detect the target, but also to determine its nature, role, importance for the enemy, and, therefore, the priority assigned by the operational level commander. The cycle is run in six phases.

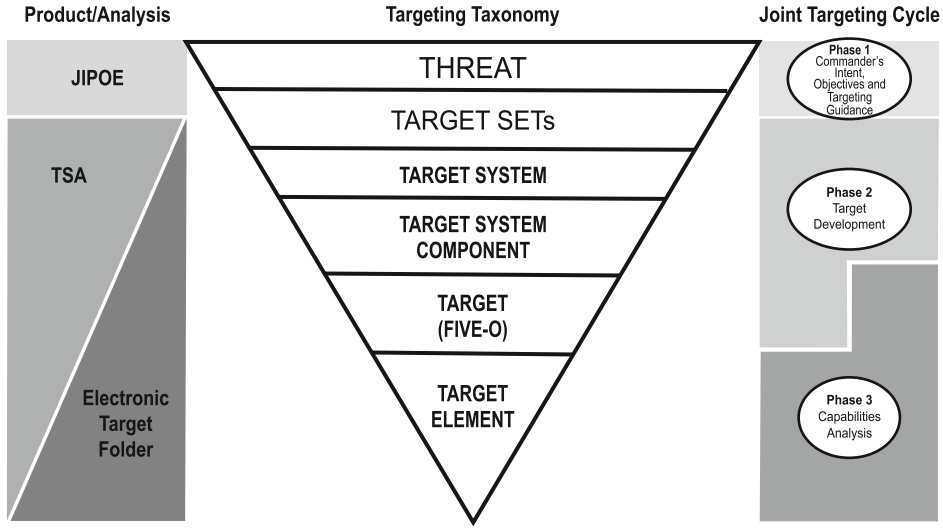


The Joint Targeting Cycle, AJP-3.9, p. 1–14

From the perspective of a LEGAD, Phase 2 (Target Development) is the most critical one. It is during this phase that targets are identified and selected for specific engagement and verification whether such engagement would be lawful. The second phase involves the validation of the target, which consists in ensuring compliance with the law (including IHL) and Rules of Engagement (ROE),[2] higher-level political and military guidelines, and the commander's intent. Target validation requires verifying the accuracy, credibility, and reliability of the intelligence (INTEL) data based on which the target was developed, and then cross-referencing it with legal analysis against criteria for the definition of a permissible military target and compliance with mandate/other policy guidelines (NATO AJP 3.9. 2021, 15–16).

Target development is based on a system analysis, supported by the so-called JIPOE (Joint Intelligence Preparation of the Operation Environment), which enables the assessment of the contribution of individual targets to the operational capabilities of the enemy.

[2] Defined as "[…](G)uidance and directives to NATO Commanders and the forces under their command or control, defining the circumstances, conditions, degree and manner for the use of force, and/or Describing and regulating behaviour and actions of NATO forces that may be construed as provocative, in peacetime, crisis or conflict."; MC 0362/2, *NATO Rules of Engagement*, 18th July, 2019.



Note: 1. Electronic Target Folders focus on the target but will identify the target system component and target system that it is part of

Legend:

FIVE-O	Facility, Individual, Virtual, Equipment-Organization
JIPOE	Joint Intelligence Preparation of the Operational Environment
TSA	Target System Analysis

Target development relationships, AJP-3.9, p. 1–17

The purpose of target validation is to ensure the lawfulness of both the target and selected means or methods of engaging it. As previously mentioned, NATO's doctrinal definition of a target is broader than a lawful military objective. Joint targeting must be consistent with the applicable legal framework – in particular the four core IHL principles of humanity, military necessity, distinction, and proportionality – and take into account the requirement to take feasible precautions in attack, as embodied in IHL. AJP-3.9 recognises that in armed conflicts the use of the term "target" does not imply that they may be lawfully engaged under IHL (see, e.g., "friendly" actors which may only be subject to information/influence or STRATCOM activities). A legal assessment must be carried out before any engagement. Similarly, in situations other than armed conflict, a legal assessment before any targeted action is taken must be conducted on the basis of the applicable legal framework, including the principle of proportionality under international law (NATO AJP 3.9. 2021, 1–4).

3. THE CORE IHL PRINCIPLES AND TARGETING

If legality is one of the cornerstones of the targeting process, the four core principles of IHL will have a significant impact on the process. There is no intent to repeat the meaning of the principles in this paper but, rather, to "translate" them into the language of the targeting process.

HUMANITY. This principle means the prohibition to cause superfluous injuries of unnecessary suffering to enemy combatants. It stems from the customary IHL norm that the right to choose means and methods of warfare is not unlimited. This is sometimes referred to as the principle of limitation, which is reflected in a series of treaty-based rules restricting specific means and methods of warfare. In the law of armed conflict, means and methods of warfare include weapons in the widest sense as well as the way in which they are used. Therefore, the law of armed conflict limits both the types of weapons that may be used and the manner in which they may be used. It is prohibited to use a weapon that by its very nature causes superfluous injury or unnecessary suffering to combatants, or to use any weapon in a manner that causes superfluous injury or unnecessary suffering. In the targeting process, it mainly affects the selection of appropriate means of engaging targets (in targeting jargon referred to as "weaponeering"), as to avoid weapons either prohibited by IHL (e.g. expanding bullets, undetectable fragments, poisonous weapons or poisoned projectiles, chemical weapons, biological weapons, etc.) or prohibited use of otherwise lawful weapons (NATO AJP 3.9. 2021, 1–8, para 0120.a). By reference to the war in Ukraine, this does not include incendiary weapons, which are not prohibited per se, although their use against personnel raises doubts with regard to the unnecessary suffering or superfluous injuries. Additional Protocol 3 to the CCW prohibits the use of air-delivered incendiary weapons in the vicinity of the concentrations of civilians, but does not outlaw incendiary weapons as such. It also does not regulate the use of smoke rounds (e.g. white phosphorus), illumination rounds, or the so-called "combined-effects munitions", e.g. thermobaric or High Explosive/Fragmentation/incendiary such as the infamous Russian OFZAB-500 (Осколочно-фугасно-зажигательная авиационная бомба – Fragmentation-Blast-Incendiary Aviation Bomb) aviation bomb (Rosoboronexport. N.d.), often erroneously reported as being prohibited by IHL (NATO AJP 3.9. 2021, 1–18).

The most often used incendiary weapon in the Russian-Ukrainian war was 9M22S (Missilery n.d.; Collective n.d.) incendiary cluster munitions for BM-21 Grad Systems, used by both parties (Ukraine and Russia), containing thermite type incendiary substance. Since these are rocket artillery rounds, they do not fall under the prohibition to use air-delivered incendiary bombs in the vicinity of concentration of civilians.

MILITARY NECESSITY. This principle allows the use of force not otherwise prohibited by IHL that is necessary for the partial or complete submission of the enemy. Military necessity is not an overriding principle allowing breaches of IHL (NATO AJP 3.9. 2021, 1–8). In the targeting process, military necessity is closely related to humanity and weaponeering. It may be translated into using the minimum force or a weapon with minimum damage potential necessary to achieve the desired effect on the target.

PROPORTIONALITY. An attack is prohibited when it may be expected to cause incidental harm to civilians and civilian objects consisting of 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. Military advantage and incidental harm to civilians and civilian objects are two very dissimilar concepts, and it is, therefore, difficult to strike a balance between them as the law requires. There is no mathematical formula that will decide whether the destruction of a particular military objective warrants the reasonably foreseen death or, other, harm to a certain number of civilians or civilian objects of a particular type. Nevertheless, the law requires both officers and soldiers to make such a good faith assessment, based on all information reasonably available to them (Rendulic rule), and to decide whether a proposed attack crosses the threshold of expected "excessive" incidental harm (NATO AJP 3.9. 2021, 1–9). It must be stressed that proportionality assessment is conducted *ex ante* or *ante factum* and – as it will be discussed in the final part of this paper – assessment based upon the results of a strike (*post factum*) is usually not conclusive in determining whether the principle of proportionality was observed.

DISTINCTION. The principle of distinction imposes an obligation on all targeting decision-makers to distinguish between legitimate targets and civilian objects and the civilian population. The rule that requires only the targeting of military objectives is an expression of this principle.

Only targets that are military objectives may be attacked. Certain installations/facilities/objects that have both military and civilian uses (referred to as "dual-use" facilities) are more difficult to identify as lawful legitimate military objectives. Examples of possible dual-use facilities include bridges, electrical systems, fuel, communication nodes, vaccine, and chemical plants, etc. Before attack, these dual-use facilities must be carefully analysed based upon the current situation and information to determine if they are legitimate military objectives (NATO AJP 3.9. 2021, 1–8).

Indiscriminate attacks are prohibited. Accordingly, any attack must be directed at a specific lawful military target, must employ means and methods of combat which are capable of being directed at a specific lawful military target, must employ means and methods of combat the effects of which can be limited as required by the law of armed conflict; and if the proposed attack is aimed at clearly

separated and distinct military objectives in an area containing a concentration of civilians or civilian objects, it must be conducted as separate attacks on each military objective.

Distinction is the principles requiring adequate, accurate, credible, and reliable INTEL, facilitating the target validation, but also proportionality assessment and precautions in attack (NATO AJP 3.9. 2021, 1–18).

PRECAUTIONS IN ATTACK. While not necessarily universally considered as a core principle of IHL by all NATO member states, precautions in attack are universally recognised as a requirement of customary IHL, even by states not parties to Additional Protocol 1. AJP 3.9 does reflect the requirement to undertake all feasible precautions *as part of legal review prior to engagement (NATO AJP 3.9. 2021, 1–4), under the proviso that "(t)he word 'feasible' in this context means what is practicable, or practically possible, considering all the circumstances at the time using all the information reasonably available. Some nations refer to 'feasible precautions', vice 'all feasible precautions'" (NATO AJP 3.9. 2021, 1–18). Two more phases in the NATO-approved targeting cycle, which require LEGAD's inputs, advice, and oversight will thus be Phase 4 – where the servicing agency (the component delivering the effect on target) is selected, alongside with the 'weaponeering solution' i.e. the selection of means and methods necessary to achieve the deliver the desired effect on the target – and Phase 5, where the actual engagement takes place and based upon the circumstances ruling at the time may require either a change of the selected delivery method or even an abortion of the engagement, should it be expected that expected incidental losses are excessive compared to anticipated military advantage.

While in 20 years of NATO's focus on counterinsurgency (COIN) operations, with technological supremacy over the adversaries and total air dominance, the policy (not a legal standard, though) requirement of zero CIVCAS (civilian casualties) was – at least theoretically – achievable and enforceable, in high-intensity urban warfare it would be unreasonable to expect, as recently demonstrated by the Russian-Ukrainian war and Israeli operations in the Gaza Strip triggered by Hamas's terrorist attack on 7th October, 2023. Nevertheless, precautions in attack still are a valid requirement, and the NATO's targeting doctrine does take that into account. One of the possible methods of undertaking feasible precautions is the application of the so-called Collateral Damage Estimation Methodology (CDEM).

4. THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY – A TOOL FOR PRECAUTIONS IN ATTACK AND ASSISTING THE PROPORTIONALITY ASSESSMENT

The Collateral Damage Estimation (CDE) is a product of the process of the "Joint Methodology for Estimating Collateral Damage and Casualties for Conventional Weapons: Precision, Unguided, and Cluster".[3] This part will be based upon the author's experience and observations from the practical application of the CDE Methodology in NATO's targeting process, in line with the aforementioned "Joint Methodology…"

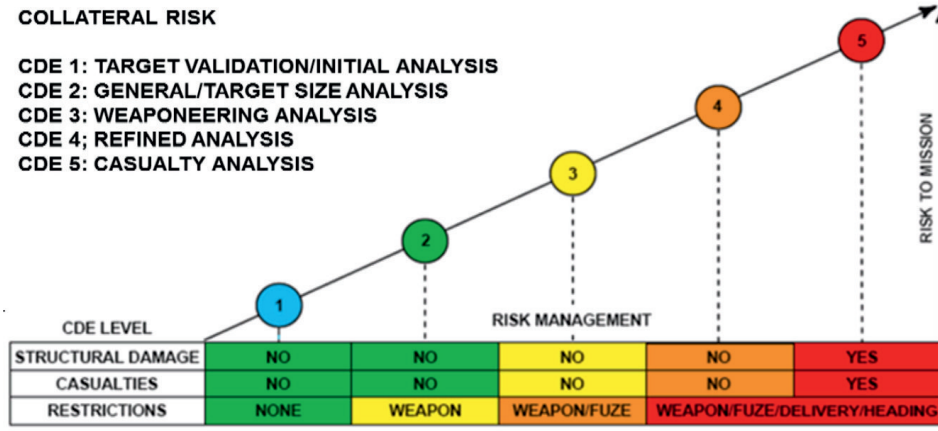
What is the Collateral Damage Estimation Methodology (CDEM)? It is a balance of science and art that produces the best judgment of potential damage to collateral concerns. The CDEM encompasses the joint standards, methods, techniques, and processes for a commander to conduct the CDE and mitigate unintended or incidental damage or injury to civilian or non-combatant persons or property or the environment. The CDEM assists commanders in weighing risk against military necessity and in assessing proportionality within the framework of the military decision-making process, and is a means for assisting a commander in adhering to LOAC, in particular precautions in attack and – if the threshold of Casualty Estimate (CE) within CDE Level 5 (to be explained below) is reached – proportionality assessment.

The CDEM technical data and processes of the methodology are derived from physics-based computer models, weapons test data, and operational combat observations. All contain some degree of inherent error and uncertainty. The CDEM is not itself a decision – it only informs a commander's decision and its application relies on sound judgement. The CDEM is not the only input to a commander's decision-making in the targeting process. There will be other factors to be taken into account: LOAC, the Rules of Engagement (ROE), target characteristics (*inter alia* nature, function, purpose or use), operational objectives, political guidance, STRATCOM considerations, etc.

It is based on five mutually-dependent CDE levels (CDE Level 1 through Level 5), each level being based on a progressively refined analysis of available intelligence, weapon types and effects, physical environment, target characteristics, and delivery method. For each of the levels, a simple YES/NO test is to be conducted for three aspects, which the diagram below explains.

1) Are there any risks of causing structural damage?
2) Are there any risks of causing non-combatant casualties?
3) Are there any additional restrictions (e.g. on the type of weapon) which need to be applied?

[3] Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 31260.01, *No-Strike and the Collateral Damage Estimation Methodology,* 13 February 2009.

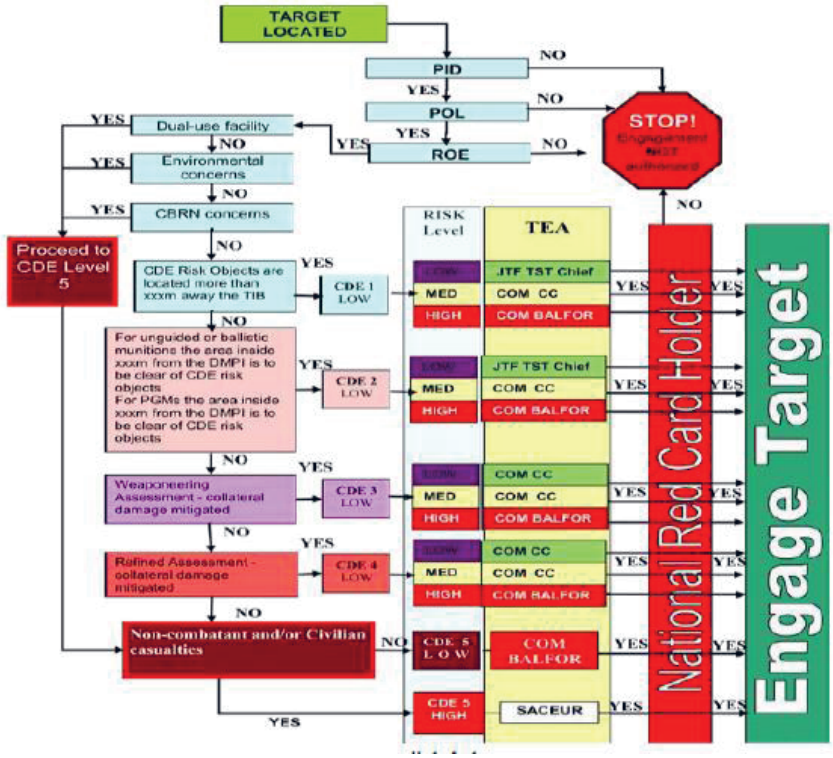


Five steps of progressive CDE assessment, CJCSI 3160.01, p. D-A-3

If the answer to any of the three questions is 'YES', it requires a mandatory move to the next CDE level and the conduct of the same three-question test until receiving three 'Nos' or reaching CDE Level 5, where despite all the precautions or mitigation measures, damage to CIV objects or non-combatant casualties is inevitable and there is a need to estimate the casualties.

The CDEM is thus a valuable tool in employing precautions in attack (e.g. by selecting the ordnance to be used, fusing, delivery method, direction and tactics), thus making it possible to either mitigate the expected collateral damage (incidental losses) or assess the extent of expected collateral damage when mitigation is not possible.

It is not the LEGAD's role to assess the CDE level – it is responsibility of the targeting cell. The LEGADs do need to know what the implications are, including the respective Target Engagement Authority (TEA).



An example of a Target Engagement Authority (TEA) Matrix

Also, sometimes LEGADs need to ask the right questions, in particular in areas which the CDE Methodology does not account for. One of the examples refers to secondary effects. They need to be taken into consideration when there is the risk of the occurrence of such effects, in particular when they have the potential to outweigh the primary effects of the ordnance. A proportionality analysis needs to take into account all the factors which are foreseeable when conducting the analysis with due diligence. IHL requires both officers and soldiers to make such a good faith assessment based on all information reasonably available to them, and to decide whether a proposed attack crosses the threshold of expected "excessive" incidental harm.

This requirement is reflected in the so-called Rendulic rule, which was formulated by the International Military Tribunal in Nuremberg in the so-called "Hostage Case".[4] Under the Rendulic rule, acts of soldiers and commanders on the battlefield should be assessed by the information available to them at the time of the decision (Smith 2020, 58; Sliedregt 2003, 125–126, 304, 314) (circumstances

[4] International Military Tribunal Case 7: The "Hostage Case," US v. List et al., https://nuremberg.law.harvard.edu/nmt_7_intro#judgement (accessed: 13.11.2023).

ruling at the time) and not on the basis of information emerging after the decision had been made. The rule establishes the standard of a reasonable commander, which requires that decisions made by the commander are judged based upon information obtained or possible to obtain when exercising due diligence (Piątkowski 2013, 69, 74, 76–77).

The CDEM does not always predict the actual outcome of weapon employment. Intelligence fidelity and timeliness, operational considerations, weapon reliability, or delivery method alterations are some reasons for differences. However, the CDEM enables a reasonable determination of collateral damage inherent in weapons employment, thus addressing IHL requirements for reasonable precautions to minimise effects of combat on the civilians/civilian population or non-combatants.

CDM does not account for weapon malfunction, operational delivery errors, or altered delivery tactics based on aircrew judgment. It cannot "predict" or model unknown transient civilian or non-combatant personnel and/or property (e.g. vehicles or pedestrians) in the target area. Most importantly, CDE does not account for secondary effects (e.g. ammo cook-off); therefore, it does not replace all means of proportionality assessment.

While the CDEM offers a tool for modelling and assessing the expected incidental losses as well as possible mitigation measures, thus constituting one of the feasible precautions, it should be noted that the formal CDE process, with the complete employment of the CDEM, is time-consuming and in given circumstances may not be feasible (time constraints, dynamic engagements, an inability of the software and certified operators). It could then be substituted with the so-called "field CDE", understood as the best assessment of expected incidental losses based upon the experience and expertise of the personnel conducting it.

Also, the CDEM does not replace proportionality assessment, as it only provides the first half of the proportionality analysis, i.e. the expected incidental losses, but not the anticipated military advantage, which needs to be assessed separately and may produce results significantly affecting the balance between incidental losses (humanity) and military advantage (military necessity). Maintaining this balance is the primary purpose of IHL.

Therefore, relying solely on the CDEM for the proportionality assessment or utilising the CDEM as the only precautionary measure would probably not satisfy the reasonable commander standard, which – as per the Rendulic rule – should apply not only to assessing military necessity, but also proportionality and precautions (Hayashi 2023). As stated above, the application of the CDEM does not relieve the personnel involved in target nomination and prosecution (including commanders) from the requirement to actively seek highest possible intelligence fidelity. However, intelligence itself is not enough to remove the probability of errors resulting from negligence, duress, or poor judgement of subordinates, but commanders' errors may be culpable if they are not "(…) subjectively honest

and objectively reasonable" (Hayashi 2023). In "the circumstances ruling at the time", the requirement for feasible precautions may actually mean the necessity of going above and beyond what the CDEM can provide (produce) and employing other mitigation measures, such as additional INTEL, environmental, Chemical, Biological, Radiological, Nuclear (CBRN) or engineering assessments, the employment of Precision-Guidance Munitions (PGMs), etc.

5. LEGAL ADVISORS IN TARGETING – LESSONS IDENTIFIED FROM THE RUSSIAN-UKRAINIAN WAR

Legal advisors bear a significant responsibility in the targeting process. LEGADs are one of the three core participants in the Joint Targeting Cycle explicitly mentioned in the NATO's Targeting Doctrine, ensuring a legal assessment of the targets and desired effects, supporting the development of collateral damage prevention procedures based on commanders' guidance and higher-level directives and ensuring that targeting efforts are aligned with the legal framework and that IHL principles are integrated along the whole process from target discovery through validation and engagement (NATO AJP 3.9. 2021, 1–23). While targeting procedures may be more restrictive than permitted by IHL, they may never be more permissive. Commanders should receive training in IHL and have the LEGAD's support available when needed. This legal support should include as a minimum target validation in Phase 2 of the Joint Targeting Cycle (determining that the criteria of lawful military objective are met), i.e. satisfying the requirements of distinction, force planning and assignment in Phase 4 (in particular the selection of means and methods – weaponeering) addressing military necessity and humanity and target engagement in Phase 5 (including the CDEM and recommendation to abort engagement in case of expected excessive incidental losses), thus following the requirements of proportionality and precautions in attack.

This requires the LEGADs to possess at least the basic knowledge of the Targeting Process and the CDEM as well as general military expertise in the fields of Tactics, Techniques, and Procedures (TTPs) as well as effects of the employment particular weapon systems in given circumstances. This should be supported by thorough knowledge of IHL, in particular the practical aspects of its application in military operations.

The media coverage of the Russian-Ukrainian war has contributed significantly to the misperception of IHL provisions applicable to targeting: from erroneous statements regarding the use of incendiary weapons, to "sentences" or "verdicts" issued by the media classifying certain incidents as war crimes despite the lack of basic knowledge of the principles of IHL.

During the war in Ukraine, political declarations were made several times that a war crime had occurred in the form of a deliberate attack on civilian objects. For example, at the beginning of the war, the "Retroville" shopping mall near Kiev was struck, which, as open sources later revealed, was used to shelter Ukrainian BM-21 launchers. The second example is the strike on the "Amstor" shopping mall in Kremenchuk, considered by Ukrainian authorities as a deliberate attack (if so, it would constitute a war crime). However, the hit on the shopping centre was most likely the result of the lack of precision of the Kh-22 missiles used to attack the Road Machinery Plant. KREDMASH, which constituted a lawful military objective as a dual-use facility. In this case, we can talk about the Russians' failure to take precautions in attack in the sense of the selection of means of warfare (weaponeering), and, therefore, a violation of Article 57 AP I, which, however, does not constitute a war crime (Bellingcat 2022).

After more than 20 years of NATO's involvement in peace enforcement or stability operations of counterinsurgency (COIN) type, with total air dominance and significant technological supremacy over the adversaries, public opinion has got used to "zero CIVCAS" being an actual legal requirement. The Russian-Ukrainian war is an evident example that this standard is impossible to sustain in high-intensity urban warfare. Nevertheless, media often portray every case of a civilian casualty as a violation of IGL or even a war crime, mainly based upon *ex ante*/*ante factum* analyses.

The legality of a particular strike can rarely be judged based upon the results of the strike or via post-strike Battle Damage Assessment (BDA). The presence of civilians or the occurrence of civilian casualties does not determine the civilian character of the object, just as it cannot shield a military objectives from attack. A dual-use facility is a lawful military objective, although its dual use will complicate the proportionality assessment.

Trying to verify the correctness of proportionality assessment by means of post-strike BDA is a fundamental mistake. Proportionality assessment is conducted ahead of the strike, not afterwards. Actual casualty numbers do not necessary matter in assessing proportionality. IHL does not prohibit/outlaw inflicting incidental losses (including CIV casualties). IGL prohibits attacks, which are expected to cause excessive incidental losses compared to definite military advantage anticipated as a result of the strike. This professional judgement should be based upon INTEL and tools available for the assessment of the result of the strike during its planning.

Not all ordnance impacts on civilian objects are results of deliberate targeting (war crimes). There are so many variables in the equation that without in-depth knowledge of the decision-making process behind each strike, including INTEL used in support of such decision, making conclusive assessments is virtually impossible. Not to mention technical factors, such as weapons malfunctions,

failure of guidance systems, enemy's counteractions (air defence, electronic countermeasures, jamming, etc), or deviations from established delivery method and tactics.

While certain factors, e.g. the use of precision-guided munitions, may be an indicator of the intent to strike a particular object, jamming or other forms of electronic countermeasures may have a significant impact on the accuracy of a weapon system. Without access to background INTEL, it is impossible to assess what level of knowledge a particular commander authorising the strike had at the moment when the strike was authorised (circumstances ruling at the time).

While certain objects, e.g. critical infrastructure facilities – especially electrical grid and electricity production facilities – are particularly controversial targets, in most of the cases they constitute dual-use objects and thus lawful military objectives in accordance with state practice, dating back to the operation Desert Storm. As stated by the US Department of Defence, "[e]lectricity is vital to the functioning of a modern military and industrial power such as Iraq, and disrupting the electrical supply can make destruction of other facilities unnecessary. Disrupting the electricity supply to key Iraqi facilities degraded a wide variety of crucial capabilities, from the radar sites that warned of Coalition air strikes, to the refrigeration used to preserve biological weapons (BW), to nuclear weapons production facilities" (Department 1992, 127).

The impact of the strikes on Ukrainian electricity infrastructure and on civilian populace has been tremendous. However, without the access to Russian INTEL and other data stored in Russian targeting support systems, assessing whether the anticipated military advantage from disabling the energy infrastructure justified the impact on the civilian populace is extremely difficult. Nonetheless, taking into account that the strikes on this infrastructure took place mostly in cold autumn and winter periods, it can be reasonably assumed that their main purpose was to affect, if not terrorise, the civilian populace. If this purpose is proven by independent and impartial inquiries, these attacks would constitute a violation of Art. 33 of the Geneva Convention IV as well as Art. 52(2) of AP I. Proving this intended purpose would – to a large extent – require access to Russian background data, which is a highly unlikely condition to be fulfilled while the current regime is in power, unwilling to cooperate with the International Community and – specifically – with the International Criminal Court.

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LAND WARFARE DURING THE RUSSIAN-UKRAINIAN WAR AND INTERNATIONAL HUMANITARIAN LAW

Abstract. The Russo-Ukrainian War is one of the largest – and probably the most intensive – conflicts of the last several decades. Fought between large, regular, and well-equipped forces of two sides, it naturally provides an extremely wide scope of materials for analysis as to the functioning of *ius in bello*.

At the current stage, however, the evidence is often piecemeal and unclear, particularly taking into consideration the lack of access to documents and to Russian materials. While there is a significant body of evidence to indicate serious violations of humanitarian law, including indiscriminate or deliberate attacks on civilian targets, a detailed analysis requires taking into consideration a broader scope of circumstances which at this point are unclear. One of areas where we have strong evidence, if based on a sample, is the issue of the treatment of the prisoners of war. In general, the initial information seems to indicate widespread and systematic violations of humanitarian law during the conflict.

Keywords: humanitarian law, *ius in bello*, Ukraine, Russia, cluster munitions, prisoners of war, landmines, weapons usage, war crimes

DZIAŁANIA LĄDOWE PODCZAS WOJNY ROSYJSKO-UKRAIŃSKIEJ I MIĘDZYNARODOWE PRAWO HUMANITARNE

Streszczenie. Wojna Rosyjsko-Ukraińska jest jednym z największych – i potencjalnie najintensywniejszym konfliktem ostatnich kilku dekad. Toczona pomiędzy dużymi, regularnymi i dobrze wyposażonymi siłami dwóch stron w naturalny sposób dostarcza niezwykle szerokiego materiału dotyczącego stosowania przepisów *ius in bello*.

Na aktualnym etapie materiał dowodowy w tym obszarze często jest jednak wycinkowy i niepewny, w szczególności w związku z brakiem dostępu do dokumentów oraz do materiałów po stronie rosyjskiej. O ile istnieją silne przesłanki do przyjęcia że w wielu przypadkach mamy do czynienia z działaniami prowadzonymi w sposób nierozróżniający czy z celowymi atakami na cywilów, dokładna analizy tego stanu rzeczy wymaga uwzględnienia szerszego zakres okoliczności, które w tym momencie są niepewne. Jednym z obszarów w których dane są stosunkowo konkluzywne,

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choć oparte o badania próbki, jest kwestia traktowania jeńców wojennych. Wstępne informacje sugerują jednak na szeroki i systematyczny charakter naruszeń prawa humanitarnego w toku konfliktu.

Słowa kluczowe: prawo humanitarne, *ius in bello*, Ukraina, Rosja, amunicja kasetowa, jeńcy, miny lądowe, użycie broni, zbrodnie wojenne

The conflict between Russia and Ukraine includes the largest number of land forces engaged on either side since the Iraqi-Iranian war of 1981–1989[1] and may have surpassed this conflict in the intensity of fighting.[2] Modern communication technologies allow unprecedented amount of information to be collected and made available, resulting in this conflict being perhaps the best documented war in history (Hofman 2023), tracked almost in real time all around the world.

As a result, the amount of potential information concerning activities of either side seems to be very extensive. However, this also creates a significant amount of information noise and unconfirmed claims concerning the events on the battlefield. Multiple claims concerning violations of humanitarian law which were made in news outlets or (especially) on Internet forums cannot be verified. Similarly as was noted in the case of air war, so far no independent international institution – such as the OSCE, the ICC, or the UN – managed to obtain full access to the military records and data of either Ukrainian or Russian armed forces, and any investigation at best used samples and widely available data.

In certain fields, independent inquires were prepared by some NGOs, such as the Human Rights Watch. However, those used only sample data and thus may not provide a full picture. Moreover, the assessment of certain requirements of *ius in bello* can be done only by an analysis of specific situation and by waging relevant requirements and details of a given situation. Such details are currently not available in most cases, making assessments of legality very difficult.

Scale of warfare makes it impossible to describe in such a text specific reported instances of violations of attacks on a small scale. As such, the text concentrates on providing a general outline of possible violations of *ius in bello* in Russian-Ukrainian conflict as far a ground operations are involved.

[1] The Armed Forces of Ukraine are usually cited to number around 700,000 personnel – (ukr-military, 2023). It is notoriously difficult to estimate how many troops are present on the Russian side; it is not clear if the provided numbers fully include rear echelon and associated forces (PMCs, forces from other republics), but the number is certainly at least in the hundreds of thousands – the mobilisation in autumn 2022 included around 300,000 personnel and at least three waves of conscription of around 130,000 each, in addition to the pre-war strength. The Gulf War of 1991 could be considered to have had more men present in the Theatre of Operations at a given moment (at around 1,700,000 for both sides combined), but the overall number of soldiers involved was lower.

[2] At the time of the battle of Al Faw, Iraq achieved greater shell usage per day than Russia did during the height Battle of Donbass in June 2022, but in the latter conflict such intense fire was maintained for far longer. See: Cordesman (1991, VIII–39).

1. MILITARY OPERATIONS

To assess the usage of weaponry, we need to first take into consideration general requirements concerning military operations. Three interdependent principles – *military necessity*, *humanity*, and *honour* – provide the foundation for other law of war principles, such as *proportionality* and *distinction*, and most of the treaty and customary rules of the law of war (U.S. DoD *Law of War Manual* II).

- military necessity – only measures necessary to accomplish legitimate military objectives should be taken, provided international law does not otherwise prohibit those measures;
- humanity – measures should not inflict suffering, injury, or destruction which is not necessary to accomplish a legitimate military objective;
- proportionality – attacks expected to cause incidental harm to civilians or damage to civilian property which is excessive in relation to the concrete and direct military advantage to be gained have to be avoided. All feasible precautions to avoid or reduce incidental civilian harm have to be taken;
- distinction – the used weapons and measures have to be able to distinguish between civilians and combatants and between protected and unprotected objects.

Whether the requirements of those principles were met has to effectively be decided on case-by-case basis, taking into account a specific situation. At this stage of the conflict, it is not feasible to present a careful case-by-case analysis due to lacking and incomplete information. Therefore, only specific issues related to particular fields will be presented in the text.

2. ATTACKS ON CIVILIAN TARGETS

The majority of attacks on civilian targets were carried out by either aviation or long range effector, and as such are described in the appropriate chapter. On multiple occasions, we have, however, seen frontline ground forces carry out attack against civilian targets which could clearly be identified as civilian. Such attacks can be traced back to the very first day of the war[3] and have continued since. Russian soldiers were reported to open fire on civilian targets, e.g. to deal with a traffic jam (Queen 2022). Such attacks were clearly intended as direct attacks on civilian targets, and not cases of mistaken identity or indiscriminate weapons usage, and are gross violations of international norms.

Particularly during the first phase of the war, Russia conducted large-scale, indiscriminate shelling with artillery of Ukrainian residential areas and other civilian targets. Investigation by the OHCHR in its *Report of the Independent*

[3] Examples occurred as early as on the first day of the war – such as footage of BMP – 2 IFV opening fire on civilian car parked on the road (Radio 2022b). Similarly, in the testimony regarding the death of Ivan Levankov, orders to carry out an attack on civilian cars in a traffic jam were given on the first day of invasion (Queen 2022; Bell 2022).

International Commission of Inquiry on Ukraine estimated that by 10th September, 2023, at least 8,062 persons were killed and 16,610 were injured in attacks carried out against residential areas (the number included both air and artillery attacks). The actual number was noted as being likely higher. During the investigation, it was concluded that indiscriminate attacks with explosive weapons were the most common case of civilian deaths during the conflict.

Many of Russian basic weapons of war, used in large numbers against citizen and civilian areas, are by design not capable of precise, discriminate attacks,[4] but despite that they were employed in mass attacks on Ukrainian positions. Additionally, as the OHCHR noted, in many cases, the Commission has not been able to identify any military presence in the locations affected by the attacks. Either the targets were not being verified, or attacks were carried out against civilian targets with premeditation, and not as an effect of indiscriminate weapons being used.

3. ATTACKS ON HUMANITARIAN CORRIDORS

During the early stage of the war, several Ukrainian cities were effectively encircled by the Russian forces. While IHL does not define or regulate such corridors specifically, their creation is an instrument helping to fulfil duties of safeguarding the civilian population. Article 23 of the Fourth Geneva Convention states that belligerent parties must allow the passage of medical and hospital consignments and objects necessary for religious worship. Further, it requires those Parties to allow "the free passage of all consignments of essential foodstuffs, clothing and tonics intended" for singularly vulnerable populations – namely "children under fifteen, expectant mothers, and maternity cases" (see also U.S. DoD *Law of War Manual*, § 5.19). Article 70 of Protocol I Additional to the Geneva Conventions expands on Article 23, extending the "circle of those benefitting [from relief] to the whole of the civilian population." Humanitarian corridors can thus be a means of allowing and facilitating the unimpeded passage of such consignments, equipment, and personnel – and while they are not compulsory, such agreements should be followed in good faith (U.S. DoD *Law of War Manual*, § 5.19).

Russian forces did enter into local agreements to establish humanitarian corridors and to temporary cease fire to allow the evacuation of civilians Despite those agreements, corridors from cities such as Mariupol, Sumy, or Kharkiv came under repeated attack from armed forces of the Russian Federation (Tan 2022).

[4] For example, the basic and most common in Russian army MLRS system BM – 21 Grad when fired at a range of 20 km, with a full salvo of 40 rockets has a lethal area of up to 600 m x 600 m (Jelic 2013).

Direct shelling of evacuation routes was reported as preventing evacuation from Sumy. In THE case of Mariupol security corridor, it was additionally reported by the ICRC as being mined upon being established.[5]

Such attacks are both a violation of the countries' duties mentioned above as well as a direct attack on civilians. At no point did Russia provide any proof that the corridors were being used by military forces. At the time of the attack, the Russian forces were aware that the areas would be used for exclusively civilian traffic and could not be seen as a military objective. Therefore, such shelling should be considered as a violation of Art. 51 of the I Additional Protocol to Geneva Conventions.

4. THE USAGE OF LANDMINES IN UKRAINE

As weapons of war, landmines have received considerable attention during the war. In recent months, Ukraine has been reported to be one of the most mined countries in the world[6] and, especially during the operations in summer 2023, very high density of newly laid minefields has been reported.[7]

Ukraine signed the Mine Ban Treaty on 24th February, 1999, and ratified it on 27th December, 2005, becoming a State Party on 1st June, 2006. Meanwhile, the Russian Federation is not a signatory of the treaty, although scholars argue that anti-personnel landmines are in almost all cases indiscriminate weapons, as their usage in accordance with the rules of *ius in bello* is almost impossible (ICRC 1997).

For the most part, Ukraine followed its obligations concerning anti-personnel landmines. Ukrainian forces were reported by the Human Rights Watch to have deployed anti-personnel landmines only in the ending days of 2022, during the battle of Izium. As a result of this usage, several civilian casualties, including one death, were reported. Ukraine promised to investigate the issue, though at the time of this text being written specifics are unclear. The HRW did claim that the investigation was being stymied and did not produce any specific results (HRW 2023). No further claims concerning the usage by Ukraine of landmines appeared after this from independent organisations.

[5] Information about corridor being useless due to mining was provided by Dominik Stillhart, director of operations for the International Committee of the Red Cross (ICRC) for BBC (Tan 2022). At the time, the terrain was under control of the Russian forces, and Ukraine had likely no capability to place the mines, hence they had to be laid down by Russia.

[6] The opinion on Ukraine being the most mined country in the world was expressed by the Ukrainian Foreign Minister Dmytro Kuleba. It is estimated that about 174,000 square kilometres are contaminated by mines and ERW, which is about equal to the total area of Cambodia, which was presently called the most mined country in the world.

[7] According to Defence Minister Oleksii Reznikov, Ukrainian military sometimes encounter as many as five Russian mines per square meter of territory (Tyshchenko 2023).

Russian news did claim to have uncovered thousands of mines and other examples after the Battle of Mariupol during anti-mining operations, which will take time until 2024 (TASS 2022). No specific claims were presented as to whether those were anti-personnel landmines or unexploded ordnance, nor about which side deployed them. Nor is it possible to verify those claims, given that no details were given as to what percentage of ordnance recovered were landmines, and no independent investigation occurred. Additionally, Russia made several claims concerning the usage by Ukraine of anti-personnel landmines in other circumstances (example: Chronology 2022). All those, however, remained unconfirmed and no independent organisation collaborated them.

In comparison, the usage of anti-personnel landmines by Russian forces was widespread. Ukrainian Prosecutor General Irina Venediktova claimed that air-delivered landmines were used by the Russian forces in the Kharkiv region as early as 26th February, 2022 (Venediktova 2022). After this, petal mines were scattered over city and residential areas multiple times, such as in Sumy or Popasnaya. The use of at least 13 types of mines has been reported, including broad usage of the above-mentioned air-delivered "butterfly mines", where any markings or the removal of mines afterwards is effectively impossible, and which are, therefore, by their nature almost always indiscriminate as to their effects. Mines were also used by Russia to deny access to agricultural areas, creating a threat to farmers (Deprez 2023). Despite this, the number of landmine civilian victims so far has remained relatively low compared to other causes, with 124 dead and 286 wounded as of April 2023 according to the Ministry of Defence (Tyschenko 2023), presumably due to static nature of fighting in the last year, where there was limited opportunity to mine areas attended by civilians.

Additionally, Russian forces also emplaced numerous victim-activated booby traps, particularly during the retreat from Kyiv and Kharkiv offensives in early April 2022. Rigging a booby-trap qualifies as an "attack", to which IHL rules regarding the conduct of hostilities apply (Schmitt 2022).

In some reported cases, booby traps were placed in items meant only for civilian usage – such as washing machines (Grylls 2022) or under dead bodies (Baker 2023). While using booby traps in a way which would reduce harm to civilians is not prohibited, using them without regard to whether they will harm combatants or civilians amounts to an indiscriminate attack (AP I, art. 51, 52; U.S. DoD *Law of War Manual II*, § 6.12.5.1, 6.12.5.2; ICRC *Customary IHL Study*, rules 1, 11). Traps deployed by Russia were in some cases clearly meant to cause harm to civilian targets, possessed in their deployed form almost no military utility and as such were intended as an attack on civilian population.

In certain other cases, the usage of booby-trapped bodies was reported. Such an action, apart from the above-mentioned indiscriminate effect, would amount to perfidy and is considered a war crime (see Rome Statute, art. 8(2)(b)(xi)).

The Mine Ban Treaty prohibits antipersonnel mines, but not anti-vehicle mines, which are subject to general prohibitions regarding the usage of weapons of war. The usage of those weapons by both sides has been widespread and had significant effect on the conflict. While of limited danger to humans on foot, anti-vehicle landmines deployed in Ukraine do create a danger to civilians, both directly – through their explosive potential – and through denial of access to homes, infrastructure, transportation routes, and agricultural areas used by civilians. Moreover, there is an agreement that any explosive device that is capable of being detonated by the unintentional act of a person is an antipersonnel mine and is thus prohibited under the Mine Ban Treaty (ICRC 2023).

Both sides are using stockpiles of older Soviet-era anti-vehicle contact and proximity mines, while Ukraine has been supplied with additional ordnance of at least 7 types. Some of older, particularly Soviet-era anti-tank mines do not have any method to self-destruct (HRW 2022) and as a result remain a significant threat throughout the period of their deployment. There is no specific obligation to include such self-destruction mechanism, but it is a factor in assessing compliance with specific provisions of humanitarian law. At this point, it is difficult to assess the legality of usage of anti-vehicle landmines in Ukraine. Their large-scale usage happened in the static part of the conflict; inhibiting the movements of military units clearly cannot be associated with any breaches of customary or contractual obligations of both belligerent countries. Anti-vehicle landmines were, however, also used to block landlines and civilian roads by Russian forces during the retreat from Kyiv and Kharkiv offensives. Such action as attacks on roads are not, by themselves, a breach of obligations concerning the usage of weaponry. Roads and other civilian infrastructure can be considered as legitimate targets as transportation objects – provided they are being or can be used for military purposes (Dinstein 2002). Particularly during a retreat, the mining of roads has direct military utility with the aim of slowing down potential pursuit.

An atypical threat associated with anti-landmines occurred after the destruction of the Nova Kakhovka dam, where the current would carry significant amount of landmines, threatening civilians on flooded areas. However, this threat seems to be outside of the scope of liability concerning the usage of mines as a method of waging the war. It is also unclear to which side the landmines which created such threat belonged,[8] further making it impossible to assign such liability.

[8] While the mines were washed from the Russian-held shore, either party could have been responsible for placing them – Russia as a defensive measure, while artillery or air-delivered mines could have been placed by Ukraine to limit enemy movement.

5. THE USAGE OF INCENDIARY AMMO AGAINST CIVILIAN TARGETS

The usage of incendiary ammunition is regulated primarily by the Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects. Both Ukraine and the Russian Federation are signatories of this protocol, having signed it as Republics of the Soviet Union. In its Art. 2.3, it does allow the usage of ground-launched incendiary ammunitions including against concentration of civilians, provided that the military objective is clearly separated from the concentration of civilians and all feasible precautions are taken to limit the damage to civilians and civilian structures.

Whereas Russia has already been accused of usage of prohibited incendiary weapons during the Syria conflict (HRW 2017; HRW 2019), in Ukraine a larger scale of the usage of such weapons has been claimed. Russian armed forces have used incendiary ammo against civilian targets on multiple occasions – such as during the siege of Azovstal (Grynszpan 2022), during the fighting in Bakhmut (Murphy 2023) as well as against city areas in Vulhedar, including the white phosphorus munitions (Barnes 2023). There appears to be no attempt taken by Russia to limit the effects of weapons in those cases pursuant to the requirements of Protocol III. In the case of Bakhmut attacks, Ukraine confirmed that those were carried out against areas with no civilian presence (Murphy 2023). In other cases, however, no such separation has been made. Particularly in the case of Azovstal attacks, it was clear that the area was occupied by civilians at the time. Ukraine has launched its own criminal investigations in the firebombing of Azovstal; no outcome has been reported to date.

Apart from the above-mentioned attacks, it is possible that incendiary ammunitions were used to start forest fires and burn fields (UNCG 2022). Protocol III prohibits in the Art. 2.4 the use of incendiary weapons on forest or other plants unless the vegetation is used to conceal military objects. Therefore, in most cases, starting such fires would also constitute a breach of the Protocol III obligations. No investigation was conducted at this point as to whether the fires were started intentionally or as a side effect of fighting in the area.

There are no known cases of Ukraine military using incendiary weapons in a way which would create direct threat to the civilians. Russia did accuse Ukraine of using incendiary weapons during the Battle of the Hostomel airport.[9] However, even if true, in this case, the Protocol III requirements would be followed – airport

[9] According to the Russian Ministry of Defence spokesperson (Meduza, February 27, 2022). Veracity of this statement appears to be in doubt; in the same meeting, a number of untrue statements about the Ukraine military were made and the claim itself included elements which were unlikely to be known to the Russian MoD at that point (such as specific systems which allegedly were used to fire incendiary rounds).

at the time was unlikely to house any civilians and its size makes indiscriminate effect easy to avoid.

