

Special Issue: The War in Ukraine and its Long-Term Consequences for Security and Human Rights

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Introduction to the Special Issue

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The full-scale invasion of Ukraine has moved into its third year. While Russia's invasion in February 2022 took many by surprise, so too did Ukraine's resolute defense and the unity of the West in standing up to Moscow's aggression. But how and when will this war end? And is it possible to rebuild European security?

This special issue of Security and Human Rights takes a long view on what has turned into a long war. In addition to this introduction, four substantive articles address a range of issues related to both security and human rights as well as the potential role of the OSCE in rebuilding a post-war security order. These articles have already appeared on the Security and Human Rights website, but have been combined into a special issue to cluster several articles on the topic of Ukraine and how Russia's invasion has had an impact on core issues that are covered by this journal such as human rights, the OSCE, as well as other topics that are relevant to the war in Ukraine and how to end it, such as sanctions.

The original motivation for putting together this special issue was that some members of the editorial board, more than a year ago, thought (but maybe they were merely hoping, like all of us) that by the end of 2023 the war would be over and that there would be opportunities to look at how to rebuild security and cooperation in Europe. Unfortunately, at the time of writing this introduction (July 2024) there is no end in sight to the war. But the day will come, and when it does many of the topics discussed in this special issue will be highly relevant, if they are not already. Therefore, rather than just looking back at the recent past, this special issue can also provide inspiration when looking to the future.

The first article of this special issue looks at the challenge of Ukrainians who have been deported to Russia, and how to bring them back. Onysiia Syniuk notes that the forcible transfers and deportations of Ukrainians already began on 18 February 2022, prior to the full-scale invasion of Ukraine by the Russian Federation on 24 February, with the announcement of evacuations in the territories of Donetsk and Luhansk regions.

However, since then, the process of forcible transfers/deportations gained momentum, and was enforced in all the territories occupied by Russia. Syniuk asserts that despite Russia referring to the displacements as evacuations, examining the grounds invoked for these evacuations and the way the process was and is carried out, arguably shows that the displacements fail to comply with the rules on evacuation under international humanitarian law and in fact amounts to forcible transfers and deportations.

In her article, Syniuk provides a comprehensive analysis of the process of forcible transfers and deportations of Ukrainians, conducted by Russia, including the timeline, geography and the policy designed to enable the process. The categories of people forcibly transferred and deported, as well as the violations they experienced prior, during and following the displacement are highlighted in order to determine the specific needs of the different groups involved in the process, including in relation to their potential future repatriation. Examining the decisions issued by Russian and occupation authorities, as well as the details of the process of forcible transfers and deportations in the different regions of Ukraine occupied by Russia, help determine a pattern and the planned nature of the act. The article concludes that the crime of forcible transfer and deportation is an ongoing one, and while the documentation efforts have been successful, issues arise with accountability and restitution. Syniuk concludes by calling for renewed pressure on Russia to comply with its obligations, as well as the urgency of devising practical ways of ensuring that people who want to return are able to do so and are assisted once they return.

On a related topic, Nader Nadery and Victoria Kerr look into lessons learned from trying to hold the Union of

Soviet Socialist Republics (USSR) accountable for human rights violations during its occupation of Afghanistan. In February 1989, the USSR left Afghanistan following a ten-year invasion. Although an Action Plan for Peace, Reconciliation and Justice was drafted, in the quest for peace, justice for victims of the atrocities was never prioritised by authorities and the international community. Thirty-three years later, on 24 February 2022, President Putin of the Russian Federation announced the commencement of a ‘special military operation’ in Ukraine. Even as the invasion continues, questions remain as to how Ukraine will approach and implement transitional justice. Although there are clear differences between the invasions, if history is to be instructive, the authors point out that there is much to be learnt from the USSR invasion of Afghanistan, the response to it, and the Soviet legacy apparent in the Russian invasion of Ukraine which are of relevance to the transitional justice process in Ukraine and the international rule of law.

The authors note that Russia’s tactics in Ukraine, as in Syria and Chechnya, are similar to those used by the Red Army in Afghanistan, particularly the use of bombardments that cause ‘indiscriminate carnage’ to civilians and civilian infrastructure. They also highlight a pattern of conflict-related sexual violence. This begs the question of how to bring perpetrators to justice and how to uphold the right to a remedy and reparation for victims of gross violations of human rights.

The authors note the high number of actors who are gathering evidence in Ukraine about human rights violations. However, the vast number of cases makes the documentation process complex. Furthermore, Russia is not part of the International Criminal Court nor is it a member of the Council of Europe, and thus far cases before the European Court of Human Rights and the International Court of Justice in relation to the situation in Ukraine have been unenforceable against Russia.

Difficulties in addressing atrocities carried out by the USSR in Afghanistan as well as other countries in other contexts show the limitations of the current international system. Furthermore, political will is often lacking, which results in the selectivity of states in upholding international law and human rights commitments. Drawing on these historical perspectives, this article aims to generate further discourse on peace, justice and accountability for victims, ensuring past mistakes are not repeated.

The authors argue that the focus on accountability and justice for human rights violations in Ukraine could be an opportunity to bring back a stronger focus on victims and a closer link between human rights and security. They warn that reactionary and selective action will not prevent future illegal invasions nor civilian suffering in Ukraine or elsewhere.

Russia’s aggression against Ukraine as well as human rights violations have triggered a resolute response from the West. This includes several rounds of sanctions against Russia, particularly by the United States, the United Kingdom and the European Union. But after more than two years, how effective are they? Larissa van den Herik and Peter van Bergeijk assess the impact of sanctions, particularly what they describe as “autonomous sanctions” by individual states and the EU (without an underlying obligation by the UN Security Council to do so) in addition to institutional sanctions imposed by international organizations (such as expelling or suspending Russia as a member) and corporate self-sanctioning: sanctions by private sector actors that either divested or exited from Russia.