Ban on incendiary weapons usage is severely limited by the scope of the applicability of Protocol III – it applies only to weapons primarily designed to set fire to objects or cause burn injury to persons. Therefore, it does not apply to certain weapons where the primary effect is non-incendiary. For example it does not apply to thermobaric weapons, which are used in large quantities by Russia, primarily in the form of TOS launchers. Those weapons do not meet the definition of an incendiary weapon as contained in the Article 1 of Protocol III, being classified as enhanced blast weapons instead (Türker 2016), though arguments to the contrary are raised.[10] However, they remain subject to general limitations on any other type of weapon and heavy explosive weapons, and should be avoided in urban or populated areas (ICRC Detonating the Air 2023). Russia was accused of deploying such weapons against city targets on multiple occasions, both at the opening stage of the conflict as well as later (Institute 2022a; 2022b). No evidence has publicly surfaced concerning instances of their illegal usage against civilian targets, though such claims were present since the beginning of full scale hostilities. Such weapons were reported as being used in inhabited areas even where Ukrainian positions were not present in the city – such as during the battle of Chernikhiv (Institute 2022b), strongly implying indiscriminate and disproportionate attacks.

6. THE USAGE OF CLUSTER MUNITIONS

Neither Russia nor Ukraine are a party to the Convention on Cluster Munition. However, such weapons are argued to have significant indiscriminate effect due to their inability to properly distinguish between military and civilian targets at the time of firing and their tendency to generate a significant number of unexploded dud ordnance which creates a considerable threat afterwards (HRW 2004).

While both of those factors create a situation where the usage of cluster munitions is likely to be in violation of the rules of International Humanitarian law, there is no reason to deliver a general prohibition of the use of such weapons from customary or conventional law. Cluster munitions can be still used against purely military targets, and the obligation to take measures to minimise the risks and effects of unexploded ordnance – both during as well as after the end of hostilities – can still be observed in accordance with Protocol V to the Convention on Certain Conventional Weapons.

[10] The ICRC's review argued the rules on incendiary weapons that may, by analogy, be applied to the use of thermobaric weapons according to ICRC Rules 71–85 (Henckaerts, Doswald 2005).

So far, cluster munitions seem to be used by Ukraine exclusively in areas free from civilian presence, against military targets. Munition sent by the United States should possess a failure rate of no more than 2,35%, though it is questioned by some sources.[11] While such failure rate still creates a significant amount of unexploded ordnance[12] – being used in areas of high intensity combat, already saturated with unexploded remnants of war – it does not seem to create significantly higher risk to civilians. However, such munitions should be used carefully and taking into account potential effect after war.

Ammunition with high dud rate can be used in a manner consistent with the general requirements of humanitarian law. An example could be the attack carried out against the Berdyansk airport on the night of 16th–17th October, 2023. An attack against military airport would not threaten any civilian infrastructure or civilian lives, as such an installation by design is meant for military usage and its size precludes accidental effect. Even in the case of dud sub-munitions, using them in an area with restricted access, which is primarily meant for military personnel, would likely preclude an indiscriminate impact on civilian population.

No such restrictions are seemingly observed by Russia. Since the very first days of the conflict, cluster warheads were used by Russia to target civilian infrastructure, including hospitals, schools, residential areas, and others (HRW 2022; Amnesty International 2022). Russia uses cluster munitions of older, Soviet design with higher dud rate;[13] apart from the immediate risk to civilians, its usage against positions in urban centres creates significantly higher risk associated with explosive remnants of war. Violations of the rules of war concerning the usage of such weapons in the case of Russia are widespread and systematic.

A particularly tragic and noteworthy attack was carried out against the Kramatorsk station on 8th April, 2022, causing at least 58 civilian deaths and wounding over 100 others. Attack was carried out using OTR-21 *Tochka U* short-range tactical ballistic missile using cluster warhead.

Railway and rail infrastructure falls under the notion of "dual-use" objects, with both military and civilian applications, thus it may be a target of a military attack if it is deemed necessary to military operations (Dienstein 2002). Any such attack should, however, adhere to other principles and requirements, including proportionality and humanity. Targeting a railway station filled with civilians and refugees clearly exceeded these two principles and amounted to an indiscriminate attack, disproportionately causing civilian loss of life or injury, excessive in relation to the tangible and direct military advantage anticipated.

[11] See, for example, Ismay 2023, who claims that the actual dud rate may be as high as 14%.

[12] Standard 155 mm shell as sent to Ukraine would contain 72 sub munition, meaning that even if the 2,35% goal is achieved, on average each such shell would produce two cases of unexploded ordnance.

[13] Reported being possibly as high as 40% (Dres 2023).

Moreover, the fact that cluster munitions were used strongly implies that the intention behind the attack was causing civilian deaths and not striking the rail hub as a dual-use installation. A smaller explosive pack of submunitions would effectively limit damage done to the railway hub itself compared to a classical high-explosive warhead. After the attack, buildings and infrastructure remained relatively undamaged, clearly implying that no military target at all was sought or achieved – the intended target was the civilian lives. The Russian side denied responsibility for this attack, although no other reasonable explanations exists and the station was clearly in the range of Russian launchers (SITU/Research 2023).

7. THE TREATMENT OF THE PRISONERS OF WAR

The scale of conflict between two organised armies and an active first phase lead to a significant number of prisoners of war being taken. The exact scale is unclear and no overall claims have been made. However, by December 2022, it was reported that about 3,400 Ukrainian servicemen remained in Russian captivity and 15,000 more were considered missing, according to A. Verbytska, the President's Commissioner for the Rights of Defenders of Ukraine (War Ukraine UA, 4th May, 2022). Similarly unclear is how many Russian soldiers were taken captive; around 2,500 prisoners from either side were exchanged (Ochab 2023). It is, therefore visible, based on the number of exchanges, that the number is in the thousands for both sides, possibly reaching around 10,000. As the war has not seen large-scale surrenders of surrounded forces, it seems unlikely that the number could be higher.

The Office of the United Nations High Commissioner for Human Rights did launch an investigation into the treatment of the prisoners of war. However, the investigation only managed to collect data from a sample of POWs, less than 10% of their total number based on estimations (OHCHR Treatment of Prisoners of War 2023).

Access to POWs was also not equal. The Government of Ukraine provided the OHCHR with full and confidential access to POWs in official places of internment, and Ukrainian authorities have engaged with the OHCHR in relation to concerns raised regarding the treatment of POWs. Meanwhile, in general, the OHCHR has not been granted access to POWs interned by the Russian Federation with the exception of a group of 13 Ukrainian men interned in a pre-trial detention facility in Luhansk, who could not be confidentially interviewed.

8. THE STATUS OF A PRISONER OF WAR

The 3rd Geneve Convention awards the status of a prisoner of war to all members of a nation military. Therefore, it should be respected regardless of nationality or organisation to which a person belongs. In the case of the Russian army, the status of prisoners of war should apply, aside from Russian Armed Forces, to members of militias from unrecognised republics (LPR, DPR, Abkhazia, and Southern Ossetia), Rosgvardia personnel, Private Military Contractors, volunteer units, and others. Similarly, on the Ukrainian side, the status of a POW should potentially apply to all units and members of military regardless of nationality, including international auxiliaries.

Throughout the period 2014 to 2022, Russia denied its participation in war. Similarly, Ukraine referred to ongoing conflict as an "anti-terrorist operation". Famously, after full-scale hostilities were initiated on 24th February, it was referred to in Russia exclusively as a "special military operation", with the usage of other names being punishable in Russia.[14] Despite that, at least in theory, the question of recognising Ukrainian prisoners as prisoners of war is not questioned by Russia. In certain situations, however, soldiers of selected units were denied such status. Russia famously initiated the number of "criminal charges" against members of certain units for activities that amounted to mere participation in hostilities. Combatants enjoy combatant immunity and cannot be prosecuted for mere participation in hostilities, or for lawful acts of war committed in the course of the armed conflict, even if such acts would otherwise constitute an offence under domestic law.

Of particular note were trials that begun in mid-June 2023 against 22 soldiers belonging to the Azov regiment (Radio 2023) and in mid July 2023, against 18 soldiers belonging to the Aidar battalion (Koroleva 2023). In both cases, charges included "membership in a terrorist organisation". A significant number of additional Ukrainian prisoners of war received charges which amounted to mere participation in hostilities which are prohibited under the 3rd Geneve Convention. The results of those proceedings remain mostly unknown. Additionally, on at least one occasion, members of international legion were convicted for mercenary activities and terrorism, and working towards a violent overthrow of power in the Donetsk republic (HRW 2023), being sentenced to death. Similarly, two British and one Moroccan citizen were sentenced by the same court to death, but they were later exchanged for Russian POWs. Russia and aligned forces seem not to recognise foreign volunteers as members of armed forces of Ukraine in accordance with the 3rd Geneve Convention.

[14] This seems to have been abandoned in latter part of 2023, with the conflict openly being referred to as "war" in official Russian media.

While Ukraine respects the status of Russian soldiers as prisoners of war, members of affiliated armed groups were subject to criminal proceedings with charges such as "trespass against territorial integrity, state treason, membership in a terrorist organisation, membership in an unlawful armed formation and unlawful possession of firearms" (OHCHR 2023). Those cases were primarily brought against people who were *de iure* Ukrainian citizens from either the Donetsk or Lughansk areas (no proceedings were reported against the citizens of Crimea). Regardless of the fact that those states are not recognised, personnel recruited from there should enjoy the status of prisoners of war on the basis of Art. 4 of the 3rd Geneva Convention. Moreover, as the OHCHR noted, in the overwhelming majority of cases, the charged personnel was forcibly recruited; this, however, has not been taken into account by Ukrainian courts. During those trials and in accordance with newly established Ukrainian law, the accused were pressurised to confess, and very strict sentences were given.

Both sides have, therefore, engaged in illegal proceedings against Prisoner of War in violation of the 3rd Geneva Convention, though in most cases the status of POWs is respected in principle.

9. THE MURDER, TORTURE, AND HUMILIATION OF PRISONERS OF WAR

Multiple cases of summary executions of Ukrainian prisoners of war have been noticed or alleged. The OHCHR report noted at least 14 cases of executions of the prisoners of war by Russia within the first year of war. Executions included both revenge killings upon capture as well as execution due to a lack of cooperation or as a part of terror tactics. Claims of additional cases of Ukrainian POWs being executed have emerged (Olinyk 2023), although so far they have not been verified.

At least 50 Ukrainian POWs were killed during the night of 28th–29th July, 2022, after a missile strike at barracks in the penal colony No. 120, located approximately 5 km east of the town of Olenivka in the Donetsk region. According to the OHCHR, repeated claims were made that the barracks were being used to shield Russian artillery before attack, such action being a clear violation of requirements of Art. 23 of the 3rd Geneve Convention. Additionally, at least part of deaths was caused by insufficient medical aid to the wounded. Moreover, initial investigation done by the OHCHR indicated that the damage to the barracks appeared consistent with a projected ordnance originating from the east – from Russian territory, and not Ukrainian HIMARS strike, as was initially presumed (OHCHR 2023). While more detailed investigation is needed, it is possible that the POWs were murdered in order to frame Ukraine.

A number of cases where Russian prisoners of war were executed by Ukrainian soldiers have been noted. The OHCHR has recognised at least 25 instances within the first year of the conflict. Additional cases occurred in

a situation where a group of eleven Russian soldiers surrendered and the last one opened fire, leading to deaths of all. It is unclear if the deaths occurred as part of execution or during the gunfight and whether it was intended or accidental. A potential perfidy of one of surrendering soldiers does not invalidate the status of others as POWs, although deaths could have occurred as an accident rather than intentionally.

It has to be repeated that in general, Ukraine is far more transparent that Russia on its own conduct. In particular, the OHCHR's mission was denied access to POW camps in Russia (Keaten 2022), which makes ascertaining the total scale of potential abuses difficult. In general, it is much easier to locate and pinpoint instances of humanitarian law violations on the part of Ukraine, especially as far as POW treatment goes. Comparably, the majority of cases where summary executions of POWs by the Russian side occur could only be identified through video footage or statements of surviving witnesses. Therefore, while the numbers as stated by the OHCHR seem to be comparable, ratio may, in fact, be significantly different, and known 14 cases are likely not a good representation of the scale of POW executions on the Russian side.

The General Prosecutor's Office of Ukraine has announced its intention to investigate certain cases of POWs execution and mistreatment, although so far no cases have been brought before courts and no developments on those cases have been noted.

10. TORTURE, BEATINGS, MISTREATMENT

Multiple cases of beating and torture were reported by Ukrainian prisoners of war returned from Russian captivity. According to the OHCHR, prisoners were mistreated and beaten both as a part of interrogation, to provide testimonies against other servicepersons, and in general for no seeming reason during their captivity and as a part of execution. Mistreatment and beatings did seem to be a perpetual element, occurring regularly, with some prisoners reporting "daily" beatings.

Of particular note are multiple allegations of castration of Ukrainian prisoners of war. While a single instance of such activity has acquired mass recognition (Amnesty International 2022), multiple additional instances were claimed, including by Ukraine Officials.[15] Those claims have been unconfirmed so far. At least one case of situation where POWs were used in a military operation was noted – in July 2022, where two POWs were used to approach and attack Ukrainian positions near Bakhmut, Donetsk region, by PMCs aligned with Russia,

[15] See the address of Volodymyr Zelensky to the 77th session of the United Nations General Assembly, where he claimed that the video "is not the first case" of castration. For claims of multiple other cases, see, for example, Lamb (2023).

resulting in their deaths. In two other cases, Russian artillery was deployed next to places of internment of POWs, exposing them to the risk of counter battery fire, which is in violation of Art. 23 of the 3rd Geneva Convention.

Allegations emerged that Russia started using Ukrainian POWs to create military units (estimated at the battalion level or more) that would be sent to the front (Institute 2023). Article 7 of the 3rd Geneva Convention prohibits coercing prisoners of war of the other side to be sent to the front. Some actors argue that this provisions render unlawful any recruitment of prisoners of war, even as volunteers (Levie 1978; Krähenmann 2013). Even if the prisoners of war volunteered, one has to take into consideration widespread information on POWs not being granted sufficient food (described hereinafter). Starving POWs could be seen as a method of coercion in itself and as such is in itself a violation of the Rules of War. Similarly, widespread mistreatment and torture could be clearly seen as creating pressure on such prisoners of war to join military force, precluding their volunteer action.[16] The fact that the unit in question was not an official part of the Russian military forces would be of no consequence to assess the legality of such action.

Apart from large-scale torture and direct violence, in general, Russia has not followed on its obligations to treat POWs in a humane way and with respect (Articles 13 to 14), and to guarantee them appropriate standards of hygiene and healthfulness (Art 22). The OHCHR's mission has identified "consistent patterns of torture and ill-treatment, poor quartering conditions, and lack of food, water and proper medical attention" affecting Ukrainian prisoners of war in 32 out of 48 controlled sites. In the majority of cases, POWs were held in overcrowded cells or other forms of close confinement in violation of Articles 21 and 22 of the 3rd Geneva Convention. The places often lacked beds, fresh air, and adequate sanitation, and were exposed to cold temperatures. Food was often inadequate and in extreme situations POWs lacked access to clean water. Out of 203 Ukrainian POWs interviewed by the OHCHR, 171 (21 women and 150 men) reported the loss of a significant amount of body weight due to inadequate food. Similarly, appropriate sanitary supplies were for the most part not delivered and while wounded POWs did receive appropriate medical attention, in 4 identified cases, wounded or sick POWs died to its lack.

Even during the exchanges, prisoners of war were subjected to inhumane conditions and ill-treatment, in breach of Article 119 of the 3rd Geneva Convention. Reports included beatings, inhumane conditions of transport, and repeated humiliation of the POWs by guards during the way to exchange – including purposeful exposure to freezing temperatures.

The OHCHR's mission reported fewer cases of violation of rules on providing the prisoners of war with appropriate conditions in the case of

[16] See, for example, *United States v. Weizsaecke et al.* (The Ministries Case), XIV Trials of War Before the NMT, 549.

Ukraine. POWs received appropriate water and food as well as quartering. While in many cases investigated POWs were quartered in prisons and detention centres, they were separated from other inmates and given more freedom. In general, the conditions of Russian POWs interment were in accordance with the requirements of the 3rd Geneva Conventions, although the OHCHR's mission did find certain violations and deficiencies. Russian POWs were often treated in a humiliating manner during their evacuation to transit camps and permanent internment facilities. POWs were frequently transported half-dressed, packed in minivans or trucks in stress positions, with their hands bound behind their backs. Afterwards, they were subject in multiple cases to humiliating treatment and, in some cases, to beatings and physical violence. That beatings and physical attacks were, however, significantly more limited in scope than in the cases of Russian abuses. The OHCHR did also note that the treatment of Russian POWs in Ukraine improved over time and certain older violations were amended (OHCHR 2023).

11. COMMAND LIABILITY – GROUND FORCES

The Russo-Ukrainian conflict has seen a high number of units which were not part of their countries' respective militaries. In the case of Ukraine, this happened at the earlier stage of conflict, starting in the year 2014, which saw a number of independent volunteer units; over the years, those units were folded into the national military chain of command. By the opening of the large-scale hostilities in 2022, essentially no independent units operated outside of the main Ukrainian chain of command.

Meanwhile, during the invasion, Russia employed a significant number of units not fully integrated into the military chain of command. Apart from the Russian Armed Forces operating under the Ministry of Defence, multiple Rosgvardia units subordinate to the Security Council of the Russian Federation, the Private Military Contractors of varying allegiance, volunteer formations, and forces from non-recognised states were present. Units such as the Private Military Corporation Wagner group have become infamous for the scope of war crimes committed (Shcherba 2023). Other units of such nature included Patriot, Potok, or Aleksander Nevsky. In total, around 27 Private Military Corporation units were identified as active in Russia during the conflict, the majority of which participated to some extent in the war (Sauvage 2023). The placement of all those troops in the chain of command changed over time.[17]

[17] The forces from the Donetsk and Lughansk republics were initially operating as partially separate detachments, being fully integrated into the Russian Armed Forces only after the annexation of both areas in 2022. PMC placement in the command chain also changed over time, with

This complex scape of actors does lead towards questions concerning potential command liability of Russian generals. The notion of command liability is well-entrenched in international law. Three elements must be proved before a person may incur superior responsibility for the crimes committed by subordinates: 1) the existence of a relationship of superiority and subordination between the accused and the perpetrator of the underlying offence; 2) the mental element, or knowledge of the superior that his/her subordinate had committed or was about to commit the crime; 3) the failure of the superior to prevent the commission of the crime or to punish the perpetrators.

Even a *de facto* authority requires that the superior wield powers of control that is substantially similar to *de jure* authority with regard to establishing responsibility.

Particularly in the case of the above-mentioned PMC, it is unclear to what extent the Russian command was effectively in a relationship of superiority to those groups. While they certainly acted under the general control of the Russian central authorities, theatre commanders were often reported to possess limited or no capacity to command those units. Famously, Wagner operations as carried out in the Bakhmut area were claimed to be essentially outside of the army chain of command, even to the extent where they would compete for resources with the Russian Armed Forces (see for example: Marten 2023). Such a situation is substantially different compared to requirements for *de facto* authority.

Similarly, it is not quite clear to what extent such liability could be established for various Rosgvardia units. Formations such as the 141. special motorised regiment seem to be operating largely independently of the main chain of command, primarily responding to Ramzan Kadyrov and to central authorities rather than to military command. For the most part, those units were also not taking active part in the fighting, being used in the rear instead. It is likely that no command responsibility of the Russian military command could be established in this case as well. To answer this question, more specific examination of Russian orders is necessary.

Numerous other units – in particular forces from non-recognised countries (the Lughansk or Donbass republics) – as well as volunteer battalions were, on the other hand, integrated into the chain of command of the Russian forces and, as such, their actions could entail the liability of appropriate commanders.

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the most noteworthy case being Wagner, which was integrated into the military chain of command only in the second part of 2023.

12. DURESS AND THE INDIVIDUAL LIABILITY OF RUSSIAN SOLDIERS

It should be noted that in certain situations, those Russian soldiers who refused to carry out illegal orders were subject to punishment, which in at least one case included an execution for sparing civilians (Quinn 2022). This leads to the question whether Russian soldiers, engaging into violations of humanitarian law, can be considered as acting under duress.

The question of duress has been critically approached by the ICTY in the Erdemovic case, where the majority of the judges refused to admit duress as a defence to the killings of civilians, noting that in this case, "implementation of international humanitarian law" should be asserted as an "absolute moral postulate" (ICTY Prosecutor v. Erdemovic 1997). However, this line of reasoning was not followed by the Rome statue, which addresses the question of duress in its Art. 31.

The question of duress is regulated under Art. 31 of the Rome Statue and includes three elements that have to be met in order for a soldier to claim that actions were carried out under duress: 1) The threat of imminent death or serious bodily harm; 2) The acts are necessary and reasonable to avoid the threat; and 3) No intention to cause a greater harm than the one sought to be avoided. In cannot be ruled out that in certain cases, Russian soldiers could claim duress under those conditions. However, in each such case, the existence of those elements would have to be proven separately. Threat has to be imminent (ICC Prosecutor v Dominic Owden 2015) and information regarding Russian army practices does not imply that this can be claimed in general. It is also unclear to what extent the practice of forcing soldiers to engage into war crimes is common in Russia.

13. THE LEGALITY OF UKRAINIAN REVENGE KILLINGS

In several cases, Ukrainian forces were accused of carrying out revenge killings against certain targets. Of particular note was the assassination of the commander of the submarine *Krasnodar*, which was identified as launching missile attacks against targets in Ukraine. Cpt 2nd rank *Vladislav Rzhitsky* was shot while jogging in his civilian attire. There is, however, no specific rule of either conventional or customary international law which would prohibit killing enemy soldiers while they are not on duty (and not wearing uniform); general limitation on the killing of enemy combatants applies only once they are rendered *hors de* combat, through capture, surrender, or incapacitating injury – none of which was the case.

Soldiers need to no longer desire to participate in hostilities to be considered to be *hors de* combat; a temporary pause, such as in case of a leave, is not enough.

Therefore, the act itself was not in opposition to either convention or customary law. Even if declared to be illegal, such actions could be justified under the doctrine of reprisals.

14. ACTIONS CARRIED OUT AGAINST OWN SOLDIERS

Compared to other recent conflicts, a new element which garnered considerable attention involved reprisals carried out by certain Russian units against their own soldiers – such as executions of returned POWs by Wagner mercenaries (Faulconbridge, 2023) or often claimed usage of barrier troops against retreating forces (example: Gozzi 2023). Such situations as treatment by a side of their own troops are, however, outside of the scope of conventional or customary international humanitarian law and involve country obligation towards its own population under relevant Human Rights regimes.

A separate issue is the problem of POWs exchange if they are known to be under threat of receiving capital punishment from their military organisation. The 3rd Geneva Convention does not prohibit such exchanges and does not regulate situations of returning POWs to their country of origin, even if they face sanctions, including execution, for their conduct. No prohibition is imposed on a state not to return or exchange such prisoners, both in conventional and in customary international law.[18]

15. CONCLUSIONS

It is clear that humanitarian law violations in the ground war in the Russian-Ukrainian conflict are systematic and widespread. It appears that from the onset, the Russian forces carried out actions that amounted to serious violations of humanitarian law and, in general, ignored its requirements, both as to measures used and actions taken – at times to the point where actions taken by Russia were likely contrary to military objectives.

The static nature of the conflict over the last year was a limiting factor as far as possible violations associated with ground operations were involved, in a similar manner to the Western Front of World War I.

At this stage of the conflict, an overall summary of humanitarian right violations is not possible – data collected by various observers likely illustrates

[18] Such action could be however seen as a violation of a nations obligations under the European convention on the protection of human rights and fundamental freedoms – Right to Life as far as extradition to country where a person could receive death penalty is contrary to such obligation – see for example *Soering v. the United Kingdom* 7 July 1989 (article 3). No case law of interpretation however exists concerning obligations of a state towards Prisoners of War in this regard.

only a fraction of the total picture. A detailed investigation by independent authorities will take many years and will be possible after access to more data and documentation is obtained. Similarly, assigning the responsibility – including command responsibility – for specific crimes requires detailed knowledge of the mutual responsibilities and powers of command staff.

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TRACKING IHL VIOLATIONS THROUGH ARMS EXPORT IN THE CONTEXT OF THE RUSSIAN AGGRESSION AGAINST UKRAINE[1]

Abstract. The paper tracks challenges to litigating (direct and indirect) imports of military equipment to Russia and Russia's subsequent international humanitarian law of armed conflicts (IHL) violations committed in indiscriminate attacks in Ukraine. It asks whether arms export control is capable of preventing or mitigating the results of indiscriminate attacks in Ukraine. It is assumed that IHL compliance can be complemented by preventing military equipment from being delivered to recipients when there is a risk of serious IHL violations being committed with that equipment. By comparing arms transfers from Iran with other controversial arms exports, the paper examines if increased protection for IHL ensued by arms export control laws can remedy deficiencies in arms transfer decisions that do not account for IHL. If an answer is negative, corporate due diligence will perform a complementary role in respecting IHL when state authorisation for arms transfer fails to account for IHL.

Keywords: indiscriminate attacks, Russia, arms transfer, business, due diligence

NARUSZENIA MIĘDZYNARODOWEGO PRAWA HUMANITARNEGO W ZAKRESIE EKSPORTU BRONI PODCZAS ROSYJSKIEJ AGRESJI PRZECIWKO UKRAINIE

Streszczenie. Artykuł prezentuje wyzwania związane ze sporami sądowymi dotyczącymi importu sprzętu wojskowego do Rosji oraz naruszeń przez Rosję międzynarodowego prawa humanitarnego dotyczącego konfliktów zbrojnych (MPHKZ). Praca weryfikuje, czy kontrola eksportu sprzętu wojskowego jest w stanie zapobiec nierozróżniającym atakom na Ukrainie. Zadaje pytanie, czy kontrola eksportu broni jest w stanie zapobiec masowym atakom na Ukrainie lub je złagodzić. Zakłada się, że uzupełnieniem zgodności z MPHKZ może być zapobieganie dostarczaniu sprzętu wojskowego do odbiorców, gdy istnieje ryzyko popełnienia przez ten sprzęt poważnych naruszeń MPHKZ i praw człowieka. Porównując transfery broni z Iranu z innymi transferami w artykule zbadano, czy zwiększona ochrona MPHKZ wynikająca z przepisów dotyczących kontroli eksportu broni może stanowić remedium na transfery broni prowadzące do nierozróżniających

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ataków. W razie negatywnej odpowiedzi, standard *due diligence* pełniłby rolę uzupełniającą, gdy autoryzacja państwa na transfer broni nie uwzględnia MPHKZ.

Słowa kluczowe: ataki nierozróżniające, Rosja, transfer uzbrojenia, biznes, należyta staranność

1. INTRODUCTION

The full-scale Russian aggression against Ukraine on February 24th, 2022, has initiated broad discussions on the effectiveness of the international legal order to prevent and respond to violations of peremptory rules of international law. Even more tragic in terms of civilian harm and damage have been Russian military operations conducted in the territory of Ukraine, many of which amount to indiscriminate attacks. Russian missiles and munitions deployed to launch these attacks are reported to consist of microchips and microprocessors produced by foreign – including EU- and US-based – companies, such as STMicroelectronics, Intel, Thales, and Souriau (Bouissou 2023; Bilousova et al. 2023; Bilousova, Shapoval, Vlasiuk 2023). Despite sanctions being imposed on trade with the Russian Federation and increased arms export control laws, the supply of electronic components has continued.

Controversial arms exports have been widely researched, in particular concerning the Saudi-led invasion against Yemen in 2015 (Arms 2021; Auble 2022; David et al. 2019; ECCHR 2023; Group of Eminent International and Regional Experts on Yemen 2020; Aksenova, Bryk 2020). In 2019, several NGOs submitted a communication to the Office of the Prosecutor of the International Criminal Court (ICC) to investigate alleged war crimes committed by several European arms exporters who transferred weapons to Saudi-led coalition states, which were later used in indiscriminate attacks in Yemen (The Office of the Prosecutor of the ICC 2020, para. 35). However, as of November 2023, the subsequent reports of the Office of the Prosecutor remain silent on the topic. In the meantime, China, Venezuela, Iran, and North Korea, among others, cooperate with the Russian Federation in arms transfers.

This paper asks what paths to litigate arms transfers with a state allegedly involved in indiscriminate attacks exist. In a broader sweep of the military-industrial complex, the paper verifies if reports on indiscriminate attacks affect authorising states' and arms manufacturers' willingness to supply military equipment to the recipient (perpetrator) state and, therefore to question that arms transfers cease when the recipient state is involved in indiscriminate attacks.

The legal basis for assessing the legality of arms transfers from the disarmament law perspective is as follows: the Arms Trade Treaty of 2013 (*The Arms Trade Treaty* Adopted April 2nd, 2013, Entered into Force December 24th, 2014, 2013), the EU Common Position of 2008 (*Council Common Position 2008/944/CFSP of December 8th, 2008, Defining Common Rules Governing*

Control of Exports of Military Technology and Equipment 2008), both applicable to France and Italy but not to Iran, as well as the law on state responsibility (identified in Articles on State Responsibility for Internationally Wrongful Acts of 2001 – hereinafter ARSIWA), (*Articles on Responsibility of States for Internationally Wrongful Acts* 2001), and IHL applicable to every examined state as customary law.

There are several sources in which states register their arms transfers, such as the UN Register of Conventional Arms (UN General Assembly 1991), the Monitor of the Arms Trade Treaty (*The Arms Trade Treaty* Adopted April 2nd, 2013, Entered into Force December 24th, 2014, 2013), and the Wassenaar Arrangement (*Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies* 1996). All of these registers meet participation and reliability of information challenges. In this paper, I have selected the SIPRI Trade Registers as a comprehensive collection of the statistical data on arms transfers related to actual deliveries of primary conventional weapons that use a trend-indicator value.[2] The number of arms transfers registered annually covers civil and military equipment uses. SIPRI Trade Registers were used to demonstrate the states that transferred significant amounts of weapons to the Russian Federation between the pre-annexation and pre-agression periods of the 2010–2022 period. Data for 2023 has not been available yet. These states are as follows: China (transferring ship engines that were ordered after Germany imposed arms embargoes on the Russian Federation in response to the annexation of Crimea in 2014), the Czech Republic (with the last transfer in 2017), France (last transfer in 2013), Iran (transferring armed unmanned aerial vehicles, including Shahed-136, that were bought for use against Ukraine), Israel (last transfer in 2010), Italy (last transfer in 2015), Ukraine (last transfer in 2014 after Ukraine stopped exports to the Russian Federation that year), the United States (transferring vehicle engines for Taifun – produced in the Russian Federation as KamAZ), as well as unknown supplier (Ukrainian merchant ship sold to Turkish company, resold to a UK company and bought by Russian navy via Mongolian and/or Russian company for transport of military equipment to Syria). The final results concerning the number of transfers are affected by the post-COVID consequences, since any technology transfer to the Russian Federation was impacted by lower production in times of the COVID-19 pandemic globally (Bilousova et al. 2023).

The paper uses three case studies to analyse the interconnection between arms transfers and indiscriminate attacks. The study has compared the legal consequences of Iranian arms transfers to the Russian Federation (that continue) with the cases litigating arms transfers in France and Italy to recipients engaged

[2] This unit represents the transfer of military resources rather than the financial value of arms transfers. Since information is updated on a yearly basis, the available information can be reduced to a specific period of time (for example, a year).

in other armed conflicts, namely Israel and the Kingdom of Saudi Arabia (both of which allegedly involved indiscriminate attacks). The paper demonstrates obstacles in preventing indiscriminate attacks facilitated by the transfers. To demonstrate other available paths to litigating arms transfers, the paper occasionally refers to other cases in which arms manufacturers were successfully sentenced for aiding or abetting serious IHL or human rights violations. It must be noted that the additional cases refer to armed conflicts or internal disturbances that differ from the analysed case studies. Although this work is a critical review of the effects of arms transfers to states involved in armed conflicts, the selected case studies are only exemplary and do not create a consistent overview of the challenges in various jurisdictions to litigating all arms transfers that facilitated indiscriminate attacks.

The qualitative method has supported identifying and analysing the relevant social, political, and normative landscapes for addressing the consequences of challenging transfers to the Russian Federation by states and private corporate entities. These transfers only exemplify the whole spectrum of dimensions in which the defence industry contributes to IHL violations. The temporal and material grounds for decisions on arms transfers are as follows: the period from 2014 to 2022 (annexation of Crimea and war crimes committed in the eastern part of Ukraine), an act of aggression of February 24th, 2022, and the period from February 24th, 2022, until now. However, the accessible data on arms transfers is limited to the end of 2022, as reports are released annually. To ensure consistency of the analysis, the paper will only examine the responses to revelations on indiscriminate attacks (and neither the act of annexation of Crimea nor the act of aggression on February 24th, 2022).

Numerous reports have indicated that the Russian Federation has launched indiscriminate attacks on the territory of Ukraine, including with the use of the so-called kamikaze drones transferred from other states (O.A.H. Hathaway Ryan, Goodman 2022; Khan 2022; Sabbagh, Higgins, Lock 2022; Feldstein 2022; Koshiw 2022; Wintour 2022). For this paper, *an indiscriminate attack* refers to Art. 51(4) of the Additional Protocol I to the Geneva Conventions of 1949 and a corresponding customary rule (Henckaerts, Doswald-Beck 2005). It is understood as an attack not directed at a specific military objective, employing a method or means of combat which cannot be directed at a specific military objective, or employing a method or means of combat the effects of which cannot be limited as required by IHL; and consequently, is of nature to strike military objectives and civilians or civilian objects without distinction (*Protocol Additional to the Geneva Conventions of August 12 1949, and Relating to the Protection of Victims of International Armed Conflicts,* Adopted June 8th, 1977, Entered into Force December 7th, 1978). With individual criminal responsibility, indiscriminate attacks amount to a war crime under art. 8(2)(b)(i) of the ICC Statute (*Rome Statute of the International Criminal Court,* Adopted July 17th, 1998, Entered into Force July 1st, 2002, 1998), to which Iran and the Russian Federation have not adhered.

2. CASE STUDIES OF ARMS SUPPLIES

Case 1. Iranian and West – manufactured components found on the crime scenes in Ukraine

Iran has transferred unmanned aerial vehicles, including Shaheed-131, Shahed-136, and Qods Mohajer-6, to Russia, which were used to carry out indiscriminate attacks in Kyiv, Odesa, and Kharkiv. Iran claims that the drones were sent to Russia before the aggression. Russia later re-branded these loitering munitions to Geran-1 and -2 models. The USA imposed sanctions against Iranian state organs, private corporations, and individuals for transferring drones to Russia in the full knowledge that these weapons significantly contribute to the commission of war crimes. The sanctions included, among others, the Iranian entities involved in the production and ongoing transfer of unmanned aerial vehicles to Russia (Islamic Revolutionary Guards Corps Aerospace Force, Qods Aviation Industries and Shahed Aviation Industries Research Center). On November 16th, 2022, Ukraine recovered parts of the unmanned aerial vehicles Shahed 131/136, partly manufactured by the companies registered in several EU Member States, the USA, Japan, and Israel. The USA sanctioned the Iranian arms manufacturers, but no case was brought against the companies supplying Iranian manufacturers (Reuters 2022; Talley 2022; Blinken 2022; 'Israeli Parts Found in Iranian Drones Used by Russia – WSJ' 2022).

Case 2. Eurofard France – produced components found on the crime scene in the Gaza Strip

On July 17th, 2014, a missile hit the roof of a civilian object in Gaza City, killing three children. In the accident, a missile, probably fired by a drone, hit a civilian object and killed three civilians. The missile fired by the drone was precise as it did not extend beyond an expressly framed area and was designed to kill a human being without destroying an object. A Hall effect sensor manufactured by Eurofard France (now Exxelia Technologies) was found on the ground. In France, a criminal case against the French arms manufacturer Exxelia Technologies was brought by a Palestinian family who lost three children in this attack launched by the Israeli armed forces. The family of victims, supported by an NGO, brought a criminal case against the arms manufacturer, claiming that the company supplied the Israeli armed forces with the full knowledge that it would be part of a missile and with knowledge of the risks that their military products might be used to commit war crimes. Thus, the complainants argued that Exxelia Technologies was complicit in a war crime or manslaughter. The criminal case was dismissed, but as of November 2023, the civil action for assisting in harm against the arms manufacturer is ongoing (Ayad 2023; Al Mezan Center for Human Rights 2016, 2023).

Case 3. RWM Italia SpA – produced weapons found in Yemen

On October 8th, 2016, as the result of the airstrike on the village of Deir Al-Hajari, six civilians, including four children, were killed. The remnants at the scene of the attack were identified as produced by RWM Italia SpA and transferred to Saudi Arabia after the UN human rights bodies and NGOs had reported serious IHL violations committed by the Saudi-led coalition. In the case EECHR et al. vs UAMA's officials and managers of RWM Italia S.p.A., the criminal case was launched against the Italian Ministry of Foreign Affairs officials and RWM Italia directors. It could have opened the way to addressing arms manufacturers' responsibility for complicity in potential war crimes. The Italian Minister of Defence stated that the bombs found on the ground were not Italian but contracted by an American company and subcontracted to the German Rheinmetall, who owned factories in Italy. Even though the Italian Court assessed that the Italian National Authority for the Export of Armament was undoubtedly aware of the possible use of the arms transferred by RWM Italia to Saudi Arabia in the conflict in Yemen, it continued to license arms transfers in violation of Art. 6 and 7 of the ATT (prohibiting arms transfers if the transferring state is aware of the possible use of arms against civilian targets). On March 15th, 2023, the case was dismissed on grounds of the lack of proof that the RWM Italia profited from the abuse of power.

In contrast, Italian officials had complied with the binding arms export laws. As of November 2023, an application was lodged before the European Court of Human Rights (ECtHR) alleging the violation of Article 2 of the ECHR by Italian authorities who were aware at the moment of authorisation that the continued transfer could be used in indiscriminate attacks by the recipient ('Italy: Indictment against Manager of Rheinmetall Subsidiary RWM Italia for Contributing to Potential War Crimes in Yemen Dismissed' 2023; ECCHR 2023; De Boni 2023). The European Centre has argued that the Italian court left the question of arms manufacturer unresolved and "entirely neglected that considerations on doubling the turnover of the company and granting employment were actively put forward, by both the company and Italian public officials, throughout the licensing decision-making process, as a justification to grant authorisation for the export of bombs" (ECCHR, Mwatana for Human Rights, and Rete Italiana Pace Disarmo 2023).

3. DISCUSSION

The analysed case studies demonstrated several ways in which victims of indiscriminate attacks can litigate arms transfer decisions. In both Italian and French cases, NGOs were involved in assisting victims of indiscriminate attacks. NGOs are, therefore, the first contact line for victims to seek advice on accessible

legal proceedings and remedies. Then, litigation usually initiates before municipal criminal courts as the cases of alleged war crimes. It is the first way to challenge state authorisation that allegedly aided or abetted war crimes. Should private entities be also concerned, the criminal case against individuals embraces state officials and representatives of arms manufacturers who were responsible for the particular arms transfer. Should corporate criminal responsibility exist in municipal law, the criminal case can be lodged directly against the arms manufacturer. However, both cases were dismissed because of insufficient evidence that the accused individuals/companies contributed to the indiscriminate attacks. Afterwards, if the civil procedure allowed, the alleged victims brought a civil action against the arms manufacturer for assisting in the harm occurring from the indiscriminate attack. If, however, criminal proceedings failed and the party exhausted all domestic proceedings, the application was lodged against a state before the ECtHR.

The legal assessment of Iranian (and indirect EU-based) transfers to the Russian Federation is different since there are two types of technology transfer relevant in the context of military equipment used in indiscriminate attacks by the Russian Federation. The first path, mostly sanctioned now, is through state authorisation and arms export control regimes, either through arms export or licensing weapons free of charge. States are gatekeepers of the arms trade, which leads to the arms sector being governed by multiple regulatory frameworks. These regimes differ among states, with some parties to the Arms Trade Treaty of 2013 or even further to the EU Common Position of 2008. The ATT of 2013 does apply to the UK, France, Germany, Italy, and, most recently, to China (from July 6th, 2020), but not to the USA, Turkiye, Iran, and the Russian Federation. Similarly, the EU Common Position of 2008 applies only to the EU Member States. Both documents require risk assessment before state authorisation is granted. The risk assessment embraces the facilitation of serious violations of IHL, such as indiscriminate attacks, or serious human rights violations. If a particular transaction presents these risks, the transfer shall be prohibited. Under art. 6 of the ATT, states shall deny transfer where there is a likelihood that IHL violations will occur. Similarly, under Criterion Two of the E.U. Common Position of 2008, EU Member States shall deny an export licence if there is a clear risk that the military equipment might be used in the commission of serious IHL violations. A state must assess the recipient's attitude towards the relevant IHL principles when making a licensing decision. Despite the wording differences between the two documents (Maletta 2021, 77–79), both require risk assessment in licensing decisions and, thus, open up a domestic path to challenge authorisations of transfers that facilitated serious IHL violations.

Valentina Azarova, Roy Isbister and Carlo Mazzoleni have presented case studies challenging licensing decisions concerning the intervention in Yemen. The authors noted that after the ATT entered into force, litigating arms transfer

decisions increased. In contrast, neither Iran nor the Russian Federation adhered to the ATT, which makes litigating transfers from Iran (even if Iran acts as an intermediary to the EU-based companies) to the Russian Federation unaccessible (Bryk, Sluiter 2022). Another contributing factor to the increased litigation was the amount of IHL violations committed by the Saudi-led coalition using the military equipment transferred from the state parties to the ATT and, when applicable, the EU Common Position of 2008. Victims of these violations would be left alone in the legal proceedings if the position of the civil society that assisted victims in litigating licensing decisions was not sufficiently solid and transnationally linked (Azarova, Isbister, Mazzoleni 2021).

Even though Iran is not a party to the ATT, Iran's responsibility for aiding and abetting as a state is considered from the perspective of Art. 16 and 41(2) of the Articles on Responsibility of States for Internationally Wrongful Acts of 2001, ARSIWA ('Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' 2001). Article 16 of the ARSIWA stipulates that a state aiding or abetting in the commission of an internationally wrongful act by another state is responsible, provided that it did the act with knowledge of the circumstances of the act and that the act would be internationally wrongful if committed by that state. The Commentary to art. 16 of the Articles has set forth the examples of aiding and abetting by essentially facilitating the wrongful act but limits aiding and abetting, firstly, to the relevant state organs being aware of the circumstances making the act wrongful. In the analysed case, Iranian organ authorising transfer of Shaheds to the Russian Federation should be considered from the acts between 2014 and 2022 related to annexation of Crimea, the act of aggression on February 24th, 2022, and then separately from indiscriminate attacks which amount to an internationally wrongful act on both transferring and recipient states, of course assuming that the prohibition of aggression and the prohibition of indiscriminate attacks (regulated in art. 51 of the Additional Protocol I of 1977) are the rules of customary law applicable to both states. The second limitation refers to the Iranian authorisation of the transfer of Shaheds being given to facilitate and actually facilitating the indiscriminate attacks. The link between facilitation and the commission of indiscriminate attacks is determined, among other things, by the mental element of the authorising organ that intended to facilitate the wrongful act by at least significantly (and not essentially) contributing to the indiscriminate attacks. The intent relates to foreseeable consequences of the authorisation and transfer (Goodman and Jackson 2016). The widespread reports of indiscriminate attacks being committed using Shaheds are indicative of the foreseeable consequences of Shahed's transfers to the Russian Federation by Iran.

With arms transfers assessed under the ATT (e.g. arms transfers by China after it had adhered to the ATT), Tomas Hamilton has argued that the knowledge test is not satisfied when the aider or abettor knows that indiscriminate attacks will be committed with the supplied weapons. In contrast, when indiscriminate attacks

are numerous or systematic, any arms transfer to the Russian Federation would suffice the knowledge test (Hamilton 2022a). In case of eventual ICJ proceedings, one cannot lose sight of the so-called Monetary Gold principle in this respect. The principle would prevent the ICJ's jurisdiction over the responsibility of a state if it had to decide on the lawfulness of the act of another state (in this case, the Russian Federation) that is absent or has not consented to it. The Monetary Gold principle does not exclude other lawful state responses to aiding or abetting in indiscriminate attacks, such as through diplomatic protests or sanctions (Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America) 1954, 1954, 32; 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' 2001, 67).

The reports have suggested that little evidence can be brought to indicate that armed conflicts lead to reducing arms transfers, irrespective of the opposite indications found in the municipal law and policies of the exporting states. On the contrary, the outbreak of armed conflicts appears to contribute to an increased probability of arms transfers to areas affected by armed conflicts (Perlo-Freeman 2021, 5–6). *Andrew Feinstein* has pointed to a concept of the 'shadow world' in which arms manufacturers will sell military equipment irrespective of the recipient's profile and compliance with the law. It has even been suggested that a presumption of the ability to control where the arms go after the transfer and how they are used is a myth (Feinstein 2012; Holden et al. 2017).

Since the requirement of state authorisation depends on what is and is not classified as military equipment, another regime regulates dual-use technology. Since dual-use technologies that are imported to Russia by private corporate entities operating in the UK, the USA, Germany, the Netherlands, Japan, Israel, and China are challenging to regulate through export control laws (Bilousova et al. 2023, 5), there are calls for expanding sanctioned products to other goods (Bilousova, Shapoval, Vlasiuk 2023, 6). Direct and indirect arms exports to the Russian Federation constitute a challenge in a broader sweep of military and dual-use components. The Russian Federation relies heavily on foreign information and communication technologies to conduct its invasion on the territory of Ukraine, including through command and control, targeting, surveillance, reconnaissance, and targeting. Most imports of dual-use technologies into the Russian Federation come from the EU, the UK, and the USA. Since there is no clear separation between civil and military information and communication technologies exported to the Russian Federation, targeting these transfers solely through arms export control laws is not easy. Therefore, there is an increasing demand to sanction the transfer of these technologies, including by third parties. A proposed sanction coordination mechanism could be modelled in the Financial Action Task Force or the Wassenaar Arrangement (Azhniuk et al. 2022, 7). Components transferred from the EU, the UK, and the USA are found on the crime scenes of indiscriminate

attacks in Ukraine. Many of these components are argued to be transferred after 2014 despite the sanctions imposed on the Russian Federation (Conflict Armament Research 2023).

EU- and US-based producers of the electronic components found in Shaheed 131 and 136 have indirectly continued trade relations with the Russian Federation after February 24th, 2022, predominantly through intermediary states. It has been suggested that these trade patterns reflect money laundering practices by involving illegal networks, creating one-day shell companies, multiplying the number of suppliers, and engaging in fake transit operations. After the full-scale invasion, trade with the Russian Federations was reduced. However, at the end of 2022, the trade stabilised with the intensified trade passes through Kazakhstan, Kyrgyzstan, and Armenia, as well as by opening production facilities in China (the latter remains the first supplier of military and dual-use technologies to the Russian Federation). By producing components outside of the territory of a state that imposed sanctions against the Russian Federation, manufacturers are left alone to determine their compliance with sanctions. Along with delays in investigating violations of sanctions, the practices of transferring technology to the Russian Federation are only exemplary reasons behind the US- and EU-manufactured components being found on the crime scenes in Ukraine (Bilousova, Shapoval, Vlasiuk 2023, 5, 17–19).

The kamikaze drones Shahed 131 and 136 are of particular concern for IHL compliance, since they have been used in indiscriminate attacks, including against the Ukrainian cities and energy infrastructure, all of which deepen the humanitarian crisis in Ukraine. The further challenging practice of the Russian Federation was that it removed the Iranian origin of the vehicles and left them without marking. Whereas the serious IHL violations committed by the members of the Russian armed forces need to be accounted for, the practices of foreign corporations based in the USA and EU Member States require further attention. The International Working Group on Russian Sanctions has indicated that "the crux of the challenges lies in the accessibility of these components, with a substantial portion being readily obtainable through publicly accessible channels" (Bilousova, Shapoval, Vlasiuk 2023, 9–12).

Samuel Perl-Freeman has further argued that armed conflicts are precisely the factor that fosters increasing arms transfers to parties to armed conflicts (Perlo-Freeman 2021, 5). In addition, *Giovanna Maletta* has noted a gap between rhetoric and compliance with arms export control laws on the part of state parties to the ATT. Some states may assert that they fully comply with ATT obligations while continuing controversial technology and weapons transfers (Maletta 2021, 75).

Nevertheless, another layer of arms transfers remains under-regulated under international law. The defence sector consists of various actors producing or being directly linked to research, development, design, production, delivery, maintenance, and repair of military technology, including weapons systems,

subsystems, parts, components, and other supporting equipment. This sector further covers actors that provide technical assistance, training, financial, or other assistance related to military activities. These actors rely on complex international supply chains for their products (UN Working Group on Business and Human Rights 2022, 1; 'Outsourcing Responsibility: Human Rights Policies in the Defence Sector' 2019, 8). Defence sector actors are neither parties to IHL nor arms export control treaties. While the legal arms transfers are conducted through state authorisation, these actors are not required (by an authorising state) to conduct IHL due diligence in the licensed operations. It allows the private companies to hide behind state authorisation that allegedly supersedes the corporate due diligence since states are obliged to ensure respect for IHL. Such practices are justified by the symbiotic relationship between states and arms manufacturers in protecting national security interests or fostering state foreign policy, among other things (UN Working Group on Business and Human Rights 2022, 4).

The primary international documents relating to corporate due diligence belong to soft law (OHCHR 2011; OECD 2011; 'OECD Due Diligence Guidance for Responsible Business Conduct' 2018). It means that they do not create duties on the part of the defence sector. Therefore, municipal, EU (if applicable) arms export control frameworks, and IHL continue to apply to the defence sector. For those companies registered in the states that have not yet adopted a duty of due diligence, the due diligence constitutes a standard of care in causing or contributing to adverse IHL impacts by their products or services. For the companies operating, for example, in France, which adopted the Vigilance Law of 2017, due diligence is an obligation to verify their supply chains and business partners and to consider ceasing activities contributing to adverse IHL impacts seriously. Taking into account that the Russian Federation heavily relies on electronic supply chains in its weapons and electronic warfare, the continuance of electronic sales to the Russian Federation is questionable after the annexation of Crimea in 2014 until February 24th, 2022, and then after full-scale aggression on February 24th, 2022, until now (when the number of serious IHL violations increased). However, depending on whether municipal law provided separate due diligence obligations for private companies or not, the practices of some remain normatively irrelevant (Bryk and Sluiter 2022; *LOI N° 2017–399 Du 27 Mars 2017 Relative Au Devoir de Vigilance Des Sociétés Mères et Des Entreprises Donneuses d'ordre (1)* 2017). The scope of the military-industrial complex in which states control the defence sector remains relevant for state responsibility in authorising arms transfers to the Russian Federation.

When litigating arms transfer decisions and corporate due diligence failures, *Linde Bryk* and *Goran Sluiter* have proposed an international criminal law framework applying to the actors in the defence sector who continued trading with the Russian Federation. The authors have analysed two Dutch cases of Van Anraat and Kouwenhouwen as potential litigation of aiding or abetting in war crimes

committed on the territory of Ukraine. The analysis has been conducted from the perspective of provisions of art. 25(3)(c) and (d) of the ICC Statute implemented in the Dutch law. The first case related to the armed conflict between Iran and Iraq, in which an individual, Frans Van Anraat, delivered Thiodiglycol, a material necessary to produce mustard gas, to the regime of Saddam Hussein between 1980 and 1988. The Dutch court decided that Van Anraat played an essential role by supplying the regime with materials used against the civilian population and Iranian combatants. *Dolus eventualis* was considered sufficient by the court as the mental element for his responsibility for aiding and abetting war crimes. The second case also relied on *dolus eventualis* in aiding or abetting in war crimes and crimes against humanity being committed by the President of Liberia, Charles Taylor, during NIAC in Sierra Leone. Guus Kouwenhoven was convicted for exercising effective control over two companies involved in the smuggling of weapons to Liberia in violation of the UN arms embargo. He was, therefore, an accomplice in war crimes by deliberately providing an essential contribution to the IHL violations through arms supply. The evidence used to prove *dolus eventualis* was media reports on IHL violations committed by Charles Taylor (Bryk, Sluiter 2022; Schliemann, Bryk 2019, 15–16).

Nonetheless, there are difficulties in proving criminal responsibility for commercial activities that eventually resulted in indiscriminate attacks. The crime of indiscriminate attack is a crime of conduct, meaning that the criminal responsibility of arms manufacturers depends on whether arms manufacturers controlled the recipient's behaviour to carry out an indiscriminate attack. In contrast, when crimes of result are concerned, the question is whether arms manufacturers exercised causal control over an indiscriminate attack (Bo 2022). *Tomas Hamilton* has doubted whether the involvement of EU companies in supplying Iran could demonstrate these companies aiding or abetting in indiscriminate attacks committed by Russia. Their contribution to the supply of drones is one step removed (both physically and causally) from the indiscriminate attacks (Hamilton 2022b).

4. CONCLUDING REMARKS

This paper asked about the paths to litigate arms transfers with a state allegedly involved in indiscriminate attacks. The analysed cases have demonstrated that adhering to international arms export control laws, such as the ATT or the EU Common Position of 2008, allows victims to question whether licensing decisions complied with IHL before the municipal courts, first in criminal proceedings and then for war torts. Once the procedure fails, human rights framework enables alleged victims to lodge an application before the ECtHR. However, neither the Russian Federation nor Iran are parties to the ECHR, so the UN Human

Rights Committee would be the accessible litigation path (unless the substantive jurisdiction provides otherwise, but for human rights violations only and not IHL violations). Otherwise, regime on state responsibility seems to be the main available path for the states concerned. The reports on indiscriminate attacks may affect authorising states and arms manufacturers' willingness to supply military equipment to the recipient (perpetrator) state, but arms transfers did not cease when the recipient state was involved in the alleged indiscriminate attacks.

The analysis of arms transfers to the Russian Federation after the annexation of Crimea and the full-scale invasion against Ukraine has proved that states generally ceased reporting official arms transfers to the Russian Federation. Reports on the alleged indiscriminate attacks after December 31st, 2022, would count for risk assessment in arms transfer decisions made after that date. Therefore, it is crucial for each state and each company transferring military equipment to the Russian Federation to constantly monitor reports on IHL compliance. Transfers of electronic components to the Russian Federation continued despite sanctions being imposed. The difficulties in litigating the transfer of dual-use items to the Russian Federation and Iran despite human rights and NGO reports informed on the serious IHL violations committed by the recipient state arise, since the supply chain is blurred by using intermediaries and the classification of dual-use goods.

For arms transfers, the licensing decision is crucial for ensuring IHL compliance. The interdependencies between a state and the defence sector harden identifying IHL concerns being taken into consideration in transferring decisions. The more states occupy the primary role in ensuring respect for IHL, the less actors from the defence sector are expected to account for IHL in their due diligence practices. It should be concluded that state IHL assessment and corporate IHL due diligence exist independently as states may have various interests (and hence be unable or unwilling to comply with IHL) in licensing decisions.

Further interesting topics regarding arms and technology supply in this armed conflict need to be researched. The question of neutrality, for example, does not prevent third states from trading with the belligerent parties. It is debatable whether the massive supply of weapons, military advice, and material assistance to Ukraine no longer violates the neutrality of supplying states as they provide assistance to support the international legal order in cases of a breach of the prohibition of aggression (O.A. Hathaway, Shapiro 2022; Heller, Trabucco 2022, 255–263). Another topic worth developing is the individual criminal responsibility of employees of corporations that aid or abet in war crimes. Under the ICC case law, interpreting the purpose-based mental element of aiding or abetting in international crimes remains unresolved. The Russian aggression against Ukraine has forced states, international organisations, and private actors to develop new and increase the existing sanction mechanisms for supporting the war efforts.

Arms export control can contribute to preventing or mitigating the results of indiscriminate attacks in Ukraine. The increased protection for IHL ensued by the ATT and the EU Common Position of 2008 can remedy deficiencies in arms transfer decisions that do not account for IHL. However, as long as the supplying state is not the party to the ATT, the law on state responsibility for aiding and abetting indiscriminate attacks remains relevant for victims of these attacks. The support of NGOs in proving that the state authorisation violated arms export control laws is crucial for victims of indiscriminate attacks. Since the Russian Federation withdrew from the European Convention on Human Rights, and Iran is not a party to the ECHR, the UN Human Rights Committee would be an interesting option to litigate aiding and abetting indiscriminate attacks (of course within its human rights and not IHL jurisdiction). Last but not least, corporate due diligence is a complementary safeguard in respecting IHL when state authorisation for arms transfer fails to account for IHL.

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THE LEGAL STATUS OF 'CIVILIAN HACKERS' UNDER INTERNATIONAL HUMANITARIAN LAW

Abstract. In response to the rising trend of civilian hackers participating in cyber conflicts, the International Committee of the Red Cross has recently issued guidelines regulating their conduct. This article navigates the intricate legal landscape surrounding civilians who actively participate in cyber hostilities, exploring the concept of direct participation in hostilities (DPH) in the context of cyber warfare. Given the unique nature of cyber warfare, the article highlights the need for a nuanced and context-specific approach in determining the legal status of civilians involved in cyber hostilities. It underscores the importance of distinguishing between actions linked to an ongoing armed conflict and those that occur independently. The piece discusses the challenges in defining civilians in cyber warfare, the principles of distinction and proportionality, the criteria for qualifying a civilian as a "direct participant of hostilities" and the concept of continuous combat function (CCF), which distinguishes civilians continuously involved in cyber hostilities from those sporadically or *ad hoc* engaged. The article also delves into the temporal challenges in cyber operations and the "revolving door" concept, which complicates the application of DPH status in cyber warfare.

Keywords: cyberwar, hacktivists, civilian hackers, direct participation in hostilities, Russia-Ukraine war

STATUS PRAWNY CYWILNYCH HAKERÓW W ŚWIETLE MIĘDZYNARODOWEGO PRAWA HUMANITARNEGO

Streszczenie. W odpowiedzi na rosnącą liczbę cywilnych hakerów uczestniczących w różnego rodzaju aktywnościach cybernetycznych, Międzynarodowy Komitet Czerwonego Krzyża opublikował wytyczne dotyczące podejmowanych przez nich tego rodzaju działań. W niniejszym artykule omówiono regulacje prawne dotyczące cywili, którzy biorą udział w działaniach zbrojnych w cyberprzestrzeni, opierając analizę przede wszystkim na koncepcji bezpośredniego uczestnictwa w działaniach zbrojnych w kontekście wojny cybernetycznej. Ze względu na szczególny charakter wojny cybernetycznej, podkreślono potrzebę zastosowania kontekstowego i indywidualnego podejścia celem określenia statusu prawnego cywili zaangażowanych w działania zbrojne w cyberprzestrzeni. W artykule omówiono trudności w definiowaniu cywili w wojnie cybernetycznej, zasady rozróżnienia i proporcjonalności, kryteria kwalifikacji cywila jako „bezpośredniego uczestnika działań zbrojnych" oraz koncepcję ciągłej funkcji bojowej, która odróżnia cywilów stale zaangażowanych

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w działania zbrojne w cyberprzestrzeni od tych działających okresowo czy *ad hoc*. Poruszono również problemy związane z aspektami czasowymi operacji w cyberprzestrzeni i koncepcję „revolving door", która utrudnia precyzyjne określenie statusu prawnego cywilnych hakerów w kontekście wojny cybernetycznej.

Słowa kluczowe: cyberwojna, haktywiści, cywilni hakerzy, bezpośrednie uczestnictwo w działaniach zbrojnych, wojna rosyjsko-ukraińska

1. INTRODUCTION

The International Committee of the Red Cross [ICRC] has recently published a set of rules aimed at regulating the conduct of civilian hackers involved in conflict situations (ICRC 2023). This development comes in response to a growing trend of people joining patriotic cyber groups following the Ukraine invasion. These guidelines, consisting of eight key rules, include provisions that prohibit attacks on hospitals, the creation of hacking tools that can spread uncontrollably, and the making of threats that terrorise civilian populations.

In a rapidly changing world where warfare transcends traditional boundaries, cyber conflict has emerged as a powerful and unconventional battleground. This new form of warfare challenges established legal frameworks, raising questions about the status of those who engage in hostilities through cyber means. Ukraine's ongoing conflict with Russia has provided a real-world backdrop to these inquiries, as civilian hackers, driven by the desire to support Ukraine, target Russian entities.[1]

As we navigate this evolving landscape, it becomes essential to understand the legal status of civilians who actively participate in hostilities through cyber operations (civilian hackers). International humanitarian law (IHL) traditionally distinguishes between combatants and civilians in armed conflicts under the principle of distinction. However, the rise of cyber warfare blurs these lines, making the legal status of engaged civilians more complex.

This article delves into the realm of civilian direct participation in cyber hostilities, especially as it relates to the conflict in Ukraine. The aim is to explore the notion of direct participation in hostilities (DPH), keeping in mind the actions of cyberactivisits responding to the ongoing conflict. Moreover, the article addresses unique aspects of cyber warfare, such as civilians operating beyond the geographical limits of the armed conflict and their anonymity on the Internet.

By exploring these complex issues, the article seeks to shed light on the intricate legal status of civilian hackers operating within the context of the Ukrainian conflict. This article is inspired by the actions of hacktivists in response to the ongoing war in Ukraine, aiming to provide insights into their legal standing and the evolving nature of warfare in the digital age. The analysis will be conducted in several interconnected chapters, each contributing to a thorough understanding of this evolving landscape.

[1] See: Tidy (2022; 2023).

2. CIVILIANS IN THE CROSSFIRE – DECIPHERING PROTECTION UNDER IHL

International humanitarian law, a specialised segment of international legal norms, serves as a framework that regulates and confines conduct during times of armed conflict. These principles and standards find expression in legal instruments such as the 1949 Geneva Conventions and their 1977 Additional Protocols, as well as customary international law. The primary aim of IHL is to mitigate the detrimental consequences of warfare, especially regarding civilians, that is non-participating individuals (Melzer 2016, 17).

Defining whether an individual qualifies as a civilian, based on their status rather than their actions, is a complex and distinct issue. Art. 50 of Protocol Additional to the Geneva Conventions of 12th August, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8th June, 1977, 1125 UNTS 3, offers a definition of a civilian as "any person who does not belong to one of the categories of the persons referred to in Art. 4A (1), (2), (3), and (6)"[2] and when in doubt, a person should be presumed a civilian. While this definition aids in identifying civilians, it does not offer guidance on the legal perception of civilians who engage in hostilities.

The principle of distinction, which mandates that attacks must clearly differentiate between civilians and combatants, as well as between civilian and military targets, plays a pivotal role in international humanitarian law. It serves as the foundation for regulating the conduct of parties involved in armed conflicts and is enshrined in Arts. 51–52 Protocol I.

This principle not only prohibits direct attacks on civilians or civilian objects but goes further to explicitly forbid any acts of violence primarily intended to terrorise the civilian population, as stipulated in Art. 51(2)

[2] Article 4(A) (1), (2), (3) and (6) of the Third Geneva Convention (Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12th August, 1949):

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognisable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Protocol I. Furthermore, it expressly bans any attacks that do not adequately distinguish between civilians and combatants, as outlined in Art. 51(4) Protocol I.

Additionally, the principle of proportionality, stated in Art. 51(1)(b) Protocol I, establishes that every attack leading to collateral damage, which results in civilian casualties, injuries, or damage to civilian property, must be proportionate to the specific and direct military advantage anticipated from the attack. These comprehensive protections for civilians are frequently referred to as "non-combatant immunity", emphasising the fundamental safeguard provided by IHL to individuals who do not take part in hostilities (Lazar 2013, 1).

As mentioned, Art. 51(2) Protocol I explicitly prohibits any attacks on the civilian population and individual civilians. This provision generally means that civilian hackers typically steer clear of involvement in armed conflicts as per international humanitarian law. However, Art. 51(3) Protocol I adds the condition that civilians enjoy protection "unless and for such time as they take a direct part in hostilities."[3] This prompts a significant consideration whether the actions of civilian activists qualify as 'direct participation' in the ongoing Russia-Ukraine war. Safeguarding civilians and adhering to the principle of distinction are fundamental aspects of international humanitarian law reflecting customary international law (Supreme Court of Israel, Public Committee against Torture in Israel v. Government of Israel, Case No. HCJ 769/02, 13th December, 2006, 46).

It is thus paramount to recognise the importance of distinguishing civilians from combatants in the context of these legal principles, as the consequences bear directly on the level of protection they receive during armed conflicts. Clarity in identifying who qualifies as a civilian and who does not is vital for upholding the integrity of international humanitarian law and ensuring that civilians are shielded from the horrors of warfare to the greatest extent possible.

Concluding the analysis of the foundational principles that govern the protection of civilians under international humanitarian law, the transition to the intricate realm of direct participation in (cyber)hostilities becomes imminent. The forthcoming exploration delves into the actions of civilian activists, probing the nuanced boundaries of their engagement within the established legal framework. This shift in focus leads to a comprehensive examination of the dynamic discussions surrounding direct participation in (cyber)hostilities, as well as the evolving interpretations provided by legal scholars and institutions in response to the challenges posed by modern conflict scenarios.

[3] The very same approach is visible in Art. 13(3) Protocol II focusing on the protection of victims in non-international armed conflicts. Civilians are offered a protection conditionally, meaning that they are protected unless and for such time as they take a direct part in hostilities. By acknowledging the conditional nature of protection, this legal provision acknowledges the dynamic and fluid nature of conflict situations, where the status of individuals may change based on their actions and involvement in hostilities.

3. DIRECT PARTICIPATION IN (CYBER)HOSTILITIES

It can be assumed that the cyberattacks by activists against the Russian government are a reaction to the war, clearly intended to support the Ukrainian side. This central issue revolves around whether these actions attain the necessary level of significance within international humanitarian law. The assessment of whether a civilian is actively participating in the ongoing conflict is not contingent on their status or affiliations but on their involvement in specific hostile activities (Schmitt 2017, 413). The mode of operation for activists, be it random, impulsive, or disorganised, is not of primary importance.

The regulations concerning the targeting of civilians remain unchanged, whether in an international (as in the Russo-Ukrainian case) or non-international armed conflict (Buchan 2016, 21). Nevertheless, in the context of both types of conflicts, civilians can become subject to direct targeting when they engage in direct participation in hostilities (Buchan 2016, 21–22).

However, there is no defined guidance provided in treaty law for the definition of 'direct participation in hostilities', although this concept seems crucial when determining legal status of civilians engaged in conflict-related behaviours.

In response to the uncertainty surrounding the concept of direct participation in hostilities, the International Committee of the Red Cross undertook research and engaged in expert consultations to elucidate the conditions under which a civilian may be considered as directly involved in hostilities. It is essential to emphasise that the ICRC's work, while addressing this issue, does not seek to modify the existing legal framework but, rather, offers an interpretation of the concept of direct participation in hostilities within the established boundaries (Melzer 2009, 6).

In May 2009, the ICRC issued the Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (Guidance). The Guidance faced substantial criticism, with numerous voices contending that it embraced an excessively restrictive interpretation of the concept of direct participation in hostilities (Schmitt 2010a, 720[4]). Nevertheless, for the purpose of determining the legal status of civilians involved in hostilities, this article presumes the legal significance of the Guidance because of its growing respect and worldwide recognition (Longobardo 2017, 828[5]).

[4] See also: Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (2010, 66–67).

[5] See also: Akande (2010, 180 et seq).

4. CRITERIA TO QUALIFY A CIVILIAN AS A DIRECT PARTICIPANT IN HOSTILITIES

As per the ICRC's Guidance, for cyber operations to be considered legally relevant actions under international humanitarian law, they need to meet three specific criteria. First, these operations must reach a specific threshold of harm (4.1). Second, they must directly result in that harm (4.2). And third, they must be designed with the intent of supporting one party in the conflict over the other, a requirement known as the belligerent nexus (4.3). In addition, the notion of continuous combat function is a pivotal supplement to the three criteria set by the DPH framework (4.4).

4.1. How severe should the harm be?

The first threshold, referred to as the 'threshold of harm', requires that "act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack" (Melzer 2009, 46–50). This indicates that even if the desired result has not happened yet, the act's repercussions must be likely to lead to it. As a result, the probability of harm is adequate to meet the harm threshold. This suggests that there is an objective probability that harm that can be objectively identified will be caused whenever a citizen has a subjective desire to do so (Schmitt 2010a, 725). On the other hand, the threshold of harm can also be reached by doing "harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack" (Melzer 2009, 47).

According to the Guidance, "the interruption of electricity, water, or food supplies, (…) the manipulation of computer networks, (…) would not, in the absence of adverse military effects, cause the kind and degree of harm required to qualify as direct participation in hostilities" (Melzer 2009, 50).

This becomes particularly relevant when we delve into the realm of cyberwarfare. Although relatively uncommon, cyberattacks can undeniably lead to fatalities, severe injuries, or significant destruction. Consequently, it becomes evident that a cyber operation encounters challenges in meeting the civilian aspect of the threshold of harm.

The primary focus of the Guidance is on harm occurring in the physical world (Prescott 2012, 253). In the realm of cyberspace, the absence of immediate loss of life or physical injuries might be conspicuous, but it is clear that the vulnerability of data to loss or damage is ever-present. The concept of damage or destruction to data could arguably surpass the threshold of harm, particularly in critical contexts such as government or military databases, where the implications can be substantial.

When it comes to the military aspect of the harm threshold, which necessitates that it must "adversely affect military operations or military capacity," (Melzer 2009, 50) cyber operations seem to offer a more attainable avenue. Cyberattacks have the potential to be highly disruptive and can significantly impact military capacity. Nonetheless, there is ongoing debate as to whether a specific cyberattack genuinely affects military capacity or merely serves as a form of expression, propaganda, or a minor nuisance (Kilovaty 2016, 12). Additionally, the Guidance acknowledged the possibility of cyberattacks affecting military capacity by suggesting that "electronic interference with military computer networks could also suffice, whether through computer network attacks (CNA) or computer network exploitations (CNE), as well as wiretapping the adversary's high command or transmitting tactical targeting information for an attack" (Melzer 2009, 48).

4.2. One step back

The second criterion, the so-called 'direct causation' condition, requires that "there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part" (Melzer 2009, 46, 51–57).

In simpler terms, a particular activity must be capable of independently causing the harm. Alternatively, it can also fulfil the direct causation requirement if it is an essential and integral component of a combined military operation that is reasonably expected to lead to the required level of harm (Schmitt 2010a, 727–728). In essence, this criterion underscores the need for a direct, cause-and-effect relationship between the action in question and the harm that is either directly produced or reasonably anticipated.

The predominant method for determining causation involves evaluating whether the harm can be traced back to the act with just a single causal step in between (Kilovaty 2016, 12). When it comes to cyber operations, they do not significantly pose a challenge to this criterion. The action's causal relationship to the expected or actual injury remains intact, even if it takes place outside the battlefield in its traditional – physical – meaning (Melzer 2009, 55).

The cascading nature of effects in the realm of cyber operations can be likened to a chain reaction, where each step in the process contributes to the eventual outcome. These multi-step causal chains can involve a series of interconnected systems, often including unwitting intermediaries who play a role in transmitting the impact. This intricate web of cause and effect can make it considerably more challenging to directly attribute the harm to the initial cyber operation, particularly when it involves a complex network of compromised systems.

Furthermore, the rapidly evolving landscape of cyber threats and vulnerabilities adds another layer of complexity to assessing direct causation

in cyber operations. As technology and tactics evolve, the interconnectedness of systems and the potential for harm to ripple through various layers of infrastructure only intensify. This dynamic environment underscores the need for a nuanced approach to understanding the causal links in cyber conflicts (Turns 2012, 288 et seq.).

4.3. Belligerent nexus

The 'belligerent nexus' requirement plays a vital role in distinguishing actions that are tied to the dynamics of an armed conflict from those that occur independently. Its significance lies in two primary functions.

First, the requirement is a targeted tool aimed at capturing actions that take place within the specific context of an armed conflict. It focuses on those actions that are strategically designed to tip the scales in favour of one party involved in the conflict while causing harm to the opposing side. In essence, it seeks to identify and hold accountable individuals whose actions are strategically aligned with the objectives of one of the conflicting parties (Melzer 2009, 58).

Secondly, the belligerent nexus requirement serves as a filter that screens out actions that, though they may result in the requisite level of harm, occur independently of any ongoing armed conflict. In such cases, where the harm is directly caused by the act but the act itself lacks a strategic connection to the conflict, the civilian involved is not classified as a DPH. Consequently, these individuals are subject to standard legal processes and law enforcement procedures, as their actions do not meet the criteria set forth by the belligerent nexus requirement. This nuanced criterion ensures that individuals are held accountable within the appropriate legal framework based on the nature of their actions in relation to the conflict (Melzer 2009, 64).

5. CONTINUOUS COMBAT FUNCTION – THE DIFFERENCES BETWEEN CCF CIVILIAN AND DPH CIVILIAN

The concept of 'continuous combat function' [CCF] stands as a significant complement to the principles associated with the framework of direct participation in hostilities (Melzer 2009, 33). The conventional understanding of the DPH status holds that it is time-bound, applying solely to civilians during the period when they actively engage in hostile actions (Art. 51(3) Protocol I). This implies that individuals who sporadically, spontaneously, or in an uncoordinated manner carry out such actions are susceptible to being targeted exclusively during the execution of those actions.

However, the introduction of the CCF principle introduces an important distinction. When a civilian assumes an integral role within an organised armed

group and his/her tasks are related to the preparation, execution, or command of acts amounting to direct participation in hostilities, he/she acquires the CCF status. Under the CCF principle, such a civilian can be targeted even when he/she is not actively involved in hostile actions at the precise moment of targeting (Melzer 2009, 34). Essentially, the CCF civilian becomes a potential target based on their status, which solidified due to their persistent and consistent involvement.

On the other hand, a DPH civilian is only subject to targeting during the specific instances when he/she is actively engaged in hostile actions. This implies that a civilian forfeits his/her protection against direct attacks only for the duration of each distinct act constituting direct participation in hostilities.

Members of organised armed groups involved in an armed conflict cease to be civilians and relinquish their protection against direct attacks for as long as they maintain their CCF (Melzer 2009, 70). A hacker who continuously conducts cyber-attacks within an armed conflict and is a member of an organised armed group participating in the conflict would be holding a CCF. Consequently, such a person can be considered a potential target at all times, as long as he/she retains the CCF status.

6. PREPARATORY MEASURES, DEPLOYMENT, AND RETURN – WHEN DOES THE DPH START?

In accordance with section VI of the Guidance it is stated that "measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act" (Melzer 2009, 66). In other words, the determination of whether preparatory measures constitute direct participation in hostilities hinges on their specific intent. If these measures are aimed at executing a particular hostile act, they fall within the purview of direct participation. However, when they serve to build a more general capacity for engaging in unspecified hostile acts, they do not meet the criteria for direct participation (Delerue 2014, 10). This distinction is crucial in defining the scope of actions that qualify as direct participation in hostilities under international humanitarian law.

The time-related aspect is challenging in the context of cyberspace due to the nature of cyber operations, encompassing their initiation, effects realisation, and termination (Schmitt 2010b, 16; Kilovaty 2016, 31). This is also complicated by the fact that some cyber operations may only reveal their consequences long after the civilian actor had reverted to their non-combatant status. The key challenge lies in dealing with the lasting effects of certain cyber operations. In essence, they blur the temporal boundaries of DPH. To address this, it is essential to establish a clear framework that distinguishes between the time when a civilian's involvement in cyber operations

renders them targetable under the DPH framework and the period when the enduring effects of those operations may still impact the target.

According to Kilovaty, it is important to differentiate between two types of sustained effects resulting from cyber operations (Kilovaty 2016, 31). There are cyber operations where the attack code remains active, leading to continuous consequences – the civilian conducting the cyber operation remains targetable as long as the DPH criteria are met when the code is operational (Dinnis 2012, 276). On the other hand, there are cyber operations that trigger prolonged effects, not directly linked to the ongoing cyber operation – the civilian may be considered targetable during the actual duration of the cyber operation (Dinnis 2012, 276).

Therefore, to effectively address the temporal challenges associated with cyber operations, a nuanced and context-specific approach is required, taking into account the evolving nature of cyber conflicts and the complex interplay between civilian actors, states, and their responsibilities in cyberspace. Navigating the temporal challenges inherent in cyberspace operations prompts a crucial consideration of the 'revolving door' concept and its applicability to cyber warfare. The swift and dynamic nature of cyberattacks, often detected after their execution, complicates the application of this concept.

7. THE REVOLVING DOOR CONCEPT

Civilians directly participating in hostilities do not cease to be part of the civilian population, but their protection against direct attack is temporarily suspended (Melzer 2009, 70).

The notion of the 'revolving door', which involves the loss and subsequent regaining of civilian protection for each specific act amounting to direct participation in hostilities, has generated considerable debate. It is considered customary international law according to the two additional protocols to the Geneva Conventions. However, experts involved in the Tallinn Manual process (the Tallinn Manual is not a binding international law instrument but "examines how extant legal norms apply to 'new' form of warfare") had varying opinions on this concept, and no consensus was reached (Schmitt 2013, 1).

The concept may initially appear valid and beneficial for evaluating liability in the context of cyberattacks, especially given their rapid and dynamic nature, although the application of the revolving door concept to cyber warfare is particularly challenging (Schmitt 2010b, 37–38). Cyberattacks are often quick to launch and execute, making it difficult to address the direct participation of the civilian due to their short duration of engagement. Additionally, many cyberattacks are only detected after they have been carried out, at which point the civilian perpetrators have already regained their civilian status, as per the existing legal framework.

These challenges raise significant questions about the adequacy of current legal frameworks in effectively addressing the dynamic and rapidly evolving landscape of cyber warfare.

In contrast, individuals who are considered "members of organised armed groups belonging to a non-state party to the conflict" undergo a different categorisation (Melzer 2009, 71). They lose their civilian status for the duration of their membership in such organised armed groups, as long as they continue to perform functions directly related to combat. This means that even if they are not actively engaged in hostile acts at a specific moment, their CCF keeps them from retaining civilian protection.

In brief, when a civilian engages in cyber operations irregularly and without a consistent pattern, they should have their civilian protection reinstated once the cyber operation ends. Nonetheless, if substantial evidence suggests their affiliation with hacking groups, their civilian protection might be revoked.

8. FINAL REMARKS

Cyberspace exists beyond the confines of physical war zones or specific geographic locations. In the realm of cyberspace, traditional notions of state territory become less relevant, giving rise to a virtual and universal landscape that is inherently complex to define (Hoffmann 2003, 419). Moreover, cyberspace thrives on anonymity, making it a haven for those engaged in cyberattacks who conceal their identities. However, the absence of clear identities poses a significant hurdle when it comes to assigning blame for these crimes to specific individuals, thereby impeding the process of holding them accountable. This challenge looms large over both domestic and international criminal jurisdictions.

A civilian hacker may be deemed to engage in direct participation in hostilities, thereby permitting the victim State to respond within the boundaries of international humanitarian law. Such a response would not qualify as a war crime. However, if the cyberattack predominantly disrupts civilian infrastructures and causes economic harm, the civilian hacker maintains their civilian status.[6] Consequently, any retaliatory action against them could potentially be construed as a war crime. The mentioned rule encompasses both armed forces members and civilians involved in cyber operations linked to ongoing armed conflicts while excluding those engaged in purely criminal or malicious cyber activities unrelated to the current international or non-international armed conflict.

Crucially, the protection provided by IHL ceases to apply if it is convincingly demonstrated that, through the cyberattack they initiated, the individual has

[6] See: The International Criminal Tribunal for the former Yugoslavia. *Prosecutor v. Galić (it-98–29).* Judgment of 5 December 2003, para 48.

engaged in direct participation in hostilities. Such a demonstration renders the individual a legitimate military target under the purview of IHL, allowing for a proportionate response. These complex legal dynamics are central to the article's exploration and offer insights into the evolving landscape of cyber warfare within the realm of international humanitarian law.

The primary purpose of the DPH framework is to serve as a mechanism for halting ongoing hostile actions rather than penalising individuals after the fact. As a result of breaches of international or domestic criminal laws, the individual responsible could still be subject to criminal prosecution (Fleck 2013, 255–257).

The legal status of civilian hackers is a complex phenomenon that requires a case-by-case analysis. Each cyber action may vary, and the legal evaluation depends on the specific details of the actions involved.

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ACCOUNTABILITY FOR THE CRIMES AGAINST CIVILIANS COMMITTED DURING THE ARMED CONFLICT IN UKRAINE

Abstract. The article explores the question of crimes committed against the civilian population during the war in Ukraine and the possible ways of bringing to justice those responsible. A full-scale aggression launched by Russia has caused death and widespread suffering of thousands of Ukrainian civilians and combatants. The article focuses on the events following 24th February, 2022, bearing in mind that the conflict had started much earlier – with the illegal annexation of Crimea and the beginning of fighting in eastern part of the Ukraine in 2014. After introductory remarks in the first section, the second part of this article will be focusing on different acts constituting war crimes that were committed during the war in Ukraine, and the third part will address existing accountability mechanisms and briefly discuss the advantages and disadvantages of each of them.

Keywords: Ukraine, Russian, war crimes, civilians, international humanitarian law

ODPOWIEDZIALNOŚĆ ZA ZBRODNIE NA LUDNOŚCI CYWILNEJ POPEŁNIONE PODCZAS KONFLIKTU ZBROJNEGO W UKRAINIE

Streszczenie. Artykuł porusza kwestię zbrodni na ludności cywilnej popełnionych podczas konfliktu zbrojnego w Ukrainie i sposobów pociągnięcia sprawców do odpowiedzialności. Rosyjska agresja spowodowała śmierć i cierpienie tysięcy ukraińskich obywateli, zarówno cywilów jak i kombatantów. Analiza ograniczona jest do wydarzeń mających miejsce po pełnoskalowej napaści z 24 lutego 2022 roku, co pozostaje bez wpływu na fakt, że konflikt ten rozpoczął się o wiele wcześniej – wraz działaniami zbrojnymi na wschodzie Ukrainy i aneksją Krymu w 2014 roku. Część pierwsza stanowi wprowadzenie, wskazuje akty prawne mające zastosowanie do oceny omawianej sytuacji oraz materiały źródłowe wykorzystane do przygotowania niniejszego opracowania. W części drugiej omówione zostały poszczególne czyny mogące stanowić zbrodnie wojenne, natomiast część trzecia stanowi refleksję na temat istniejących mechanizmów egzekwowania odpowiedzialności domniemanych sprawców, z uwzględnieniem wad i zalet każdego z nich.

Słowa kluczowe: Ukraina, Rosja, zbrodnie wojenne, ludność cywilna, międzynarodowe prawo humanitarne

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My promise to you is that international law will not be an empty promise. Today's documentation will be tomorrow's prosecution.

Pramila Patten, UN Special Representative for Sexual Violence in Armed Conflict

1. INTRODUCTION

The very aim of international humanitarian law is to limit, to the maximum possible extent, the suffering of human beings during armed conflicts, and the main role of international criminal law is to bring to justice those responsible for the most serious crimes. The paper examines these two frameworks in the context of the Russian aggression on Ukraine, which has caused death, destruction, and rampant suffering of thousands of civilians and combatants (OHCHR Report 2022, 5–7). After introductory remarks in the first section, the second part of this article will focus on different acts constituting war crimes that were committed against civilian population, and the third part will address existing accountability mechanisms and briefly discuss the advantages and disadvantages of each of them.

1.1. Relevant law

1.1.1. *War crimes and grave breaches of Geneva Conventions*

Russian crimes against civilian population in Ukraine could potentially be classified as crimes against humanity and war crimes. As there are no doubts regarding the existence of international armed conflict, the article will focus on the latter category of crimes. In addition, some of same acts committed with the intent to destroy, in whole or in part, the Ukrainian national group as such may constitute the crime of genocide, an issue that has received significant scholarly attention (Azarov et al. 2023). The list of acts qualifying as war crimes within the meaning of the Rome Statute of the ICC is very long, although only part of them can be committed against civilians. According to Art. 50 of the Additional Protocol I to the Geneva Conventions, "civilian" is any person not belonging to the armed forces and not taking part in a "*levée en masse*" (Henckaerts, Doswald-Beck 2005, 17). In principle, the analysis will be narrowed down to the crimes that are not connected directly to the conduct of warfare, excluding acts such as indiscriminate attacks or use of prohibited weapons.[1] Bearing in mind the above-mentioned

[1] This assumption is based on the historical distinction between the so-called "Hague law" dealing with means and methods of warfare, and "Geneva law", which is focussed mainly on the protection of certain groups of people during armed conflicts. It is generally accepted that the two branches of law merged with the adoption of Additional Protocols in 1977, but the distinction is still sometimes used in the doctrine of international humanitarian law. "This 'Hague Law' (…) fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add

stipulations, five categories of war crimes will be described in the second part of this article: wilful killings, acts of torture, deportations, sexual violence, and pillaging – acts that are also covered by the regime of grave breaches created by the Geneva Conventions (Eboe-Osuji 2012, 206).[2]

1.1.2. *The law of occupation*

As a result of the Russian invasion of 2022, vast parts of the Ukraine were temporarily or still are under occupation. According to Art. 42 of Hague regulations, "territory is considered occupied when it is actually placed under the authority of the hostile army." This triggers the application of the set of provisions from the IV Geneva Convention, which states that it "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Russia denies this status and treats parts of Ukraine as part of the Russian Federation; after staging four plebiscites, on 30th September, 2022, Vladimir Putin announced the annexation of Donetsk, Kherson, Luhansk, and Zaporizhzhia oblasts of Ukraine, although the annexation of conquered territory is prohibited by international law. In addition, the Occupying Power shall not transfer its own civilian population into the territory it occupies – such actions can be classified as a war crime under Art. 8(b)(viii) of the Rome Statute (Hurska 2021). In any case, the illegal annexation should not prevent the ICC or other courts from applying relevant rules concerning belligerent occupation. Similar situation occurs in the case of some of the occupied Palestinian territories which are treated by Israel as its territory (East Jerusalem). Following the declaration under Art. 12(3) of the Rome Statute lodged by the Government of Palestine, the Pre-Trial Chamber issued a decision, stating that the Court could exercise its criminal jurisdiction and that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem.[3]

to this the 'Geneva Law' (…), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law" (ICJ 1996, par. 75).

[2] With the exception of sexual violence, which is not specifically mentioned in Art. 147 of the IV Geneva Convention. However, most of such acts can be qualified as a form of torture or inhumane treatment.

[3] The declaration was lodged on 1st January, 2015, and since April 2015, Palestine has been a party to the Rome Statute.

1.1.3. *Human rights law*

In addition to the protection guaranteed by international humanitarian law, international human rights law also applies in times of armed conflicts; that is why absolute prohibition of torture, guaranteed, *inter alia*, by the UN Convention against torture remains in force. What is more, some human rights instruments reinforce the application of international humanitarian law to certain protected groups, such as children (Art. 38 of the UN Convention on the Rights of the Child). Since 16th September, 2022, the Russian Federation has no longer been a party to the European convention for the protection of human rights and fundamental freedoms (hereinafter: ECHR), although it does not mean that it is released from the obligations arising from the Convention in respect of any act performed to that date (Art. 58 ECHR). The cases brought to the ECRH against Russia are still pending, including the inter-state applications by Ukraine and the Netherlands. In any case, Russia is still bound by a number of other human rights instruments which apply to areas under state's 'effective control', and occupied territories are included in that definition.[4] Moreover, Art. 43 of the Hague Regulations requires the occupant to respect the "the laws in force in the country", which means that all human rights treaties ratified by Ukraine shall be binding on occupied territories (Benvenisti 2008, par 14).

1.2. Resources

The full-scale war begun a year and a half ago. Many crimes are not yet revealed, in many instances the investigations are ongoing or have not even started yet. Gathering evidence and documenting violations of international humanitarian law during the ongoing armed conflict is a huge challenge for Ukraine and other entities engaged in this process. The Ukrainian Office of the Prosecutor General has created a special website, where victims and witnesses of war crimes can report it and send evidence.[5] There are also other entities dealing with the collection of evidence and accounts of the crimes. One of them is the Raphael Lemkin Centre for Documenting Russian Crime in Ukraine created by the Pilecki Institute – a Polish NGO based in Warsaw. Another important source of information comes from the civilian surveillance: initiatives such as the Bellingcat investigative group publish "incidents (…) that have resulted in potential

[4] Both Ukraine and the Russian Federation are party to seven UN core conventions: the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities.

[5] https://warcrimes.gov.ua/en/all-crimes.html (last accessed in November 2023).

civilian harm", documented with user-generated content, such as videos and images. In order to help civilians with the adaptation in wartime, the Ukrainian Centre for Strategic Communication has developed the *Dovidka.info* project. Among many useful pieces of information found on this website, it calls upon recording violations of human rights and sharing the evidence with the Ukrainian and international community.[6] Nevertheless, still, there are not many judicial materials available. For these reasons, this article is based also on sources such as: information and statistics published by the UN Human Rights Monitoring Mission in Ukraine (HRMMU), the Independent International Commission of Inquiry on Ukraine, and other UN agencies; reports of NGO's: Human Rights Watch (HRW), Amnesty International (AI), Reporters Without Borders; conclusions of media investigations: *New York Times*, *BBC*, *The Independent*, *Deutsche Welle* (DW), and reports prepared by different research institutions.

According to the statistics published by the Office of the Prosecutor General of Ukraine, as of November 2023 there are more than 100 thousands cases concerning violation of the Art. 438 of the Ukrainian Criminal Code alone (violations of the laws and customs of war).[7] Most probably, many years will have to pass until the true scale and nature of the crimes committed during this war will be revealed. Therefore, this article will deal only with a few selected examples of the most blatant violation of the laws protecting civilian population.

2. WAR CRIMES

2.1. Wilful killing

According to the principles of international humanitarian law, the death of non-combatants is not necessarily a violation. Civilian population must never be made the object of an attack, although the death or injury of civilians during an attack on a military objective can be permissible subject to the principles of proportionality and military necessity. The latter example requires careful scrutiny; every single case needs to be assessed with diligence. In any case, wilful killings of civilians is a grave breach of the IV Geneva convention and a war crime (Art. 8 (2)(a)(i) of the Rome Statute). According to the Elements of crimes, states must penalise killing of one or more persons protected under the Geneva conventions of 1949.

The Independent International Commission of Inquiry on Ukraine found numerous cases in which members of the Russian armed forces shot at civilians

[6] "Record violations of human rights and constitutional values. But do it only if it is safe! Secretly record violations and share evidence with the Ukrainian and international community." https://dovidka.info/en/ (last accessed in November 2023).

[7] https://www.gp.gov.ua/ (last accessed in November 2023).

fleeing to safety, which resulted in the killing or injury of the victims. As it was pointed out in the report, the victims "wore civilian clothes, drove civilian cars and were unarmed." Most of the incidents took place during daytime, which means that these traits should have been clear to the attacker (Independent International Commission of Inquiry on Ukraine 2022). In any event, under international humanitarian law, in case of doubt, a person shall be considered to be a civilian. This principle is a part of international customary law commonly accepted by states, including Ukraine and Russia.[8] The HRMMU reports that 322 civilians died because of mine or explosive remnants of war as of October 2023 (OHCHR 2023). Russian troops left mines and booby traps in the formerly occupied territories. Mines had been placed in dead bodies and toys; doors had been wired with grenades to explode when open.[9] It seems that in most cases, booby traps were deployed without consideration as to the status of the potential victims; many were found in the cities and densely populated areas or even in private households of Ukrainian population: "they are mining all this territory, mining houses, equipment, even the bodies of killed people" (Zelensky 2022). Overall, more than 9,700 civilians were killed since 24th February, 2022. The OHCHR believes that the actual figures are substantially higher, because the receipt of information from some regions has been delayed due to the ongoing hostilities, and many reports require confirmation (OHCHR 2023). Some Russian soldiers have already been convicted by Ukrainian courts. In May 2022, media worldwide reported first war crime conviction – the sentencing of V. Shishimarin, Russian tank commander who killed a civilian in the Sumy Oblast and has been sentenced to life imprisonment (District City Court of Kyiv 2022). The sentence has been reduced to 15 years by the court of appeal (Hogue 2023, 108).

Investigation conducted by the *New York Times* in Bucha, small town on the outskirts of Kyiv, has exposed mass graves and evidence of killings of

[8] "(…) In case of doubt whether a person is a civilian, that person shall be considered a civilian; civilian population is a population which consists of civilians" (Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation 2001, par. 1); "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian" (Manual on the Application of IHL Rules 2004, par. 1.2.32).