The authors underscore that the aim of sanctions has been to maximize the cost of war for Russia and to ensure Putin’s strategic failure, as well as to signal resolute defense of the norm that borders cannot be

changed by force. This is what Oona Hathaway and Scott Shapiro have described as “outcasting” in their book *The Internationalists*. The intention is to punish Russia for what it has done, try to change Moscow’s behaviour, and deny Russia the benefits available to being part of certain clubs such as the G7 and the International Olympic Committee.

However, as the authors point out, the impact of the sanctions has been lower than anticipated; indeed the IMF forecasts that the Russian economy will grow by more than two percent in 2024. President Putin has not changed his behaviour, Russia’s economy has not collapsed, and Russia’s war machine is still rolling. The authors attribute the limited impact of sanctions to a number of factors. The first is that sanctions work better against democracies than autocracies; the pain threshold of the latter is higher because leaders with a strong grip on their country pay less attention to public opinion. Secondly, Russia has found ways to adjust, not least in finding alternative customers to buy its oil and gas – particularly in Asia – and enhancing trade with “friendly countries” (not least for tech imports). The authors also caution that the opaqueness of Russian data and national accounting practices may mask the real impact of sanctions on the Russian economy. Furthermore, the perceived robustness of the Russian economy is partly due to a major increase in industrial production for the defense industry.

Therefore, while sanctions from the West and others have demonstrated resolve and unity in defending the norms of the post-1945 international order, they also show how sanctions in themselves are insufficient to end the war. They will have to be constantly adjusted and adapted, there will have to be greater use of secondary sanctions against enablers, and sanctions will have to be used in combination with other means in order to affect change. Unfortunately, moves by the West to bolster the military defense of Ukraine show the extent to which economic sanctions have been insufficient in stopping Russia’s aggression.

Indeed, more than two years into the full-scale invasion, the signs are of escalation rather than de-escalation. Both Russia and the West are in an arms race and there is a boom in the manufacturing of war material and ammunition. Almost all arms control instruments have been dismantled. Russia has moved nuclear weapons into Belarus. The West is delivering increasingly more sophisticated weapons systems to Ukraine. President Macron of France has not ruled out sending ground troops to Ukraine.

In this security environment, is there a place for the OSCE or cooperative security? Walter Kemp argues that reports of the OSCE’s death are an exaggeration. However, without a doubt, the organization is in trouble: in the past few years, all ten principles of the Helsinki Final Act have been violated. There is war in Europe instead of cooperation. Since decisions in the OSCE are taken by consensus, the polarized geopolitical environment is making it difficult to agree on anything – from the agenda of meetings to who should hold leadership positions in OSCE institutions. No unified budget has been adopted since 2021. Nonetheless, Kemp argues that the OSCE, one of the few remaining European security organizations where Russia and the West can talk and seek to manage relations peacefully, is still alive. There is a place for both the OSCE and cooperative security, at least in the post-war context. Kemp suggests that the OSCE should be considered to be on standby rather than on life support and that participating States, or at least the organization’s leadership, should work on a cooperative agenda that would provide the OSCE with a strategic direction so that it is prepared and well-positioned for being a key forum for managing relations between Russia and the West when the time is ripe. However, if and when security and peace are to be restored in Europe, it is time to start planning now: history shows that it usually takes a crisis to reform the multilateral system as witnessed in 1815, 1919 and 1945. But the security structures and arrangements that emerged after those wars were months if not

years in the making, for example at the Congress of Vienna, Versailles as well as Dumbarton Oaks and San Francisco. Debates and drafts on a new order were already being carried out (among the Allies) before the old one fell away. Kemp also explains that cooperative security is not appeasement and suggests using the 25th anniversary of the Helsinki Final Act in 2025 as a way of reminding the public, parliamentarians and politicians about OSCE principles and commitments, the importance of dialogue and the link between human rights and security. Kemp concludes that the OSCE faces its biggest crisis since 1975 yet also its biggest opportunity since 1990. With effective leadership and enough buy-in from participating States the OSCE could become a key venue for rebuilding some degree of predictability and order in Europe.

We hope that these articles can trigger debate and contribute to fostering ideas on how to enhance security and protect human rights at this difficult time in Europe.

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Rapidly approaching deadline: Bringing back Ukrainians deported to Russia

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Abstract

The Russian Federation has committed numerous grave violations of international human rights law and international humanitarian law since it launched its full-scale aggression against Ukraine on 24 February 2022. The forcible transfers and deportations of Ukrainians – the focus of this article - however already began a few days earlier, on 18 February 2022, with the announcement of evacuations in the territories of Donetsk and Luhansk regions, occupied before 2022.

Since then, the process of forcible transfers/deportations gained momentum, and was enforced in all the territories occupied by Russia after 24 February 2022. Despite Russia referring to the displacements as evacuations, examining the grounds invoked for these evacuations and the way the process was and is carried out, arguably shows that the displacements fail to comply with the rules on evacuation under international humanitarian law and in fact amounts to forcible transfers and deportations.

This article seeks to provide a comprehensive analysis of the process of forcible transfers and deportations of Ukrainians, conducted by Russia, including the timeline, geography and the policy designed to enable the process. The categories of people forcibly transferred and deported, as well as the violations they experienced prior, during and following the displacement are highlighted in order to determine the specific needs of the different groups involved in the process, including in relation to their potential future repatriation. Examining the decisions issued by Russian and occupation authorities, as well as the details of the process of forcible transfers and deportations in the different regions of Ukraine occupied by Russia, will help determine a pattern and planned nature of the act. Analysing the consequences of the displacement for the people deported highlights the urgency of setting up a mechanism of their return. The article concludes that the crime of forcible transfer and deportation is an ongoing one, and while the documentation efforts have been successful, issues arise with accountability and restitution. The entire international community should be mobilised to condemn and pressure Russia into stopping these unlawful practices and ensure the return of deported Ukrainians.