[9] According to Art. 2(2) and Art. 4 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, booby trap is "any device or material designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless objects or performs an apparently safe act." It is forbidden to use this kind of weapons in cities, towns, villages or other areas containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless "(a) they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party; or (b) measures are taken to protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences."

a dozen civilians. For the first time in the history of warfare there are so many video evidences of mass atrocities committed against civilians. As revealed by the investigation, some of the killings that took places in Bucha were recorded by street cameras, drones, and mobile phones of witnesses (The New York Times 2022). Drones also recorded killings that took place in the beginning of March 2022 on the Zhytomyr highway outside Kyiv (DW 2022). Several months later mass graves were discovered in Izium. After the city had been recaptured by Ukrainian forces, more than 400 graves marked with wooden crosses were found in a suburban forest. Most of the bodies belonged to civilians, many showed signs of violent death, some presented traces of torture (BBC 2022). Killings of civilians in Bucha, Izium, and other regions had very often been preceded by acts of detention, interrogation, and ill-treatment (Independent International Commission of Inquiry on Ukraine 2023, par. 55).

2.2. Torture

Torture is prohibited by Article 32 of the IV Geneva Convention; it also constitutes a grave breach and a war crime within the meaning of Art. 8 (2)(a)(ii) of the Rome Statute. According to the Elements of crimes, torture is the infliction of severe physical or mental pain or suffering upon one or more persons for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind (Rodley 2002, 467–493).

The HRW reported 42 instances of torture that took place in the Russian-occupied areas of the Kherson and Zaporizhzhia regions (HRW 2022a). More accounts followed after the liberation of Kherson in November 2022. Ukrainian parliament commissioner for human rights said they found "10 torture chambers in this region" (Muzzafar 2022). Evidence of torture on a mass scale was revealed after the liberation of Izium, which had been occupied by Russian troops for more than 6 months. Survivors described being subjected to electric shock, severe beatings, waterboarding, and other forms of cruel treatment. According to the HRW, the violence and abuse in Izium were not random incidents, "multiple victims shared credible accounts (…) of similar experiences of torture during interrogation in facilities under the control of Russian forces and their subordinates, indicating this treatment was part of a policy and plan" (HRW 2022c). Some professional groups were targeted more often – Russian troops threatened representatives of local media in the occupied territories in order to prevent them from reporting the facts and force them to spread propaganda. According to the Reporters Without Borders (RSF), many journalists were threatened and tortured. One of them was Oleh Baturin, who was kidnapped by Russian soldiers in Kakhovka, tortured for eight days, and then released. Also members of the families were targeted and taken hostage (RSF 2022).

In the areas that were under Russian control during longer periods of time, dedicated detention facilities were established and more diverse methods of torture were used. In such cases, more perpetrators have been involved in the commission of torture and other crimes – including the Federal Security Service of the Russia, the National Guard and its subordinate units as well as Russian aligned armed groups from the so-called Donetsk and Luhansk People's Republics (Independent International Commission of Inquiry on Ukraine 2023, par. 52). Many torture victims reported being subjected to rape and other forms of sexual abuse (Davies 2022). Torture and other forms of inhumane treatment have also taken place in the filtration camps, a practice linked to deportation of civilians that will be described below.

2.3. Deportation or forcible transfer of population, including children

Forcible transfer and deportation of civilians is a grave breach of the IV Geneva Convention and a war crime according to Art. 8 (2)(a)(vii) and 8 (2)(b)(viii) of the Rome Statute. To constitute a crime, these acts need to be "forcible." The consent to be moved has to be voluntary and genuine, i.e. not given under coercive conditions. In addition, forcible transfer of children of one national group to another group can also qualify as an act of genocide within the meaning of Art. 6 of the Rome Statute, as well as Art. 2 of the Genocide Convention of 1948. This would require proving that the deportations were organised with the intent to destroy, at least in part, the Ukrainian nation (Azarov et al. 2023, 261).

Individual or mass deportations of protected persons from occupied territory to the territory of the occupying power or to that of any other country are prohibited. Nevertheless, the occupying power may organise evacuation of a given area, if the security of the population or imperative military reasons so demand. In such a case, the occupying power shall secure, to the greatest practicable extent, that adequate accommodation is provided, that the removals are effected in satisfactory conditions of hygiene, health, safety, and nutrition, and that members of the same family are not being separated (Art. 49 of the IV Geneva Convention). Transferring or displacing civilians cannot be justified by humanitarian reasons if the humanitarian crisis triggering the displacement itself results from unlawful actions of the occupying power.

Shortly after the invasion, the Russian military forces forcibly deported at least 15,000 Ukrainian citizens from Mariupol to Russia. People were deprived of all their documents, including passports. Russian soldiers and other officials were separating families, confiscating Ukrainian documents, and issuing Russian passports in an apparent effort to change the demographic composition of certain Ukrainian regions (Blinken 2022). The HRMMU reported detention of a large numbers of Ukrainian civilians and their massive displacement to the areas under the Russian control or to Russia's own territory. Only till the end of April 2022,

between 300,000 and 500,000 Ukrainian citizens had been deported to Russia according to various sources from both countries (OSCE 2022, 72). As reported by the HRW, thousands of Ukrainian citizens were subjected to a process referred to as "filtration" – a form of compulsory security screening, in which they typically collected peoples' biometric data, including fingerprints and facial images, conducted body searches, and searched personal belongings, especially phones (HRW 2022b). While Russian authorities are allowed to conduct security screenings of those entering its territory, they should collect biometric data only where it is lawful, proportionate, and necessary. In addition, people should be informed of why their data is being collected, how it will be used, and how long it will be held for. Filtration camps were created to register, interrogate, and detain Ukrainian citizens before transferring some of them into Russia. According to the researchers from the Yale Humanitarian Research Lab, the filtration system had been created weeks before the invasion and began to grow following Russia's capture of Mariupol in April 2022 in order to accommodate more people. The authors of the report identified at least 21 filtration facilities in and around the Donetsk oblast (Khoshnood, Raymond 2022, 8). A number of sources indicate that detainees were subject to torture, rape, starvation, and other grave human rights violations (Khoshnood, Raymond 2022, 16–18). After filtration process, some people were released within the DNR, others were deported onward to various cities across Russia, including those in the Far East. In Russia, Ukrainian citizens are usually placed in refugee centres; they are pressured to apply for asylum or Russian citizenship (HRW 2022b). Russia has used footages of displaced civilians as part of its propaganda. In some cases, the arrival of displaced civilians has been presented as successful humanitarian action broadcast by Russian TV.

In May 2022, President Putin signed a decree facilitating the acquisition of Russian citizenship by some categories of children (Independent International Commission of Inquiry on Ukraine 2023, par. 14). According to various sources, Russian authorities deliberately separate Ukrainian children from their parents and abduct them from different institutions to put them up for adoption in Russia. As indicated by a report published by the Yale Humanitarian Research Lab, the Russian government is operating a systematic network of at least 43 child custody centres scattered across the country (Khoshnood, Howarth, Raymond 2022).[10] The report provides evidence of systematic efforts to cut off the communication between the deported children and their relatives in Ukraine, to prevent the children's return to their families, and to "re-educate" them to support Russia. It also describes placing children for adoption by families in Russia. The evidence of such acts has lead the ICC to issue an Arrest Warrant for Vladimir Putin and

[10] The research team has been monitoring the relocation programme since early spring 2022. The researchers had developed the methodology and data sources to document the transfer of Ukrainian children.

Maria Lvova-Belova on 17th March, 2023. Based on the Prosecution's applications, the Pre-Trial Chamber considered 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, in particular of Ukrainian children.

2.4. Sexual violence

Wars are inherently gendered and have been since time immemorial; whilst men are killed in the battlefield, women's bodies are the spoils of war (O'Brien, Quenivet 2022). History shows that sexual violence is deep-rooted in armed conflicts (Brownmiller 1993). For most of the history, however, this category of crimes was neglected. The Nuremberg Tribunals failed to charge the defendants with sexual crimes, although the witnesses testified about it occurring. There is no specific mention of rape or other sexual crimes in the Charter of the International Military Tribunal, it could be prosecuted as a crime against humanity under Article 6(c) – "other inhumane acts." Similarly, sexual crimes as such have not been included in the grave breaches regime of the Geneva Conventions. The turning point came in the 1990s as a reaction to sexual atrocities committed in the former Yugoslavia and in Rwanda. It seems that, finally, this issue has been recognised as a serious problem requiring international attention. Rape has been included as a part of the definition of crimes against humanity in the Statutes of the two *ad hoc* Tribunals and in the Rome Statute. In addition, the ICC Statute specifically lists acts such as: sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence as war crimes in Art. 8 par. 2(b)(xxii).

Since the beginning of the invasion, many allegations of conflict-related sexual violence have been made by state officials, national and international NGOs, media, and social media users. These are not isolated incidents but, rather, a part of a policy, as pointed out by the UN Special Representative of the Secretary-General on Sexual Violence in Conflict: "When you hear women testify about Russian soldiers equipped with Viagra, it's clearly a military strategy" (Patten 2022). As usual in cases of conflict related to sexual violence, women and girls constituted the majority of alleged victims (OHCHR 2022a, 96). Nevertheless, men and boys are also targeted, because the Russian Federation is using rape and other forms of sexual violence as one of instruments of terror to control the civilian population.

The Office of the Prosecutor General confirmed its focus on conflict-related sexual violence and the setting up of a specialised unit within the War Crimes Department to deal with this type of crimes (Marchuk 2022, 793). The very first trial held in absentia involved the rape of a civilian by a Russian soldier, Mikhail Romanov (Saliy 2022). Unlike other war crimes described above, sexual crimes are very often underreported and the true number of victims is likely

to be far higher than official figures suggest. Fear and shame are the main reasons why people affected by conflict-related sexual violence do not report that fact (Myroniuk 2022; OHCHR 2022a, 6).

2.5. The pillaging, destruction, and appropriation of civilian property

The ICC statute contains numerous provisions protecting property, both during international and in non-international armed conflicts. War crimes of pillaging towns or other places and destroying or seizing the enemy's property are prescribed in Article 8(2)(b)(xiii) and (xvi). According to the Elements of crime, pillaging is an intentional appropriation of certain property for private or personal use, done without the consent of the owner. In addition, unlawful appropriation of property that is not justified by military necessity can be classified as a grave breach of the IV Geneva Convention, as long as it is carried out extensively – an isolated incident would not be enough. Moreover, the occupying power is not allowed to destroy real or personal property belonging individually or collectively to private persons, to the State, to other public authorities, or to social or co-operative organisations, except where such destruction is made absolutely necessary by military operations (Art. 53 of the IV Geneva Convention).

Acts of pillaging and destruction of property do not seem that serious compared to other crimes described previously. However, they also require attention because of the symptomatic and widespread character. The image of a Russian soldier bringing home a washing machine has become one of many symbols of this war. After the liberation of certain places, many people returned home to find that they have been robbed. Reports of stolen personal belongings such as clothes, kitchen devices, perfumes, electronic devices, and even furniture were repeated by civilians from many previously occupied areas (Pastukhov 2022). Many pillaged items were sent to Russia using shipping services of different companies. Footages from online camera of one of the delivery services in Belarus were published online in April 2022 – Russian soldiers captured in the video were most likely using it to send items stolen from Ukrainians. Not only personal things belonging to civilians, but also many cultural artefacts have been stolen. The HRW reported pillaging of "thousands of valuable artefacts and artworks from two museums, a cathedral, and a national archive in Kherson" (HRW 2022d). Similar acts were committed in Mariupol and Melitopol, a potential breach of Art. 4(3) of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, to which Russia and Ukraine are both parties. Things that could not be stollen were often destroyed, as well as the interiors of houses and other buildings. All these practices are not a new phenomenon – they had occurred before in other conflict areas in which Russian soldiers and mercenaries were deployed, including

Chechnya and Georgia.[11] Some commentators say that stolen goods are a form of an additional motivation for army members (Pastukhov 2022). Others point out to the fact that they are ill-equipped on the battlefield and deprived of home. Images of Russians stealing chickens and gasoline were also published in social media. According to the Ukrainian Defence Ministry: *"*Due to significant logistical problems and stretched communications, they are unable to properly provide their units with fuel, food, equipment, ammunition and rotation. The Russian army gave permission to do something that had already been occurring for weeks when it instructed its troops to live off the land and move to 'self-sufficiency' until further orders" (Ministry of Defence of Ukraine 2022).

As proven by the first verdicts of Ukrainian courts in cases concerning stolen property, the judges appear to have adopted a harsh stance towards the persons accused of the war crime of pillage – the sentences are comparable to those delivered in cases concerning wilful killings and similar atrocities. On 3rd August, 2022, the District Court in Kyiv had sentenced Russian soldier, Sergey Zakharov, to 12 years of imprisonment for pillaging women's jewellery worth equivalent of 13,000 UAH. In a similar case, the Court in Chernihiv had sentenced Russian POW, Nikolai Filatov, to eight years and six months of imprisonment for pillaging a civilian's golden necklace (Marchuk 2022, 794).

3. ACCOUNTABILITY

Assuring accountability of those responsible for war crimes is one of the main goals of international criminal justice (Sterio 2023, 501). It is also clear that "bringing to justice" people committing international crimes during the war in Ukraine is among the priorities for the Ukrainian government and for governments of states that are supporting it. Potentially, there are many different accountability models available: prosecutions in Ukrainian national courts, prosecutions in specialised war crimes chambers or so-called "internationalised" domestic tribunals, prosecutions in national courts of other states under universal jurisdiction, prosecutions at the ICC, or specially created hybrid tribunals.[12] It seems that three

[11] "The looting of Alkhan-Yurt was systematic and organised, involving a large number of soldiers who acted with impunity throughout their stay in the village. Looted goods were stored in the homes occupied by Russian commanders as well as the tents of soldiers, and were transported openly in military vehicles out of Alkhan-Yurt. It is simply impossible that such widespread looting could take place in broad daylight without the knowledge and, at a minimum, the tacit consent of Russian commanders. The looting that took place in Alkhan-Yurt was not an isolated incident of such misconduct by Russian forces in Chechnya: since the beginning of the Chechen conflict, Russian troops have been systematically looting villages and towns under their control, and there is no evidence that the Russian command has taken any steps to prevent it" (HRW 2000).

[12] Created under a special agreement between Ukraine and an international organisation, most probably the UN or the EU (such as the Special Court for Sierra Leone or the Extraordinary

of those methods are of particular importance – national prosecutions by Ukraine, prosecutions by other states on the basis of the principle of universal jurisdiction, and prosecutions by the ICC. Each method has advantages and disadvantages. It is desirable for various mechanisms to operate in parallel, supporting each other's work. Using different accountability mechanisms allows a better cooperation and the simultaneous conduct of multiple prosecutions. The latter seems especially important, taking into account the number of reported war crimes.

3.1. National prosecutions

The individuals responsible for the commission of war crimes can face prosecution in domestic courts of the territorial state, in the same way as those who commit "ordinary" offences. National level prosecutions could take place in Ukrainian courts or within specialised war crimes chambers composed of judges, who should first receive appropriate training and develop the requisite expertise in terms of adjudicating large numbers of complex war crimes cases (Sterio 2023, 479). There are several undisputed advantages associated with prosecutions in domestic courts of the conflict country: access to victims, witnesses, and evidence; territorial proceedings are less costly and more time-efficient, and they allow the local population to follow or participate in the proceedings. In addition, participation in local proceedings may have a reconciliatory effect on the affected population. Nevertheless, some commentators raise doubts as to the very idea of holding trials during the ongoing war, arguing that this may affect the fairness of proceedings in a negative way (Marchuk 2022, 789).

According to official statistics published by the Office of the Prosecutor General of Ukraine, there are more than 100,000 reported cases concerning violations of the laws and customs of war (as of November 2023). This situation creates many new challenges for the criminal justice authorities and the forensic expert community (Shevchuk 2022). As mentioned previously, some trials of alleged war criminals have begun, several have already been concluded. Nevertheless, even the very first conviction raised some doubts with regard to the application of international humanitarian law – courts of both instances have qualified killing of a civilian as a violation of Art. 51(2) of the I Protocol (terrorising civilians), but not as a grave breach of the IV Geneva Convention (Marchuk 2022, 800).

3.2. The International Criminal Court

The ICC Statute was negotiated in 1998 and entered into force on 1st July, 2002. There are 123 member states, including most of the European countries, but neither the Russian Federation nor Ukraine are parties to the Rome Statute. However, the

Chambers in Cambodia). This is unlike *ad hoc* Tribunals created in the 1990s by the UN Security Council, which is obviously not possible with Russia as a permanent member with veto power.

ICC has jurisdiction over that armed conflict, pursuant to two declarations lodged by Ukraine and many referrals by States parties.[13] Ukraine had accepted the ICC's jurisdiction after the annexation of Crimea in 2014, but that process was not yet completed in 2022, so "Russian tanks literally rolled into a still-open situation before the Court" (Kelly 2023, 80). Taking into account its earlier conclusions and following referrals from 43 member states, on 28th February, 2022, the Prosecutor of the ICC decided to open an investigation into allegations of war crimes, crimes against humanity, and genocide. Authorisation by the Pre-Trial Chamber was granted two days later, i.e. on 2nd March, 2022. International support for the ICC prosecution has also taken a form of extra-budgetary contributions and seconded staff provided by some states (Vasiliev 2022). Under the complementarity principle, however, the ICC should refrain from taking on cases that Ukraine or other states are willing and able to handle on their own (Art. 17.1(a) of the Rome Statute). As some commentators point out, the future of international criminal law is domestic, and Ukraine is no exception. That is why attention should be given to the possibility of domestic prosecutions: by Ukraine, but also by other states of the "justice coalition" created shortly after the outbreak of the full scale war (Vasiliev 2022).

3.3. Universal jurisdiction

Universal jurisdiction is a concept based on the idea that certain crimes are so harmful to international community that states are entitled to start the investigation regardless of the location of the crime and the nationality of the perpetrator or the victim. A distinction can be made between situations in which States are obliged to investigate under universal jurisdiction (mandatory universal jurisdiction) and those with respect to which they may choose to do so (permissive universal jurisdiction). Universal jurisdiction may stem from a customary rule or from the international treaty; in the second scenario, it is generally mandatory. One of the basis for the exercise of compulsory universal jurisdiction is the grave breaches regime created by the Geneva Conventions of 1949, requiring that "each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts" (Clapham 2023).[14] According to the rule 157 of the customary international humanitarian law, "states have the right to vest universal jurisdiction

[13] Ukraine has accepted the *ad hoc* jurisdiction of the ICC by lodging two Article 12(3) declarations: the first one after the Maidan protests and the second one in the aftermath of the occupation of Crimea and the outbreak of war in eastern part of the country. Unlike the first declaration, which was limited in scope, the second declaration extended to alleged crimes committed from 20th February, 2014, onwards. More: https://www.icc-cpi.int/situations/ukraine (last accessed in November 2023).

[14] Art. 49 of the I Geneva Convention, Art. 50 of the II Geneva Convention, Art. 129 of the III Geneva Convention, Art. 146 of the IV Geneva Convention.

in their national courts over war crimes." As is pointed out by the ICRC, this right/obligation is supported extensively by national legislation. A large number of war crime cases have been adjudicated by national courts on the basis of universal jurisdiction, and the states of nationality of the accused did not object. In addition, military manuals of many states support the rule that war crimes jurisdiction can be established on the basis of the principle of universal jurisdiction.

Germany, Estonia, Latvia, Lithuania, and Poland have opened universal jurisdiction investigations of war crimes following the 2022 Russian invasion.[15] Several other countries declared similar intention (Pashkovsky 2022). In addition, in January 2023, the United States has adopted new legislation entitled the "Justice for Victims of War Crimes Act", allowing for prosecutions of those responsible for grave breaches of the Geneva Conventions in the United States, where there is no other connection apart from the presence of the alleged perpetrator in the USA (Clapham 2023). These developments have been described as "cooperative universal jurisdiction", as they allow non-belligerent allies of Ukraine to provide important strategic, logistical, and operational support in the enforcement of international humanitarian law. What is particularly important is the fact that universal jurisdiction allows joint cooperation and assistance for the collection and preservation of evidence in an ongoing conflict zones (Burk 2023, 9). The "justice coalition" formed by different states in the cooperation with institutions such as Eurojust is an unprecedented development. Initiatives such as "Lublin Justice Triangle" and the creation of joint investigative teams shows that many states are willing to support Ukraine in the pursuit of justice.

4. CONCLUSIONS

It is clear that no single accountability measure is suitable to achieve full justice for war crimes committed in Ukraine and to fulfil different goals of international criminal justice. Various mechanisms must function in parallel and support each other's work. It is necessary to conduct multiple prosecutions in a complementary and comprehensive manner (Sterio 2023, 482). This conclusion leads to questions concerning the division of work between domestic actors and the ICC in the delivery of justice. It seems that the situation in Ukraine might become the breeding ground for innovative forms of international cooperation in war crimes cases (Vasiliev 2022).

[15] On the basis of Art. 113 of the Polish Penal code: "Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements, or an offence described in the Rome Statute of the International Criminal Court."

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THE VIOLATION OF THE LAWS OF ARMED CONFLICT IN THE UKRAINIAN AND POLISH DIMENSION: THE CRIMINAL LAW DISCOURSE

Abstract. The current Criminal Code of Ukraine has shown that it can effectively respond to the challenges associated with the war unleashed by the Russian Federation against Ukraine. Chapter XX of the Special Part of the Criminal Code of Ukraine contains a number of articles that qualify the criminal acts of Russian occupiers. First of all, this is Article 438 "Violation of the laws and customs of war". In its content, it largely reflects the compliance of Ukrainian national criminal law with the provisions of international law in the field of the regulation of responsibility for committing criminal violations of international humanitarian law (the law of armed conflicts). A comparative legal analysis of Ukrainian and Polish legislation was carried out in terms of criminal liability for the violation of the laws and customs of war. Criminal violations of international humanitarian law are punishable under Articles 122–126 of the Criminal Code of the Republic of Poland. A detailed analysis of the content of these articles of the Criminal Code of the Republic of Poland showed a significant difference between the norms of the Polish criminal law in terms of detailing the acts that the Polish legislator defined as a violation of international humanitarian law. In particular, in addition to the general concept of the civilian population, the Polish criminal law proposes as victims persons laying down their arms or having no means of protection, the surrendered, the wounded, the sick, the shipwrecked, medical personnel, the clergy, unifying the concept of all persons enjoying international protection during armed hostilities. This position of the Polish legislator is more constructive and more closely connected with the relevant international legal acts than the corresponding norm of the Criminal Code of Ukraine. In addition, § 2 of Article 123 of the Criminal Code of the Republic of Poland provides an expanded understanding of ill-treatment of victims, which is not found in Article 438 of the Criminal Code of Ukraine. Also, the Ukrainian legislator ignored those violations of international humanitarian law which are indicated in Article 124 of the Criminal Code of the Republic of Poland – which also works in favour of the Polish criminal law, as it tries to comply with the provisions of international humanitarian law to a greater extent.

Keywords: international law, violation of laws and customs of war, criminal responsibility

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NARUSZENIE PRAWA KONFLIKTÓW ZBROJNYCH W WYMIARZE UKRAIŃSKIM I POLSKIM: DYSKURS PRAWA KARNEGO

Streszczenie. Obowiązujący Kodeks karny Ukrainy pokazał, że potrafi skutecznie odpowiedzieć na wyzwania związane z wojną rozpętaną przez Federację Rosyjską przeciwko Ukrainie. Rozdział XX części specjalnej Kodeksu karnego Ukrainy zawiera szereg artykułów kwalifikujących przestępcze działania rosyjskich okupantów. Przede wszystkim jest to artykuł 438 „Naruszenie praw i zwyczajów wojennych". W swojej treści w dużej mierze odzwierciedla zgodność ukraińskiego krajowego prawa karnego z przepisami prawa międzynarodowego w zakresie regulacji odpowiedzialności za popełnienie karalnych naruszeń międzynarodowego prawa humanitarnego (prawa konfliktów zbrojnych). Dokonano porównawczej analizy prawnej ustawodawstwa ukraińskiego i polskiego pod kątem odpowiedzialności karnej za naruszenie praw i zwyczajów wojennych. Karalne naruszenia międzynarodowego prawa humanitarnego podlegają karze z art. 122–126 Kodeksu karnego Rzeczypospolitej Polskiej. Szczegółowa analiza treści tych artykułów Kodeksu karnego RP wykazała istotną różnicę pomiędzy normami polskiego prawa karnego w zakresie uszczegółowienia czynów, które polski ustawodawca określił jako naruszenie międzynarodowego prawa humanitarnego. W szczególności, jak widzimy, poza ogólną koncepcją ludności cywilnej, polskie prawo karne jako ofiary proponuje osoby, które składając broń lub nie mając środków ochrony, poddały się, ranni, chorzy, rozbitkowie, personel medyczny, duchownych, ujednolicając koncepcję wszystkich osób korzystających z ochrony międzynarodowej podczas działań zbrojnych. Takie stanowisko polskiego ustawodawcy jest bardziej konstruktywne i ściślej powiązane z właściwymi międzynarodowymi aktami prawnymi niż odpowiadająca im norma Kodeksu karnego Ukrainy. Ponadto § 2 art. 123 Kodeksu karnego RP zapewnia rozszerzone rozumienie złego traktowania ofiar, którego nie ma w art. 438 Kodeksu karnego Ukrainy. Ustawodawca ukraiński zignorował także naruszenia międzynarodowego prawa humanitarnego, na które wskazuje art. 124 Kodeksu karnego RP – co także działa na korzyść polskiego prawa karnego, starając się przestrzegać przepisów prawa międzynarodowego w większym stopniu prawo humanitarne.

Słowa kluczowe: prawo międzynarodowe, naruszenie praw i zwyczajów wojennych, odpowiedzialność karna

1. INTRODUCTION

The tragic consequences of the Second World War did not result in the cessation of military confrontation worldwide. Even after WWII's end, new armed conflicts continue to flare up, accompanied by the perpetration of acts against the life and health of prisoners of war, the civilian population, and the environment. The international community was forced to introduce certain rules for conducting armed conflicts (wars), and formulated legal norms prohibiting such acts and establishing criminal liability for their commission.

This gave rise to a new branch in the field of international law – international humanitarian law (the law of armed conflicts) as "a system of internationally recognised legal norms and principles applied during armed conflicts, establishing the rights and obligations of subjects of international law to prohibit or restrict the

use of certain means and methods of armed struggle, ensuring the protection of the victims of the conflict and defining responsibility for the violation of these norms" (Ministerstvo oborony Ukrainy 2018).

On 24th February, 2022, a full-scale war of the state of "the Russian Federation" against the state of "Ukraine" began (although here it should be immediately noted that Russia committed armed aggression against Ukraine already in 2014, and from 2014 to 2022 there was only an operational break, and from 24th February, only the next stage of this war began). In order to conceal the goals of the war, authorities in the Russian Federation avoided using the term "war" and used the terms "special military operation" (Espreso.tv 2022), "liberation of primordial Russian lands" (Prysedska 2022), and "conflict between fraternal peoples" (Holos Ameryky Ukrainskoiu 2023). But, in fact, the invasion of the territory of Ukraine by the Russian troops, and Russian military aggression, meets all the characteristics of war, which is defined as "a state of affairs between two states, or between two groups of states, or between a state and a group of states, accompanied mainly by the termination of diplomatic relations, further suspension of the application of the general rules of international peacetime law and a general determination to commit acts of violence, even if such acts do not actually take place" (Shunevych 2022). This took place despite the fact that Russia acted as one of the guarantors of the territorial integrity and inviolability of Ukraine when signing the Budapest Memorandum on 5th December, 1994, in which the Russian Federation pledged to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, "in accordance with the principles of the Final Act of the CSCE respect the independence and sovereignty and the existing borders of Ukraine" (United Nations 1994).

2. A SPECIAL MILITARY OPERATION OR WAR?

The Russian Federation, having started the war, called it a "special military operation". At the same time, the state of Ukraine was not obliged to declare war on the Russian Federation, since international law recognises the aggression of one state on the territory of another as a war, without additional resolutions and legislative acts. In the event of a declaration of war, the UN is obliged to recognise one of the parties as the state that unleashed it. With such a country, UN members are required to break off all diplomatic relations (Zaverukha 2023), which did not happen and which, in a certain way, explains the position of Russia on the issue of defining the aggression that it committed against Ukraine.

3. CRIMINAL OFFENCES AGAINST PEACE, HUMAN SECURITY, AND INTERNATIONAL LAW AND ORDER IN THE CRIMINAL CODE OF UKRAINE

Adopted in 2001, the Criminal Code of Ukraine in Section XX of the Special Part "Criminal offences against peace, security of mankind and international law and order" contains a number of articles providing definitions for so-called international crimes (Verkhovna Rada Ukrainy 2001). This is broadly in line with the classification given in Article 6 of the 1945 Statute of the International Military Tribunal for the Trial and Punishment of the Major European Axis War Criminals (the Statute of the Nuremberg Tribunal). In this legal act, international crimes are classified into three main groups: crimes against peace, war crimes, and crimes against humanity – and these acts are given an exhaustive definition: "1) crimes against peace: planning, preparing, authorising, or waging a war of aggression or a war in violation of international treaties, agreements or assurances, or participating in a common plan or conspiracy to carry out any of the above; 2) war crimes: the violation of the law and customs of war. These crimes include: killings, torture, giving into slavery or for other purposes the civilian population of the occupied territory, killing or torturing prisoners of war, killing hostages, robbing public or private property, senseless destruction of cities and villages, destruction not justified by military necessity, and other crimes; 3) crimes against humanity: killings, exterminations and other atrocities committed against the civilian population before or during the war, or persecution for political, religious, racial reasons for the commission of or in connection with any crime that is subject to the jurisdiction of the Tribunal, regardless of whether these acts were a violation of the internal law of the country where they were committed or not" (United Nations 1945).

At the same time, not only Section XX of the Criminal Code of Ukraine contains the above description of criminal acts; they are also placed in Section XIX of the Criminal Code of Ukraine "Crimes against the established procedure for performing military service (war crimes)", in Articles 433 "Violence against the population in the region military actions" and 434 "Bad treatment of prisoners of war" of the Criminal Code of Ukraine (Verkhovna Rada Ukrainy 2001). Comparing the crimes defined by articles 433, 434, and 438 of the Criminal Code of Ukraine, it should be noted that all these articles describe acts prohibited by international legal documents in the form of violence against prisoners of war and civilians in armed conflict. The similarity of the legislative structure gives rise to problems in qualifying these crimes. In my opinion, the difference lies in who the subject of these crimes is.

According to Articles 433, 434 of the Criminal Code of Ukraine, the responsible parties are the "servicemen of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the National Guard of Ukraine

and other military formations formed in accordance with the laws of Ukraine, the State Special Transport Service, the State Special Communications Service and protection of information of Ukraine, as well as those liable for military service and reservists during training camps" (Article 401 of the Criminal Code of Ukraine).

In addition, Ukrainian military personnel may be held liable for some acts that may be considered as a violation of the laws and customs of war, but *are* according to special provisions of the Criminal Code of Ukraine, in particular, Article 432 "Looting", 435 of the Criminal Code of Ukraine "Illegal use of the symbols of the Red Cross, Red Crescent, Red Crystal and its misuse".

While liability under Article 438 of the Criminal Code of Ukraine is borne by:

"1) as a rule, combatants from the side of the aggressor state;

2) persons authorised to issue orders to combatants;

3) civilians, including those who, for certain reasons, were not recognised as combatants (for example, those who took up arms and did not join the military formation, spies, saboteurs, mercenaries)" (Khavroniuk 2022).

4. THE DEFINITION OF A COMBATANT – THE NATIONAL AND THE INTERNATIONAL DIMENSION

The important question is – who should be considered combatants? Article 4A of the Geneva Convention Relating to the Treatment of Prisoners of War (United Nations 1949d) as well as articles 43, 44 of the Additional Protocol to the Geneva Conventions of 12th August, 1949, concerning the protection of victims of international armed conflicts (Protocol I) (United Nations 1949e) both refer to combatants as those who have the right to directly participate in hostilities – in particular:

1) the personnel of the armed forces of a party to the conflict (with the exception of medical and religious personnel, as well as spies and mercenaries). Protocol I puts forward one requirement for them – subordination to an internal disciplinary system, which, along with others, ensures compliance with the rules of international law applicable during armed conflicts (United Nations 1949e). If we are talking about the armed forces of the aggressor state of Russia, then these are representatives of: the regular armed forces of the Russian Federation; other armed formations of the Russian Federation: border troops, internal troops ("Rosgvardia"), the Federal Security Service, the Foreign Intelligence Service, state security agencies, civil defence rescue military units, the military prosecutor's office, military investigative agencies of the Investigative Committee, the federal body for providing mobilisation training, special formations, military educational institutions, etc. (Article 2 of the Law of the Russian Federation "On military duty and military service" as amended on 13th December, 2021) (Hosudarstvennaia Duma Rossyiskoi Federatsyy 1998).

2) members of organised resistance movements who meet the following conditions:

a) they are commanded by a person responsible for his subordinates;

b) they have a permanent, distinctive insignia, well recognisable from a distance;

c) they carry weapons openly;

d) they conduct their operations in accordance with the laws and customs of war (Article 13(2) of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12th August, 1949; from the armed forces at sea of 12th August, 1949, Article 4(2) of the Geneva Convention on the Treatment of Prisoners of War of 12th August, 1949, Article 43(1) of the Additional Protocol to the Geneva Conventions of 12th August, 1949, concerning Protection of Victims of International Armed Conflicts (United Nations 1949a, United Nations 1949b, United Nations 1949d, United Nations 1949e)). Arguably, partisans or militants of the so-called "Donetsk and Luhansk people's republics" can be classified as such persons. It is possible, however, that referring to this category of representatives of private military campaigns in that context is a controversial stance. According to Ukrainian professor Mykola Khavronyuk: "On the one hand, the belonging of such persons to organised resistance movements can be questioned if they ignore the laws and customs of war, the observance of which is a mandatory sign of combatants. On the other hand, Article 44, paragraph 2, of Protocol I states that although all combatants are bound by the rules of international law applicable in armed conflicts, violations of these rules do not deprive a combatant of his right to be considered combatants and, if he falls into the power of the opposing side, to be considered prisoners of war (with some exceptions, for example, when a combatant disguises himself as a civilian when participating in an attack)" (Khavroniuk 2022);

3) members of the personnel of the regular armed forces, declaring their allegiance to the government or authorities, not recognised by the state detaining them (as prisoners of war). "The civilian population of the unoccupied territory, who spontaneously took up arms when the enemy approached and did not have time to organise into the regular armed forces of a party to the conflict – *levée en masse* (subject to open carrying of weapons and respect for the laws and customs of war)" (Senatorova 2018, 80).

An important implication of combatant status for the individual is the combatant's privilege, which grants him/her "the right to take a direct part in hostilities" on behalf of a party to an international armed conflict (Article 43(2) Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts) (United Nations 1949e). This means that combatants, as the lawful representatives of the belligerents, enjoy immunity from prosecution for lawful hostilities – that is, for hostilities carried out in accordance with international humanitarian law (Article 44(2) Additional

Protocol to the Geneva Conventions of August 12, 1949 concerning the Protection of Victims of International Armed Conflicts) (United Nations 1949e). At the same time, "combatants are required to respect international humanitarian law, while combatants are not immune from prosecution for violations of international humanitarian law and are punished under international criminal law or in accordance with the criminal law of the state that took them prisoner" (Meltser 2020, 194).

In general, combatant privileges granted by international humanitarian law to participants in an international armed conflict do not apply to military criminal offences. The "right of a combatant to take a direct part in hostilities provides an immunity from prosecution for lawful hostilities that would otherwise constitute offences under the national law of the capturing State. But combatants are not immune from violations of international humanitarian law punishable under national or international criminal law" (Article 129 (2), (3) of the Geneva Convention Relating to the Treatment of Prisoners of War, 1949) (United Nations 1949e). However, there are no combatant privileges in the event of a non-international armed conflict – or for civilians taking a direct part in hostilities and not enjoying the privileges of a combatant, sometimes characterised as "unprivileged" or "illegal" combatants and not falling under the categories of persons protected by the Geneva Conventions of 1949 (Meltser 2020, 195).

Moreover, any immunities that are granted to a head of state or head of government, a member of government or a member of parliament, an elected representative or official, do not exempt these persons from international criminal responsibility, i.e. from liability for military criminal offences, genocide as a crime, etc. (article of the Rome Statute of the International Criminal Court) (United Nations 1998). The jurisdiction of the International Criminal Court on the territory of Ukraine extends in accordance with the "Statement of the Verkhovna Rada of Ukraine to the International Criminal Court on the recognition by Ukraine of the jurisdiction of the International Criminal Court on the commission of crimes against humanity by the highest officials of the state, which led to especially grave consequences and the massacre of citizens during protests between 21st November, 2013, 22nd February, 2014" (Verkhovna Rada Ukrainy 2014) and the Statement of the Verkhovna Rada of Ukraine "On the recognition by Ukraine of the jurisdiction of the International Criminal Court regarding the commission of crimes against humanity and war crimes by the highest officials of the Russian Federation and the leaders of the terrorist organisations "DPR" and "LPR", which led to especially grave consequences and the massacre of Ukrainian citizens" (Verkhovna Rada Ukrainy 2015). "That is, today the jurisdiction of the International Criminal Court is limited and applied only on these applications", notes G. Anisimov, Secretary of the Third Judicial Chamber of the Criminal Court of Cassation as part of the Supreme Court of Ukraine (Anisimov 2022).

Another important aspect of international humanitarian law is that, in non-international armed conflicts, no immunity from prosecution is granted even for lawful acts of war. This means that any person who takes a direct part in hostilities in a non-international armed conflict bears full responsibility in accordance with applicable national law (Meltser 2020, 198). This is despite the fact that "any damage caused by government forces and police in accordance with international humanitarian law will be justified under national law as a lawful act of the state. However, like any harm caused by non-state armed groups and their civilian supporters, they are subject to prosecution under the standard provisions of national law. International humanitarian law simply recommends that, at the end of hostilities, the authorities shall endeavour to grant the widest possible amnesty to persons who have participated in an armed conflict, except for persons suspected, accused or convicted of war crimes" (Article 6(5) of the Geneva Convention of 12th August, 1949, concerning the Protection of Victims of Non-International Armed Conflicts) (United Nations 1949e).

5. THE ILL-TREATMENT OF PRISONERS OF WAR AND CIVILIANS

Returning to Article 438 of the Criminal Code of Ukraine, it should be noted that the relevant international acts contain norms prohibiting: to kill or injure a surrendered enemy; to use against the civilian population and prisoners of war torture, torment, insulting, degrading treatment, hostage-taking, other acts of violence aimed at terrorising the civilian population; to subject prisoners of war to scientific or medical research that is not justified by their medical treatment and interests. All such actions committed against prisoners of war or the civilian population should be recognised as ill-treatment, specified in Article 348 of the Criminal Code of Ukraine as one of the alternative options for criminal acts provided for by this norm (Verkhovna Rada Ukrainy 2001). Almost all of these actions were committed by the Russian military during the full-scale aggression of the Russian Federation against Ukraine. Thus, on 28th July, 2022, videos of torture, castration, and murder of a Ukrainian prisoner of war in the "Privilege" sanatorium, committed by Russian servicemen, were circulated on the Internet. A video circulated by Russian sources recorded how a Russian castrated, mocked and shot a bound Ukrainian prisoner of war with a knife (Amnesty International 2022). Also widely known is the case of the mass murder of prisoners of war in Olenivka, which was committed on the night of 28th–29th July, 2022 by the Russian troops in the village of Molodyozhny of the Olenovsky village council against Ukrainian prisoners of war, defenders of "Azovstal" in Mariupol. Explosions on the territory of the former Volnovakha correctional colony No. 120, where Ukrainian prisoners were kept, killed 53 people and injured more than 130 (BBC News Ukraina 2022). The situation is no better with regard to the

actions of the Russian occupiers in relation to the Ukrainian civilian population. Thus, the Commissioner of the Verkhovna Rada of Ukraine for Human Rights, Dmitry Lubinets, reports that the occupying Russian troops are carrying out demonstrative filtration measures in southern Ukraine for patriotic local residents. For example, in Kherson, up to 50 civilians were tortured and killed, and about 120 residents of the city were abducted. Their whereabouts are currently unknown (Upovnovazhenyi Verkhovnoi Rady Ukrayiny z prav liudyny 2022).

6. THE EXPULSION OF THE CIVILIAN POPULATION FOR FORCED LABOUR

Forced labour, referred to in Article 438 of the Criminal Code of Ukraine, is such labour during which the civilian population, without their voluntary consent, is forced to participate in military operations, to work outside the occupied territory where this population is located, and who are not paid or paid unfairly. These "jobs" clearly do not correspond to the physical or intellectual abilities of the workers; persons under the age of eighteen are involved in such work, as well as work related to the mobilisation of workers into an organisation of a military or paramilitary nature. However, the forced assignment of civilians who have reached the age of eighteen to perform work necessary for the needs of the occupying army (e.g. work on the construction of enemy defence lines), or work related to the provision of food, housing, clothing, transport and health of the population of the occupied area, does not entail liability under Article 438 of the Criminal Code of Ukraine, since such actions are expressly permitted by the Convention for the Protection of Civilian Persons in Time of War (United Nations 1949c). Forced labour also does not include work that is normally required during detention imposed in accordance with the procedure for the execution of punishment established by law (United Nations 1949c). During the occupation, numerous cases of coercion by the occupying Russian authorities of civilians to perform work were documented (Informatsiine ahentstvo "Ukrainski Natsionalni Novyny" 2022).

7. PLUNDERING NATIONAL VALUES IN THE OCCUPIED TERRITORY

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 defines the obligations of states and non-state participants in an armed conflict to protect and respect cultural property – in particular, it provides for the obligation to refrain from attacks on cultural property, their use for military purposes, and attempts to rob and destroy (United Nations 1954). Article 1 of the Convention provides a list of property recognised as cultural property: 1) movable and immovable property significant for the cultural heritage of each people, such as architectural monuments, books, and works of

art; 2) buildings intended for the storage and display of cultural property, such as museums and libraries; 3) centres of concentration of cultural values, such as ancient temples and palaces (United Nations 1954). The Russian occupation troops systematically and totally plunder and take out monuments of cultural and historical heritage. In Kherson alone, the invaders stole more than 15,000 unique cultural monuments. In particular, the Russians took out a valuable collection of coins from the ancient cities of the Northern Black Sea region, samples of weapons of the 16th–20th centuries, as well as porcelain and antique furniture from the Kherson Museum of Local Lore (Ukrainer.net 2023).

In Ukraine, the Law of Ukraine "On the Export, Import and Return of Cultural Property" became the law regulating the category of "cultural property", Article 1 of which establishes that cultural property is "artistic, historical objects of material and spiritual culture that have an ethnographic and scientific value and are subject to conservation, reproduction and protection in accordance with the legislation of Ukraine" (Verkhovna Rada Ukrainy 1999).

The concept of "cultural values" includes: original art works of painting, graphics and sculpture, artistic compositions and installations from any materials, works of arts and crafts as well as traditional folk art; items related to historical events, the development of society and the state, the history of science and culture, as well as those related to the life and work of prominent figures of the state, political parties, public and religious organisations, science, culture and art; items of museum significance found during archaeological excavations; components and fragments of architectural, historical, artistic monuments and monuments of monumental art; old books and other publications of historical, artistic, scientific and literary value, separately or in a collection; manuscripts and incunabula, early printed editions, archival documents, including film, photo and audio documents, separately or in collections; unique and rare musical instruments; various types of weapons of artistic, historical, ethnographic and scientific value; rare postage stamps, other philatelic materials, individually or in a collection; rare coins, orders, medals, seals and other collectibles; zoological collections of scientific, cultural, educational, educational or aesthetic value; rare collections and samples of flora and fauna, mineralogy, anatomy and paleontology (Verkhovna Rada Ukrainy 1999). Accordingly, the Law of Ukraine "On the protection of cultural heritage" determines the list and content of measures that must be implemented within the framework of the protection of cultural heritage, in particular: prevention of destruction or harm, ensuring protection, preservation, appropriate use, conservation, registration of cultural heritage objects (Verkhovna Rada Ukrainy 2000).

The protection of cultural property during armed conflicts according to the Ukrainian criminal law is clearly insufficient. Responsibility for the looting of national values in the occupied territory is provided for by Article 438 of the Criminal Code of Ukraine. However, its reach is limited. First, it applies only to armed conflicts of an international character. After all, the Geneva Conventions

for the Protection of War Victims of 12th August, 1949, followed by Article 438 of the Criminal Code of Ukraine, do not provide for liability for the looting of national valuables in non-international armed conflicts. In addition, the subject of looting of national valuables is only property of cultural or other national valuable (i.e. it meets the requirements of the Law of Ukraine "On the Protection of Cultural Heritage", the Convention for the Protection of Cultural Property in the Event of Armed Conflict dated 14th May, 1954). Therefore, it is such property that is national, state or property of individual legal entities and individuals and for which the state has established a special protection regime, including cultural valuables (monuments of architecture, art, history, etc.) The looting of national valuables in the occupied territory covers their arbitrary seizure in any way, combined with their subsequent circulation in favour of another state or individuals, and also, as a rule, with their export outside the occupied territory (Boiko, Brych, Hryshchuk, Dudorov 2019, 1338).

A certain way around this situation is that among the norms of the Ukrainian criminal law there are those that provide for liability for encroachment on cultural property, and they can be applied during a non-international armed conflict. In particular, these are articles of the Criminal Code of Ukraine: 178 "Damage religious buildings or places of worship", 179 "Illegal retention, desecration or destruction of religious shrines", 298 "Illegal prospecting at an archaeological heritage site, destruction, destruction or damage to cultural heritage objects" (Verkhovna Rada Ukrainy 2001).

8. THE USE OF MEANS OF WARFARE PROHIBITED BY INTERNATIONAL LAW, OTHER VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR

Article 438 of the Criminal Code of Ukraine provides for a criminal law prohibition on "the use of means of warfare prohibited by international law, other violations of the laws and customs of war provided for by international treaties, the consent to be bound by which is provided by the Verkhovna Rada of Ukraine" (Verkhovna Rada Ukrainy 2001).

There are a significant number of international legal acts prohibiting the use of certain means and methods of warfare in the course of armed conflicts, both international and non-international in nature.

Thousands of cases of violation by the armed forces of the Russian Federation of the prohibitions established by international humanitarian law have been documented.

Clearly, there was a violation by the Russian military of the provisions of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (United Nations 1980). At different times, the Russian Federation ratified five additional protocols to this convention:

1) Protocol on missing fragments (Protocol I); 2) Protocol on the Prohibition or Restriction of the Use of Mines, Booby-Traps and Other Devices (Protocol II); 3) Protocol on the Prohibition or Restriction of the Use of Incendiary Weapons (Protocol III); 4) Protocol on blinding laser weapons (Protocol IV); 5) Protocol on Explosive Ordnance (Protocol V). The Russian Federation has been proven to have violated at least three of these five additional protocols.

First of all, there is the use by the Russian Federation of booby traps and so-called surprise mines, which can hit both military personnel and the civilian population. Such Russian booby traps were found in post-occupied territories in document covers, machine gun horns, children's toys, gift bags, balls, books, clothes, candy boxes, packs of cigarettes (Defense Express 2022). The most terrible and cynical was the case of the installation by Russian servicemen of a mine between a murdered mother and her living child, which they've tied to the corpse of the woman (ZMINA 2022).

Also, the Russian armed forces have repeatedly used incendiary ammunition throughout the course of hostilities against Ukraine. On 12th March, 2022, near the city of Popasna in the Luhansk region, the use of incendiary ammunition of the 9M22S type by Russians fired from multiple launch rocket systems was recorded (Safronov 2022). Also, the military aviation of the Russian Federation used, in particular during the shelling of Chernigov, Nikolaev, Kherson, OFZAB-500 high-explosive fragmentation bombs on the territory of Ukraine, which, due to their power and uncontrollability, are means of indiscriminate action. The use of OFZAB-500 air bombs in Ukraine was confirmed during interrogations of Major of the Armed Forces of the Russian Federation A. Krasnoyartsev, who piloted a Su-34 military aircraft shot down over Chernihiv (ZMINA 2022a).

According to Article 2 of Protocol V on Explosive Ordnance – Consequences of War, "a Party to an armed conflict shall, after the cessation of active hostilities and as soon as possible, locate, render harmless, remove or destroy explosive ordnance – Consequences of War in territories under its control" (United Nations 2003). However, the military personnel of the Russian Federation who were or controlled the temporarily occupied territories of Ukraine and during the armed conflict in the east of Ukraine, starting from 2014, and during the full-scale invasion of 2022–2023, did not take any of the measures listed by Protocol V, which would be aimed at neutralising explosive items.

The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction provides for the obligation of States Parties to "never and under no circumstances use anti-personnel mines" (United Nations 1997). However, since the beginning of the full-scale invasion of the territory of Ukraine, international organisations and national non-governmental organisations have repeatedly announced the use of anti-personnel mines, such as POM-3, known as "Medallion" by the armed forces of the Russian Federation (Human Rights Watch 2022). This convention was

joined by almost all nations of the world – including Ukraine – in 2005. However, the Russian Federation has not ratified this convention.

The Russian Federation has also not ratified the 2008 Convention on Cluster Munitions, which states that the use of cluster munitions is a flagrant violation of customary international humanitarian law and general prohibitions on indiscriminate weapons (United Nations 2008). At the same time, the use of cluster munitions by the troops of the Russian Federation has been repeatedly confirmed both at the national and international levels. In particular, according to the UN, the Russian Federation has repeatedly used cluster munitions against Ukraine (United Nations 2022).

The 1977 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modifiers (United Nations 1977) was ratified by both Ukraine and the Russian Federation. Despite this, throughout the entire period of full-scale military aggression, the Ministry of Environmental Protection and Natural Resources of Ukraine recorded numerous violations by military personnel and the occupying authorities of the Russian Federation and reported on the catastrophic consequences of the war for the environment of Ukraine. Thus, the explosion of the dam of the Kakhovskaya hydroelectric power station was the greatest catastrophe caused by the Russian invaders since the beginning of the full-scale invasion, the consequences of which the Ukrainian people will have to deal with for decades (Ministerstvo zakhystu dovkillia ta pryrodnykh resursiv Ukrainy 2023).

The above indicates that, during the war against Ukraine, the Russian Federation used and continues to use almost all the means of warfare prohibited by international humanitarian law.

9. THE USE OF WARFARE METHODS PROHIBITED BY INTERNATIONAL LAW

As for the prohibited methods of warfare that the Russian Federation uses during the war against Ukraine, they are interpreted by scientists who comment on the provisions of Article 438 of the Criminal Code of Ukraine as "other violations of the laws and customs of war provided for by international treaties, the consent to be bound by which has been granted by the Supreme Rada of Ukraine" (Verkhovna Rada Ukrainy 2001) (due to the fact that the term "methods of warfare prohibited by international law" itself does not appear in this article). It should be noted that the norms of international humanitarian law prohibit such methods of warfare as: indiscriminate attacks; use of human shields; orders to leave no one alive; attacks on persons deprived of combat capability – the wounded, sick, surrendered; the use of civilian starvation as a method of warfare; attacking, destroying, removing or rendering unusable objects necessary for the survival of the civilian population; the use of military insignia of the enemy, etc.

On a regular basis and systematically, the Russian Federation military personnel carry out indiscriminate attacks, which have been reported many times both nationally and internationally (Ukrainska pravda 2022; ZN.UA 2022a).

In addition, the Russian military has repeatedly resorted to using the Ukrainian civilian population as human shields when planning and carrying out aggressive offensive operations on the territory of Ukraine (ZN.UA 2022). In fact, the Armed Forces of the Russian Federation are not just fighting, but are carrying out a real "campaign of terror", as high-ranking officials of foreign states, in particular, the representative of the US State Department, Ned Price, declare (Orlova 2022).

Another prohibited method of warfare is treachery, i.e. "actions aimed at inspiring the enemy's confidence, making him/her believe that he/she has the right to protection and is obliged to provide such protection in accordance with the rules of international law applicable in armed conflicts, for the purpose of deceiving him/her" (Ministerstvo oborony Ukrainy 2018).

The list of treacherous acts is exhaustive and consists of: "feigning an intention to negotiate under the banner of a truce or feigning surrender; simulation of failure as a result of injury or illness; feigning possession of civilian or non-combatant status; feigning protection status through the use of insignia, emblems or uniforms of the United Nations, neutral States not party to the conflict" (Ministerstvo oborony Ukrainy 2018).

However, international humanitarian law does not prohibit the use of military tricks to mislead the enemy (camouflage, demonstrative actions, disinformation, imitation, etc.)

This allows us to assert that during the full-scale invasion of Ukraine, the Armed Forces of the Russian Federation repeatedly and insidiously used a number of various prohibited methods of warfare.

10. COMPARATIVE LEGAL ANALYSIS OF CRIMINAL UKRAINIAN AND POLISH LEGISLATION FOR VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR

An interesting part of my research was also a comparative legal analysis of Ukrainian and Polish legislation in terms of criminal liability for violation of the laws and customs of war. Despite sometimes differing approaches to the criminalisation of infringements on peace, security of mankind and international legal order, along with liability for other crimes against peace and humanity, the Criminal Code of the Republic of Poland provides for liability for violation of international humanitarian law.[1] A comparative legal analysis of the fight against

[1] Criminal Code of the Republic of Poland 6.06.1997, pol. Ustawa z dnia 6 czerwca 1997 r. Kodeks karny (t.j. Dz.U. z 2024 r. poz. 17). Futher in the text: Criminal Code of the Republic of Poland.

such criminal violations makes it possible to identify positive experiences in the legal regulation of this area as well as gaps and shortcomings in national legislation.

The special part of the Criminal Code of the Republic of Poland opens with Chapter XVI "Crimes against peace, humanity and war crimes", previously unknown to the previous Criminal Code of the Republic of Poland of 1969. Implementing the provisions of Article 9 of the Constitution of the Polish State that the Republic of Poland "respects international law, which is binding for it",[2] Polish legislators established in this section liability for acts provided for by convention and other norms of international legal acts, including the norms of international humanitarian law. In particular, it is the criminal violations of international humanitarian law that entail liability under Articles 122–126 of the Criminal Code of the Republic of Poland. By virtue of Article 105 § 1, the statute of limitations does not apply to all these crimes.

Article 122 of the Criminal Code of the Republic of Poland concerns the fulfilment of international obligations of the Republic of Poland and includes two paragraphs defining two separate crimes. § 1 of Article 122 of the Criminal Code of the Republic of Poland provides for liability for the use of prohibited methods of warfare – an attack on an undefended area or object, a sanitary or neutral zone, or other prohibited methods of combat. Article 122 § 2 of the Criminal Code of the Republic of Poland provides for liability for the use of means of warfare prohibited by international law during hostilities.

Article 123 § 1 of the Criminal Code of the Republic of Poland defines the responsibility of those who, in violation of international law, commit murder: 1) persons who have drawn up arms or who, having no means of protection, have surrendered; 2) the wounded, sick, shipwrecked, medical personnel or clergy; 3) prisoners of war; 4) the civilian population of an occupied territory or one where hostilities are taking place, or other persons enjoying international protection during hostilities. Paragraph 2 of this article establishes liability for violation of international law due to the infliction of grievous bodily harm to persons indicated in § 1 of this provision, as well as subjecting these people to torture, cruel or inhumane treatment, holding them, even when they consent, cognitive experiments, using the presence of civilians in a certain territory or object for their own protection against military operations or their own troops, or holding these civilians as hostages.

In Article 124 of the Criminal Code of the Republic of Poland, the legislator legally determines which actions should be classified as "other violations of international law". Thus, in § 1 of Article 124, it is determined that it is a violation of international humanitarian law to compel persons specified in Article 123 of

[2] Constitution of the Republic of Poland 2.04.1997, pol. Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483 z późn. zm.).

the Criminal Code of the Republic of Poland "to serve in the armed forces of the enemy or participate in military operations against their own country", as well as the application of corporal punishment to these persons, force, unlawful threats or deceit, inducing these people to have sexual intercourse or committing such an act, attacking personal dignity, in particular humiliating and degrading treatment, deprivation of liberty, depriving these persons of their right to an independent and impartial court or limiting their right to a defence in criminal proceedings. The same punishment is imposed on anyone who, contrary to international humanitarian law, "delays the repatriation of prisoners of war or civilians, transfers, relocates or deports civilians liable for military service, recruits into the armed forces persons under the age of 18 years, or actually uses such persons in hostilities" (§ 2 article 124 of the Criminal Code of the Republic of Poland).

A separate article, 125 of the Criminal Code of the Republic of Poland, provides for liability for violations of international humanitarian law committed in an occupied territory or one where hostilities are taking place and consist in the destruction, damage, seizure or appropriation of property or cultural property (§ 1 of Article 125 of the Criminal Code of the Republic of Poland). The qualified composition of this norm establishes liability for the same action if it concerns property of significant value or objects of special importance for culture (§ 2 of Article 125 of the Criminal Code of the Republic of Poland).

Such a detailed analysis of the content of the relevant articles of the Criminal Code of the Republic of Poland showed a significant difference between the norms of the Polish criminal law in terms of detailing the acts defined by the Polish legislator as a violation of international humanitarian law. In particular, as we see, in addition to the general concept of the civilian population, the Polish criminal law proposes as victims persons who, laying down their arms or having no means of protection, surrendered, the wounded, sick, shipwrecked, medical personnel, the clergy, unifying the concept of persons enjoying international protection during hostilities. In my opinion, such a position of the Polish legislator is more constructive and more closely connected with the relevant international legal acts than the corresponding norm of the Criminal Code of Ukraine.

In addition, § 2 of Article 123 of the Criminal Code of the Republic of Poland provides an expanded understanding of ill-treatment of victims, which is not found in Article 438 of the Criminal Code of Ukraine.

Also, the Ukrainian legislator ignored those violations of international humanitarian law, which are indicated in Article 124 of the Criminal Code of the Republic of Poland. This too works in favour of the Polish criminal law, as it tries to comply with the provisions of international humanitarian law to a greater extent.

At the same time, in fairness, it should be noted that, of course, Poland did not fully implement in the relevant section the provisions of international legal acts on liability for international crimes and crimes of an international nature. In

particular, in the Criminal Code of the Republic of Poland, there is no such type of violation of international humanitarian law as forced labour of the civilian population of the occupied territories, which makes a case for the need to improve the Polish criminal law.

11. CONCLUSIONS

Thus, the current Criminal Code of Ukraine has shown that it can effectively respond to the challenges associated with the war unleashed by the Russian Federation against Ukraine. Chapter XX of the Special Part of the Criminal Code of Ukraine contains a number of articles that qualify the criminal acts of Russian occupiers, such as Article 438 "Violation of the laws and customs of war". In its content, it largely reflects the compliance of the Ukrainian national criminal law with the provisions of international law in the field of the regulation of responsibility for committing criminal violations of international humanitarian law (the law of armed conflicts). Unfortunately, during the year of hostilities, Russian servicemen committed almost all of the crimes provided for by both Ukrainian criminal law and international legal acts. The list of specific grave international war crimes committed by the Russian aggressors is endless.

It should be noted that, in addition to Article 438 of the Criminal Code of Ukraine, actions in the form of violence against prisoners of war and civilians in armed conflict, prohibited by international legal documents, are also described in Articles 433, 434 of the Criminal Code of Ukraine (Section XIX "Military criminal offences"). The similarity of the legislative structure gives rise to problems in the qualification of these crimes and, in my opinion, the difference lies in who the subject of these crimes is.

Responsibility under Articles 433, 434 of the Criminal Code can only be borne by the military personnel of Ukraine in the conditions of both international and non-international armed conflict. Also, Ukrainian servicemen can be held accountable for some acts that can be considered a violation of the laws and customs of war. But, according to special provisions of the Criminal Code of Ukraine, in particular, under Articles 432, 435 of the Criminal Code of Ukraine, while under Article 438 of the Criminal Code of Ukraine, only foreign combatants and persons equivalent to them can be held responsible.

The protection of cultural property during armed conflicts according to the Ukrainian criminal law is, clearly, insufficient. Responsibility for the looting of national valuables in the occupied territory is provided for in Article 438 of the Criminal Code of Ukraine, but its possibilities are limited. A certain way around this situation is that, among the norms of the Ukrainian criminal law, there are those that provide for liability for encroachment on cultural property, and they

can be applied during a non-international armed conflict; in particular, these are articles 178, 179, 298 of the Criminal Code Ukraine.

Within the framework of this study, it is advisable to analyse the offences of Ukrainian and Polish legislation in terms of criminal prosecution for violation of rules and customs. Criminal violations of international humanitarian law are punishable under articles 122–126 of the Criminal Code of the Republic of Poland. A detailed analysis of the content of the articles of the Criminal Code of the Republic showed a significant difference in the size of the Polish law in terms of detailing acts which, under the Polish law, constitute a violation of international humanitarian law – in particular, as can be seen, the wide dissemination of whom the Polish criminal law recognises as victims – identifying who, orienting themselves by weapons or undetectable means of protection, surrendered, the wounded, the sick, the shipwrecked, medical personnel, the clergy, association of all involved persons, during military actions, using international defence structures. In my opinion, this position of the Polish law is more constructive and closely related to international legal acts than the norms of the Criminal Code of Ukraine. In addition, § 2 of Article 123 of the Criminal Code of the Republic of Poland provides an expanded understanding of ill-treatment of victims, which is not found in Article 438 of the Criminal Code of Ukraine. Ukrainian law-makers missed out on including those international humanitarian rights, which are specified in Article 124 of the Criminal Code of the Republic of Poland, which also positions Polish legislative powers as trying to be more in line with the provisions of international humanitarian law.

As such, the above-mentioned comparison makes it possible to assert that the Polish legislative experience in the criminal law regulation of violations of international humanitarian law can and should be useful to Ukrainian legislators and the Ukrainian judicial practice.

In any case, a proper investigation and qualification of the facts of the use by the Russian occupiers of prohibited means and methods of warfare, both at the national and international levels, will necessarily ensure that military personnel, and the highest military and political leadership of the Russian Federation are held criminally liable for committing crimes against peace, humanity, and war crimes.

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WAR AS AN ACCESSION ACCELERATOR? UKRAINE'S PATH TOWARDS THE EU[1]

Abstract. The European Union's response to the war in Ukraine is perceived as swift and relatively coherent. The political willingness to support its attacked neighbour has also extended to Ukraine's membership bid. Despite protracting war and worsening Ukraine's position, there are no doubts over the state's commitment to reforms. For now, it can be safely assumed that Ukraine will pursue its path towards membership. Can fighting war and pushing an arduous accession process be balanced by the political will of the EU Member States rooted in a wartime gesture of solidarity?
Keywords: European Union, Ukraine, membership, accession process, negotiations

WOJNA JAKO AKCELERATOR AKCESJI? UKRAINA NA ŚCIEŻCE DO CZŁONKOSTWA W UE

Streszczenie. Odpowiedź Unii Europejskiej na wojnę w Ukrainie jest postrzegana jako szybka i relatywnie zgodna. Polityczna wola wsparcia zaatakowanego państwa sąsiedzkiego znajduje także swoje odbicie we wsparciu Ukrainy w jej dążeniu do członkostwa w Unii Europejskiej. Pomimo przedłużającego się konfliktu nie ma wątpliwości co do zaangażowania Ukrainy w proces reformowania kraju. W tym momencie można założyć, iż Ukraina będzie dążyć do uzyskania członkostwa w Unii Europejskiej. Czy zakorzeniona w wojennej solidarności wola polityczna państw członkowskich UE może zbalansować ciężar jednoczesnego prowadzenia wojny oraz procesów reformujących Ukrainę?
Słowa kluczowe: Unia Europejska, Ukraina, członkostwo, akcesja, negocjacje

1. INTRODUCTION

On 28th February, 2022, five days after Russia's unprovoked attack, President Volodymyr Zelenskyy signed an application for Ukraine's membership into the European Union. For the first time in history, the state at war lodged the

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application. This bold move simultaneously "boosted the combatting morale of the Ukrainian nation" and "challenged the EU to provide extensive support and live up to its fundamental principles" (Petrov, Hillion 2022, 1289). Despite Ukrainian President's plea for "immediate accession via a new special procedure", no new, preferably speed-track formula, was drafted. However, less than four months later, the European Council, upon considering the European Commission's positive opinion, granted the EU candidate status to Ukraine. It means that Ukraine has been implementing reforms while fighting a war, all during the phase in which the EU decides whether or not to open accession negotiations, which, according to Haughton (2007, 235), is a phase in which the EU has the strongest transformative power.

Taking under consideration that the war is ongoing, the final needs for the (sustainable) reconstruction are not known yet. The EU has already declared long-term support to "re-establish the foundations of a free and prosperous country, anchored in European values and well-integrated into the European and global economy and to support it on its European path" (European Commission 2022c), but, as already mentioned, protracting war is reducing Ukraine's capacity to meet the criteria towards accession. Therefore, the crucial question regarding "accession through war" (Petrov, Hillion 2022) is about the durability of the political will rooted in a wartime gesture of solidarity and its reflection on a comprehensive accession process. To provoke substantive debate, the author will attempt to navigate between perspectives of an EU-aspiring state (not a legal term) and international organisation *per se* which has created intricate and formalistic accession process.

Relations between the European Union and Ukraine have not started with the lodged membership application. Therefore, to contextualise Ukraine's path towards the EU membership, the first part will be dedicated to sketching EU–Ukraine relations from the moment of Ukraine's independence from the Soviet Union in 1991 to steps taken after Russia's attack in 2022 with the exclusion of the membership bid. Since the EU *acquis* does not envision an accession procedure other than the one enshrined in Article 49 of TUE, the next part of the presented paper will focus on the accession process, which broadly consists of three stages. Meagre provisions of Article 49 do not reflect that due to a constant evolution of the *acquis* potential, accession can be more difficult than cases of previous enlargements (especially those before the "big bang" enlargement). The next section discusses the EU's approach towards Ukraine after Russia's attack, with special attention given to Ukraine's membership bid. Finally, possible challenges ahead for Ukraine will be analysed.

Throughout the text, some of the debates on the enlargement will also be outlined.

The author will review relevant materials: normative sources (the Treaty of Lisbon, secondary sources of the EU law) and authoritative sources (scholarly

legal writings). Additionally, a body of documents produced by the EU institutions regarding accession procedures, reports, speeches, statistics, and Ukrainian government statements will be analysed.

In response to Russia's invasion of Ukraine, the EU adopted sanctions against Russia (eleven packages with most recent including anti-circumvention tool). Despite being unprecedented in its scale, the issue falls outside the scope of the presented paper.

2. NOT-SO-PRIORITY PARTNER

Ukraine relations with the European Union have not started with the membership application but can be dated back to Ukraine's independence in 1991. Founded on the periphery of the Eurasian empire, Ukraine became a part of un-sustainable "overlapping" (Casier 2016) and "contested" (Delcour 2017) neighbourhood in which elites were "balancing domestic interests, Russia and the West" (Ekman 2023). Democratic shortcomings in Ukraine hindered any discussion about Ukraine's membership, whereas later on the European Union's side "enlargement fatigue" was looming large.

With the Copenhagen Conclusions (1993), the European Council expressed "keen interest in expanding cooperation with Ukraine". In June 1994, the EU signed a Partnership and Cooperation Agreement with Ukraine. A decade later, Ukraine became the EU's priority partner under the frame of the European Neighbourhood Policy (ENP). In May 2009, Ukraine became a part of the Eastern Partnership (EaP) – Eastern dimension of the ENP aimed at deepening political association and economic integration between the bloc and six partnering states. However, the Joint Declaration (2009) pointed out that the aim of the Eastern Partnership is to support of "political and socio-economic reforms of the partner countries and facilitate approximation towards the European Union", creating a sense of ambiguity. Partnering states were about to transform, but without the membership perspective.

Despite Ukraine's progress towards full-fledged membership, in December 2022, foreign ministers from Member States and EaP partners reaffirmed their commitment to the framework in parallel to the enlargement process and bilateral relations. From the current perspective, a reshaped Eastern Partnership could play a crucial role in bringing the partner states which do not aspire to membership closer to the EU standards.

In March 2007, Ukraine negotiated an Association Agreement (AA). In February 2008 – Deep Comprehensive Free Trade Area (DCFTA). One week before the Vilnius Summit in November 2013, then Ukraine's president, Viktor Yanukovych, refused to sign both acts. Ukrainians started the "Revolution of Dignity" in the aftermath, which resulted in the annexation of Crimea by Russia.

In spite of this, Ukraine's new government signed both the AA – considered "the most advanced agreement of its kind ever negotiated by the European Union" (Van Rompuy 2013) and DCFTA, the biggest international legal document in Ukrainian history. Both entered into force in September 2017.

The same year, Ukrainian citizens (with biometric passports) gained the possibility of travelling throughout the Schengen Area for up to 90 days during any 180-day period. Currently, Ukraine also is a part of the Erasmus Plus Programme and the Creative Europe Programme. Moreover, it became fully associated to the EU's Horizon 2020.

On an internal front, aiming at consolidation of its pro-Western course, in 2019, Ukraine introduced changes to its Constitution. Article 85(5) explicitly states that the goal is acquisition of the "full-fledged membership" into the EU and in the North Atlantic Treaty Organization (NATO). It is the President's role to guarantee the implementation of this strategic course (Article 102) and the Cabinet of Minister's role to provide the implementation of the strategic course.

Despite the reforms, the EU had not acknowledged Ukraine's (and Georgia's and Moldova's) membership aspirations. In July 2021, at trilateral summit in Batumi, three states called for a clearer membership perspective.

3. LONG AND ARDUOUS – THE ACCESSION PROCESS

Enlargement is a "success story for the European Union as a whole" (European Councill 2001). According to the European Commission (2022), "a credible enlargement policy is a geostrategic investment in peace stability, security and economic growth in the whole of Europe". Throughout years, the number of Member States increased from six to twenty-eight (post Brexit – twenty-seven), with Croatia being the recent to join on 1st July, 2013. Subsequently, "enlargement fatigue" dominated the EU public opinion (Devrim, Schulz 2009), making the accession policy "practically dead" (Tocci 2023). Russia's unprovoked and unjustified war on Ukraine, however, has put the EU enlargement "to the fore of the European agenda" (European Commission 2022), with a high number of EU citizens in favour of a new enlargement (European Commission 2022e).

Membership into the European Union is based on voluntariness; nonetheless, accession is not granted automatically, and negotiations process is highly asymmetrical. The initiative is on the aspiring third country that must "accept the pre-existing set of rules before getting chance to take part in shaping them" (Raik 2006, 85). Throughout the process, a candidate state has to prepare to meet its obligations. With the core principle "nothing is agreed until everything is agreed", negotiation chapters are closed, and agreements are reached at the end of the process (European Commission 2007, 11). The EU's position throughout the process is rather cautionary and reactive.

The readiness of the aspiring state is assessed according to accession criteria known as the "Copenhagen criteria" defined in 1993. Criteria were divided into three groups. The first one requires the candidate state to achieve stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect and protection of minorities. This so-called political criterium is perceived as the crucial one (Truszczyński 2020). Second, there must be the existence of a functioning market economy and capacity to compete with market forces within the EU. The third criterion is about the ability to carry Member State's obligations.

Despite absorption capacity not being added as a criterion, provision of the Copenhagen Conclusions explicitly points to the fact that enlargement shall not influence the position of the Union as the viable political force and it would not come at the expense of efficient and accountable policymaking.

The legal basis for enlargement consists of Article 49 of the Treaty on the European Union (TEU) establishing what state can apply for membership and Article 2 of the TEU – encapsulating the EU's founding values which must be respected by the state. Pursuant to Article 49, a state that wishes to join the EU addresses its application to the Council. The European Parliament and national parliaments are notified of this application. The Council by unanimity agrees to grant the country the candidate status. Negotiations are launched once the EU Council issues unanimous decision. The process can be considered a form of gradual trust-building, where the Accession Treaty is the crowning achievement (Truszczyński 2020, 29).

However, before the negotiations start, the European Commission delivers a "screening" report for each negotiation chapter. The conclusion of screening report is Commission's recommendation to open negotiations. Following the recommendation, it is the Council that decides unanimously to open new negotiation chapter(s). At the same time, financial and transitional arrangements are discussed. The process can be suspended when "serious and persistent breach of the principle of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law" occur (European Commission 2006).

Accession negotiations are accomplished when all negotiation chapters are closed (with approval of every Member State's government). The drafting committee creates an accession treaty which must be approved by the Council of the EU unanimously. It also must receive consent from the European Parliament. The treaty is signed by each Member State and by the accession country which must ratify it in accordance with their constitutional requirements. Countries that have signed the treaty of accession obtain a status of "acceding states." From the date of accession, the provisions of the original Treaties and the secondary law are binding on the new Member State and shall apply under conditions laid down in Treaties on which the Union is founded as amended or supplemented.

Finally, it is worth adding that after Croatia's accession, the European Commission decided to put the rule of law at the centre of the negotiation process

with negotiating chapters on Judiciary and Fundamental Rights (chapter 23), and Justice, Freedom and Security (chapter 24) to be opened at an early stage and closed as the last. Under the revised methodology, no negotiation chapter can be closed if the interim benchmarks on the rule of law chapters have not been met.

4. WAR AND ACCESSION

On 24th February, 2022, unprovoked Russia attacked Ukraine. The European Union became "unavoidably entangled in this war" (Zielonka 2023). Member States and European institutions immediately showed their unwavering support in the form of emergency and humanitarian assistance, as well military aid. Some of them were unprecedented. For example, for the first time in history, the Temporary Protection Directive (TPD) was activated, which not only allowed asylum-seekers to avoid a prolonged asylum process and falling into irregular status, but also alleviated migratory pressure on Member States' asylum systems (Mazur 2023, 35).

On the economic front, the first package of assistance measures from the European Peace Facility (worth 500 million EUR) were allocated February 2022. Out of the entire 12 billion EUR total budget for 2021–2027, 5.6 billion EUR was allocated to Ukraine. In June 2023, the European Commission also proposed a new Ukraine Facility based on three pillars: support to Ukraine in the form of grants and loans; the mobilisation of private investments in Ukraine by providing guarantees and blended finance; and finance assistance and capacity-building programmes for Ukraine's government and civil society to help to achieve the EU acquis and standards. If adopted, it would mobilise up to 50 billion EUR to support Ukraine's path towards accession. Regarding trade, until June 2024, customs duties under Title IV of the Association Agreement, quotas and trade defence measures were suspended. Moreover, the EU (European Commission 2022d) has also introduced Security Lanes, making sure Ukraine can export grain and import the goods it needs.

Finally, with regard to external relations, the idea of the European Political Community emerged. Due to fears of EU-aspiring states, it was quickly assured that the platform is not an alternative for the EU membership.

Five days after Russia's attack, in circumstances described as "tragic" (Petrov 2023, 3), Volodymyr Zelenskyy submitted an application for Ukraine's membership into the European Union. Some of the Member States supported the notion of a "special track" for Ukraine's membership, but the European Commission (2022b) explicitly stated that the "accession process remains based on established criteria and conditions".

After submittance, the Council acted swiftly and on 7th March, 2022, invited the European Commission to submit its opinion. Although the Versailles

Declaration (2022) did not mention the candidate status, on 8th April, 2022, Ukraine received the questionnaire on the political and economic criteria, five days later on the *acquis*. Ukraine provided its replies swiftly respectively on 17th April and 9th May, 2022, with the European Commission (2022b) acknowledging the "remarkable level of institutional strength, determination and ability to function".

The European Commission in its Opinion (2022b), which also took into account the state's progress in the implementation of the obligations under the Association Agreements and Deep and Comprehensive Free Trade Area, recommended that Ukraine should be given the perspective to become a member of the European Union. Opinions included seven prerequisites for Ukraine, regarding selection procedure for judges of the Constitutional Court of Ukraine; the election of candidates for the High Council of Justice and High Qualification Commission of Judges of Ukraine; strengthening the fight against corruption, in particular at a high level; anti-money laundering legislation; Anti-Oligarch law; the adoption of a new media law aligning the EU audio-visual services directive; and legal framework for national minorities.

During the European Council meeting on 23rd June, 2022, the European Council granted EU candidate status to Ukraine and invited the European Commission to report back on the fulfilment of the conditions presented in the Commission's Opinion. EU leaders decided that this should be done as a part of a regular enlargement package issued in Fall 2023, which for the first time includes reports on Ukraine, Moldova, and Georgia. In this case, the Council decided to not go with the Commission's plan to report on recommended steps. However, in order to send an encouraging signal to Kyiv, in December 2022, the Council of the European Union (2022) asked the Commission to provide preliminary assessment on seven recommendations in Spring 2023, without prejudice to the regular reporting for the enlargement package.

In June 2023, the European Commission (European Commission 2023a) extraordinarily in an oral update on progress stated Ukraine met two out of seven above-mentioned conditions, namely Step 2 (on the High Council of Justice and High Qualification Commission of Judges of Ukraine) and Step 7 (on key media legislation). Among above-mentioned, the most challenging reform is the law on de-oligarchisation. According to the Venice Commission (2023), the legislation took a "personal approach", which seeks to identify persons as "oligarchs" and has a punitive character, although it can only be considered a "supplement" approach and does not alternate a "systemic" approach.

In the Enlargement Package 2023, which for the first time covers the Associated Trio, the European Commission stressed a "steady intensification of work on the respective reform agendas" in Ukraine (European Commission 2023). The Commission also underlined "resilience and strong political will" demonstrated by the Ukrainian Parliament. Considering the fulfilment of the Copenhagen criteria and the continuation of its reforms, the Commission

recommended the Council to open accession negotiations with Ukraine. Assuming that the Council would give the green light during the summit in December 2023, the screening process for Ukraine might even start the same month.

5. CHALLENGES AHEAD

Taking under consideration heavy social and economic impact caused by Russia's invasion, Ukraine's overall preparedness for accession might become a serious challenge. Membership into the European Union creates rights and obligations, not only for a state, but also its citizens, business entities, and other organisations. As mentioned above, from the date of accession, the provisions of the original Treaties and the secondary law are binding on the new Member State and shall apply under conditions laid down in Treaties on which Union is founded as amended or supplemented. Despite some flexibility instruments (safeguard clauses, post-accession monitoring mechanism, and country-tailored conditions), the process remains technocratic and rigorous. Considering Poland's and Hungary's democratic backsliding after accession, the EU might be particularly uncompromising on the rule of law.

As pointed above, the rule of law is a crucial requirement for EU membership. This is reflected in an enhanced way in the revised methodology. Notwithstanding progress made so far by Ukraine, a fight with deeply rooted corruption might be one of the most difficult steps towards EU membership. Despite progress on appointing new heads on SAPO and NABU, Ukraine does not have a "credible track record of prosecutions and convictions" (Press Remarks 2023). According to former European Commission President Jean-Claude Juncker, due to levels of corruption, Ukraine should be disqualified from membership into the EU (Augsburger Allgemeine 2023).

Once accessing the EU, Ukraine will be responsible for controlling external borders with Russia and Belarus. The lack of border stability might influence Ukraine's ability to protect the EU external borders on behalf of other Schengen countries. The decision on joining the Schengen Area is taken by the Council after consulting with the European Parliament. According to the European Council (2014), "outstanding disputes", including border disagreements, are having detrimental effect on the accession process and they must be solved in accordance with international law and established principles. The case of Bulgaria and Romania proves that the decision on allowing state to join the Schengen zone is a clearly political call that requires unanimity among Member States. Due to the Dutch and Austrian opposition, both states still do not belong to the Schengen Area, although they gained read-only access to Visa Information System.

On the EU's side, its institutions have to preserve credibility along the process in order to sustain reform and public support in Ukraine and other aspiring

states. With so many states in the process, the EU must assure that conditions for membership are "objective, precise, detailed, strict and verifiable" (European Commission 2021, 25). Despite the original Western Balkan's frustration about Ukraine's progress and their deadlock in bids to join the EU (Brzozowski, Taylor 2022), by the end of 2022, Balkan states and the EU came out with reinvigorating agreements (on roaming charges and integration into the EU higher education system) and the Tirana Declaration (2022), in which the bloc confirmed "full and unequivocal commitment to the European Union membership perspective of the Western Balkans", underlining that this can happen based upon "credible reforms by partners; fair and rigorous conditionality".

6. CONCLUSIONS

Ukraine's membership into the European Union should not only be perceived as a continuation of the process, which started in 1993, but as a symbol of historical justice. For now, the primary concern is the war, but with the volume of military, financial, and legal support provided by the EU, it can be assumed that further in the process, Brussels will be willing to continue its extraordinary support, driven by a sense of moral obligation towards a neighbourhood state tarnished by war.

Support extended by the European Union to Ukraine is a rare example of a relatively coherent response to an external crisis which highlights the EU's potential to "enact meaningful collective diplomacy" (Mauer et al. 2023). The EU is more than willing to recognise the effort made by Ukraine, which is an extension of wartime gestures and solidarity. However, as shown above, there is no appetite for any shorter procedure. At the same time, at least for now, Ukraine is not interested in any kind of subsidiary association due to the prestigious reasons.

To conclude, Russia's attack on a neighbouring state revived the European Union's interest in enlargement and in a rapid pace, allowing Ukraine to not only be granted a candidate status but with a higher possibility to also open negotiations by the end of 2023. However, considering the complexity of the process, Ukraine's path can be long and arduous. The aspiring state needs to acknowledge that the EU is not a *deux ex machine* that can resolve national problems (Dimitrova 2021). As noted by Sadurski, Czarnota, and Krygier (2006), conditionality is the most efficient when it resonates with domestic preferences. Reforms, however, should not only be credible, but also irreversible (European Commission 2023).

Contrary to the past developments, there are no question marks over Ukraine's current commitment to the reforms. The European Commission (2022b) stated that Ukraine has given "ample proof of its adherence to the values on which the EU is founded", permanently escaping shades of declarative Europeanisation,

but whether Ukraine can handle an "extensive penetration of state sovereignty" (Schimmelfenning, Sedemeier 2005, 288) caused by the accession process, remains to be seen.

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THE EU'S SANCTIONS AGAINST RUSSIA IN THE CONTEXT OF THE RUSSIAN AGGRESSION ON UKRAINE, AND THEIR JUDICIAL CONTROL

Abstract. In 2014, the Russian aggression against Ukraine began and it escalated even greater in February 2022. The Western states, including the Member States of the European Union, reacted and introduced a wide variety of sanctions, first in 2014, then in 2022, yet until now they have not led to the termination of the Russian–Ukrainian conflict and to the withdrawal of the Russian troops from Ukraine. The aim of this article is to analyse these sanctions and their development as well as the judicial control that was effectuated in relation to these measures by the Court of Justice of the European Union.

Keywords: sanctions, restrictive measures, aggression, Russia, Ukraine, judicial control

SANKCJE UNII EUROPEJSKIEJ PRZECIWKO ROSJI W ŚWIETLE AGRESJI ROSJI WOBEC UKRAINY ORAZ ICH KONTROLA SĄDOWA

Streszczenie. W 2014 r. rozpoczęła się Rosyjska agresja przeciwko Ukrainie, która znacznie eskalowała w lutym 2022 r. Państwa Zachodu, w tym państwa członkowskie Unii Europejskiej, zareagowały na nią i wprowadziły szeroki wachlarz sankcji, najpierw w 2014 r., a następnie w 2022 r., jednakże do tej pory środki te nie doprowadziły do zakończenia konfliktu rosyjsko-ukraińskiego i do wycofania oddziałów rosyjskich z Ukrainy. Celem artykułu jest analiza sankcji oraz ich rozwoju, jak również kontroli sądowej wykonywanej przez Trybunał Sprawiedliwości Unii Europejskiej nad tymi środkami.

Słowa kluczowe: sankcje, środki ograniczające, agresja, Rosja, Ukraina, kontrola sądowa

1. INTRODUCTION

The aim of the article is to analyse the issue of the sanctions applied by the European Union as a reaction to the Russian aggression on Ukraine. As the conflict is dated back to 2014, the deliberations will be divided into two parts.

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First the article will focus on the EU measures adopted after the illegal annexation of Crimea in 2014. The second part of the paper will concentrate on sanctions imposed after 24th February, 2022. Both parts will contain an overview of restrictive measures, consideration on their legal basis, and the scope of judicial review, which will make it possible to form conclusions on the legality of those sanctions. For this reason, the article will focus mainly on those measures that were subjected to judicial review.

2. THE EU'S SANCTIONS AGAINST RUSSIA AFTER THE ANNEXATION OF CRIMEA

In February 2014, due to the impeachment procedure applied against the Ukrainian President Viktor Yanukovych, clashes between pro-Ukrainian and pro-Russian protesters broke out. The pro-Russian protesters demanded the secession from Ukraine and a help from the Russian Federation. Government buildings in Crimea, including one of the Supreme Council, were seized and locked by armed and masked individuals. After that, the Supreme Council decided on a referendum on the status of Crimea (Bebler 2015, 40; Bilková 2015, 34; Olson 2014, 19; Yue 2016, 182).

The Crimean referendum took place on 16th March, 2014. 96,77% voters out of 81.36% registered voters that took part in the referendum chose the separation of Crimea from Ukraine and its annexation to Russia. However, the results were not verified by impartial international observers. Ukraine did not recognise the outcome. Moreover, it was not accepted by many of the EU and the NATO member states. On 17th March, 2014, Crimea declared its independence, and on 11th April, 2014, it adopted a new constitution of the Republic of Crimea. A treaty on annexation of Crimea and Sevastopol to the Russian Federation was signed on 18th March, 2014, in Moscow. Nevertheless, on 11th April, 2014, the Ukrainian Parliament declared Crimea and Sevastopol "occupied territories" (Bebler 2015, 42–43, 53; Olson 2014, 20).

As a result, pro-Russian protests and actions took place in other Ukrainian cities such as Donetsk or Lugansk. On 17th July, 2014, a civilian aircraft on an international flight, Malaysian Airlines flight MH17, was shot down in the Donetsk Oblast, probably by Russian rebels, causing death of 298 passengers and crew on board.[1] On 5th September, 2014, the NATO leaders called upon Russia to restore previous Ukrainian borders (Bebler 2015, 47, 51). Despite this, the situation did not change and in July 2015, the Russian Prime Minister Medvedev declared the full annexation of Crimea to the Russian Federation (McHugh 2015).

[1] UN Security Council resolution 2166 (2014).

The European Union declared that Russian activities in the territory of Ukraine constituted a gross violation of international public law because of the prohibited use of force and coercion, which was in breach with the Helsinki process.[2] The prohibition of the use of force is considered to be *jus cogens* (a peremptory norm of international law), as well as a customary law and one of the fundamental principles of international law (Bilková 2015, 28; Gilder 2015, 26; Mik 2013, 43–44).[3] The activities of the Russian Federation constituted a prohibited act of aggression. As V. Bílková rightly points out, the Russian forces were within the territory of another state (Ukraine), and although they were there with the primary agreement on the part of Ukraine, they were finally used in contravention of the conditions provided for in this agreement. Moreover, they engaged and supported actions that violated the internal law of Ukraine and there was on the part of Russia a hostile intention for the use of these armed forces. There appeared also a certain degree of gravity, confirmed by the effects of the use of force and the presence of the Russian military troops in Ukraine, namely the illegal annexation by Russia of Crimea and Sevastopol, constituting the breach of territorial integrity of Ukraine, as well as an invasion and a military occupation resulting from such an invasion. According to the mentioned author, the Russian activities could be even qualified as an armed attack (Bilková 2015, 33–37), triggering Ukraine's right to self-defence.[4] As such, Russia's war of aggression endangers the security of the European region and for this reason, the EU's sanctions are justified as collective countermeasures (Kokott 2023, 5).

An overview

In relation to the Russian Federation, the European Union introduced prohibitions concerning financial transactions, including the ones with the five major Russian banks as well as embargo on the import and export of arms, related materials, and military goods and technology to and from Russia.[5] As to the territories of Crimea and Sevastopol, the EU imposed an import embargo on all goods coming to the EU from these territories with the exception of goods examined and controlled by the Ukrainian authorities and which have been

[2] European Council Conclusions, 20–21 March 2014, EUCO 7/1/14, Rev 1.

[3] See also: International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits),* judgment of 27th June, 1986, I.C.J. Reports 1986, p. 14, at 191–193.

[4] Article 51 UN Charter.

[5] Council decision 2014/512/CFSP of 31st July, 2014, concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229 31.07.2014, p. 13. Council decision 2014/659/CFSP of 8th September, 2014, concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 271 12.09.2014, p. 54. Council regulation (EU) No 833/2014 of 31st July, 2014, concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229 31.07.2014, p. 1.

granted a certificate of origin by the Ukrainian government, an export embargo on all goods, technology, services (including technical assistance, brokering, construction, engineering or tourism services) to Crimea and Sevastopol, and the prohibition of any type of investments on these territories. The Council ordered the EU Member States to implement these measures and provide for effective, proportionate, and dissuasive penalties for breach of any of the above-mentioned prohibitions.[6]

Finally, the European Union introduced restrictive measures against individuals (natural or legal persons, entities, or bodies) responsible for the misappropriation of the Ukrainian State funds, for human rights violations in Ukraine[7] and for the destabilisation of the situation in Ukraine, and against individuals associated with them.[8] This means that these persons do not have to individually or directly threaten or undermine the territorial integrity, sovereignty, and independence of Ukraine, but it is enough that they materially or financially support the actions taken to that effect.[9] These measures include: travel ban, freezing of funds, and other economic resources. The individuals targeted by the sanctions are listed and the listing should also include the grounds for it as well as information necessary to identify the individual concerned. The EU law provided also for exemptions on humanitarian grounds or due to attending an intergovernmental meeting. The exemptions are authorised by the Member States and require to inform other EU Member States and the Commission. The Member States are also obliged to implement the prohibitions in their national laws and provide for the penalties applicable to infringements of the provisions of the EU sanctions.[10]

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[6] Council decision 2014/286/CFSP of 23rd June, 2014, concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol, OJ L 183 24.06.2014, p. 70. Council regulation (EU) No 692/2014 of 23rd June, 2014, concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol, OJ L 183 24.06.2014, p. 9.

[7] Council decision 2014/119/CFSP of 5th March, 2014, concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 66 6.03.2014, p. 26. Council regulation (EU) No 208/2014 of 5th March, 2014, concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 66 6.03.2014, p. 1.

[8] Council decision 2014/145/CFSP of 17th March, 2014, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78 17.03.2014, p. 16. Council regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78 17.03.2014, p. 6.

[9] General Court, case T-255/15 *'Almaz-Antey' Air and Space Defence Corp. v. the Council*, judgment of 25 January 2017, ECLI:EU:T:2017:25, p. 97–98, 117.

[10] Council decision 2014/119/CFSP of 5th March, 2014, concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, OJ L 66 6.03.2014, p. 26. Council regulation (EU) No 208/2014 of 5th March, 2014, concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine,

It results thereof that the European Union decided to apply sanctions of a mixed character. These are economic measures of general application against a state or region and, on the other hand, targeted sanctions. This diversification was intended to positively influence the effectiveness of the EU's reaction to the Crimean conflict. On the other hand, these measures were regarded as low-intensity sanctions with diminishing effect every year, permitting Russia to minimise the real impact of sanctions, which finally led to the escalation of the Russian aggression in 2022 (Shangina 2022, 4).

Legal basis

Being an international organisation, the European Union can act only within the powers conferred to it by its Member States.[11] Promoting and contributing to international peace and security as well as to the strict observance and the development of international law in accordance with the principles enshrined in the UN Charter is one of the Union's main objectives, also within the scope of Common Foreign and Security Policy (CFSP).[12] The decisions relating to the CFSP are issued unanimously by the European Council and the adoption of legislative acts, in the meaning of Article 289 TFEU, is excluded.[13] The Council's decisions can define the approach of the Union to a particular matter of a geographical or thematic nature.[14] On the basis of a decision taken within the CFSP, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, can adopt economic sanctions in relation to one or more third countries, or restrictive measures against natural or legal persons and groups or non-State entities.[15] The European Union makes use of these provisions and often uptake actions, including targeted measures, that prove the EU's intent to be a European leader in the peace and security policy.[16]

OJ L 66 6.03.2014, p. 1. Council decision 2014/145/CFSP of 17th March, 2014, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78 17.03.2014, p. 16. Council regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78 17.03.2014, p. 6.

[11] Article 5 (1) TEU.

[12] Article 3 (1) and (5) TEU, Article 21 (1), 2 (a)(b)(c) TEU, Article 23 TEU.