1. Introduction

The Russian Federation has committed numerous grave violations of international human rights law and international humanitarian law since it launched its full-scale aggression against Ukraine on 24 February 2022. The forcible transfers and deportations of Ukrainians – the focus of this article - however already began a few days earlier, on 18 February 2022, with the announcement of evacuations in the territories of Donetsk and Luhansk regions, occupied before 2022.

Since then, the process of forcible transfers/deportations gained momentum, and was enforced in all the territories occupied by Russia after 24 February 2022. Despite Russia referring to the displacements as evacuations, examining the grounds invoked for these evacuations and the way the process was and is carried out arguably shows that the displacements fail to comply with the rules on evacuation under international humanitarian law and in fact amount to forcible transfers and deportations.

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In Section 2, an overview will be given of the number of Ukrainians deported, provided by different sources, and with an estimate on how accurate these are. Section 3 will include the legal framework applicable to displacements during an armed conflict, including permissible grounds for the transfer of the population and how they apply to the situation at hand. Section 4 will then examine aspects of these transfers that point to their planned nature, making displacements not the means (for ensuring the safety of the population), but the goal. Section 5 will be focused on the different groups of people deported, especially the vulnerable groups, such as those under 18 and those confined to specialized institutions, as well as the varying challenges they face in leaving the place they were deported to and reaching Ukraine or other countries. In Section 6 the “forcible” nature of the transfers, namely what constitutes force and how consent can be invalidated will be further examined. Section 7 will identify other violations that are committed during displacements. Section 8 will subsequently look into the different qualifications the forcible transfers and deportations might fall under. Finally, in Section 9, apart from drawing conclusions, the article will offer recommendations on what further steps are needed and what the involvement of the international community should be in ceasing the violations and assisting the return of the deported people.

2. The issue of numbers

During a speech held on 6 October 2022, Ukrainian President Zelensky noted that more than 1.6 million

Ukrainians have been forcibly deported to Russia¹, though how this estimate came about remains unclear. More specifically about children: a number of 19 546 children have been deported according to information gathered by the National Information Bureau of Ukraine,² with 4 390 of them being orphans and children deprived of parental care.³

According to UNHCR data, as of 30 June 2023, there were 2.852,395 million border crossings from Ukraine since 24 February 2022 into Russia.⁴ This figure has not changed since the last update on 31 December 2022 and no later data is available, which indicates the UNHCR has not received any further information from the Russian authorities.

Russia itself reports disproportionately bigger numbers - the latest available information indicates a total of 5.4 million Ukrainian “refugees”, including 744 000 children.⁵

Estimating the number of people displaced from the occupied territories of Ukraine to Russia is essential in order to devise a comprehensive support and return program, as well as to set up an accountability and compensation mechanism. However, there are several reasons preventing an accurate account.

Russia, against its obligations,⁶ refuses to provide accurate information. The numbers indicated above, reported in Russian media, can arguably not be viewed as reliable, considering the systematic infringement of freedom of speech in the country, as well the possibility of inflated numbers for Russian propaganda. Moreover, these numbers are neither explained, not supported by any further data. Russia does not provide additional information on whether these are just recorded border crossings to Russia from the territory of Ukraine, or people registered for shelter and refugee programs. The status of these “refugees”, especially children, is also unknown - there is no segregation of data on the number of children traveling with parents, those from specialised institutions for children deprived of parental care or children who have relatives in Ukraine and were staying in boarding type institutions. None of this information is directly communicated either to the Government of Ukraine or any other third party, such as other States or international organisations with a mandate to ensure the safety of and care for these people. The last official information

1 ‘We need your support to bring back peace faster - address by the President to the participants of the session of the General Assembly of the Organization of American States, which is ongoing in Lima’, 6 October 2022, available at: <https://www.president.gov.ua/en/news/nam-potribna-vasha-pidtrimka-shob-priskoriti-nastannya-miru-78305> (last accessed 23 June 2023).

2 The “Children of War” platform, created by the Ukrainian Ministry of Reintegration and the National Information Bureau on behalf of the Office of the President of Ukraine, provides up-to-date, consolidated information about children who suffer as a result of Russia’s war against Ukraine (killed, wounded, missing, deported) and those who have been found and rescued. Quantitative indicators are updated daily by law enforcement agencies, available at: <https://childrenofwar.gov.ua/en/> (last accessed 29 January 2024).

3 ‘National Information Bureau gathers data on deported Ukrainian children’, 28 March 2023, available at: <https://minre.gov.ua/2023/03/28/nacjonalne-informacijne-byuro-nakopychuye-dani-pro-deportovanyh-ukrayinskyh-ditej/> (last accessed 24 July 2023). Operational Data Portal, Ukrainian Refugee Situation, UNHCR, available at: <https://data.unhcr.org/en/situations/ukraine> (last accessed 29 January 2024).

4 Operational Data Portal, Ukrainian Refugee Situation, UNHCR, available at: <https://data.unhcr.org/en/situations/ukraine> (last accessed 29 January 2024).

5 ‘The number of refugees from Ukraine and Donbas in Russia surpassed 5.4 million’, TASS, available at: <https://tass.ru/obschestvo/17248303> (last accessed 24 July 2023).