[13] Article 24 (1) TEU.

[14] Article 29 TEU.

[15] Article 215 (1) and (2) TFEU.

[16] As an example the European Union's activities in the field of combatting terrorism can be pointed out: Council Common Position 2001/930/CFSP of 27th December, 2001, on combating terrorism, OJ L 344, p. 90, 28.12.2001; Council Common Position 2001/931/CFSP of 27th December, 2001, on the application of specific measures to combat terrorism, OJ L 344, p. 93, 28.12.2001; Council Regulation (EC) No 2580/2001 of 27th December, 2001, on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 377, p. 70,

The Union's competence to adopt measures in relation to the Crimean conflict, as well as their scope and the procedures used, were disputed before the CJEU. The Attorney General Wathelet suggested[17] to the Court that the Union's authorities had legal basis for their action as well as respected the division of powers and procedures provided for by the Treaties. The Attorney General underlined the specificity of the CFSP and concluded that the decision 2014/512/CFSP and the regulation 833/2014 are not legislative acts and could be issued within the frame of the CFSP.[18]

The General Court was of an opinion that the European Union could impose targeted sanctions and apply Article 215 TFEU in relation to the Crimean crisis, as this action falls within the scope of the EU competence in the CFSP area. The individual measures can be directed solely against individuals identified as being responsible for the misappropriation of public funds and to persons, entities, or bodies associated with them, whose actions are liable to have threatened the proper functioning of public institutions and bodies linked to them, undermining the rule of law in the state concerned.[19] In its judgment of 28th March, 2017, in the case of *Rosneft*, the Court of Justice confirmed that Article 215 TFEU can serve as a legal basis for the adoption of targeted measures in relations to the Crimean conflict. Moreover, it stressed that Article 29 TEU can be used by the Council to describe in detail the persons and entities that are to be the subject of the restrictive measures provided for subsequently in the regulation issued on the basis of Article 215 TFEU.[20] This is consistent with the hitherto jurisprudence of the Court of Justice, according to which once the Council uses its competences under the CFSP to react to a given situation constituting a threat to international peace and security, Article 215 TFEU can be a legal basis for the individual targeted measures.[21]

Taking into consideration the Union's objectives, its tasks under the CFSP, and the competence to adopt sanctions enshrined in Article 215 TFEU, it cannot

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28.12.2001; Council Decision (CFSP) 2016/1963 of 20th September, 2016, concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, OJ L 255, p. 25, 21.09.2016; Council Regulation (EU) 2016/1686 of 20th September, 2016, imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them, OJ L 255, p. 1, 21.09.2016.

[17] Attorney General Wathelet, case C-72/15 *Rosneft Oil Company OJSC v. Her Majesty's Treasury and others,* opinion of 31st May, 2016, ECLI:EU:C:2016:381.

[18] Attorney General Wathelet, case C-72/15 *Rosneft* , p. 96–99.

[19] General Court, case T-340/14 *Kluyev v. the Council,* judgment of 15th September, 2016, ECLI:EU:T:2016:496, p. 83, 85, 89–91.

[20] Court of Justice, case C-72/15 *Rosneft,* judgment of 28th March, 2017; ECLI:EU:C:2017:236, p. 86–93.

[21] Court of Justice, case C-130/10 *European Parliament v. the Council,* judgment of 19th July, 2012, ECLI:EU:C:2012:472, p. 49–66, 82–84.

be reasonably argued that the Union acted *ultra vires*. In that state of affairs, the only possible conclusion is that there was an illegal intervention of the Russian Federation in Ukraine and there are no legally valid reasons justifying this interference. That is why the EU decided on the application of a wide range of measures which aim at the stabilisation of the situation in Ukraine and had legal basis to adopt them.[22] These measures were taken with regard to the Russian Federation, to the territories of Crimea and Sevastopol, and to the individuals responsible for the misappropriation of the Ukrainian State funds or for the destabilisation of the situation in the part of the Ukrainian territory.

Judicial review

The listed persons sought to challenge the imposed targeted sanctions before the Court of Justice of the European Union.[23] The individuals' arguments concerned the factual and legal background justifying the imposition of the restrictive measures, as well as the breach of their fundamental rights. Although some of the acts in question fall in the scope of the Common Foreign and Security Policy, the CJEU has a competence to verify the legality of these acts on the basis of Art. 275 TFEU, including the Court's power to control the legality of general provisions. Otherwise, as the Court states, the lack of judicial control would undermine the fundamental right of access to justice.[24]

The allegations of individuals concern mostly the right of the defence, as enshrined in Article 41(2)(a) of the EU Charter of Fundamental Rights and the right to effective judicial remedy affirmed by Article 47 of the Charter. These rights include the right to be heard and the right to have access to the file, with the reservation of maintaining confidentiality of some part of the file if the issues of security are at stake. In the first place, it has to be pointed out that the Council is not required to hear the individual before the first listing takes place, so that the imposed sanctions would have a surprise effect, but, as a principle, the individual should be heard by the authority before they make a decision on maintaining

[22] European Council Conclusions, 20/21 March 2014, EUCO 7/1/14, Rev 1. European Council Conclusions, 19/20 March 2015, EUCO 11/15.

[23] Court of Justice, case C-72/15 *Rosneft*. General Court, case T-290/14 *Portnov v. the Council*, judgment of 26th October, 2015. ECLI:EU:T:2015:806. General Court, case T-340/14 *Kluyev v. the Council*. General Court, case T-341/14 *Kluyev v. the Council*, judgment of 28th January, 2016, ECLI:EU:T:2016:47. General Court, case T-348/14 *Yanukovych v. the Council,* judgment of 15th September, 2016, ECLI:EU:T:2016:508. General Court, case T-434/14 *Arbuzov v. the Council*, judgment of 28th January, 2016, ECLI:EU:T:2016:46. General Court, case T-486/14 *Stavytski v. the Council,* judgment of 28th January, 2016, ECLI:EU:T:2016:45. General Court, case T-720/14 *Rotenberg v. the Council*, judgment of 30th November, 2016, ECLI:EU:T:2016:689. General Court, case T-255/15 *'Almaz-Antey' Air and Space Defence Corp.*

[24] Court of Justice, case C-72/15 *Rosneft,* p. 51–57, 60–81. General Court, case T-348/14 *Yanukovych v. the Council,* p. 58.

them on the list at issue. This obligation of hearing does not, however, cover the situations in which the measures are maintained on the same grounds as those that justified the initial listing. The requirement of hearing is also fulfilled if the Council communicates with the individual's representatives. Moreover, the authority does not have to spontaneously grant the individual an access to all the non-confidential files, but the request from the party concerned is necessary. The mere infringement of these rights does not suffice in itself to annul the act; it must be demonstrated that, had it not been for that breach, the outcome of the procedure might have been different.[25]

While discussing the legality of the smart sanctions, it has to be borne in mind that the Council has a broad margin of appreciation as to what to take into consideration for the purpose of adopting economic and financial sanctions. It has to be especially remembered while assessing the compatibility of the act in question with the right to effective judicial review. In the case of restrictive measures, the Courts' review is limited to checking the rules governing procedure and the statement of reasons, and also to verifying if the facts are materially accurate and that there has been no manifest error of assessment of the facts or misuse of power. At least one of the reasons given by the EU institution should be substantiated by sufficiently specific and concrete evidence, and it is the task of the EU authority to establish that these reasons are well-founded, as it is not the obligation of the individual concerned to prove that they are not (*eius incumbit probatio qui dicit non qui negat*).[26]

Moreover, the Court underlined the significance of the proper statement of reasons to the decision on listing. On the one hand, it should provide the individual concerned with sufficient information to make it possible to determine whether the act is well-founded, and on the other hand, it should enable the EU Courts to review the lawfulness of the act. Although the specification of all the relevant matters is not necessary, the statement of reasons cannot consist merely of a general, stereotypical formulation, and it should include matters of fact and law which constitute the legal basis for the adoption of the targeted sanctions, as well as the considerations which led to the imposition of those measures. The failure to state reasons by the EU institution cannot be remedied during the proceedings

[25] General Court, case T-340/14 *Kluyev v. the Council,* p. 55–56. General Court, case T-348/14 *Yanukovych v. the Council,* p. 68–69. General Court, case T-720/14 *Rotenberg v. the Council*, p. 143–145, 150, 158–159. General Court, case T-255/15 *'Almaz-Antey' Air and Space Defence Corp.*, p. 66–67, 69–72, 80, 83, 95.

[26] Court of Justice, case C-72/15 *Rosneft,* p. 146. Attorney General Wathelet, case C-72/15 *Rosneft* , p. 105. General Court, case T-290/14 *Portnov v. the Council*, p. 38, 45. General Court, case T-340/14 *Kluyev v. the Council,* p. 36, 41–44. General Court, case T-341/14 *Kluyev v. the Council*, p. 38, 47–51. General Court, case T-348/14 *Yanukovych v. the Council,* p. 41, 49, 101. General Court, case T-434/14 *Arbuzov v. the Council*, p. 31. General Court, case T-486/14 *Stavytski v. the Council,* p. 37. General Court, case T-720/14 *Rotenberg v. the Council*, p. 70–72, 116. General Court, case T-255/15 *'Almaz-Antey' Air and Space Defence Corp.*, p. 84, 127–128.

before the Court. In the cases concerning the sanctions imposed in connection to the situation in Ukraine, the Court acknowledged that the mere reference to connections of an individual to some unspecified 'Russian decision-makers', without further details, is too vague and not sufficient to justify the listing. Moreover, these should be precisely those decision-makers that are responsible for the destabilisation of the situation in Ukraine, as the sanctions concern the conduct of the Russian authorities in relation to Ukraine and not their conduct in general.[27]

In the case of *Rosneft,* the Russian company claimed that the restrictive measures breached the principle of equal treatment. The Court of Justice overthrew this argument by underlining the broad margin of appreciation that is granted to the Council in the area at issue. Therefore the choice of targeted undertakings or sectors is consistent with the objective of ensuring the effectiveness of the adopted sanctions.[28]

Finally, the individuals alleged that the targeted sanctions violated their right to property, the right to privacy, and the freedom to conduct a business. The Court noticed that the applied measures are not penalties but prospective pecuniary measures and that they do not constitute a deprivation of these rights, but only their restriction. As these rights are not absolute, some limitations are permissible, if they satisfy the requirements of the principle of proportionality. The restrictions should be provided for by law, refer to an objective of general interest (the protection of Ukraine's territorial integrity, sovereignty, and independence), and may not be excessive, meaning they should be proportional to the aim sought, and the substance of the limited right should not be impaired. According to the Court, these conditions were fulfilled by the sanctions in question, taking into consideration the specificity and the aims of the Common Foreign and Security Policy, especially the objective of preventing conflicts and strengthening international security.[29]

These judgments stay in accordance with other CJEU's judgments on targeted sanctions applied in other instances, e.g. the fight against terrorism. The Union's Courts always seek balance between the aim pursued by the restrictive measures and the fundamental rights of the targeted individuals. The proper statement of reasons as well as guarantees of the right to a fair trial, including right to be heard,

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[27] Court of Justice, case C-72/15 *Rosneft,* p. 120–125. General Court, case T-340/14 *Kluyev v. the Council,* p. 65–70. General Court, case T-348/14 *Yanukovych v. the Council,* p. 47–48, 78–80. General Court, case T-720/14 *Rotenberg v. the Council*, p. 47–49, 90–92. General Court, case T-255/15 *'Almaz-Antey' Air and Space Defence Corp.*, p. 54–56, 68.

[28] Court of Justice, case C-72/15 *Rosneft,* p. 132.

[29] Court of Justice, case C-72/15 *Rosneft,* p. 147–151. Attorney General Wathelet, case C-72/15 *Rosneft*, p. 201–202. General Court, case T-340/14 *Kluyev v. the Council,* p. 130–135. General Court, case T-348/14 *Yanukovych v. the Council,* p. 164–170. General Court, case T-434/14 *Arbuzov v. the Council*, p. 32. General Court, case T-720/14 *Rotenberg v. the Council*, p. 164, 166–180. General Court, case T-255/15 *'Almaz-Antey' Air and Space Defence Corp.*, p. 99–110.

and the scope of limitations to economic and property rights of the persons are always under Court's detailed scrutiny.[30] Therefore, it needs to be concluded that the limitations of the rights of individuals caused by the sanctions are not arbitrary and disproportionate to the aim sought.

To sum up the deliberations on the judicial control of the EU sanctions relating to the Crimean conflict, it has to be pointed out that the review is effective. The CJEU analyses legal and factual background for the imposition of the measures. In consequence, the Council decisions as well as the procedure of their adoption should meet certain conditions relating to the protection of human rights, including guarantees of a fair trial. Even when facing a threat to peace and security in the region, the EU institutions are obliged to respect the fundamental values of the EU law.

3. THE EU'S SANCTIONS AGAINST RUSSIA AFTER 24TH FEBRUARY, 2022

The aggression of Russia against Ukraine received a new impetus in 2022. On 15th February, 2022, the State Duma of the Federal Assembly of the Russian Federation voted in favour of asking President Vladimir Putin to recognise as independent States the parts of eastern Ukraine claimed by separatists. On 21st February, 2022, the President of the Russian Federation acknowledged the independence and sovereignty of the self-proclaimed "Donetsk People's Republic" and the "Luhansk People's Republic", and ordered that Russian military forces be deployed in those areas. On 24th February, 2022, Vladimir Putin announced a special military operation in Ukraine and on the same day Russian armed forces attacked Ukraine.

The international community reacted to the aggression and condemned the Russian attack on Ukraine. The UN General Assembly in its resolution decided that the Russian aggression was in violation of Article 2(4) of the UN Charter and demanded Russia to immediately, completely, and unconditionally withdraw all of its military forces from the territory of Ukraine.[31] The Committee of Ministers of the Council of Europe first suspended the Russian Federation from its rights of representation in the Council of Europe,[32] and then ceased the membership of Russia

[30] Court of First Instance, case T-228/02 *Organisation des Modjahedines du Peuple d'Iran v. the Council,* judgment of 12th December, 2006, ECLI:EU:T:2006:384, p. 91–99, 119–129, 138–140, 152–155. Court of First Instance, case T-47/03 *Sison v. the Council,* judgment of 11 July 2007, ECLI:EU:T:2007:207, p. 139–147, 166–176, 185–187, 199–202. Court of Justice, case C-402/05 P and C-415/05 P *Kadi and Al-Barakaat v. the Council,* judgment of 3rd September, 2008, ECLI:EU:C:2008:461, p. 334–370.

[31] UNGA, resolution of 2nd March, 2022, on Aggression against Ukraine, A/RES/ES-11/1.

[32] CM CoE, decision of 25th February, 2022, on Situation in Ukraine, CM/Del/Dec(2022)1426ter/2.3.

to the CoE.[33] The attack of 24th February, 2022, was a very strong indication that the hitherto applied sanctions were not sufficient and new measures needed to be adopted by international community, including the European Union.

An overview of the new sanctions

In the first place, it has to be emphasised that the sanctions imposed after the annexation of Crimea did not cease to have effect. The European Union continues to apply these measures and broadened their scope. Not only did new individuals get listed for the purposes of targeted sanctions, but also the EU introduced new types of measures in the regulation 833/2014, such as: the prohibition to sell, supply, transfer or export, directly or indirectly, dual-use goods and technology; the prohibition to provide public financing or financial assistance for trade with, or investment in, Russia; the prohibition to sell, supply, transfer or export, directly or indirectly, goods or technology and to provide technical assistance, brokering services or other services related to these goods. The new sanctions include a variety of prohibitions related to investing in Russia: to acquire any new or extend any existing participation in any legal person, entity or body incorporated or constituted under the law of Russia or any other third country and operating in the energy sector in Russia; to grant or be part of any arrangement to grant any new loan or credit or otherwise provide financing, including equity capital, to any legal person, entity or body incorporated or constituted under the law of Russia or any other third country and operating in the energy sector in Russia, or for the documented purpose of financing such a legal person, entity or body; to create any new joint venture with any legal person, entity or body incorporated or constituted under the law of Russia or any other third country and operating in the energy sector in Russia; and to provide investment services directly related to the above mentioned activities. The EU territory is closed for aircraft and sea vessels registered in Russia or owned by Russian entities. Luxury goods cannot be anymore sold and exported to any natural or legal person, entity or body in Russia or for use in Russia.

A very interesting set of sanctions is regulated by Art. 2f of the regulation 833/2014. It shall be prohibited for operators to broadcast or to enable, facilitate, or otherwise contribute to broadcast any content by the legal persons, entities or bodies listed in Annex XV, including through transmission or distribution by any means such as cable, satellite, IP-TV, Internet service providers, Internet video-sharing platforms or applications, whether new or pre-installed. Any broadcasting licence or authorisation, transmission, and distribution arrangement with the legal persons, entities or bodies listed in Annex XV shall be suspended. Lastly, it shall be prohibited to advertise products or services in any content produced or

[33] CM CoE, resolution of 16th March, 2022, on the cessation of the membership of the Russian Federation to the Council of Europe, CM/Res(2022)2.

broadcast by the legal persons, entities or bodies listed in Annex XV. On the basis of this provision, the EU suspended the broadcasting activities and licences of the following outlets: *Sputnik* and subsidiaries including *Sputnik Arabic*, *Russia Today* and subsidiaries, *Rossiya RTR/RTR Planeta*, *Rossiya 24/Russia 24*, *Rossiya 1*, *TV Centre International*, *NTV/NTV Mir*, *REN TV*, *Pervyi Kanal*, *Oriental Review*, *Tsargrad*, *New Eastern Outlook*, *Katehon*.

Finally, the Council decided on the suspension of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation.[34] Moreover, Russian banks were disconnected from SWIFT (Shangina 2022, 5).

By now, the European Union has blocked 300 billion EUR of the Russian Central Bank and has frozen 19 billion EUR belonging to Russian oligarchs. This would not suffice to cover damage suffered by Ukraine that is estimated at 600 billion EUR. Moreover, the assets of the Russian Central Bank cannot be confiscated, as it would be contrary to the rules on state immunity, whereas the assets of private actors could be confiscated, but only as a result of penal proceedings (Kokott 2023, 4–9). Nevertheless, it does not mean that the sanctions are deprived of any effect. One of the results of the fund freezing and of other economic sanctions is that these funds and other economic assets are not being used to finance the Russian aggression on Ukraine. The restrictions imposed on Russian citizens, such as the suspension of the issuance of visas, may decrease the support of Russians towards their government and the aggression on Ukraine.

Legal basis

The issue of the legal basis for the analysed measures has already been largely discussed, and the reasoning applied to sanctions imposed after the annexation of Crimea applies equally to the sanctions being in force after 24th February, 2022. However, the European Union broadened the scope of the restrictive measures, which led to questioning the legal basis *de novo* regarding the new types of sanctions.

That was the case of measures consisting of the prohibition of broadcasting, as described by art. 2f of the regulation 833/2014 regarding RT France.[35] On 1st March,

[34] Council Decision (EU) 2022/333 of 25th February, 2022, on the partial suspension of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation, OJ L 54, p.1, 25.02.2022. Council Decision (EU) 2022/1500 of 9th September, 2022, on the suspension in whole of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation, OJ L 234l, p. 1, 9.09.2022.

[35] RT France is a single-shareholder simplified limited company established in France, whose activity consists in the publication of specialised television channels. RT France's entire share

2022, the Council, on the basis of Art. 29 TEU, adopted the contested decision[36] and on the basis of Article 215 TFUE – the contested regulation[37] in order to prohibit continuous and concerted propaganda actions in support of military aggression against Ukraine by the Russian Federation, targeted at civil society in the European Union and neighbouring countries, channelled through a number of media outlets under the permanent direct or indirect control of the leadership of the Russian Federation, since such actions constituted a threat to the EU's public order and security.[38] As it is stated in recitals (6) to (9) of the regulation 2022/350, the Russian Federation has engaged in a systematic, international campaign of media manipulation and distortion of facts in order to enhance its strategy of the destabilisation of its neighbouring countries and of the Union and its Member States. In particular, the propaganda has repeatedly and consistently targeted European political parties, especially during election periods, as well as targeting civil society, asylum seekers, Russian ethnic minorities, gender minorities, and the functioning of democratic institutions in the Union and its Member States. In order to justify and support its aggression against Ukraine, the Russian Federation has engaged in continuous and concerted propaganda actions targeted at civil society in the Union and neighbouring countries, gravely distorting and manipulating facts. Those propaganda actions have been channelled through a number of media outlets under the permanent direct or indirect control of the leadership of the Russian Federation. Such actions constitute a significant and direct threat to the Union's public order and security. Those media outlets are essential and instrumental in bringing forward and supporting the aggression against Ukraine.

The General Court agreed with the Council that the European Union had a legal basis to adopt the contested measures on the prohibition of broadcasting. The Court noticed that since the propaganda and disinformation campaigns are capable of undermining the foundations of democratic societies and are an integral part of the arsenal of modern warfare, the restrictive measures at issue also form part of the pursuit by the European Union of the objectives assigned to it in Article 3(1) and (5) TEU. By adopting the contested decision, the Council therefore exercised the competence attributed to the European Union by the Treaties under the provisions relating to the common foreign and security policy,

capital is held by the association ANO 'TV Novosti', an autonomous not-for-profit association in the Russian Federation, without share capital, having its headquarters in Moscow (Russia), which is almost entirely funded by the budget of the Russian State – General Court, case T-125/22 *RT France,* judgment of 27th July, 2022, ECLI:EU:T:2022:483, p. 2.

[36] Council Decision (CFSP) 2022/351 of 1st March, 2022, amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65, p. 5, 2.03.2022.

[37] Council Regulation (EU) 2022/350 of 1st March, 2022, amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65, p. 1, 2.03.2022.

[38] General Court, case T-125/22 *RT France,* p. 21.

and the adoption of the contested regulation on the basis of Article 215 TFEU was a natural consequence of the decision, as the uniform implementation of the temporary prohibition of the broadcasting of the applicant's content throughout the territory of the European Union could be better achieved at the EU level than at the national level.[39]

It has to be pointed out that Article 215 TFEU is formulated in a general and broad manner, leaving the EU institutions a wide margin of appreciation as to what restrictive measures against natural or legal persons and groups should be taken in reaction to a specific threat. It is not limited to sanctions of purely financial or economic nature. The suspension of the broadcasting licence falls within the limits set up by this Treaty provision.

Judicial review

The standard of review of targeted sanctions is already settled, which is why the applications of individuals to annul individual measures are subjected to rules already described in this paper. They were applied by the General Court in the judgment in *Pšonka*[40] concerning the sanctions adopted after 24th February, 2022, and there is no need to discuss these standards *de novo* here. That is why this part of the paper will focus on the new measures introduced after 24th February, 2022, namely the suspension of the broadcasting activities and licences of the selected media outlets.

In the case of *RT France*, the applicant raised that the adoption of the contested measures violated numerous fundamental rights, such as the rights of the defence including the right to be heard and the inadequacy of the statement of reasons. The Court emphasised that the restrictive measures were adopted in an extraordinary context of extreme urgency, as the rapid escalation of the situation and the gravity of the violations made any form of the modulation of the restrictive measures designed to prevent the conflict from spreading difficult. The adoption of the restrictive measures at issue immediately after the military aggression began, in order to ensure their full effectiveness, also met the requirement to put in place multiple forms of rapid response to that aggression. Restrictive measures against media outlets funded by the Russian State budget and directly or indirectly controlled by the leadership of that

[39] General Court, case T-125/22 *RT France,* p. 56–63.

[40] General Court, case T-244/22 *Pšonka,* judgment of 26th July, 2023, ECLI:EU:T:2023:425. The Court annulled the Council Decision (CFSP) 2022/376 of 3rd March, 2022, amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, and Council Implementing Regulation (EU) 2022/375 of 3rd March, 2022, implementing Council Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, in so far as the name of Viktor Pavlovyč Pšonka was maintained on the list of persons, entities and bodies subject to those restrictive measures.

country, which is the aggressor country, in that they were considered to be at the root of a continuous and concerted activity of disinformation and manipulation of the facts, became, following the launch of the armed conflict, overriding and urgent in order to preserve the integrity of democratic debate in the European society. *RT France* and other listed media outlets engaged in propaganda actions in support of the military aggression against Ukraine, which was proven by numerous articles published on *RT France*'s website. The statement of reasons was comprehensible and sufficiently precise, thus it permitted the applicant to know the exact reasons for its listing. That is why the Court concluded that there was no violation of the rights of the defence regarding *RT France*.[41] This reasoning is in line with the case-law of the CJEU on targeted sanctions mentioned in the previous parts of the paper.

However, as *RT France* is a media outlet, the legal questions in the case *RT France* concerned also the freedom of expression, as enshrined in Article 11 of the EU Charter of Fundamental Rights and being a general principle of the EU law (Woods 2021, 344), and enshrined in Article 10 of the European Convention on Human Rights. This issue had not been discussed before, therefore it is necessary to analyse it in this part of the paper. It can be indicated that before 24th February, 2022, participation in the Russian propaganda could justify the listing of an individual on the targeted sanctions list, yet the Court did not asses the compliance of such listing with the freedom of expression.[42] It can be also noticed that the measure consisting of suspending media outlets had been applied before by some EU Member States, such as Lithuania and Latvia, on the basis of Article 6 of the AVMS Directive[43] against Russian-language television programmes (Baade 2023, 168).

Freedom of expression constitutes one of the essential freedoms of a democratic society based on the rule of law. It covers not only "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb, in accordance with the demands of that pluralism, tolerance, and broadmindedness, without which there is no "democratic society".[44] Freedom of expression is not an absolute right and there are legitimate exceptions thereto provided that interference is necessary

[41] General Court, case T-125/22 *RT France,* p. 75–115.

[42] General Court, case T-262/15 *Kiselev,* judgment of 15th June, 2017, ECLI:EU:T:2017:392.

[43] Directive 2010/13/EU of the European Parliament and of the Council of 10th March, 2010, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Codified version) (Text with EEA relevance), OJ L 95, p. 1, 15.04.2010.

[44] ECtHR, case *Handyside v. the United Kingdom* (App. no. 5493/72), judgment of 7th December, 1976, p. 49.

in a democratic society, meaning it corresponds to a pressing social need.[45] The protection of the right of journalists to impart information on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis, and provide "reliable and precise" information in accordance with the ethics of journalism.[46] These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by way in which they present the information.[47] The views of the ECtHR regarding the freedom of expression were generally adopted by the CJEU, which decided that the scope and the meaning of Article 11 EU Charter should be the same as the one of Article 10 ECHR (Woods 2021, 343–344).[48]

In its judgment in *RT France*, the General Court indicated that the limitation of the freedom of expression was provided by law. As the imposed measures are temporary in their nature, they comply with the essence of the freedom of expression and do not undermine this freedom, as such and they pursue an objective of general interest. The Court emphasised that the evidence gathered in the case files proved that *RT France* engaged in activities in support of the Russian Government's actions and policies to destabilise Ukraine, during the period preceding the military aggression against that country, through articles published on its website and interviews seeking, in particular, to present the deployment of the Russian armed forces as a preventive action to defend the self-proclaimed republics of Donetsk and Luhansk. Moreover, once the military aggression had been launched, the applicant continued to adopt the official position of the authorities of the Russian Federation that the offensive was a "special operation", a preventive, defensive, and limited action, caused by Western countries and by the aggressive attitude of the NATO and also by Ukrainian provocation, aimed at defending the self-proclaimed republics of Donetsk and Luhansk. Therefore, it was also of the utmost importance for the European Union temporarily to suspend the applicant's propaganda activity in support of the military aggression against Ukraine from the first days when that aggression was launched. Such exercise of the freedom of expression, which covers propaganda activity to justify and support the Russian Federation's illegal, unprovoked, and unjustified military

[45] ECtHR, case *Kràcsony and Others v. Hungary* (App. no. 42461/13), judgment of 16th September, 2014, p. 54.

[46] ECtHR, case *NIT S.R.L. v. the Republic of Moldova* (App. no. 28470/12), judgment of 5th April, 2022, p. 180. ECtHR, case *Fressoz and Roire v. France* (App. no. 29183/95), judgment of 21st January, 1999, p. 54. ECtHR, case *McVicar v. the United Kingdom* (App. no. 46311/99), judgment of 7th May, 2002, p. 73.

[47] ECtHR, case *NIT S.R.L. v. the Republic of Moldova* (App. no. 28470/12), judgment of 5th April, 2022, p. 181. ECtHR, case *Stoll v. Switzerland* (App. no. 69698/01), judgment of 10th December, 2007, p. 104.

[48] See also: Court of Justice, case C-345/17 *Buivids,* judgment of 14th February, 2019, ECLI:EU:C:2019:122, p. 65.

aggression against Ukraine, cannot be said to have been of a kind calling for the enhanced protection afforded to press freedom under Article 11 of the Charter. The propaganda activity put in place by *RT France* forms part of the context of an ongoing war, provoked by an act committed by a State and characterised as 'aggression' by the international community, in breach of the prohibition on the use of force laid down in Article 2(4) of the United Nations Charter.[49]

It has to be pointed out that freedom of expression, which is so essential to democratic societies, does not cover propaganda, which is in its nature a negation of the very essence of the freedom of expression. Article 11(2) of the EU Charter of Fundamental Rights obliges every state to safeguard media pluralism, and the discussed sanctions definitely restrict this pluralism within the European Union. Nevertheless, taking into consideration their goal, they are not disproportionate to the aim sought.

A propaganda against peace or designed to provoke or encourage threats to peace was long ago condemned by the UN General Assembly.[50] Art. 20(1) of the International Covenant on Civil and Political Rights stipulates that any propaganda for war shall be prohibited by law. History knows examples in which propaganda incited to violence and genocide, such as the Rwandan conflict between Tutsis and Hutus. Tutsis were shown as traitors and a threat, and propaganda created among Hutus a sense of 'urgency' in response to the alleged danger caused by Tutsis. Mass killings were largely presented as a way of defence, and extermination was displayed as a measure against the cruelty of Tutsis and as a result for which around 130,000 people took actively part in the killings. The propaganda even led to forming a belief among French troops that the Hutus were, in fact, victims of the conflict (Lower, Hauschildt 2014, 1, 4–5).

Addressing the Russian propaganda shows that the European Union learnt a lesson from the Rwandan conflict. In 2016, the European Parliament observed that disinformation and propaganda are part of hybrid warfare. It recognised that the Russian Government was employing a wide range of tools and instruments, such as think tanks and special foundations (e.g. *Russkiy Mir*), special authorities (*Rossotrudnichestvo*), multilingual TV stations (e.g. *RT*), pseudo news agencies and multimedia services (e.g. *Sputnik*), or cross-border social and religious groups, as the regime wanted to present itself as the only defender of traditional Christian values. The role of social media and Internet trolls was to challenge democratic values, divide Europe, gather domestic support, and create the perception of failed states in the EU's eastern neighbourhood. Moreover, Russia invested relevant financial resources in its disinformation and propaganda instruments engaged either directly

[49] General Court, case T-125/22 *RT France,* p. 142–215.

[50] UNGA, resolution 381 (V) of 17th November, 1950, *Condemnation of propaganda against peace.* UNGA, resolution 110 (II) of 3rd November, 1947, *Measures to be taken against propaganda and the inciters of a new war.*

by the state or through Kremlin-controlled companies and organisations. According to the Parliament, Russian strategic communication is part of a larger subversive campaign to weaken EU cooperation and the sovereignty, political independence, and territorial integrity of the Union and its Member States.[51] This confirms that the measures against the Russian propaganda were necessary, but they should have been taken even before 24th February, 2022, as it could be considered to be a propaganda for war and not one-sided reporting (Baade 2023, 273–275).

Combatting media propaganda is an appropriate measure, but not the only one that could be applied in the case of Russian aggression against Ukraine. At the moment, only the biggest pro-Russian TV channels are targeted and at the same time, propaganda is spread by minor actors, especially on the Internet and social media. In 2021, the European Union introduced the regulation 2021/784,[52] aimed at the dissemination of terrorist content online. On the basis of this regulation, service providers are obliged to remove or disable access to terrorist content online within one hour of receipt of a removal order from a competent national authority. A similar approach could be applied by the European Union with regards to the content encompassing Russian propaganda.

4. CONCLUSIONS

Economic restrictions imposed due to the Russian invasion on Ukraine strongly affected the EU trade with Russia. Imports fell from 9,6% in February 2022 to 1,7% in June 2023, whereas exports decreased from 3,8% to 1,4% in the same period (Eurostat 2023). The sanctions had thus their negative effect on the Russian economy. In time and combined with sanctions applied by other states,[53]

[51] European Parliament resolution of 23rd November, 2016, on EU strategic communication to counteract propaganda against it by third parties (2016/2030(INI)) (2018/C 224/08), OJ C 224, p. 58, 27.06.2018.

[52] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29th April, 2021, on addressing the dissemination of terrorist content online (Text with EEA relevance), OJ L 172, p. 79, 17.05.2021.

[53] For example, a wide variety of sanctions, similarly to the European Union, is applied by the United States since 2014: Executive Order 13660 *Blocking Property of Certain Persons Contributing to the Situation in Ukraine,* 6th March, 2014. Executive Order 13662 *Blocking Property of Additional Persons Contributing to the Situation in Ukraine,* 20th March, 2014. H.R.4152 – *Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act 2014,* 3rd April, 2014. 31 Code of Federal Regulations Part 589. Executive Order 13661 *Blocking Property of Additional Persons Contributing to the Situation in Ukraine,* 16th March, 2014. Executive Order 13662 *Blocking Property of Additional Persons Contributing to the Situation in Ukraine,* 20th March, 2014. H.R.4152 – *Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act 2014,* 3rd April, 2014. 31 Code of Federal Regulations Part 589. Executive Order 13685 *Blocking Property of Certain Persons and Prohibiting Certain Transactions*

they can decrease the Russian ability to finance its aggression and make them retract from Ukraine. At the time of writing this paper, Ukraine managed to regain control over some of its territories attacked by the Russian troops. Nevertheless, sanctions themselves are not linked to any particular conditions for their repeal, such as ceasefire or unconditional Russian withdrawal from the Ukrainian territory, which hampers the evaluation of their effectiveness (Shagina 2022, 6–7). Moreover, Russia is trying to circumvent restrictive measures by entering into a closer economic cooperation with states that do not apply sanctions, such as China, with the increase of Russian imports from China by 27%.[54]

Turning the attention to the EU's sanctions against Russia due to its aggression on Ukraine, it can be concluded that the EU's measures have an adequate legal basis both in international and EU law; they are necessary and proportionate. In the application of these sanctions, human rights are safeguarded by the scrutiny of the Court of Justice of the European Union, which elaborated a satisfactory standard of judicial review. The opposite suppositions are made only by Russian scholars (Voynikov 2022, S636–S642). The measures are not discriminatory and they safeguard the rights of the defence. Individuals are granted access to non-classified parts of the case-files, decisions on listing are reasoned, and the CJEU exercises full judicial review of the contested measures. Taking into consideration the threat that the Russian aggression causes for the European region, the applied sanctions are not disproportionate to the aim sought.

Measures targeting the Russian propaganda, namely the suspension of broadcasting licences of selected media outlets, do not violate freedom of expression. Propaganda, and especially war propaganda, is an abuse of freedom of expression and thus should not be protected.

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STARLINK'S PROVISION OF TELECOMMUNICATION SERVICES DURING THE TIME OF ARMED CONFLICT AND ITS CONSEQUENCES FROM THE PERSPECTIVE OF PUBLIC INTERNATIONAL LAW

Abstract. This article attempts to provide an overview of the most important international regulations relating to the provision of telecommunication services by private companies to one or more belligerent parties in times of an armed conflict. Taking as an example the recently widely commented issue of Starlink allegedly withholding its services otherwise provided to the Ukrainian Armed Forces, this article reviews the issue from the perspective of general public international law as well as international space law. Specifically, the customs and regulations concerning the attributability of private parties actions as well as peaceful utilisation of outer space are scrutinised.

Keywords: international space law, Elon Musk, Starlink, Ukraine, USA

ŚWIADCZENIE USŁUG TELEKOMUNIKACYJNYCH PRZEZ STARLINK W TRAKCIE KONFLIKTU ZBROJNEGO A MOŻLIWE KONSEKWENCJE W RAMACH PRAWA PUBLICZNEGO MIĘDZYNARODOWEGO

Streszczenie. Niniejszy artykuł ma na celu zaprezentowanie najistotniejszych regulacji międzynarodowych dotyczących świadczenia usług o charakterze telekomunikacyjnym przez podmioty niepubliczne jednej lub większej ilości stron aktywnego konfliktu zbrojnego. Biorąc za przykład szeroko komentowany przypadek firmy Starlink, która rzekomo miała odmówić udostępnienia swojej sieci rządowi Ukraińskiemu, artykuł ten stara się przedstawić skrótowe studium tego przypadku z perspektywy prawa publicznego międzynarodowego, jak również regulacji międzynarodowych poświęconych wyłącznie kwestiom wykorzystania przestrzeni kosmicznej. Analiza ta w szczególności dotyczy reguł poświęconych przypisywalności państwu działań podmiotów prywatnych jak i pokojowemu wykorzystaniu przestrzeni kosmicznej.

Słowa kluczowe: międzynarodowe prawo kosmiczne, Elon Musk, starlink, Ukraina, USA

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1. INTRODUCTION

In early September 2023, all major news outlets began distributing information concerning Elon Musk's decision to "shut off communications network" of SpaceX's constellation Starlink before an upcoming military action of Ukraine's Armed Forces against an illegal aggression of the Russian Federation, which was supposed to take place on the coast of Crimea. As indicated by Elon Musk himself on his portal X,[1] SpaceX has received "(…) an emergency request from government authorities to activate Starlink all the way to Sevastopol" (Musk 2023). He further stated that "the obvious intent [is] to sink most of the Russian fleet at anchor. If I had agreed to their request, then SpaceX would be explicitly complicit in a major act of war and conflict escalation". This came after the company had provided "thousands" of Starlink terminals to Ukraine right after the beginning of the Russian invasion (Sheetz 2022), at the same time allegedly not allowing its infrastructure to be used for long-rage drone strikes (Satariano 2023), with Starlink's CEO going as far as claiming that it was "never meant to be weaponised". Ultimately, this is merely one of the chapters in Elon Musk and Ukraine saga, with the 21st century version of the Howard Hughes seemingly changing his outlook on the business and political ramifications of the armed conflict at hand.

At the same time, the entire situation has sparked a debate on the consequences of the involvement of private parties into international armed conflicts – a debate that has been borderline framed by Elon Musk himself, and ultimately leading, in the consciousness of the general public, to a conundrum of whether the provision of Starlink services can lead to a war between the USA and the Russian Federation. Or, to put it in more scientific terms, whether the actions of a private company can amount to changing the status of any given state from neutral to belligerent. The question itself is quite complex and is in itself a prime subject for a PhD dissertation rather than a simple article. However, it is still worth conducting a review of potentially applicable rules of public international law for the Starlink's operations and involvement in the currently ongoing events. The following analysis will not concentrate on the concept of neutrality or qualified neutrality, but will, rather, focus on what are the legal ramifications for Starlink's activities from the perspective of state responsibility and outer space regulations as the two most likely avenues to tie actions of a corporate entity to its state and registration, by extension making them actions of a given state itself. Therefore, the main goal of this article is to establish whether the operations of Starlink are in line with international obligations flowing from international outer space law.

[1] More commonly known as Twitter, despite Elon Musk's best efforts aimed at preventing the world from deadnaming his social platform.

As has been outlined above, the first part of the analysis will consider the Starlink operations in the light of the Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA) in order to establish whether its actions could potentially be attributable to the USA. The second part will be devoted to an analysis of *corpus iuris spatialis* in order to determine whether the rules contained therein could nonetheless justify such attribution, and if so – how they relate to the relevant state practice.

2. THE ATTRIBUTABILITY OF STARLINK'S ACTIVITIES

Within the framework of public international law, states are responsible solely for actions that can be attributed to them, as indicated by the doctrine of objective responsibility. The attributability in itself became subject of a rather complex discussion, in itself amounting to a chapter within the International Law Commission's ARSIWA. While by no means legally binding, nor equipped with any treaty value as such, the ARSIWA still remains a valid point of reference, since it in itself consists of a rather comprehensive review of the last hundred years of public international law development.

Of course, one can be tempted to simplify the entire issue basing on the ARSIWA by quoting a part of its introduction to the second chapter, which observes that in general "the conduct of private persons is not as such attributable to the State" (ILC 2001b, 9). This, however, is mostly based on a "negative" understanding of the rule. As has been stated in the *Tellini* case, and what is also being invoked by the ARSIWA, "The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal" (League of Nations 1923, 524). The same approach, albeit much more clearly presented, was adopted in the *Janes* case, where the tribunal found that "The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender" (United Nations 1951, 87). Both of the cases advocate for a state being responsible solely for "its" actions instead of those of the individuals of given state nationality, but they do not, in fact, provide us with any guidance as to what can be treated as an action of a state, apart from it not being a sole endeavour of an individual. A ruling of Iran-USA claims tribunal indicates that "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State" (Iran-US Claims Tribunal 1987, 101–102). The ARSIWA as such identified seven potential cases in which a conduct would be

regarded as a conduct of a state as such. This takes place if the conduct in question is the conduct of a state organ itself, conduct of persons or entities exercising elements of governmental authority, conduct of organs placed at the disposal of a state by another state, conduct directed or controlled by a state, conduct carried out in the absence or default of the official authorities, conduct of an insurrectional or other movement, and conduct acknowledged and adopted by a State as its own. Out of the seven cited cases, only the direction or control of the Starlink activity and the acknowledgement of the Starlink's conduct by a state, contained in Articles 8 and 11 of the ARSIWA, respectively, can be reasonably taken into account as potentially leading to the attribution of the activity in question to the government of the USA.

Starting from Article 11, i.e. the adoption of the conduct, as has been observed in the *United States Diplomatic and Consular Staff in Tehran* case (International Court of Justice 1980), this requires a positive adoption on part of the state, taking the form of official and legal approval. In the referenced case, this took the form of a positive regulation that was later abided by the governmental authorities. As of the date of writing this article, the general public has not been presented with any evidence to determine that situation as described above has taken place. The same argument can be made in reference to Article 8, which concerns the control of the state over certain activities. The level of control in question varies from case to case, although one has to bear in mind that the principle in question does not "extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control" (ILC 2001b, 18). As has been stated in the *Military and Paramilitary Activities in and against Nicaragua* case, the state has to exercise the level of control that justifies treating the party conducting the activity as acting on its behalf (International Court of Justice 1986). In both situations discussed, in order to declare the activity of a party attributable to a state, it is required for the state in question to perform certain acts, be it in the form of the acceptance of previously made conduct or in the form of controlling the entity in question. In none of the situations described is the conduct of a private entity of any significance – for the purposes of attributing it to the state at least. On the contrary, it is the state who has to either accept it as its own or direct it – again – as it would with its other activities. Hence, it is impossible, without any further evidence to the contrary, to state that any sort of Starlink's conduct could be regarded as having even a remote relation to what can be considered as a conduct of a state. Of course, that is not to say that its conduct is entirely irrelevant, but from the public international law standpoint, it remains no different than, e.g., Microsoft's continuing licensing of operating systems to the Ukrainian authorities, or any involvement in any governmental activity of Ukraine of any given corporation. With all respect due to the technological marvel that Starlink undoubtedly is, in the world where products of corporations such as Raytheon are

provided to one of the belligerent states in one capacity or another, the notion that providing services by a single company to the same belligerent state can amount to "major escalation" is far-fetched at best and narcissistic at worst.

3. STARLINK'S ACTIVITIES IN THE LIGHT OF INTERNATIONAL SPACE LAW

Having roughly described how activities undertaken by Starlink (as an enterprise) can be viewed within the framework of general public international law, we should turn our attention to international space law. Referred to in the doctrine as *corpus iuris spatialis*, it is comprised of 4 treaties, namely: the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereinafter OST); the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space; the Convention on Registration of Objects Launched Into Outer Space; and the Convention on International Liability for Damage Caused by Space Objects. Out of the treaties listed above, only the OST contains provisions that are relevant to our current considerations, i.e. concerning the attribution of space activities to a state and military uses of outer space.

Due to the nature of the regulation, the drafting parties opted for a very broad application of the attributability concept. Article VI of said treaty provides that each state party shall remain internationally responsible for national activities conducted in outer space, regardless of whether such activity was conducted by a governmental or non-governmental entity that remains under their jurisdiction. Moreover, such activities do require given state's authorisation and continuing control (Lyall, Larsen, 66). This regulation creates a rather interesting case – from the purely legal perspective – where an activity of a private corporation, seemingly "invisible" to the public international law in terms of general rules on attribution and responsibility, suddenly becomes an act of the state itself, without having to satisfy any further criteria (Brown 2022). This would in itself appear to prove the point indicated at the beginning of this paper, namely that Starlink by providing its services to the state of Ukraine would help – to quote – escalate the conflict further (Goines 2022). However, the concept of a state being internationally responsible for activities in outer space was primarily designed for ensuring the compliance with the rules of the OST itself rather than providing a catch-all clause that would be equally used in and outside the OST framework (Jakhu 2006, 14).

However, the provisions of the OST are not limited to merely facilitating the attribution of outer space activities to any given state party, with the regulations and state practice on military utilisation of outer space being of utmost importance in the present case. Article III of the OST provides that every state party "shall carry

on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding", which appears to provide additional context to the "peaceful purposes" doctrine mentioned in the preamble of the OST. Article IV, on the other hand, includes a list of outer states activities that are strictly prohibited. This includes inserting and maintaining weapons of mass destruction both on the surface of celestial bodies and in outer space, the creation of military bases, installations, and fortifications on celestial bodies, as well as testing weapons and performing military manoeuvres on the celestial bodies. Having these regulations in mind, there are two issues that need to be addressed in relation to Starlink. Firstly, assuming that Starlink's activity could be considered as "military", does it remain legal within the meaning of the OST? Secondly, is it compliant with the "peaceful purposes" doctrine included in the OST?

At a glance, it would appear that the OST has excluded any and all legal possibility for any military or – arguably – even dual use activity in the outer space. However, a more cautious look into the matter shows that, firstly, there is a distinction between the regulation contained in Article IV, with military activities in outer space being clearly divided between those conducted on the surface of celestial bodies, and those that are taking in outer space itself. Since Starlink constellation is not placed nor does it rely on any infrastructure on celestial bodies, the only provision applicable to it in the light of Article IV is the ban on containing any weapons of mass destruction. As the Starlink satellites are meant to be telecommunication devices, barring an instance of one of them actually containing a weapon of mass destruction, the answer to the first of the questions presented above is a resounding yes. Even if one were to declare Starlink constellation as a purely military infrastructure, there is no prohibition, on the grounds of Article IV of the OST, for it to be created and utilised.