6 Article 49 of the Geneva Convention (GC) (IV) relative to the Protection of Civilian Persons in Time of War provides that the Occupying Power undertaking transfers or evacuations shall inform the Protecting Power of any transfers and evacuations as soon as they have taken place. According to Article 11 of GC (IV), in the case no Protecting Power has been designated (as it is in the case of this armed conflict), the International Committee of the Red Cross or any other impartial humanitarian organization should be designated as a substitute. Therefore, the information on any transfers and evacuations by the Occupying Power should be provided to them.

the UNHCR reported dates as far back as 30 June 2023 and the figure has not changed since 31 December 2022. The latest reports by international organisations and missions also indicate it is a Russian practice to systematically refuse to provide any verified information.⁷

Ukraine has no feasible way to get the full numbers by itself. Ukrainian authorities have no access to the occupied territories and have no presence in Russia. Ukraine has also severed diplomatic relations with the Russian Federation,⁸ therefore there are no Ukrainian diplomatic missions in Russia. Moreover, Russia has refused to accept Switzerland's offer to represent the interests of Ukraine in Russia.⁹

There has been a history of displacing Ukrainians from the territories occupied by Russia since 2014, particularly Crimea.¹⁰ However, with the full-scale invasion in February 2022, the policy adjusted. In advance of the full-scale invasion, on 18 February 2022, occupation authorities in the occupied territories of the Donetsk and Luhansk regions announced the "evacuation" of the local population to Russia.¹¹ And the "evacuation" announcements appeared as soon as the Russian forces took control of new territories. Information on transfers of the local population from Mariupol¹² and the Kharkiv region¹³ appeared as early as March of 2022.

3. Legal analysis

The crime of forcible transfer or deportation occurs when the perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons from the place they were lawfully present in to another State or location, by expulsion or other coercive acts.¹⁴ The distinction between the two depends on the way of the transfer: the crime of deportation provides that the victims were displaced across a de jure state border, or, in certain circumstances, a de facto border and forcible transfer provides for displacement of persons within national boundaries.¹⁵

The prohibition of forcible transfer and deportation is enshrined in treaty, as well as customary international

7 Report of the Independent International Commission of Inquiry on Ukraine A/77/533, 18 October 2022, available at: <https://documents.un.org/doc/undoc/gen/n22/637/72/pdf/n2263772.pdf>, para. 20 (last accessed 25 July 2023).

8 'Ukraine severed diplomatic relations with Russia, which treacherously attacked it; our country will defend itself and will not give up its freedom - Volodymyr Zelenskyy', 24 February 2022, available at: <https://www.president.gov.ua/en/news/ukrayina-rozirvaladiplomatchni-vidnosini-z-rosiyeyu-yaka-p-73133> (last accessed 25 July 2023).

9 'Russia says Switzerland cannot represent its interests in Ukraine', SWI, 11 August 2022, available at: <https://www.swissinfo.ch/eng/politics/russia-says-switzerland-cannot-represent-its-interests-in-ukraine/47819330> (last accessed 25 July 2023).

10 'CRIMEA BEYOND RULES. Thematic review of the human rights situation under occupation.' - Special issue - Forcible Expulsion of the Civilian Population from the Occupied Territory by Russia, 2018, available at: https://www.helsinki.org.ua/wp-content/uploads/2018/07/5Kren_fin.pdf (last accessed 25 July 2023).

11 "'LPR' and 'DPR' announce the evacuation of civilians to Russia', TASS, 18 February 2022, available at: <https://tass.ru/mezhdunarodnaya-panorama/13758699> (last accessed 25 July 2023).

12 'Donetsk oblast Prosecutor's office opened an investigation into cases of forcible transfer and deportation from Mariupol. In particular, in March of 2022 Russian armed forces under the guise of evacuation forcibly transferred 12 underage patients of the Mariupol Oblast children's bone tuberculosis center to the territory occupied prior to February 24. 14 more children from the family type children's home along with their three guardians were brought from Mariupol to Rostov region in Russia.' Prosecutor General's Office of Ukraine, 11 April 2022, available at: <https://www.gp.gov.ua/ua/posts/primusova-evakuaciya-ditei-z-mariupolya-do-rf-tapevdorespublik-rozpocato-rozsliduvannya> (last accessed 25 July 2023).

13 Testimony recorded by ZMINA in Ruska Lozova, Kharkiv region, February 2023.

14 ICC, Elements of Crimes, 2013, Article 7 (1) (d) Crime against humanity of deportation or forcible transfer of population.

15 Prosecutor v. Jovica Stanišić and Franko Simatović, Case No. IT-03-69-T, Judgement (TC), 30 May 2013, para. 992.

law. Article 49 of Geneva Convention IV relating to deportations, transfers and evacuations provides that “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”

The prohibition of forcible transfer and deportation does have one exception – evacuation, which has to be carried out on specific grounds, as well as in an appropriate manner.

The only permissible grounds for evacuation are as follows:

- a) If the security of the population so demand, or
- b) If imperative military reasons so demand.¹⁶

These grounds are not only specific, but also exhaustive. Based on the wording of Article 49 of Geneva Convention IV, prohibiting forcible transfers and deportations regardless of motive, only the transfer of population, invoked by any of the two permissible grounds provided in the Convention, can be considered an evacuation. Displacement based on any other grounds is a violation of international humanitarian law and might amount to the crime of forcible transfer or deportation.

It is also important to note that a State designating the transfer as an evacuation does not in itself make such a transfer lawful, unless the grounds for it to be considered evacuation are present.¹⁷

Russia continuously claims the transfer of population to be evacuations, invoking both grounds. Therefore, it is important to establish if the relevant requirements are met.

As regards the first condition: the security of the population might be threatened if an area is in danger as a result of military operations or is liable to be subjected to intense bombing,¹⁸ or the humanitarian situation on the territory is so dire as to require the removal of civilians from the area.¹⁹ However, the security of the population cannot be used as a justification for the transfer if the active hostilities in the territory have already ceased when the transfer occurs.²⁰

In the Kharkiv and Kherson oblasts Russian forces announced “evacuations” long before the Ukrainian counteroffensive started.²¹ Russian forces also urged civilians to evacuate, claiming Ukrainian forces would

16 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 49, para. 2.

17 Prosecutor v Blagojević & Jokić, Case No IT-02-60-T, Judgement (TC), 17 January 2005, para. 618.

18 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Commentary of 1958, Article 49 - Deportations, transfers, evacuations.

19 The Prosecutor v. Radovan Karadžić, Case No IT-95-5/18-T, Public Redacted Version of Judgement, 24 March 2016, para. 492.

20 Prosecutor v. Radislav Krstić, Case No IT-98-33-T, Judgement (TC), 2 August 2001, para. 525.

21 On 3 August 2022 the Kharkiv regional prosecutor’s office announced they opened an investigation under Article 438 of the Ukrainian Criminal Code (“violation of the rules and customs of war”) concerning the deportation of civilians from Kozacha Lopan, Kharkiv oblast, to Russia, available at: https://khar.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=317463&s=print. The liberation of the village by Ukrainian forces started on 11 September 2022.

“level the village to the ground”, which appeared to be disinformation - no attack occurred²² in several instances.²³ Removing civilians from areas with no active hostilities at the moment and under false pretences does not amount to genuine concern for the security of the population.

In the case of the security of the population reasoning there is another important safeguard: the security of the population ground can not be invoked if the threat that caused the displacement is itself the result of the perpetrator’s own unlawful activity.²⁴ This is particularly important in the case of displacing the residents of Mariupol, as the humanitarian crisis in the city, which might have been a sufficient ground for evacuation, was caused by indiscriminate and disproportionate attacks by Russian forces.²⁵ In another example, before evacuation has been announced in Kherson oblast, the threat of the Kakhovka Hydroelectric Power Plant being blown up by the Ukrainian Armed Forces was used to spread fear among the local population,²⁶ with no substantive evidence for that claim and evidence suggesting it was actually Russian forces that were planning to destroy the Plant upon their retreat.²⁷ On 6 June 2023, the Power Plant under Russian control blew up, and although independent investigation is impossible, tentative evidence suggest it could only be blown up from the inside.²⁸

As regards the second condition: the concept of imperative military reasons is less clearly defined. For interpretation purposes, a descriptor such as “overriding” military reasons was used.²⁹ Considering the general prohibition on transfers, the approach to interpreting imperative military reasons should arguably include a high standard for a military operation to be considered “imperative” - an operation essential to the whole campaign that cannot be achieved by any other means except transferring the population. The proportionality principle should also be applied in determining whether the harm caused to the civilian population by the displacement can justify the military advantage gained by this act.

Vladimir Putin personally stated it was necessary to “remove civilians from the active hostilities zone in Kherson”.³⁰ After that, people in the Kherson oblast were evacuated to the left bank of Dnipro river and the way back was blocked by the occupation administration.³¹ The occupation administration claimed the move was

22 Testimony recorded by ZMINA in Lyptzi village, Kharkiv oblast, February 2023.

23 A similar testimony claiming disinformation about an alleged attack by Ukrainian forces to make civilians leave was also recorded by ZMINA in Kozacha Lopan, Kharkiv oblast, February 2023.

24 Prosecutor v. Milomir Stakic, Case No IT-97-24-A, Appeal Judgement, 22 March 2006, para. 287.

25 Report of the Independent International Commission of Inquiry on Ukraine to the Human Rights Council (A/HRC/52/62), 16 March 2023, available at: <https://www.ohchr.org/en/hr-bodies/hrc/iicir-ukraine/index>, para. 31 (last accessed 25 July 2023).

26 Russian General Surovikin claimed that the Ukrainian Armed Forces are preparing an attack on the plant to damage the dam, 18 October 2022, Kommersant, available at: <https://www.kommersant.ru/doc/5620635> (last accessed 25 July 2023).

27 Russian Offensive Campaign Assessment, Institute for the Study of War, 21 October 2022, available at: <https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-october-21> (last accessed 25 July 2023).

28 ‘Why the Evidence Suggests Russia Blew Up the Kakhovka Dam’, The New York Times, 16 June 2023, available at: <https://www.nytimes.com/interactive/2023/06/16/world/europe/ukraine-kakhovka-dam-collapse.html> (last accessed 29 January 2024).

29 Prosecutor v Blagojević & Jokić (Trial Chamber Judgment), para. 598.

30 ‘Putin urged to evacuate Kherson residents’, News.Ru, 04 November 2022, available at: <https://news.ru/vlast/putin-prizvalevakuirovat-zhitelej-hersona-iz-zony-boevyh-dejstvij/> (last accessed 25 July 2023).

31 ‘Today is the last day of organized evacuation from the right bank of Kherson oblast to the left bank’, Kiril Stremousov, head of Kherson occupation administration, Telegram channel, 7 November 2022, available at: https://t.me/Stremousov_Kirill/692 (last accessed 25 July 2023).

voluntary, as there was no “critical situation” at hand and evacuation was being conducted for the “safety of civilians” and to “give the military the opportunity to perform their duties”. The area, from which civilians were removed, was meant to be made into a Russian defense line.³²

The displacement of civilians in order to conduct regular military actions does not amount to imperative military reasons and violates the grounds for evacuation.

Another requirement arguably violated by the Russian Federation is for the transfer, unless strictly necessary, to occur within the bounds of the occupied territory. Considering that displacement in itself is a violation of the right of the members of the population to remain in their homes, in the territory they are lawfully present, surrounded by their community, without interference, evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement.³³ Unless the whole occupied territory can be considered dangerous,³⁴ people should be moved within occupied territory. While initially people from the Kherson region were moved to the left bank of the river and Crimea, they were later transferred to territories within Russia in absence of any material reasons for such a move.