The second question presented above concerns the concept of "peaceful purposes" and – by extension – the maintaining of international peace and security by conducting outer space activities. However, the development of this concept has included two conflicting views, with the peaceful purposes doctrine containing the meaning of either "non-aggressive" or "non-military". Regardless of how one would decide to treat the Starlink constellation in the light of the services being provided to one of the belligerent parties, the approach of the state of registration of Starlink satellites, i.e. the USA, appears to follow the "non-aggressive" line of reasoning from the moment of drafting the treaty itself (Finch 1968, 365). A point only reinforced by subsequent state practice, with both the USA (Trump 2018) and the Russian Federation[2] featuring a designated branch of the military for outer

[2] The Russian Federation – unlike the USA – combines the space capacity within its airforce, although still maintaining the space component in the name of this particular branch of the military.

space operations, dating back to as far as 1960s and the establishment of the North American Aerospace Defense Command (Farley 2020).

Moreover, Starlink is neither the first private or quasi-private entity to be utilised during the times of war, nor is it the only example of such an enterprise in the current armed conflict. Its role of providing necessary communications to one of the belligerent parties has been previously carried out by INMARSAT during the Persian Gulf armed conflict as well as during the Falklands armed conflict (Noorden 1995, 1), with INTELSAT services being provided to multiple militaries at the same time (Morgan 1994, 60). The same observation can be made regarding the ICEYE, a Finnish company specialising in remote sensing, including radar imagining, that has provided its services to Ukraine and continues to do so at the moment of writing this article, with the data provided being directly utilised by the military itself for – what we can only presume albeit with a fair dosage of certainty – military use. While the presented review of the state practice in respect to utilising satellite technologies within their military structure is by no means exhaustive, nor attempts to be one, it establishes well enough the notion of such type of outer space activity being not only widely used but also widely accepted, remaining within the "peaceful purposes" doctrine – if not outright within the "non-military" understanding, then for sure within the "non-aggressive" one.

4. CONCLUSIONS

The observations presented above are especially valid in terms of communication satellites. Firstly, it is highly unlikely that any utilisation of such satellites in the Russo-Ukrainian war could lead to the attribution of the act in question to any state but the ones directly involved in the armed conflict, and even then, the attributable act would comprise of purchasing the service in question. As for the third parties, such activity, basing on general public international law, appears to be no different than any other provision of services by companies remaining within given states' jurisdiction. One has to bear in mind that the communication services provided by Starlink do not exist in vacuum, and arriving at a different conclusion could yield an unexpected result for seemingly unrelated industries, with software licensing being most likely to be impacted due to its widespread nature.

Secondly, from purely international space law perspective, it appears that Starlink services fit within the already existing practice of outer space utilisation. This is further reinforced by some voices in the doctrine pointing out that such use of telecommunication satellites remains within the treaty boundaries as long as they are being utilised "by the military in a manner which contributes to creating a 'climate of peace,' their use will be legally permissible".

Having the explanations presented above in mind, it is highly unlikely that the concerns of Starlink's owner as well as its top official are substantiated, at the very least from the perspective of public international law and state practice available for the review of the general public as of the day of writing this article. Therefore, the answer to the question posed in the introduction to the present article appears to be affirmative. Firstly, as has been shown above, it is unlikely that Starlink's operations could be described as violating any of the discussed provisions of public international law. Secondly, the activities of Starlink appear to fall in line with the established state practice.

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THE *ALABAMA* REVISITED: SOME OBSERVATIONS ON THE EVOLUTION OF RIGHTS AND DUTIES OF NEUTRAL STATES IN ARMED CONFLICTS UNDER INTERNATIONAL LAW

Abstract. The paper discusses the concept of neutrality in contemporary international law. The traditional notion of neutrality, stemmed from states' practice since the 17th century, means the particular status, defined by international law, of a state that is not party to an armed conflict. The basic premise of this notion is, in short, quite straightforward: on the one hand, the neutral state has the right to remain apart from, and not to be adversely affected by, the conflict. On the other hand, the neutral state is under the obligation of non-participation and impartiality. In the 20th and 21st centuries, however, following several treaties and modifications of states' practice on that matter, the law of neutrality underwent changes and introduced new concepts, e.g. qualified neutrality or non-belligerency. This change, however, has produced only modifications of specific rules of the law of neutrality, not a general abolition of this whole body of law.

Keywords: aggression, armed conflict, neutrality, use of force, rights and duties of States

AKTUALNOŚĆ ORZECZENIA W SPRAWIE STATKU *ALABAMA*: WNIOSKI CO DO EWOLUCJI PRAW I OBOWIĄZKÓW PAŃSTW NEUTRALNYCH W ŚWIETLE PRAWA MIĘDZYNARODOWEGO

Streszczenie. Celem artykułu jest zbadanie instytucji państwa neutralnego we współczesnym prawie międzynarodowym. Tradycyjne ujęcie neutralności, wypracowane w praktyce państw od XVII wieku zakłada, że państwo nie będące stroną w konflikcie nabywa na podstawie prawa międzynarodowego szczególny status, który można w skrócie przedstawić następująco: państwo neutralne ma prawo nie odczuwania negatywnych skutków istniejącego konfliktu zbrojnego. Z drugiej strony, państwo takie ma obowiązek pozostawania bezstronnym i nieudzielania pomocy stronom wojującym. Jednak w praktyce XX i XXI wieku można wskazać wiele przypadków pomocy udzielanej stronom konfliktu przez państwa nie biorące w nim udziału. Koncepcja neutralności (określanej również prawem neutralności) podlegała, podobnie jak całe prawo międzynarodowe, wielu przemianom w XX wieku, wykształcając m.in., pojęcia „kwalifikowanej neutralności" oraz

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„nieuczestniczenia w działaniach zbrojnych". Zmiany te jednak nie podważyły istoty neutralności, która wciąż stanowi część prawa międzynarodowego.

Słowa kluczowe: agresja, konflikt zbrojny, neutralność, użycie siły, prawa i obowiązki państw

> "I am certain that the day will come again when no nation will have the effrontery and the cynicism to demand that, while it itself scoffs at and disregards every principle of law and order, its intended victims must adhere rigidly to all such principles – until the very moment when its armed forces have crossed their frontiers."
>
> Cordell Hull, US Secretary of State

1. INTRODUCTION

The European Union, the United States, and others have supplied many forms of assistance to Ukraine in months following the Russian aggression in February 2022. From welcoming refugees to deploying humanitarian aid, from supplying military equipment to sharing intelligence data, from intergovernmental loans to private donations, governments and private entities alike shared the need to demonstrate their condemnation to that blatant violation of international peace and security.

This rare manifestation of international solidarity in the face of the biggest attack on a European state since World War II (D'Anieri 2023, 1) invokes several questions from the international law perspective. While the Russian invasion is undoubtedly perceived as a clear violation of both Article 2.4 of the UN Charter of 1945 and the norm of customary international law prohibiting aggression[1] with the subsequent hostilities qualified as 'war' even in the absence of formal declaration thereof (Oppenheim, Lauterpacht 1955, 965), the international aid to Ukraine is of such magnitude that it gives rise to the questions on its legality under international law.

Moreover, legal considerations are strengthened by various political concerns, including the potential escalation of the global conflict with Russia. Similar

[1] Although the search for a consensual definition of aggression was lengthy and difficult (with states on one side in favour of a definition limited to the military intervention of a state on the territory of another, and states on the other side in favour of a broader definition that would reflect different forms of interference and violation of State sovereignty), there has been agreed that states should condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations (see eg.: Article I of General Treaty for Renunciation of War as an Instrument of National Policy of 1928). It was only in 1974 that the UN adopted a definition of the act of aggression. Before the General Assembly's Declaration 3314 (XXIX), the concept of aggression had also been clarified and developed in several decisions of the International Court of Justice, e.g. the Barcelona Traction case, where the ICJ instanced "the outlawing of acts of aggression" as one of the obligations *erga omnes* (Barcelona Traction 1964, p. 32, para. 34).

questions are reiterated by lawyers, politicians, and journalists on both sides on every occasion when the new shipment of support is to be deployed to Ukraine or new sanctions are to be imposed on the Russian Federation and its authorities. Without any doubt, Russia and Ukraine are engaged in an international armed conflict and thus are belligerents, but in the case of states not participating in this conflict, the case is not as clear. In particular, many commentators invoke the law of neutrality as a set of rules governing the legal relationship between states that are not taking part in an international armed conflict (neutral states) and belligerents. The law of neutrality stems from the 17th and 18th centuries state practice and in that time, it was a system of reciprocal rights and obligations for neutral states and belligerents.[2] However, it must be borne in mind that since the 18th century, international law has undergone quite a profound metamorphosis and, therefore, any simple recall of its origins must be perceived as faulty.

Under these circumstances, it is of utmost importance to analyse the contemporary meaning of neutrality in an armed conflict in order to formulate the rights and duties of states that are not taking part in an international armed conflict.[3]

2. THE ALABAMA STANDARD OF NEUTRALITY – 1860–1945

As it has been stated above, it is universally acknowledged that the first cohesive notion of neutrality was expressed by the arbitral tribunal established to settle the so-called "Alabama claims".[4] On 14th September, 1872, the Tribunal established by Article I of the Treaty of Washington[5] rendered its award concluding the diplomatic dispute between the United States and Great Britain that arose out of the US Civil War.

[2] For example, neutral states had a duty not to participate in hostilities and to be impartial in their conduct towards belligerents. In return, belligerents were obligated to respect neutral states' territory, and neutrals were permitted to trade with all sides of the conflict if they did so in an impartial way. Cf. Mulligan (2022, 2).

[3] For the purpose of the analysis, the notions of permanent neutrality, legal neutralisation, and neutrality policy stay outside the scope of this paper.

[4] The Alabama Claims is a common name for several demands for damages claimed by the government of the United States from the United Kingdom in 1869, for the attacks upon Union merchant ships by Confederate Navy commerce raiders built in British privately owned shipyards during the American Civil War (1861–1865).

[5] On 8th May, 1871, the United States and Great Britain signed the Treaty of Washington, which, by establishing four separate arbitrations, afforded the most ambitious arbitral undertaking the world had experienced up to that time. The peaceful resolution of that dispute seven years after the war ended set an important precedent for solving serious international disputes through arbitration and laid the foundation for greatly improved relations between Great Britain and the United States.

At the outset of the war, a Federal blockade of Southern ports and coasts automatically extended belligerent status to the Confederacy. To protect its own interests, Great Britain took the lead among European countries in proclaiming its neutrality (14th May, 1861). The Confederacy immediately set about building a navy to engage the Union's naval power and to destroy its merchant marine. Along with several other ships, the Alabama was built or fitted out privately on the British territory and put to sea despite the belated intervention of the British government. After the war, the United States demanded compensation from Great Britain for the damage wrought by the British-built, Southern-operated commerce raiders, based upon the argument that the British Government, by aiding the creation of a Confederate Navy, had inadequately followed its own neutrality laws.

Due to the scope of the claims presented in the *Compromis*, the Tribunal only decided upon wartime maritime obligations of neutral states with reference to international law and rules agreed by parties. Under Article VI of the Treaty of Washington, accordingly, the neutral Government is bound (i) to use due diligence to prevent the fitting out, arming or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a state with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use; (ii) not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, within such jurisdiction, to warlike use; and (iii) to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties (Treaty of Washington, 1871, Article VI).

On this basis, however, the Tribunal established the standard of compliance for neutral states with the aforementioned obligations. The Tribunal observed that (1) due diligence ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part; (2) the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the Government of the belligerent power benefited by the violation of neutrality may afterwards have granted to that vessel; and (3) the principle of exterritoriality has been admitted into the laws of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and, therefore, can never be appealed to for the protection of acts done in violation of neutrality (Alabama claims Arbitral Award 1872, 130–131).

These so-called rules of Washington (Moore 1898) were later included in two treaties adopted at the 1907 Peace Conference, namely the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War

on Land (hereinafter: Hague V) and the Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War (hereinafter: Hague XIII).[6]

Under Hague XIII and Hague V, neutral states cannot provide "ammunition, or war material of any kind whatever" to belligerents (Article 14 of Hague XIII, Article 7 of Hague V). Both treaties exempt humanitarian assistance from this prohibition (Article 6 of Hague XIII, Article 14 of Hague V), and they do not require neutral states to prevent private companies from selling munitions and war material (Article 7 of Hague XIII, Article 7 of Hague V). Neutral states also have an obligation to prevent belligerents from committing certain hostile acts on neutral states' territory (Article 8 of Hague XIII, Article 2 of Hague V), and Hague V and XIII require neutrals to intern and detain belligerent forces found in their territory (Article 24 and Article 12, respectively). As part of their corresponding set of duties, belligerents must treat neutral states' territory as inviolable (Article 1 of Hague XIII, Article 1 of Hague V). Belligerents may not move troops, munitions, or supplies across neutral territory, and they may not set up communication apparatuses or recruit combatants, among other things, on neutral territory (Article 5 of Hague XIII, Article 2 of Hague V).

Even perfunctory analysis of Hague V and Hague XIII leaves no doubt that the conduct of states in the Russo-Ukrainian war is inconsistent with the rules of Washington and stipulations of both treaties, and may confirm the aforementioned concerns expressed by many international commentators. On the other hand, some commentators also underline that the current circumstances are quite different from the times the treaties were drafted and, therefore, the Hague rules of war are not fit to govern the modern world. Again, both these positions are formulated without regard to the further development of international law which took place in the 20th century.

3. THE UNITED NATIONS CHARTER OF 1945 – A TURNING POINT FOR NEUTRALITY

In the early and mid-20th century, the gradual suppression of the *ius ad bellum*[7] restricted the right to use armed force to cases of self-defence against aggression. In 1945, the Charter of the Nuremberg Tribunal relied on the principles of international law to institute the act of planning, preparing, initiating, or waging a war of aggression as a crime against peace (Article 6.a of the Charter), engaging the criminal responsibility of perpetrators.

[6] Although Hague V and Hague XIII each have fewer than 35 (34 and 30 respectively) state parties, it is worth noting that the United States, Ukraine, and Russia have ratified both treaties.

[7] As in Article 10 of the Covenant of the League of Nations (1919) and Article 1 of the General Treaty for Renunciation of War as an Instrument of National Policy of 1928.

The United Nations Charter (hereinafter: UN Charter), signed on 26th June, 1945, creates modern framework for the recourse to force in the relations between states. Article 2.4 of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations set out in Article 1 of the UN Charter.[8] Therefore, as a general rule, the UN Member State is not allowed to use not only the force but also mere threat to use force against any other state except, as stipulated in Article 51 of the UN Charter, in the case of self-defence if an armed attack occurs against said state.

The rationale for such radical suppression of the legal possibility to use force is quite simple: the UN Charter creates a system of collective security under the primary responsibility of the Security Council. The UN Security Council's (hereinafter: UNSC) mandate is structured around the wider notion of threat to international peace and security, and the UNSC is competent to take appropriate measures in such cases, including the recourse to collective force as may be necessary to maintain or restore international peace and security (Article 42 of the UN Charter). It should be noted that although the UNSC is authorised to determine the existence of any threat to the peace, breach of the peace, or act of aggression, the UN Charter does not contain a clear definition of either of these terms. Under these circumstances, it is a prerogative of the UNSC to assess the magnitude of a potential violation of international peace and security, and to act accordingly.

The traditional concept of neutrality has been substantially modified after the UN Charter had come to force. When called upon by the UNSC to do so, Member States are obligated to provide assistance to the UN, or a state or coalition of states implementing a Security Council enforcement action, in any action it takes and to refrain from aiding any state against whom such action is directed (Articles 2.5, 25, 43 & 49 of the UN Charter). Consequently, Member States may be obliged to support a United Nations' action with elements of their armed forces, a result incompatible with the abstention requirement of neutral status (Articles 43 & 45 of the UN Charter). Similarly, a Member State may be called upon to provide assistance to the United Nations in an enforcement action not involving its armed forces and thereby assume a partisan posture inconsistent with the impartiality required by the traditional law of neutrality (Articles 41 & 49 of the UN Charter). Moreover, Article 103 of the UN Charter leaves no room for any deliberation stipulating that, in the event of a conflict between the obligations of the members of the United Nations under the UN Charter (i.e. the UNSC resolution under Chapter VII of the UN Charter) and their obligations under any other international agreement (e.g. Hague V or Hague XIII), their obligations under the UN Charter

[8] The purposes of the United Nations encompass, *inter alia*, the maintenance of international peace and security, and to that end: taking effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.

shall prevail. *A contrario*, only should the UNSC determine not to institute an enforcement action, each United Nations member remains free to assert its neutral status.

It is of utmost importance to remember that general prohibition of the use of force as provided in Article 2.4 of the UN Charter diametrically changes the possible consequences of the violation by neutral state of its rights and obligations. The violation of the law of neutrality does not implicate that a non-neutral state automatically becomes a belligerent state. On the contrary, any military response to the violation of rights and duties of a neutral state falls under scrutiny of the legitimate exceptions to the prohibition of the use of force. For example, current military assistance to Ukraine would not permit Russia to use force in response to a neutrality violation unless Russia could satisfy an exception to the UN Charter's prohibition on use of force. Nor would a violation of neutrality, on its own accord, make the EU, the USA, and other states co-belligerents or parties to the conflict fighting alongside Ukraine (Mulligan 2022).

4. FURTHER DEVELOPMENT – FROM 1945 TILL TODAY

The system of the UN Charter was put to its first crash test almost five years later, on 25th June, 1950, when North Korea invaded the Republic of Korea following years of hostilities between the two states. On the same day, the UNSC unanimously condemned the North Korean invasion of South Korea with its Resolution 82. Two days later, the UNSC determined that North Korea's aggression constituted a "breach of peace", recommended that member states "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack", recommended that such forces and assistance be made available to a "unified commander under the United States", and authorised the unified command to use the UN Flag "in the course of operations against North Korean forces" (UNSC Resolution 83/1950). These Resolutions were adopted during the Soviet Union's self-imposed absence from the UNSC proceedings. Upon the USSR's return, its veto prevented the UNSC from taking further action (Malkasian 2001, 16). Under those circumstances, the General Assembly of the UN (hereinafter: UNGA), having determined that the UNSC was unable, due to the threat of a Soviet veto, to "discharge its responsibilities on behalf of all the Member States", adopted on 3rd November, 1950, the "Uniting for Peace Resolution" (UNGA Resolution 377(V), 1950).

According to the wording of the 'Uniting for Peace' Resolution, the UNGA may, in the event of a breach of the peace and the inability of the UNSC to act due to a veto, make "appropriate recommendations to members for collective measures, including (…) the use of armed force when necessary." It must be noted that, in contrast to a binding UNSC decision, resolutions of the UNGA do not

constitute legal obligations for the Member States and as such UN members may or may not comply with them without exposing themselves to the international responsibility. Consequently, as it has been mentioned above in the case of inaction of the UNSC, in case of the UNGA's recommendations, neutrality remains a distinct possibility (Schindler 1991, 372; Ronzitti 1998, 211).

Despite the best intentions of the creators of the United Nations, the Korean war conundrum was first of many cases when the UNSC was not able to undertake any measures to restore international peace and security, the most recent being the UNSC Resolution 2623 of 27th February, 2022. The UNSC openly admits that "the lack of unanimity of its permanent members at the 8979th meeting has prevented it from exercising its primary responsibility for the maintenance of international peace and security" and decides "to call an emergency special session of the General Assembly to examine the question contained in document S/Agenda/8979" (UNSC Resolution 2623/2022). [9]

Although not provided for in the UN Charter, that tacit agreement of the international community, UNGA Resolution 377, was supported by at least three reasons. Firstly, the memory of WWI atrocities and of WWII carnage was still fresh. Secondly, the bipolarisation of the world politics and a threat of a nuclear conflict on the horizon alerted the states that in case of "new" (i.e. nuclear) conflict, any legal status would be of no consequences when the whole continent might turn out to be a collateral damage. And thirdly, the classical notion of just war gave philosophical and moral justification for assistance provided for the victim of aggression. As a result, the international community has recognised some kind of moral responsibility for maintaining international peace and security both in cooperation with the UNSC under Chapter VII of the UN Charter and under the auspices of the UNGA in compliance with customary international law.

This notion of very vague yet present obligation to maintain international peace and security may be tracked down in several subsequent cases of states' practice. For example, some states, including the United States, have adopted the doctrine of qualified neutrality. Under this doctrine, states can undertake non-neutral acts when supporting the victim of an unlawful war or aggression.[10] Moreover, in cases of collective self-defence both under Article 51 of the

[9] The question on which the UNGA was to debate had been contained in the Letter dated 28th February, 2014, from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council. It was a request for an urgent meeting of the Security Council in accordance with Articles 34 and 35 of the Charter of the United Nations, concerning the Russian annexation of Crimea. Thus far, the UNSC Resolution 2623 was the 13th case when the UNGA Reso-lution 337(V), 1950 was invoked and the 8th time the UNSC invoked it.

[10] The United States considered itself as a non-belligerent before entering World War II, but not as neutral, because it supported the United Kingdom in a way that was incompatible with the duty of non-participation under the law of neutrality. More recently, during the 2003 US-British intervention in Iraq, some European States (e.g. Germany) gave assistance to the intervening states, which was incompatible with the law of neutrality without becoming parties to the conflict.

UN Charter or under customary international law, this collective action is nothing other than assistance provided for the victim of aggression by states originally not involved in the conflict. Some authors (Schmitt 2023) also claim that although not obligatory, states may help the victim of aggression without violating their neutrality obligations, because self-defence is accepted as a treaty-based and customary law "circumstance precluding wrongfulness", as enshrined in Article 21 of the Articles on Responsibility of States for the Internationally Wrongful Acts (hereinafter: ARSIWA 2001).

A very interesting and important shift in discussion on the law of neutrality has been fuelled by the adoption of the aforementioned ARSIWA by the UNGA in 2001. During the works of the International Law Commission (hereinafter: ILC), it has been noted that the emergence of peremptory norms of international law and their consequences for, e.g., international treaties[11] imposes the responsibility for "serious breaches of obligations under peremptory norms of general international law" (ARSIWA, 2001, Chapter III). Article 41 of the ARSIWA deals with particular consequences of a serious breach of a *jus cogens* norm. According to this provision, states shall cooperate to bring to an end through lawful means any serious breach of such an obligation. Moreover, no state can recognise as lawful a situation created by a serious breach of obligations under peremptory norms of general international law, nor render aid or assistance in maintaining that situation.

In the context of neutrality, that distinction requires some deeper analysis. First of all, in order to determine a "serious breach of obligation under a peremptory norm of general international law", two criteria must be met. The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. Notwithstanding the debate on precise catalogue of peremptory norms of international law, there is no doubt that prohibition of aggression is one of such *jus cogens* norms.[12]

The second criterion serves as a further limitation of the causes for this 'qualified' responsibility, i.e. the breach itself should have been "serious". A "serious" breach is defined in paragraph 2 of Article 41 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. Consequently, the word "serious" signifies that a certain order of

[11] Cf. Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties (hereinafter: VCLT).

[12] This is supported, e.g., by the ILC's commentary to what was to become article 53 of the VCLT, uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties or the submissions of both parties in the Military and Paramilitary Activities in and against Nicaragua case and the ICJ's own position in that case, Cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, para. 190.

magnitude of violation is necessary. As explained in the ILC's Commentary to the ARSIWA, factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims (ARSIWA Commentary, 2001, p. 113).[13]

These remarks of general nature indicate that in the present case of Russo-Ukrainian war, the conclusion of existence of 'serious breach of obligations under peremptory norms of general international law' is correct and well-founded. Whether in 2014 or in 2022, the Russian invasion on Ukrainian territory has constituted a clear breach of the peremptory norm of general international law. There is also no place to question the serious character of said breach – the Russian action was intentional[14] and of vast gravity for the victim state. Under these circumstances, the international community's response of condemnation and offered assistance to Ukraine seems in compliance with obligations stated in Article 41 of the ARSIWA. States have not recognised as lawful a situation created by a serious breach of obligations under peremptory norms of general international law and have been cooperating to bring to an end said breach through lawful means.

Even if – although it has been a subject of a two-decades-long debate – the ARSIWA in this part is not the codification of customary international law, the obligations set in Article 41 are the reflection of existing rules stemming from the 20th-century states' practice. The obligation of non-recognition is established well enough since its expression as the so-called Stimson's doctrine,[15] and the obligation of cooperation to bring to an end the unlawful situation of violation of *jus cogens* norm, including prohibition of aid or assistance to the perpetrator state, is confirmed, for example, in the UNSC resolutions prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.[16]

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[13] It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale. Cf. ARSIWA Commentary, para. 40(8).

[14] Cf. e.g., various statements of Vladimir Putin and Sergiei Lavrow from the beginning of the invasion in 2022.

[15] Named after then US Secretary of State, Henry Stimson, who, during the Manchurian crisis of 1931–1932, declared that the United States of America and large majority of members of the League of Nations would not admit the legality of any situation *de facto* nor recognise any treaty or agreement which may impair the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China, nor recognise any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Kellogg-Briand Pact of Paris, 1928. Cf. Secretary of State's note to the Chinese and Japanese Governments, in: Hackworth (1940, 334).

[16] Cf. UNSC resolutions 218 (1965) on the Portuguese colonies, and 418 (1977) and 569 (1985) on South Africa.

5. CONCLUSIONS

The act of aggression is today acknowledged as the most serious form of illicit recourse to force. Within the international order that has prevailed since the Treaty of Westphalia of 1648 and the affirmation of state sovereignty, aggression appears to be the most serious crime that can be perpetrated, undermining the very existence of the state, its territorial integrity, and, as such, the fundamental principles of international law. Thereby, every state, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Mindful of atrocities of two world wars, the international community is especially interested in maintaining international peace and security. In this light, the general prohibition of aggression and very strictly limited right to use force are core elements of the contemporary system of international security as enshrined in the UN Charter.

The competence of the UNSC to determine whether a violation of, or just a threat to international peace and security exists is nothing more than contemporary analogy of medieval competence of a Pope to decide whether war was just and holly. With the Charter, the just war doctrine had returned in a secular form and states are legally obliged to support the decision of that body and refrain from actions that might assist states that are using force unlawfully, legal obligations that mirror their just war moral duties (Schmitt 2023). This analogy is further strengthened by obvious observation that, both under the UN Charter and customary international law is only possible for the victims of unlawful conduct to receive assistance in collective, lawful response to aggression. Moreover, it is recognised widely that only the victim state of aggression is afforded the right to support from neutral states, and the aggressor state is not released from the protection that neutrals enjoy *vis-à-vis* its operations. That is the main alteration of the traditional concept of neutrality – the neutral states are not obliged to formally declare their neutrality and the duty of impartiality is no longer required, and, what is more, to aid or assist the aggressor would still undoubtedly violate the tenets of neutrality law. The case of the Russo-Ukrainian war is a very good example here.

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INVESTIGATING AND PROSECUTING INTERNATIONAL CRIMES COMMITTED IN THE CONTEXT OF THE RUSSIAN AGGRESSION AGAINST UKRAINE: THE POLISH INVOLVEMENT

Abstract. The paper aims to present the available options relating to the investigation and prosecution of international crimes allegedly committed in Ukraine by the Russian authorities and members of the Russian armed forces. Firstly, it presents domestic Ukrainian criminal proceedings on these crimes. Then, the ongoing investigation in the International Criminal Court on war crimes and crimes against humanity as well as the initiatives to create a special international court that would deal with the responsibility for the crime of aggression are explored. Finally, considering substantial Polish involvement, it would be interesting to have an insight into how Poland already has and could, in the future, further contribute to bringing to justice the perpetrators of international crimes committed in Ukraine.

Keywords: international crimes in Ukraine, crime of aggression, Joint Investigation Team, criminal responsibility

BADANIE I ŚCIGANIE ZBRODNI MIĘDZYNARODOWYCH POPEŁNIONYCH W ZWIĄZKU Z ROSYJSKĄ AGRESJĄ PRZECIWKO UKRAINIE: PERSPEKTYWA POLSKIEGO ZAANGAŻOWANIA

Streszczenie. W artykule przedstawiono dostępne rozwiązania ścigania zbrodni międzynarodowych popełnionych przez władze rosyjskie i członków rosyjskich sił zbrojnych w Ukrainie. W pierwszej kolejności przedstawiono krajowe ukraińskie postępowania karne dotyczące tych przestępstw. Następnie omówiono śledztwo toczące się przed Międzynarodowym Trybunałem Karnym dotyczące zbrodni wojennych i zbrodni przeciwko ludzkości oraz inicjatywy mające na celu utworzenie specjalnego sądu międzynarodowego, który zajmowałby się pociągnięciem do odpowiedzialności karnej za zbrodnię agresji. Wreszcie, mając na uwadze dotychczasowe istotne zaangażowanie Polski, warte zasygnalizować, w jaki sposób Polska już przyczyniła się i mogłaby w przyszłości brać dalszy udział w działaniach zmierzających do pociągnięcia do odpowiedzialności sprawców zbrodni międzynarodowych popełnionych w Ukrainie.

Słowa kluczowe: zbrodnie międzynarodowe w Ukrainie, zbrodnia agresji, wspólny zespół śledczy, odpowiedzialność karna

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1. INTRODUCTION

The Russian aggression against Ukraine has resulted in the evident violations of international law. Firstly, it itself constitutes a breach of the fundamental norm of the prohibition on the use of force and an act of aggression. As such, it was recognised by the most prominent scientific groups, such as the Institut de Droit International (IDI Declaration 2022), the European Society of International Law (ESIL Statement 2022), and the International Law Association (ILA Statement 2022). Russia, violating Article 2(4) of the 1945 United Nations (UN) Charter, acted as an aggressor (UN General Assembly Resolution on aggression against Ukraine, March 2022)[1] and "must be held to account for any violations of international law in or against Ukraine including its aggression (…), as well as any violations of international humanitarian law and international human rights law" (UN General Assembly Resolution on Remedy and Reparation, November 2022). Almost unanimous condemnation of the Russian invasion of Ukraine by the international community is an unquestionable manifesto that this conduct is overwhelmingly viewed as unacceptable (Gill 2022, 126). Among international scholars there is concurring agreement that "the invasion of Ukraine constitutes an unlawful use of force, an act of aggression and an egregious violation of a rule of *jus cogens*" (Green, Henderson, Ruys 2022, 27; similarly Kwiecień 2022, 11), and "(…) is, without doubt, one of the most serious and flagrant violations of the core international legal rule prohibiting the use of armed force in international relations since the Charter came into force", constituting at the same time "(…) almost open and shut example of the crime of aggression and as such this has definite consequences beyond the largely theoretical possibility of criminal liability of the persons responsible for the planning and initiation of the invasion" (Gill 2022, 125–126). Secondly, the inhuman acts committed in the course of the invasion, including widespread violation and abuse against civilian population and wanton, large-scale destruction of essential infrastructure, indisputably constitute war crimes and crimes against humanity.

During the Fourth Summit of the Heads of States and Governments of the Council of Europe in Rejkiavík in May 2023, it was underlined that "Without accountability, there can be no lasting peace (…)." Also, they agreed that there is "the need for an unequivocal international legal response for all victims, as well as for the State of Ukraine" and that "Only by respecting the right to truth, to justice, to reparation and to guarantees of non-repetition will it be possible to overcome the past and create solid foundations to build unity in the spirit of harmony and cooperation with respect for human rights, democracy and the rule of law" (Reykjavík Declaration 2023).

[1] The resolution was adopted by a vote of 141 in favour to 5 against (Belarus, Democratic People's Republic of Korea, Eritrea, the Russian Federation, and Syria) with 35 abstentions.

This article aims to present the available options relating to the investigation and prosecution of international crimes committed by Russians in Ukraine. Also, considering that the Polish involvement in these activities has already been substantial, it would be interesting to have an insight into how Poland already has and could, in the future, further contribute to bringing to justice the perpetrators of international crimes committed in Ukraine. This research is based mainly on the analysis of relevant legal provisions. Still, it also places them in the context of activities undertaken on the international plane and refers to current doctrinal proposals.

2. FACTUAL BACKGROUND

On 4th March, 2022, the UN Human Rights Council created the Independent International Commission of Inquiry on Ukraine[2] to investigate violations and abuses of human rights, violations of international humanitarian law, and other crimes that may have been committed in the context of the aggression by the Russian Federation against Ukraine (Human Rights Council Resolution, March 2022). The Commission's tasks are, among other things, to collect, consolidate, analyse, verify, record, and preserve evidence of violations and abuses, to identify individuals and entities responsible for committing international crimes in Ukraine, and to ensure that those responsible are held accountable.

According to the Commission's first report, there were instances of illegal use by the Russian armed forces of explosive weapons, which resulted in wide-area effects caused to residential buildings and infrastructure in populated areas, including schools and hospitals. In addition, indiscriminate attacks, violations of personal integrity, including executions, torture, and ill-treatment, summary executions, and sexual and gender-based violence, where the age of victims ranges from four to eighty-two years were described (Report of the Independent Commission of Inquiry on Ukraine 2022, A/77/533, paras. 38–96). Moreover, children were exposed to violations of their rights, including forced displacement and separation from family members (Report of the Independent Commission of Inquiry on Ukraine 2022, A/77/533, paras. 99–103, 108). Further works of the Commission and the analysis of the collected data indicate that other numerous war crimes and possibly crimes against humanity were committed in the course of the Russian war of aggression (Conference room paper of the Independent International Commission of Inquiry on Ukraine 2023, A/HRC/52/CRP-4, 28–137). Similarly, the latest Commission's report, dated 19th October, 2023, reveals

[2] The Commission is one of the many UN-mandated investigative bodies. Since the mid-2000, they have been increasingly created by various UN organs to answer to situations of serious violations of international humanitarian law and international human rights law, to promote accountability, and to counter impunity.

new violations of international human rights law and international humanitarian law, and corresponding crimes of unlawful attacks with explosive weapons, torture, sexual and gender-based violence, and transfers and deportations of children (Report of the Independent Commission of Inquiry on Ukraine 2023, A/78/540, paras. 16–69, 74–99).

3. ACCOUNTABILITY OPTIONS

The first choice as to who should investigate and adjudicate crimes committed in the territory of Ukraine is certainly the Ukrainian institutions. According to the territorial theory, which remains the essential principle of criminal jurisdiction, the state on whose territory the crime was committed has jurisdiction over the offence (Perkins 1971, 1155). Notwithstanding, the idea that the state's national courts should, as a rule, try crimes committed within the state's territory and against its nationals is central to the general and fundamental principle of international law – the principle of state sovereignty.

The Ukrainian Office of the Prosecutor General operates a central war crimes unit as well as regional war crimes units that focus on investigating crimes related to the current armed conflict.[3] In addition, a specialised unit to deal with conflict-related sexual violence crimes has been established. As of 15th October, 2023, more than 100,000 crimes relating to the conflict, mainly war crimes but also cases of the crime of aggression[4] and propaganda of war, according to articles 436, 437, and 438 of the Criminal Code of Ukraine, are examined.[5] These numbers solely show the enormous burden that lies within the Ukrainian judicial authorities. Ukrainian courts are best placed to adjudge these cases not only because of the territoriality principle, but also due to practical reasons such as their proximity to the evidence, witnesses, and victims, their understanding of the context, and their knowledge of the languages involved (Nuridzhanian 2022).

Furthermore, even though Ukraine is not a State Party to the 1998 Rome Statute of the International Criminal Court (ICC), this Court established criminal proceedings relating to the situation in Ukraine.[6] Ukrainian authorities twice, in

[3] For the text of the law on the Ukrainian prosecution's service, see: https://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1789-12&p=1275121932817014#Text (accessed: 12.12.2023).

[4] Solely one major case of the crime of aggression of the Russian Federation relates to 678 suspects, including ministers, deputies, military commanders, and officials. See https://www.gp.gov.ua/en (accessed: 15.10.2023).

[5] Updated information on the scale of the proceedings is available on the website of the Office of the Prosecutor General of Ukraine: https://www.gp.gov.ua/en. The text of the Criminal Code of Ukraine in English, see https://sherloc.unodc.org/cld/uploads/res/document/ukr/2001/criminal-code-of-the-republic-of-ukraine-en_html/Ukraine_Criminal_Code_as_of_2010_EN.pdf (accessed: 15.10.2023).

[6] For broader analysis, see Kuczyńska (2022).

2014 and 2015, referred to article 12(3) of the ICC Statute, which enables a state not party to the Statute to accept the exercise of jurisdiction of the Court over alleged crimes under the Rome Statute occurring on its territory. After more than five years of preliminary examination, on 11th December, 2020, the ICC Prosecutor Fatou Bensouda announced that there is a reasonable basis to believe that war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine and that she would request authorisation from the Pre-Trial Chamber of the Court to open investigations. However, only after the outbreak of a full-scale invasion did the subsequent ICC Prosecutor, Karim A.A. Khan, announced that he would finally seek authorisation to open an investigation. Usually, it takes some time to decide on this issue in the Pre-Trial Chamber. Fortunately, this step could be omitted in the case at hand due to the action undertaken by 43 States Parties, including Poland, which submitted referrals to the ICC.[7] In such a course of events, it took only hours for the ICC Prosecutor to announce that he would proceed with opening an investigation into the situation in Ukraine. The investigation encompasses any allegations of war crimes, crimes against humanity, and genocide committed on the territory of Ukraine from 21st November, 2013, onwards. On 17th March, 2023, the ICC issued warrants of arrest for the Russian President Vladimir Putin and his Commissioner for Children's Rights, Maria Lvova-Belova, with the allegation of committing war crimes of unlawful deportation and transfer of Ukrainian children from occupied territories of Ukraine to Russia from at least 24th February, 2022 (Annual Report of the ICC to the UN on its activities in 2022/23, par. 16). The ICC investigation is ongoing, and the evidence is being collected. What is also interesting is the overall approach of this investigation that aims to develop multiple, interconnected lines of investigation, engaging in cooperation and coordination efforts with a variety of national and international participants (Annual Report of the ICC to the UN on its activities in 2021/22, par. 53).

The most challenging, not only in the Ukrainian context but also in a general discussion on individual criminal responsibility, is the question of prosecuting the crime of aggression.[8] The crime of aggression is defined in Article 8 bis of the Rome Statute as the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations. Compared to other international crimes, the crime of aggression is specific and even more challenging to prove. To find an individual criminally responsible, direct state action must be established (Hajdin 2022, 4). In other words, it is impossible to hold

[7] The first was the Lithuanian referral and then the joint referral by another 38 Member States, which was later joined by four others.

[8] For an elaborate analysis of this issue, see Grzebyk (2013). Also, compare Van Chaack (2012).

someone accountable for the crime of aggression without confirming that the act of aggression took place.

In the case discussed here, there is no option to proceed with the crime of aggression before the ICC, as neither Ukraine nor Russia are state parties to the Rome Statute. Also, due to the head of state's immunity rule, it is legally impossible to proceed with the trial of State officials in the courts of foreign states. Under international law, there is no exception to immunity in the case of a crime of aggression (ILC Report 2022, 239). It is stressed that "the determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*" (ILC Report 1996, 30). Therefore, the most common proposal as to how to deal with the crime of aggression committed against Ukraine by the political leaders and military commanders of the Russian Federation is the establishment of an international court. There are different proposals, either to create the court based on a multilateral treaty or an agreement with an international organisation (as a special or a hybrid tribunal), or to establish such a tribunal based on the powers of the UN. However, the realisation of either proposal appears problematic. Firstly, it seems impossible for the UN Security Council to adopt a resolution creating such an *ad hoc* tribunal simply due to Russia's veto power. Also, the UN General Assembly powers based on the "Uniting for Peace" resolution must be considered insufficient to establish an efficient international criminal tribunal dealing with the crime of aggression in the discussed context. Legally, it is more probable that a special court could be created by the agreement between Ukraine and the United Nations; here, there is a precedent of the Extraordinary Chambers in the Courts of Cambodia showing that the UN General Assembly has the power to trigger the process of setting up a tribunal. Another issue is the scope of personal jurisdiction of such a court. Some authors suggest broad personal jurisdiction, allowing for the prosecution of all those who, for instance, consciously took part in waging a war of aggression (Grzebyk 2023, 23). However, it should be pointed out that it is more accurate if the jurisdiction *rationae personae* of this court is limited to the most responsible, as a crime of aggression is and should be the crime of leaders. Notwithstanding that the proposals differ in detail, the proponents share a common conclusion: a new international tribunal is essential to ensure justice.

4. THE POLISH INVOLVEMENT

Poland has been engaged in post-aggression activities aiming at supporting and helping Ukraine in many fields. Unsurprisingly, this involvement is also visible concerning the accountability for international crimes committed following the Russian aggression. The act of aggression against Ukraine, a state sharing

a border with Poland, undermines European and international peace and security, and, as such, is directed against the interest of the whole international community.

The Polish criminal law makes conducting criminal proceedings on international crimes committed abroad possible. Article 113 of the 1997 Criminal Code provides a jurisdictional basis for prosecution. This provision introduces into the Polish criminal law the universal jurisdiction principle concerning crimes penalised by the Rome Statute. The universal jurisdiction principle constitutes the basis for prosecuting and punishing persons committing the most serious crimes regardless of where the crime was committed or the nationality of the perpetrator or victims.[9] It is based on the premise that certain international crimes are so heinous that they 'shock the conscience of humanity' such that those who commit them are truly *hostis humani generis*, thus justifying the idea that anyone may exercise jurisdiction over them (Princeton Principles, 23). Furthermore, Chapter XVI of the Criminal Code (Articles 117–126c) enlists the criminal behaviours that essentially amount to crime of aggression, genocide, war crimes, and crimes against humanity, as defined in international law. There is an ongoing Polish investigation into the aggressive war launched on 24th February, 2022, by the authorities and public officials of the Russian Federation against the sovereignty, territorial integrity, and political independence of Ukraine and acts classified as war crimes committed with this aggression by the Russian armed forces.[10] The investigation also covers the activities of the Belarusian authorities that made this state's territory available for committing acts of aggression against Ukraine. It was opened on 28th February, 2022, in the National Prosecutors' Office in Warsaw. What should be emphasised is that, apart from Ukraine, Poland was the first state to initiate criminal proceedings. On the one hand, this investigation must be assessed as bearing symbolic value: the initiation of proceedings by the Polish prosecutor's office not only shows Poland's compliance with international obligations relating to the prosecution of international crimes but, at the same time, constitutes an unequivocal proclamation that the most serious crimes cannot and will not go unpunished. On the other hand, formalising the investigation was the most feasible way to collect evidence in the form of the testimonies of victims and witnesses who had left Ukraine and found help and shelter in Poland.

Until now, the Polish input into collecting evidence on crimes committed in Ukraine has been significant. According to the publicly available information,

[9] For broader analysis, see: Ostropolski (2008).

[10] The official communication of the National Prosecutor's Office on the opening of the investigation mentions Articles 117 (aggressive war), Article 122 (use of prohibited means and methods of warfare), Article 123 (attacks on civilians), and 124 of the Criminal Code (attacks on the cultural property), see https://www.gov.pl/web/prokuratura-krajowa/mazowiecki-pion-pz-pk-wszczal--sledztwo-w-sprawie-napasci-rosji-na-ukraine (accessed: 12.12.2023).

only until February 2023, over 1700 witnesses were interviewed. Also, additional documentary evidence of crimes, such as films and photos, has been collected. What is more, the testimonies of witnesses have allowed for identifying 24 separate instances of murders of civilians, forced deportations, and torture, notwithstanding the establishment of the identity of some of the perpetrators.[11]

Nevertheless, there are no plans to proceed with the proceedings further, with the Polish investigation having primarily auxiliary character.[12] This approach is correct. The Polish prosecutors collect as much evidence as possible that would later be used either in Ukrainian criminal proceedings or in future trials before the ICC or any special tribunal if established.

In addition to the individual activities undertaken by the Polish authorities, there are also collective actions operating at the European Union (EU) level, primarily but not exclusively in the form of a joint investigation team (JIT).

JITs were initiated by the EU in 2002 by the Council Framework Decision of 13th June, 2002, on joint investigation teams, originally "for the purpose of combating international crime as effectively as possible", predominantly terrorism, trafficking in drugs, and human beings. They bring together investigators and prosecutors from the EU Member States and non-EU countries, supported by Europol and Eurojust if needed. Since its introduction, the use of JITs within the EU has expanded, and now they are also created to jointly investigate core international crimes such as genocide, war crimes, and crimes against humanity.

Considering the impact that the situation in Ukraine has on the EU as a whole and its Member States, as well as the data regarding crimes taking place, it is not surprising that a dedicated JIT has also been established and that Poland has been among the initiators of the creation of the JIT on the alleged core international crimes committed in Ukraine. The JIT agreement was signed on 25th March, 2022, by Lithuania, Poland, and Ukraine to enable the exchange of information and facilitate investigations into war crimes, crimes against humanity, and other core crimes committed in the course of the Russian invasion.[13] Successively, it has been joined by Latvia, Estonia, Romania, Slovakia, and the Office of the Prosecutor of the ICC. Then, in March 2023, also US Justice Department entered the agreement,

[11] Information on the results of the investigation was revealed by Prosecutor General Zbigniew Ziobro during a press conference held on 24th March, 2023, at the National Prosecutor's Office in Warsaw, see: *Briefing w sprawie śledztwa dotyczącego napaści Rosji na Ukrainę. Prokuratura Krajowa. Portal Gov.pl* (https://www.gov.pl/web/prokuratura-krajowa/briefing-w-sprawie-sledztwa-dotyczacego-napasci-rosji-na-ukraine) (accessed: 29.10.2023).

[12] Some scholars claim that the Polish courts could conduct trials of the individuals who support the Russian aggression and war crimes (Zontek 2023). Such trials would be ideally in accordance with the Polish law; however, it seems unlikely that Poland would decide not to extradite the potential suspects to Ukraine or to surrender them to an international court, let it be the ICC or a different institution, and instead to adjudge them on its own.