Russia arguably also violates the obligation to transfer the evacuated persons back to their homes as soon as hostilities in the area in question have ceased.³⁵ In fact, it is actively taking measures to prevent the possibility of such a return at any point in the future: displacing people to far-away regions of Russia, often not letting them know about the final destination to which they were transferred prior to boarding or constantly changing the information,³⁶ preventing travel from Russia³⁷ and shelling Ukrainian cities to such an extent they become unlivable.³⁸

4. Planned and intentional nature of displacement

The transfer of the Ukrainian population also appears planned in advance. The government of the Rostov region in Russia, which borders Ukraine, announced the opening of 188 temporary accommodation facilities for the “people of Donbas” as early as 20 February 2022.³⁹

32 “There is almost anarchy here’. Kherson resident on “evacuation” of his neighbors to Russia, hryvnia returning to shops and removal of monuments’, Current time, 3 November 2022, available at: <https://www.currenttime.tv/a/u-nas-pochti-anarhiya-zhitelhersona-ob-evakuatsii/32114063.html> (last accessed 25 July 2023).

33 *Supra* n. 18.

34 Final Record of the Diplomatic Conference of Geneva of 1949, Volume 2, Section A, p. 759.

35 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 49 - Deportations, transfers, evacuations.

36 Testimony of a resident from Mariupol recorded by ZMINA in Tallinn, Estonia, February 2023.

37 According to testimonies recorded by ZMINA, people reported being denied tickets outside of Russia on different grounds - them having only Ukrainian passports, no passports for traveling abroad or the danger of COVID pandemic in Europe.

38 ‘Bilohorivka and Popasna are wiped off the map: thousands of hits, completely broken infrastructure – head of Luhansk Oblast Military Administration’, *Ukraine Media Center*, 12 January 2023, available at: <https://mediacenter.org.ua/bilohorivka-and-popasnaare-wiped-off-the-map-thousands-of-hits-completely-broken-infrastructure-head-of-luhansk-oblast-military-administration/> (last accessed 25 July 2023).

39 “40 thousand people evacuated from LPR and DPR in two days’, according to the temporarily acting head of the Russian Ministry of Emergency Situations’, *Red Line*, 20 February 2022, available at: <https://www.rline.tv/news/2022-02-20-iz-dnr-i-lnr-za-dva-dnyaevakuirovalis-40-tysyach-zhiteley/> (last accessed 25 July 2023).

On 12 March 2022, the Government of the Russian Federation issued Regulation №349 providing for a system of distributing Ukrainian citizens, who “were forced to leave the territory of Ukraine” and “arrived in the territory of the Russian Federation on a mass and extraordinary basis” among the regions of Russia.⁴⁰ Notably, the division indicated zero persons to be sent to Moscow and Saint-Petersburg, while apart from the large number being accepted by regions along the border, more than 2000 were to be sent to remote regions such as Murmansk and Krasnoyarsk, thousands of kilometers away from Ukraine.

The first reports about filtration camps, an integral part of the Russian displacement process, operating fully in the occupied territories, appeared very quickly, already in March of 2022,⁴¹ with locations and a comprehensive system of interrogation and checks put in place. “Filtration” procedures were conducted at all the checkpoints while entering or exiting a town or a village in the occupied territory. They typically included inspections of cars, personal belongings, seizure of telephones and computer equipment, fingerprinting, taking photos, as well as interviews with Russian military (apparently with the participation of FSB officers). “Camps” were the second level of filtration, mostly located in the occupied territories of Luhansk and Donetsk regions. People spent a day or several days there waiting to receive a “certificate” about passing the filtration or be detained for a more detailed check.⁴²

Apart from the organised campaign of displacing people to Russia, it can be asserted that there is also a pattern discernible of attacking civilians attempting to leave on their own⁴³ and making it impossible for people to evacuate to the Ukrainian controlled territory by tricking them into going to Russia,⁴⁴ refusing humanitarian corridors and creating artificial queues at the checkpoints leading to Ukraine.⁴⁵ Discouraged from going to Ukrainian controlled territory and fearing for their lives in the occupied territory, civilians felt they had no other choice but to leave for Russia. Some of them with a clear goal to try and leave for the EU countries immediately, some of them just trying to escape the impossible situation and leaving further planning for later.

It can be argued that the number of people transferred within such a short time period, the filtration system that was quickly set up and started functioning immediately, as well as the national policies established in Russia concerning “refugees” from Ukraine, including a complicated system of temporary accommodations and an official distribution of people among the regions of Russia, indicate this was not a response to the

40 Resolution of the Government of the Russian Federation No. 349 dated 12 March 2022, On the distribution of citizens of the Russian Federation, Ukraine, DPR, LPR and persons without citizenship permanently residing in Ukraine, DPR and LPR, forced to leave the territory of Ukraine, DRP and LPR and arriving in the territory of the Russian Federation in an emergency mass manner, between the federal Subjects, available at: <http://publication.pravo.gov.ru/Document/View/0001202203120005?index=4&rangeSize=1> (last accessed 25 July 2023).

41 System of Filtration: Mapping Russia’s detention operations in Donetsk oblast, Yale School of Public Health, Humanitarian Research Lab pp. 26, 30: <https://hub.conflictobservatory.org/portal/sharing/rest/content/items/7d1c90eb89d3446f9e708b87b69ad0d8/data>.

42 ‘Deportation of Ukrainian citizens from the territory of active military operations or from the temporarily occupied territory of Ukraine to the territory of the Russian Federation and the Republic of Belarus’, Ukraine 5 AM Coalition, 1 October 2022, available at: https://zmina.ua/wp-content/uploads/sites/2/2023/01/deportation_eng.pdf (last accessed 29 January 2024).