[13] For specific information, see https://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine (accessed: 29.10.2023).

and, on 5th October, 2023, Europol became another participant in the JIT. It is worth mentioning that since April 2023, the JIT has been authorised to examine the alleged cases of genocide in Ukraine.[14]

A JIT, as a form of cooperation, allows for a direct exchange of information and evidence, facilitates working faster and more efficiently, makes it possible to carry out joint operations and investigative measures, and shares technical expertise and human resources. A notable aspect is the financial support provided by the EU to the JIT, as it reduces the impact on national budgets. It is worth mentioning that as a part of the activities undertaken in the framework of JIT, Poland provided considerable technological assistance to Ukrainian judicial authorities. Already, twice, the Polish prosecutors and police have gathered evidence of war crimes in Ukraine using 3D laser scanners.[15] They inspected locations, including civilian buildings and infrastructure sites destroyed as a result of shelling. 3D scanners constitute an innovative, advanced technology beneficial for the reconstruction of events. As such, this kind of evidence is a valuable source of precise data for further criminal investigations.

It should also be noted that Poland is a member of the newly established International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA). The Centre was embedded in Eurojust to support national investigations into the crime of aggression related to the war in Ukraine.[16] It enables independent prosecutors from different states to work together in the same location on a daily basis, exchange evidence quickly and efficiently, and agree on a common investigative and prosecution strategy. What must be underlined is that the work of the ICPA will effectively prepare and contribute to any future prosecutions of the crime of aggression, irrespective of the jurisdiction before which these will be brought.[17] The members of the ICPA include Ukraine and five JIT members states; however, also other states possessing information or evidence relevant to the investigation of the crime of aggression against Ukraine may request their participation. Taking part in this forum also indicates Poland's commitment and meaningful role in dealing with the most severe international crimes.

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[14] https://www.eurojust.europa.eu/news/joint-investigation-team-garners-further-support-icpa-and-agrees-investigate-genocide-crimes (accessed: 29.10.2023).

[15] https://www.pap.pl/aktualnosci/polscy-sledczy-po-raz-drugi-dokumentowali-dowody-rosyjskich-zbrodni-na-ukrainie (accessed: 29.10.2023).

[16] The Centre is a unique form of cooperation based on the EU law provisions on JITs. Also, its creation was preceded by the adoption of Regulation (EU) 2022/838 of the European Parliament and of the Council of 30th May, 2022, amending Regulation (EU) 2018/1727 as regards the preservation, analysis, and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes, and related criminal offences, OJEU L 148/1.

[17] For information on the Centre, its role, and future tasks, see the website of Eurojust, https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine (accessed: 3.11.2023).

5. CONCLUSIONS

In general, investigating and prosecuting international crimes raises significant concerns. They relate to the large number of victims, witnesses, and perpetrators affected by the proceedings. Even with the criminal proceedings already taking place in Ukraine and other states,[18] the numbers may challenge the rights of both defendants and victims to fair and effective trial.[19] Moreover, there are significant legal and political obstacles related mainly to the prosecution of the leadership, especially noticeable in the case of Russia, a permanent member of the UN Security Council.[20]

There is no doubt that atrocities cannot go unpunished. It sounds like a truism, but no lasting peace exists without accountability. Therefore, it is crucial to have all perpetrators of crimes committed during the conflict in Ukraine and anywhere else brought to responsibility. It requires a lot of effort and time. This short research has proven that much has been done in delivering criminal justice since the beginning of the Russian-Ukrainian conflict. The enormous set of evidence has been collected not only directly by the Ukrainian authorities but also by other states; there are ongoing investigations in Ukraine and other domestic jurisdictions, the ICC has its investigation, and a JIT is operating within the EU. Polish involvement is equally visible in many aspects, including the effective participation in activities on the EU forum, the conduct of Polish investigation, and the direct participation in evidence-gathering activities in Ukraine. Here and now, there is time for the whole international community to take the next step and establish an international tribunal on the crime of aggression to close the impunity gap and provide for the responsibility of every individual, irrespectively of their personal capacity, the power of national state, or any other circumstances. Significantly, creating this institution as a direct response to the crimes committed by the Russian leaders will constitute an essential message that every single member of the international community, even the most powerful one, must observe the law and will not escape international justice. However, although the

[18] There are already investigations, for instance, in Canada, the Czech Republic, Estonia, France, Germany, Latvia, Lithuania, Poland, Romania, Slovakia, Spain, Sweden, Switzerland, the United Kingdom, and the USA. For more information, see Conference room paper of the Independent International Commission of Inquiry on Ukraine 2023, A/HRC/52/CRP-4,143.

[19] Therefore, there are such proposals as, for instance, establishing a High War Crimes Court that would complement existing Ukrainian courts, the ICC, and any potential international tribunal for the crime of aggression as a hybrid tribunal. For more information and Draft Law for a Ukrainian High War Crimes Court, see Public International Law and Policy Group, Draft Law for a Ukrainian High War Crimes Court, July 2022, available at https://www.publicinternationallawandpolicygroup.org/draft-law-ukrainian-high-war-crimes-court (accessed: 15.10.2023).

[20] The most legitimate way of dealing with the criminal responsibility for the crime of aggression of the Russian leadership would be the establishment by the UN Security Council of an *ad hoc* tribunal, which is highly unlikely due to Russia's veto power.

idea of bringing Russian leaders to responsibility for crimes is widely accepted, it seems impossible. Already in 1998, the international community established an institution – the International Criminal Court – envisaged as the one that would end impunity. Unfortunately, the impunity gap has not yet been closed more than twenty years later. Despite many efforts, it is difficult to assume that it will be closed in the foreseeable future.

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INTERNATIONAL AND NATIONAL LEGAL PROTECTION OF THE CIVILIAN POPULATION DURING AN ARMED CONFLICT: THE EXAMPLE OF UKRAINE

Abstract. The protection of civilians is a basic ethical, strategic, and legal requirement for the international community and every democratic state, one of the key aspects of any military (combat) action. Such protection should not only be proclaimed, but also serve as a priority. If armed forces during armed conflicts rely on the foundation laid by international humanitarian law and adhere to civilised rules of military (combat) operations, then the damage caused to the civilian population can be minimised. This problem is also important in terms of the international and national legal protection of the civilian population during the international military conflict in Ukraine.

Keywords: civilian population, international law, international humanitarian law, criminal law, International Criminal Court, war crimes, armed conflict in Ukraine

MIĘDZYNARODOWE I KRAJOWE ASPEKTY PRAWNE OCHRONY LUDNOŚCI CYWILNEJ PODCZAS KONFLIKTU ZBROJNEGO: PRZYKŁAD UKRAINY

Streszczenie. Ochrona ludności cywilnej to fundamentalne zadanie społeczności międzynarodowej i każdego państwa demokratycznego, a także cel każdej akcji zbrojnej. Taka ochrona nie tylko jest proklamacją, ale podstawą działań. Jeżeli siły zbrojne posługują się w swych działaniach międzynarodowym prawem humanitarnym i stosują się do cywilizowanych zasad prowadzenia walki zbrojnej, to zagrożenia dla ludności cywilnej mogą być zredukowane. Zagadnienie to jest także kluczowe z perspektywy rozwiązań krajowych i międzynarodowych z zakresu ochrony ludności cywilnej w kontekście międzynarodowego konfliktu zbrojnego na Ukrainie.

Słowa kluczowe: ludność cywilna, prawo międzynarodowego, międzynarodowe prawo humanitarne, prawo karne, Międzynarodowy Trybunał Karny, zbrodnie wojenne, konflikt zbrojny na Ukrainie

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1. INTRODUCTION

"Russia's invasion of Ukraine, in clear violation of the United Nations Charter and international law, aggravating is geopolitical tensions and divisions, threatening regional stability, increasing the nuclear threat, and creating deep fissures in our increasingly multipolar world", UN Secretary-General Antonio Guterres said at the UN Security Council meeting on 20th September, 2023 (UN Secretary-General, 20th September, 2023). As of the end of October, according to the Office of the Prosecutor General of Ukraine, 111,413 military crimes were registered (including: the violation of the laws and customs of war, propaganda of war, planning, preparing or unleashing and waging aggressive warfare, etc.), 16,299 crimes against national security; 680 suspects have been identified, including high-ranking politicians and officials (Ofis Heneralnoho Prokurora Ukrainy 2023). It should be specifically emphasised that the armed conflict between Ukraine and the Russian Federation has caused an immediate and sharp increase in the humanitarian needs of the residents of Ukraine: supplies of essential goods were interrupted, civilians were fleeing the fighting. According to UN estimates, 12 million people will need assistance and protection inside Ukraine in the coming months, and more than 4 million Ukrainian refugees will need support in the neighbouring countries. This requires special attention to the problem of the legal protection of the civilian population of Ukraine, as well as other regions – in particular Nagorno-Karabakh, Gaza – during an international armed conflict.

2. THE LEGAL REGULATION OF ARMED CONFLICTS

The task of international law, as is known, is to facilitate positive social processes in peacetime and to prevent, in every possible way, negative processes in wartime, above all by protecting the innocent civilian population (Buromenskyi 2015, 5–17). Awareness of this has contributed to the development of international humanitarian law (hereinafter referred to as IHL). IHL, which was previously called the "law of armed conflict" ("law of war"), is a set of international legal norms and principles governing the protection of victims of war, as well as reg ulating the methods and means of warfare. In more detail, IHL is a set of rules that aim to protect human persons and property from the threat of damage or destruction during hostilities, and also to limit the choice of belligerents in the means and methods of warfare. Thus, the law of armed conflict provides the balance between the universal principle of humanism and military necessity (Meltser 2020). It is in these two directions that modern IHL has been developing.

IHL was primarily codified in: the Hague Conventions of 1899 and 1907, referred to as "Hague Law," which define the laws and customs of war; four Geneva Conventions of 1949, which provide for the protection of rights of civilian and military prisoners of war, of the wounded, the sick and civilians in and around the combat zone, etc.; two additional Protocols of 1977 to the Geneva Conventions of 1949, referred to as "Geneva Law"; resolutions of the UN General Assembly; Conventions of the Council of Europe; and other important international legal documents. IHL is part of public international law, since its provisions are closely related to other provisions of this independent system of law (Ministerstvo z pytan reintehratsii tymchasovo okupovanykh terytorii Ukrainy 2023). However, according to Jean Pictet's statement, "Humanitarian law is no longer a mere branch of international law but a province in its own right with a wide measure of autonomy" (Pictet 1966, 455).

Thus, IHL applies only to armed conflicts. Through its inherent methods, IHL has created the necessary legal conditions to mitigate the consequences of such conflicts, limiting the choice of means and methods of conducting military (combat) actions, obliging the opposing parties to spare as much as possible those persons who do not participate or have ceased to take part in hostilities. It should be emphasised that the main purpose of IHL is to protect a specific individual during an armed conflict. IHL application covers conflicts of both an international and a non-international nature. It should be emphasised that the rules require all participants in such conflicts – regardless of their role in the conflicts, of the power of their armed forces – to comply with the established rules in order to prevent devastating consequences, including death and injury to civilians.

3. THE DISTINCTION BETWEEN *IUS IN BELLO* AND *IUS AD BELLUM*

Since IHL is sometimes also referred to as the law of armed conflict or the law of war (*jus in bello*), it is important to distinguish between the terms *ius in bello* and *ius ad bellum*, which has traditionally been a subject of investigation and identified as "the two sets of rules" that "necessary apply at different times, at different stages in the deterioration of relations between states… The two sets of rules operate in quite distinct spheres" (Greenwood 1983, 222). *Ius ad bellum* relates to the conditions and provisions for the legitimate use of force in international relations. In general terms, this applies to the following cases: individual or collective self-defence; coercive measures based on the decision or the sanction of the UN Security Council; national liberation wars, etc. In all other cases, resorting to "arms" to resolve disputes is considered illegal. However, in practice, there have been cases where international armed conflicts did not always begin based on the UN Security Council's decision, just as the concept of "national liberation war" and persons taking part in armed conflicts have not always been

clearly interpreted. Regarding *ius in bello,* it applies directly to the conflict itself, assessing ongoing events and the actions of all parties taking part in it. Therefore, emphasis when applying IHL is placed precisely on *ius in bello*, since it is with the help of these provisions that the main goals of humanitarian law are supposed to be achieved. "*Ius ad bellum* is the law governing the right to go to war, while *ius in bello* govern the conduct of that war once it started" (Greenwood 1983, 222). This fundamental distinction is extremely important, since political, ideological, and other technologies may confuse these concepts, which in many ways makes it difficult or impossible to apply the humanitarian components of this law.

4. THE PRINCIPLES OF IHL

It is also worth to briefly mention the principles of IHL as the main ideas guiding principles mirroring its content and orientation. In general, the principles of IHL reflect the state of the legal consciousness of human society, while acting as a norm-forming source (factor). It is important to emphasise, taking into account the specifics of the provisions of IHL, its principles are (should be) implemented into practice not only through the relevant norms, but also directly. States are also obliged to implement the principles of IHL into their national legislation, since otherwise they may be held liable for failure to comply with the principles of international law in general and the principles of IHL in particular, including: I. Universal (general) principles of international humanitarian law. II. Principles concerning the choice of means and methods of conducting military (combat) operations (principles of "Hague Law"). III. Principles ensuring the protection of victims of war (principles of "Geneva Law").

5. THE RELATIONSHIP BETWEEN IHL AND IHRL

Considering the longstanding scholarly discussion about the interplay between IHL and international human rights law (hereinafter IHRL) (Draper 1971; Schindler 1982; Hampson 2008, 550), it is relevant at that point to clarify the relationship between IHL and IHRL, since "the leading force of these discussions is the desire to ensure the protection of a human being in times of armed conflicts to the fullest degree possible" (Hnatovskyi 2017, 271). Accordingly, this relationship is based on a common object – a human being. However, there are certain differences. While IHRL is aimed at protecting the individual from the arbitrariness of, figuratively speaking, the authorities in peacetime, IHL provides protection for the individual (group of individuals) during armed conflicts, seeking to minimise the destructive consequences of such a conflict for people. At the same time, the essentially uniform orientation of the legal regulation of both IHL and

IHRL makes it possible to highlight those provisions that are common and uniform to them: the right to life; non-discrimination; the inadmissibility of torture, cruel, inhuman or degrading treatment and punishment; the inadmissibility of slavery or other servitude; the right to procedural guarantees during judicial procedures, etc. Thus, IHL adapts the human rights law to the conditions of an armed conflict, establishing the maximum permissible minimum of individual rights in such conditions, which the state, its representatives, and other authorised persons must ensure. It is important to take these general provisions into account in relation to the events in Ukraine (Hnatovskii 2017).

In Ukraine, there are different bodies that adapt the provisions of IHL, primarily with the aim of maximising the protection of the civilian population; the leading role is being played by the Ministry for Reintegration of Temporarily Occupied Territories of Ukraine. To achieve such goals, the Ministry's function is to collect, analyse, and summarise information on compliance with IHL in the temporarily occupied territories of Ukraine, as well as adjacent territories, and to make proposals for responding to facts of its violation. In addition, in order to ensure proper implementation of the norms of IHL on the territory of Ukraine – in particular the implementation of the international legal obligations of Ukraine arising out of the "Geneva Law", as well as other international treaties in the sphere of IHL, and taking account of the challenges associated with the armed conflict in eastern Ukraine – there has been established an Interdepartmental Commission on the application and implementation of international humanitarian law in Ukraine by the Resolution of the Cabinet of Ministers of Ukraine dated 26th April, 2017 No. 329 (Pro utvorennia Mizhvidomchoi komisii z pytan zastosuvannia ta realizatsii norm mizhnarodnoho humanitarnoho prava v Ukraini 2017). The work of this commission has facilitated the creation of the platform for identifying the main practical problems in the field of humanitarian law; for determining short-term and long-term priorities for their implementation; for further implementation by all parties responsible; for monitoring the solution to the problems posed and assessing its effectiveness.

6. RESPONSIBILITY FOR THE VIOLATION OF IHL NORMS

Any system of law and any branch of law presupposes a mandatory institution of liability for the violation of the established rules. However, the issue of international legal responsibility in the doctrine of international law and the practice of its application has dealt with certain difficulties. There are many reasons for this, one of which is that the peculiarity of international law presupposes (should presuppose) its effect in sovereign states, while its influence on the latter is often limited and problematic. Therefore, despite the fact that certain mechanisms for implementing responsibility for the violation of

international law have been developed, the process of its coordinated improvement at different levels is permanently going on.

Initially, one should always distinguish between the international legal responsibility of states (other subjects of public international law) and the individual responsibility of individuals who committed an offence, including criminal law. In order to resolve the issue of responsibility for the violation of specific norms of IHL, it is necessary to identify in what capacity the offender acted: as a "private individual," i.e. he/she has acted based on his/her own interests, pursuing his/her own goals etc., or a state "stands" behind his/her actions, i.e. the motives and goals of his/her actions were "produced" by the state. Therefore, the procedures for implementing the responsibility of the state and an individual differ significantly, and thus offences in the sphere of IHL, according to their subject composition, should be divided into two groups: 1) the violation of IHL norms with the state involvement; 2) the violation of IHL norms by an individual (individuals). Given that in both cases an act may be committed by a specific person, the differentiation in these cases, which is going to play a key role in imposing responsibility, requires careful consideration.

The conditions for the responsibility of opposing (warring) states for the acts of their structures and bodies are defined in Article 3 of the IV Hague Convention of 1907 (hereinafter IV HC 1907) and "duplicated" in Article 91 of the Additional Protocol I of 1977 (hereinafter AP I of 1977). In addition, this condition is specified in relation to prisoners of war and civilians in the III Geneva Convention of 1949 (hereinafter III GC 1949) and the IV Geneva Convention of 1949 (hereinafter IV GC 1949), providing that the state in power where such persons are located is responsible for their treatment, and this does not relieve personal responsibility from representatives of this state.

In the doctrine of IHL, two forms of state participation in the violation of IHL norms are known: the so-called "direct" and "indirect" participation. "Direct" participation of the state means the commission of an offence by an organ, representative, official on behalf of the state. "Indirect" state participation includes situations where the state "allows" within its jurisdiction the commission of an offence by individuals who have no formal relationship with the state apparatus. Therefore, failure to take measures to suppress such offences is considered, subject to certain conditions, "complicity", i.e. it is also considered government misconduct.

In general, modern international law provides for two forms of international legal responsibility of states: political and material. Political measures employ restrictions on the sovereignty of the state, temporary external control over all or part of the territory, as well as in certain areas of activity related primarily to military production, financial, and economic activities, etc. Material responsibility is understood, provided by ILC 1949 (Articles 51, 52, 131, 145), as the obligation of the party violating the provisions of this convention

to compensate the damage caused to the injured party. At the same time, the IHL doctrine at one time proposed the concept of the criminal responsibility of states, but it did not receive the necessary support, since, for example, drawing analogies, in the absence of the necessary legal provisions, and interpreting some functions of the Security Council as functions of a criminal court did not prove productive (Fesenko 1998).

In general, the issue of the forms of state responsibility raises a number of questions. For example, among such forms there are: sanctions, which are understood as collective measures of international organisations (in the general understanding of this definition); and countermeasures, i.e. measures taken by the injured state against the offender, including armed reprisals to the extent that they are not prohibited by the rules of IHL.

In connection with the international armed conflict in Ukraine, international communities and individual states have begun to apply such sanctions against Russia. For example, the European Union has imposed sanctions in three main areas: limiting Russia's ability to finance war; imposing "noticeable" economic and political costs on the Russian political elite; depriving Russia of economic support, which is practically implemented in sanctions against individuals, enterprises, and organisations; restriction of visa policy; ban (restriction) of import and export; energy sanctions; transport sanctions; restrictions on financial and business services, etc. The head of the European Commission, Ursula von der Leyen, emphasised that "our sanctions greatly erode Russia's economic base, depriving it of any prospect of modernisation" (Yevropeiska komisiia. Sanktsii, zaprovadzhenni YeS shchodo Rosii cherez vtorhnennia v Ukrainu). There have already been known cases of prosecution for violating these sanctions (FOKUS. Zlochyny YeS: u Yevropeiskii radi vidreahuvaly na sproby obiity sanktsii).

As to the liability of individuals, it should be noted that in the middle of the last century, two important events occurred in the field of IHL: first, the post-World-War-II trials in Nuremberg and Tokyo formally established the personal responsibility of major war criminals for certain acts contrary to international law applicable during armed conflicts. This decision was based on many important statements. For example, one of them was: "People, not abstract entities, commit crimes subject to punishment by applying the sanctions provided for by international law, and only by punishing them can the provisions of international law be strengthened" (Jugement du Tribunal militaire international 1947). Secondly, concepts such as "crimes against peace", "war crimes", "crimes against humanity" were defined and interpreted, which in 1949 were officially enshrined in four GCs of 1949. The consolidation of these concepts made it possible to highlight the concept of a "serious violation" (war crime).

The current state of the institute of responsibility of individuals for violations of IHL norms is characterised by the presence of two models of responsibility: "direct" and "indirect". Historically, the first to emerge was the "indirect" model,

the essence of which is that if the relevant act violates the prohibition of IHL, then the responsibility to punish the person who committed this act rests with a specific state, and the legislative justification for such a decision is enshrined in national legislation, mainly criminal. On the other hand, the "direct" model of responsibility implies punishment of an individual by an international judicial body; that is, the norms of international law do not need national implementation and are applied directly by international courts, tribunals, and other judicial structures (Streltsov 2023).

In this regard, it is important to note that the Rome Statute of the International Criminal Court, which was approved at a diplomatic conference in Rome in 1998 and entered into force on 1st July, 2002, established the competence of this court within the "direct model" of responsibility of individuals, mentioned above, i.e. these provisions do not impose an obligation on states to prosecute war crimes at the national level. However, the peculiarity of this Statute is that it creates a legal regime in which states that have ratified it must show a "desire" to criminalise such acts and prosecute the perpetrators at the national level.

In general, the violation of IHL norms is subject to criminal, administrative, and disciplinary responsibility. It should be noted that the provisions of the GC 1949 and AP (I) 1977 expressly provide that certain serious offences committed during an international armed conflict are to be considered war crimes that include: intentional murders; torture and inhuman treatment, including biological experiments; intentionally causing great suffering or serious injury; damage to health; illegal, arbitrary, and large-scale destruction and appropriation of property not caused by military necessity (for more details, see Articles 50 and 51 of the ILC 1949). According to Art. 147 IV GC, such violations also include illegal deportation (including deportation of children, as happened in Ukraine); movement or arrest of a protected person; taking hostages. A number of serious offences that are considered war crimes are listed in Art. 85 AP I 1977, e.g. making the civilian population or individual citizens the object of attack; carrying out an indiscriminate attack affecting the civilian population or civilian objects, when such an attack is known to cause excessive loss of civilian life or health or cause damage to civilian objects; committing an attack on a person when it is known that he/she has ceased to take part in military (combat) actions, etc. Thus, IHL international humanitarian law provides for individual criminal responsibility for the violation of its provisions (Streltsov 2017). It is necessary to highlight that special responsibility is assigned in this regard to military leaders, who must take all necessary measures to prevent violations of the GC and AP by their subordinates, otherwise they are subject to responsibility within their competence.

In general, as is known, serious violations of IHL (war crimes) are (should be) prosecuted not only by the opposing state, but also by any other state that has the authority to do so (according to the principle of universal jurisdiction).

7. CRIMES AGAINST CIVILIANS IN UKRAINE

As is known, there are many categories of persons who, to one degree or another, are "involved" in international armed conflicts. Among them is the civilian population, which may participate in such conflicts in many capacities: as main victims, the main objects of influence on the part of the warring parties, and the so-called "security shields". Often, illegal influence on this category during armed conflicts gives rise to significant, even tragic consequences for the civilian population. In general terms, the concept of "civilian population" is presented in Article 50 of the 1977 AP(I), part 1 of which states that a civilian is any person who does not belong to any of the categories of persons specified in Articles 4 A, 1, 2, 3, and 6 III GC and in Article 43 of this Protocol, e.g. do not refer to: the personnel of the forces of the parties to the armed conflict; personnel of regular armed forces declaring their allegiance to the authorities or government; militia or volunteer units that are part of these armed forces, etc. Therefore, if a person (group of persons) does not belong to the listed categories of persons, he/she is considered a civilian, and the totality of such persons is considered the civilian population. Part 2 of Art. 50 stipulates that the civilian population consists of all persons who are civilians. Part 3 states that the presence among the civilian population of individuals who do not fall under the definition of civilians does not deprive the population of its civilian character. It should be taken into account that, in general, the civilian population and groups of such population that can be identified within this general group have, along with general definitions, normative legal acts of more special purposes (Legislative Observatory. Rezoliutsiia pro vplyv viiny proty Ukrainy na zhinok vid 5 travnia 2022 roku).

In general terms, significant violations of IHL and national criminal law in the territory of Ukraine since 2014 include: crimes of aggression, war crimes, crimes against humanity and/or crimes of genocide, and other criminal acts that violate the international legal order. As for crimes against the civilian population (not limited to this list), these are: intentional murder; sexual violence; unlawful imprisonment or other deprivation of liberty that violates fundamental rules of international law; torture and inhuman treatment; forced displacement – deportation and/or transfer of civilians, including children; intentionally causing severe suffering or serious bodily injury or harm to health; deliberately targeting civilians; deliberate attacks on civilian objects, including religious, educational, scientific, charitable, and cultural buildings, including museums, art collections; ecocide, crimes against the environment, including attacks on objects and installations containing hazardous factors; deliberate attacks on objects of humanitarian purposes, including health care facilities, as well as places where the wounded and the sick are concentrated; deliberate attacks on civilian infrastructure essential to the survival of the civilian population, including agricultural, food, energy, and/or other resource facilities;

plunder; acts of violence or threats of violence aimed at spreading terror among the civilian population; persecution of any identified group or collective on national, political, ethnic, cultural, religious, or gender grounds or on other grounds specified in international or national legal acts.

In general, as of September 2023, the Office of the High Commissioner for Human Rights (OHCHR) recorded that since the beginning of the armed conflict, civilian casualties have amounted to 27,768 people, including 9,806 deaths. Among the dead: 5,171 men, 3,156 women, 294 boys and 237 girls; the gender of other 29 children and 919 adults has not yet been determined. The OHCHR believes that the actual number of civilian deaths or injuries is significantly higher, as many reports from places where such incidents have occurred still require further confirmation, while information is being received from some places where the fighting continues, and is thus delayed. However, this information is quite enough to once again understand the tragedy of the events in Ukraine, primarily those directly affecting the civilian population.

Taking this into account, experts tried to compile a general list of the 20 most common significant violations (war crimes) of IHL that have already been committed in Ukraine since 24th February, 2022, and which require special attention, since many are directed against the civilian population. Such an initiative resulted in the creation of the following:

1. *The crime of aggression*, which is considered as the planning, preparation, initiation or execution of an act of aggression, which – by its nature, seriousness, and magnitude – constitutes a flagrant violation of the Charter of the United Nations, by a person in a position of actual direction or control of the political or military actions of the State (Article 8 bis of the Rome Statute of the International Criminal Court / ICC). These are the actions that the UN incriminated against Russia in the Resolution 3314 (XXIX) of the General Assembly. By using the armed forces of the Russian Federation against the sovereignty, territorial integrity, or political independence of Ukraine, Russia, according to this UN definition, has committed aggression.

2. *Destruction of Ukrainian cities*. 143.8 thousand houses were destroyed. Among the most affected regions in terms of housing destruction were the following regions: Donetsk, Kiev, Lugansk, Chernigov, and Kharkov. According to Prime Minister Denis Shmygal, Ukraine's losses total about 600–750 billion USD; damage from the destruction of infrastructure facilities alone amounted to 138 billion USD. He announced such figures during a joint press conference with the European Commission President Ursula von der Leyen.

3. *The Bucha tragedy*. Bucha was included in the ranking of war crimes based on the number of destroyed houses, the massacre of the Ukrainian civilian population in this city of the Kyiv region, accompanied by abductions, torture, rape – including children – and looting, all of which shocked the whole world. More than 420 city residents died.

4. *Mass murder in Izyum*. After the de-occupation of the city on 15th September, 2022, one of the largest mass graves since the beginning of the large-scale war was discovered nearby in the forest – about 450 graves. Among the dead were mainly civilians, children, and at least 17 Ukrainian Armed Forces soldiers. Most of those buried died violently from artillery fire, mine explosions, and, less commonly, airstrikes; bodies were also found with a rope around their necks, with their hands tied, with broken limbs and gunshot wounds; several men had their genitals amputated. In Izium, 6 places of detention with the use of torture were organised.

5. *Murder of prisoners in Olenovka*. On the night of 28th–29th July, 2022, explosions on the territory of the former Volnovakha correctional colony No. 120, where Ukrainian defenders were kept, killed 53 prisoners and injured more than 130. At the same time, Russia's representatives immediately stated that the shelling was carried out by the Ukrainian Armed Forces from the American HIMARS multiple launch rocket system. Ukraine denied all accusations and demanded that representatives of the UN and the International Committee of the Red Cross be allowed into the colony.

6. *The shooting of the railway station in Kramatorsk*. 61 people were killed (including five children), 114 were injured as a result of Russian troops shelling the station in Kramatorsk, Donetsk region, on 8th April. The Security Service of Ukraine examination showed that the rocket attack on the railway station in Kramatorsk was carried out from the occupied part of Donbass.

7. *Missile attack on a residential building in the city of Chasov Yar.* On 9th July, 2022, the Russian military attacked the town of Chasov Yar in the Donetsk region with Iskander missiles, firing at least four of them. This was announced by the first deputy head of the Main Directorate of the State Emergency Service in the Donetsk region, Colonel Vyacheslav Boytsov, in a comment to Ukrinform. During rescue operations, the State Emergency Service employees discovered 48 dead (including a 9-year-old boy), while nine were rescued from the rubble. The search for people had lasted five days and involved 323 people.

8. *Missile attack on the Dnieper.* On 14th January, 2023, the Russian army launched missiles at the Dnieper. One of the missiles hit an apartment building; as a result of the strike, 72 apartments were destroyed. According to the regional military administration, 46 people were killed and 80 were injured.

9. *Shelling Kharkov by "Grads" and rockets.* On the fifth day of the conflict – 28th February, 2022 – Russian military personnel fired at several districts of Kharkov using "Grad" multiple launch rocket systems and high-precision missiles: Aleksyyevka, Saltovka, Pavlopol. 87 residential buildings were damaged. As a result of the shelling, 11 people were killed and more than 40 were injured, including five children.

10. *Sexual violence*, which, according to the Office of the Prosecutor General, in the temporarily occupied territories, affected women, men, and children – all

aged from 4 to 85 years. The website of the Ukrainian Helsinki Union for Human Rights contains the material titled "Sexual crimes are probably 100 times more than official statistics", stating that this is one of the types of crimes that have little been investigated in the context of armed aggression during the war. The executive director of the Union Alexander Pavlichenko stated that according to the reports, a hundred crimes of a sexual nature are being investigated: "The real picture is that there are 100 times more of them. We have only about 1–2% of such crimes open."

11. *Strike by X-22 missiles on a recreation centre in the village of Serhiyivka.* As a result of a missile strike on 1st July, 2022, on the urban resort village of Serhiyivka in the Belgorod-Dnestrovsky district of the Odessa region, a nine-storeyed residential building was partially destroyed, followed by a fire in the store attached to it on an area of about 20 square meters. In addition, three-storeyed and four-storeyed buildings of recreation centre "Goji" were destroyed. As a result of the missile attack, 21 people were killed (among the victims was an 11-year-old boy) and 38 people were injured.

12. *Missile attack on the Amstor shopping centre in Kremenchug on 27th June, 2022*. There were more than a thousand people in the shopping centre at the time of the strike; 18 are now known to have died, 57 were injured, and 36 citizens are still being sought.

13. *The kidnapping and forced displacement of Ukrainian children.* According to the Children of War portal, 19,546 children have currently been deported and/or forcibly displaced, of which 386 have been returned (Dity viiny). The Presidential Commissioner for Children's Rights and Children's Rehabilitation, Daria Gerasimchuk, emphasised that such actions are illegal: "They have been preparing for this for a long time… This is part of their 'denazification and denationalisation programme' of little Ukrainians, when they kidnap them and move them, when they change their citizenship…" This is prohibited by the Geneva Convention. At the same time, "Movement of part or the entire population of an occupied territory, both within the relevant territory and beyond its borders" is a war crime under Art. 8(2)(b) Rome Statute. Art. 11 of the Convention on the Rights of the Child obliges "States Parties to take measures to combat the illegal movement and non-return of children from abroad."

14. *Nuclear "terrorism"*, realised primarily due to the threat of a nuclear disaster as a result of damage to Ukrainian nuclear power plants. On 4th March, 2022, the buildings and blocks of Europe's largest nuclear power plant, Zaporizhzhya, were shelled. As a result of the shelling, the first power unit was damaged. On 16th April, three Russian missiles could have hit the nuclear reactor of the South Ukrainian Nuclear Power Plant. On 25th April, two Russian cruise missiles were recorded flying in critical proximity to the nuclear facilities of the Khmelnitsky Nuclear Power Plant. On 26th April, two cruise missiles flew at low altitude over the Zaporizhzhya nuclear power plant. On 5th June, a Russian rocket

flew critically low over the Southern Nuclear Power Plant. On 18th February, 2023, during another massive Russian missile attack on the South Ukrainian Nuclear Power Plant at 8:25 and 8:27, the flights of two enemy cruise missiles were recorded. The missiles moved along the bed of the Southern Bug in the direction of the city of Pervomaisk, the Nikolaev region, and flew dangerously close to a nuclear facility. The threat of falling into a reactor with possible consequences – a nuclear disaster – was, again, high.

15. *Attacks on Ukraine's critical energy infrastructure* began on 10th October, 2022, when 84 air, sea, and ground-based cruise missiles, ballistic missiles, anti-aircraft guided missiles, reconnaissance and attack UAVs of the Shahed-136 type were used. On this day, 2 people were killed, about a hundred were injured as a result of the attacks, 11 important energy structures in 8 regions and the city of Kyiv were damaged, and some regions were de-energised. Since then, there have been 15 more missile strikes. In total, enemy missiles and attack drones fired at critical infrastructure killed 111 civilians, injured more than 200, and destroyed up to a thousand important structures: airports, ports, bridges, oil depots, transformer substations, and power plants.

16. *Forcing citizens to participate in hostilities against their own state.* Even before the start of the armed conflict, on 18th February, 2022, Russia had announced mobilisation in the temporarily occupied territories of the Luhansk and Donetsk regions. Men from 18 to 55 years old were subject to mobilisation. Because of those events, about 70 thousand people were called up in the first five months. The number of deaths is unknown. It should be recalled that for the illegal mobilisation of Ukrainian citizens into the ranks of the armed forces, representatives of Russia will bear criminal liability in accordance with Art. 438 of the Criminal Code of Ukraine or in the International Criminal Court for violation of Art. 8(2)(b)xv Rome Statute.

17. *Airstrike on the Mariupol maternity hospital*, which took place on 9th March, 2022. Three people were killed, including a child, and 17 people were injured.

18. *The "Uragan" shooting of a kindergarten in Akhtyrts*, which took place on 25th March, 2022. In general, the residential area, bomb shelters, and the Solnyshko nursery garden were damaged. One child and two teachers were killed, 17 children were injured.

19. *The destruction of civilian infrastructure, cultural heritage sites, and health care institutions.* On the territory of Ukraine, more than 3 thousand educational institutions were destroyed; 95 religious sites; 173 medical institutions; 907 cultural institutions; 168 sports facilities; 157 tourism sites.

20. *The blockade and destruction of Ukrainian ports* in connection with the attempt of the world community to organise a "grain corridor" and provide grain to different countries. Such a blockage has caused direct losses to the agriculture

of Ukraine, which, to date, already amount to more than 4 billion 300 million USD (Polishchuk 2023).

It should be borne in mind that this information is constantly changing, but most of these crimes appear to affect the civilian population, which must be constantly taken into account.

8. THE PRACTICAL IMPLEMENTATION OF THE PROVISIONS OF IHL AND NATIONAL CRIMINAL LAW

According to the requirements of international law, any state must search for war criminals and bring them to justice, regardless of the citizenship of the perpetrators of the crimes and the citizenship of their victims, or the place where the crime was committed; or must extradite the perpetrators and organisers of crimes in accordance with the law of the state to which the request for extradition is made for the purpose of legal prosecution. In addition to national institutions that consider such cases, there are also such institutions functioning at the international level. The imposition of responsibility on individuals on the basis of international legal provisions by international judicial structures, as indicated above, is called the international criminal responsibility of individuals. The practice of international criminal justice for violations of IHL had begun in accordance with the Treaty of Versailles, adopted after the First World War, and the Regulations of the Nuremberg and Tokyo International Military Tribunals after the Second World War, and, subsequently, continued in accordance with the decisions of the UN Security Council: on the creation of the Tribunal for the Former Yugoslavia, which was adopted on 22nd February, 1993, and on the creation of such a Tribunal for Rwanda, which was adopted on 8th November, 1994. Further, on 15th–17th June, 1998, a Diplomatic Conference was held under the auspices of the UN, at which the Rome Statute of the International Criminal Court was adopted. All this indicates that over the past decades, a criminal justice system has developed in cases related to violations of IHL, but the last events in the world require its constant development and improvement.

Taking account of the above, let us consider the experience of Ukraine. Recognising Ukraine's legal obligations to prosecute international crimes and the need to ensure effective investigation in this regard, primarily concerning crimes against the civilian population, on the territory of Ukraine since 2014, relevant authorities have structured a plan and have implemented the necessary measures. Along with a range of national activities, these structures have been strengthening cooperation with foreign and international partners to ensure institutional capacity as well as operational and technical efficiency to promote speedy and impartial justice and to hold perpetrators accountable. This, in particular, includes: cooperation with the Office of the Prosecutor of the International

Criminal Court to ensure comprehensive investigation and/or prosecution of international crimes in accordance with the principle of universality and complementarity (Polyakovska 2023); cooperation within the framework of the Joint Investigation Team (JIT) to investigate the commission of international crimes on the territory of Ukraine (Reznikova 2023). The parties to the agreement on the creation of the JIT include Ukraine, the Lithuanian Republic, Poland, the Estonian Republic, the Latvian Republic, the Slovak Republic, and Romania. Eurojust (Ukrainform 2023) and the Office of the Prosecutor of the International Criminal Court are also parties to this agreement; the development of the International Centre for the Prosecution of the Crime of Aggression (ICPA) as an operational centre for documenting, storing, sharing, and analysing evidence for the prosecution of the crime of aggression became an important step prior to the establishment of the Special International Tribunal (Ukrainform 2023a). Other examples of collaboration involve: partnership with the International Serious Crimes Advisory Panel, established by the United States, the European Union; and the United Kingdom to provide strategic advice as well as operational and technical assistance in the investigation and prosecution of international crimes (SShA, YeS i Velyka Brytaniia proponuiut praktychnu pidtrymku Ukrainy u zabezpechenni vidpovidalnosti za voienni zlochyny); cooperation with the Council of Europe in accordance with the Action Plan for Ukraine 2023–2026 "Resilience, Recovery and Reconstruction", aimed at supporting the recovery process in Ukraine in order to strengthen the sustainability of state institutions, strengthen the rule of law, and protect fundamental rights (Ukrainform 2023b); collaboration with the Office of the Special Representative of the UN Secretary-General on Sexual Violence in Conflict and the UN Group of Experts on the Rule of Law and Sexual Violence in Conflict to strengthen national capacity to investigate and prosecute crimes of conflict-related sexual violence, and ensure that survivors of sexual violence have access to a comprehensive support system (Ofis Heneralnoho prokurora. Eksperty Misii OON obhovoryly pidtrymku diialnosti Koordynatsiinoho tsentru ta dopomohu postrazhdalym vid seksualnoho nasylstva); cooperation with the US Department of Justice under a bilateral Memorandum of Understanding to promote prosecution of war and other crimes through appropriate investigations and prosecutions in each country (Ofis Heneralnoho prokurora. Heneralni prokurory Ukrainy ta SShA pidpysaly Memorandum pro vzaiemorozuminnia); the introduction of the Coordination Centre for Support of Victims and Witnesses, which is the beginning of the formation of a nationwide mechanism for supporting victims and witnesses of war and other international crimes in accordance with Concept 4 of its development (Lex. Novi praktyky pidtrymky poterpilykh ta svidkiv).

The implementation of these measures expectedly facilitates the effective, fair, and prompt investigation of international crimes and the prosecution of those responsible, as well as the application of international and domestic remedies,

including adjudications in accordance with the rule of law, damages, and other compensation to victims.

It is hoped that activities intended by Ukrainian judicial and other law enforcement bodies in collaboration with international judicial institutions, international organisations, foreign states, non-governmental organisations, and society will ensures the effective investigation and prosecution of persons guilty of these crimes. In general terms, the basic norms of international law – in particular, "Geneva Law" and "Hague Law"; Convention on the Prevention and Punishment of the Crime of Genocide, 1948; European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; International Covenant on Civil and Political Rights 1966; Convention on the Elimination of All Forms of Discrimination against Women 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Convention on the Rights of the Child 1989 and Optional Protocol on the Involvement of Children in Armed Conflict 2000; the Rome Statute of the International Criminal Court of 1998 and the Convention for the Protection of All Persons from Enforced Disappearance of 2006, etc. – may serve as the basis for ensuring a comprehensive and impartial investigation.

The use of effective means of criminal proceedings, including through partnerships with national organisations, foreign states, international judicial institutions, and justice institutions, is ensured by fair and transparent criminal prosecution of persons guilty of committing international crimes, as well as compensation for damage to persons affected by these crimes.

The principles (basic provisions) underlying such activities are the following: ensuring criminal prosecution as an integral component of transitional justice; compliance with the high ethical and professional standards, carrying out its functions independently and impartially; respect for the presumption of innocence, the right to a fair trial; the equality of the parties; the independence of judges and the binding nature of final judicial decisions, as well as support for the fundamental values of the European Union such as democracy, equality, the rule of law, and human rights; compliance with the principles of independence when interacting with any external entities, including governmental and international organisations; providing support and assistance to victims at all stages of criminal proceedings, in particular avoiding repeated "traumatisation"; ensuring the guaranteed right of victims to participate in criminal proceedings; interaction with civil society, etc.

All this requires the mandatory implementation of an effective organisational structure, which should cover: all national authorities responsible for the prosecution of international crimes based on a clear distribution of complementary functions and responsibilities at the national, regional, and local levels; effective coordination of the activities of authorities, pre-trial investigation bodies, and other entities involved in the investigation of international crimes at these levels; initiating legislative changes to ensure effective prosecution of international crimes

at both the national and international levels, providing compensation and redress to victims; the introduction of uniform standards of pre-trial investigation for each type of international crimes committed in Ukraine. These standards should be developed and adapted specifically to Ukraine also with the assistance of lawyers with experience in the fight against international crime by introducing a system of prioritisation and selection of criminal proceedings based on clear and transparent criteria, which will ensure fair justice within a reasonable time as well as the protection of the interests of particularly vulnerable groups, in particular victims of sexual violence in conflict, children, etc.

A separate area is the introduction of a comprehensive system for advanced training of prosecutors and investigators based on national and international standards. In modern conditions, the mandatory implementation of unified innovative IT solutions in the investigation of international crimes is required to ensure the high quality of collection, preservation, and analysis of evidence. It is necessary to change the system of communication between judicial authorities, law enforcement agencies, and society. Particular attention must be paid to ensuring the support and protection of civilian victims and witnesses. In this, it is necessary to: introduce a proactive approach to identifying witnesses and victims for the purposes of criminal proceedings on charges of international crimes; improve mechanisms to ensure the safety of witnesses and victims during pre-trial investigations as well as court proceedings; to provide effective coordination with other governmental and non-governmental organisations, as well as with authorised bodies of foreign states and institutions of international justice in order to strengthen the support and protection of victims and witnesses; to implement and develop a mechanism for supporting victims and witnesses of war and other international crimes, including a referral mechanism based on the creation of institutional mechanisms between the Coordination Centre for Support of Victims and Witnesses, law enforcement agencies, ministries and departments, as well as other support services for taking protective measures and providing security, counselling, and other assistance to witnesses and victims; implement specialised IT solutions to manage and effectively coordinate efforts to identify, protect, and provide quality support to victims and witnesses, which will also ensure effective communication between all parties involved in the processes of the identification, protection, and support of victims and witnesses.

A separate area is the development of sustainable partnerships and effective interaction between international organisations and foreign partners with civil society for the purpose of effective prosecution for international crimes with the participation of international judicial institutions and justice institutions, including the ICC, the Special International Tribunal for the Prosecution of Crimes of Aggression, and also effective assistance to foreign courts in carrying out criminal prosecutions for international crimes committed on the territory of Ukraine, in accordance with the principle of complementarity. It is also necessary to ensure

sustainable coordination and cooperation with international and interstate bodies, including Eurojust, Europol; search for mechanisms for compensation for damages for international crimes committed on the territory of Ukraine; ensure constant interaction and exchange of information with national and international non-governmental organisations involved in the process of documenting international crimes and/or supporting victims; implement a mechanism to coordinate support provided by international donors and partners to ensure effective prosecution of international crimes.

The implementation of such plans should contribute to: improving the quality of recording evidence collected during investigative and other procedural actions, properly ensuring procedural guarantees for participants in criminal proceedings; increasing access to justice for victims and witnesses both nationally and internationally, ensuring their protection and support; an increase in the number of national and international investigations into international crimes related to the armed conflict in Ukraine; an increase in the number of completed trials as well as persons brought to justice for international crimes related to the armed conflict in Ukraine; strengthening the trust of the public as well as national and international partners in the prosecutor's office and pre-trial investigation bodies of international crimes

9. CONCLUSIONS

It should be noted that leading international organisations are constantly working to establish the causes of armed conflicts and contribute in every possible way to the political, peaceful resolution of the existing conflicts. It should be borne in mind that conflicts are a direct violation of human rights, an attack on human life and health, and other human values, despite the fact that respect for human rights is the main component of the stable development of the world and the progressive development of humanity.

The response of the world community and every civilised state to armed conflicts also presupposes the uncompromising prosecution of those responsible for such conflicts, and primarily their organisers. At the same time, bringing to justice should always, especially in countries with transition economies, have three mandatory components: a qualified investigation, a credible accusation, and a well-founded and motivated decision (sentence). It is this combination of preventive and protective measures that should help maintain global law and order.

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