43 *Supra* n. 7, para. 56-59 (last accessed 25 July 2023).

44 Testimony recorded by ZMINA indicates that people were told that the evacuation bus would be going to Zaporizhzhia region and instead it brought people to a filtration camp further in occupied territory to undergo filtration before crossing to Russia.

45 ‘6000 cars blocked at checkpoint in Vasylivka’, Ukrainian Pravda, 8 October 2022, available at: <https://www.pravda.com.ua/eng/news/2022/10/8/7370945/> (last accessed 25 July 2023).

influx of people, but rather a planned set of measures.

If the evacuation itself was in fact the goal, then of course the excuse of the protection of the civilians or of imperative military necessity cannot be used.⁴⁶

While the situation not meeting the requirements of an evacuation does not immediately mean it also amounts to a forcible transfer or deportation, the situation at hand arguably contains all the necessary elements as defined for the crime of forcible transfer or deportation by the International Criminal Court (ICC):⁴⁷

- a) The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts;
- b) Such person or persons were lawfully present in the area from which they were so deported or transferred;
- c) Such person or persons were protected under one or more of the Geneva Conventions of 1949.⁴⁸

5. The “forcible” nature of the transfer

While the fact of the displacement has been widely established, the “forcible” part of it is a matter that needs further examining. It is important to note that among the numbers of people transferred to Russia there are those, who expressed genuine consent to be removed from the territory and brought to Russia with the intention to go to Russia.⁴⁹ However, they were not the only category displaced.

“Forced” is not limited to physical force. It also includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or the act of taking advantage of a coercive environment.⁵⁰ In its core, “forced” refers to the absence of a genuine choice and that also means that when the consent was given, or even a request to be moved was expressed, it is necessary to determine in every specific case whether it was actually done voluntarily.⁵¹ The circumstances, such as illegal detention, threats, the use of force and other forms of coercion and the fear of violence, might deprive the consent of any value, making the displacement unlawful.⁵² There is a difference between willingly leaving the area on the one

46 *Supra* n. 20, para. 527.

47 For the purpose of this analysis, the defining elements of the crime of forcible transfer or deportation, both as a war crime and as a crime against humanity, were used.

48 *Supra* n. 14, Article 7 (1) (d), Crime against humanity of deportation or forcible transfer of population; Article 8 (2) (a) (vii)-1 War crime of unlawful deportation and transfer.

49 “We Had No Choice”: “Filtration” and the Crime of Forcibly Transferring Ukrainian Civilians to

Russia, Human Rights Watch, 1 September 2022, available at: <https://www.hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians> (last accessed 25 July 2023).

50 *Supra* n. 20, para. 529.

51 *Supra* n. 19, para. 489.

52 Prosecutor v. Milorad Krnojelac, Case No IT-97-25-A, Appeal Judgement, 17 September 2003, para. 229.

hand and making a decision to leave, based on the certainty that it is impossible to survive otherwise, on the other.⁵³ As regards the meaning of “certainty”, arguably it should not matter whether there was a real danger to a specific person. Important is that there was an overall atmosphere of coercion and danger and the person reasonably believed to be in danger in those circumstances.

6. People deported

It is important to consider the different categories of people displaced as they are affected differently and it will require different measures to facilitate their return.

People over 18 years old, who are not receiving care in medical institutions and are not in places of deprivation of liberty, in general, have more freedom of movement. That is, however, still limited by regulations on distributing Ukrainian citizens all over Russia, limiting their ability to stay in regions along the border with Ukraine, as well as the general atmosphere of coercion and lack of resources for the victims. A lot of people lose their belongings and finances due to destruction of property and when they are transferred to remote regions of Russia, they lack the resources to flee. Usually they rely on assistance from individual volunteers and volunteer initiatives, such as Helping to Leave.⁵⁴ The duration of stay in Russia for these people is a significant concern, as there are cases of them being rejected from entering the countries bordering Russia on the ground of staying in the country too long.⁵⁵

Another category, a significantly more vulnerable one, is people over 18 years old who are placed in specialized institutions, whose freedom to move and to choose is legally limited. This concerns people in medical institutions dedicated to care for mental disabilities, but also people in detention facilities. Reports indicate there is a pattern of Russian authorities transferring people from these facilities within the occupied territory and to Russia.⁵⁶ The Ministry of Justice of Ukraine has reported around 2000 detainees have been transferred from occupied territories of the Kherson oblast.⁵⁷ Some of them were transferred to detention and penitentiary facilities in the Volgograd, Stavropol and Krasnodar regions in Russia.⁵⁸ Apart from general safeguards, which cover the protection of people in specialized institutions, by transferring detainees, Russia is also violating its obligations to detain persons in the occupied country, and, in case of conviction, to ensure they serve their sentence in the country.⁵⁹ As mentioned previously, people in confinement, who were

53 *Supra* n. 20, para. 530.

54 Helping to Leave is a volunteer initiative helping people evacuate from areas of military conflict, helping Ukrainians affected by war, including those who are forcibly deported to the temporarily occupied territories of Ukraine and to Russia, available at: <https://helpingtoleave.org/en>.

55 M. Orbegozo. ‘Ukrainians in Russia undertake harrowing journey to Estonia’, Deutsche Welle, 13 October 2022, available at: <https://www.dw.com/en/estonia-turns-away-ukrainian-refugees-at-eu-border-after-harrowing-wait/a-63412334> (last accessed 23 June 2023).

56 ‘Deportation of custodial settings from occupied territories of Ukraine’, ZMINA Human Right Center, 17 April 2023, p. 5, available at: https://zmina.ua/wp-content/uploads/sites/2/2023/07/deportation_f_eng_web.pdf (last accessed 29 January 2024).

57 Olena Vysotska, Deputy Minister of Justice of Ukraine, Ukrinform, 3 March 2023, available at: <https://www.ukrinform.ua/rubric-ato/3677438-olena-visocka-zastupnica-ministra-usticii.html> (last accessed 23 June 2023).

58 Olga Romanova tells why Russia took Ukrainian prisoners out of occupied territories,

Current Time, 1 December 2022, available at: <https://www.currenttime.tv/a/rossiya-vyvozit-zaklyuchennyh-iz-kolonyi-na-okkupirovannyh-territoriyah/32156992.html> (last accessed 23 June 2023).

59 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 76 – Treatment of detainees.

transferred, are often not allowed to contact anyone and their relatives are not informed about the transfer, which makes it harder to find and identify them. As the options of people in confinement to act of their own accord are limited, it is important that their relatives notify the authorities about the lack of contact and that the relevant authorities request information on these persons based on their registries. However, this issue is once again made complicated by Russia not providing information on any of the people transferred to the relevant authorities in Ukraine. The role of the international community and international organisations in continuously pressuring Russia to perform its obligations to this end is therefore crucial.

Another extremely vulnerable category is children. Due to their status, they are unable to consent to any transfer by themselves. Either Russian soldiers or the children's caretakers, willingly or in the absence of other options, make the decision to move the children to Russia.

Recently the permanent representative of Russia to the UN declared that the transfer of children occurred "for their safety".⁶⁰ However, the evacuation of children has a different, much stricter set of rules. Considering how vulnerable this category of the population is and the need for stability for their growth and upbringing, the prohibition on transferring of children is even stricter.

This means the ground of safety can only be applied for evacuation of children within the occupied territory - it is a violation to transfer children on the grounds of safety across the border.

The only lawful ground for a displacement of children across the border is provided for in Additional Protocol I to the Geneva Conventions: temporary evacuation where compelling reasons of the health or medical treatment of the children so require.⁶¹ The State carrying out the transfer also has a range of obligations:

- 1) the written consent to such evacuation from parents or legal guardians, or in case they cannot be found, persons who by law or custom are primarily responsible for the care of the children, is required;
- 2) the evacuation must be conducted in agreement with the State whose nationals are being evacuated;
- 3) to facilitate the return of the children to their families and country from which the children were evacuated, a card indicating important information for identification with photographs has to be drawn up for every child and submitted to the Central Tracing Agency of the International Committee of the Red Cross.

Not only can the "safety" ground not be invoked in the case of transferring the children to a foreign country, also none of the abovementioned obligations have arguably been met by Russia.

The transferred children also have different status - some of them still have relatives in Ukraine, which eases the process of finding and returning them, as relatives can contact the appropriate authorities. However, it

60 'The permanent Representative of Russia to the UN Nebenzia claims security is a prerequisite to return children taken from Ukraine', Kommersant, 20 March 2023, available at: <https://www.kommersant.ru/doc/5887517> (last accessed 23 June 2023)

61 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 78 – Evacuation of children.

can be asserted that Russia, on its part, does not provide information by itself and is not looking for relatives, except for searching within the Russian state and National Red Cross Society database.⁶² This indicates the intention to reunite children with relatives only in case the latter are Russian.

The first report on an entire child care facility being transferred to Russia appeared on 19 February 2022, hence before the full-scale invasion: 225 children from Donetsk boarding school №1 were brought to Russia.⁶³ The campaign continued in the Kherson oblast as well,⁶⁴ assisted by the occupation administration.⁶⁵

Children staying in these facilities are orphans, with or without other relatives in Ukraine, but also children whose parents are alive, but were deprived of parental rights. All of them, without distinction, have been taken to Russia and placed in child care facilities or Russian families are offered guardianship over these children. The changes to Russian legislation now also allow the President to grant foreign children Russian citizenship in a procedure where the change of citizenship is initiated by the guardians of the child, if they are Russian citizens themselves, or even heads of the institutions, in which children stay.⁶⁶

The UN Independent International Commission of Inquiry on Ukraine has concluded that the situations concerning the transfer and deportation of children, within Ukraine and to the Russian Federation respectively, violate international humanitarian law, and amount to a war crime.⁶⁷

7. Consequences of forcible transfers and deportations for the people displaced

The forcible transfers and deportations have both short-term and long-term consequences for the people whose rights were violated and continue to be violated as long as they remain uprooted from their homes and communities, unable to get back.

“Getting back” in this instance includes not only physically returning to the territory of Ukraine, which has its complications, mentioned above, but also adapting to the new reality in Ukraine they will be returning to. The longer people deported stay in Russia, the harder it will be to cross the Russian border with other countries, as a long term stay invites questions of loyalty, and the harder it will be to get back to life in Ukraine. Staying in Russia, especially considering the policy of distribution of Ukrainians all over the country, separating them from the border to their home country and from each other, preventing the creation of a community among them, means severing their connections to Ukraine. Taking into account the stress they endured in the

62 ‘The Moscow region will help with the placement of orphans from the LPR/DPR in foster families

in Russia’, 360, 6 April 2022, available at: <https://360tv.ru/news/mir/podmoskove-pomozhet-s-ustrojstvom-detej-sirot-iz-ldnr-v-priemnye-semi-v-rossii/> (last accessed 25 July 2023).

63 ‘Rostov Oblast has started receiving evacuees from Donbass’, VestyRU, 19 February 2022, available at: <https://www.vesti.ru/article/2679189> (last accessed 25 July 2023).

64 ‘The Russians took 46 small children from Kherson to Simferopol’ says head of Kherson Oblast Military Administration’, Ukrainian Pravda, 21 October 2022, available at: <https://www.pravda.com.ua/news/2022/10/21/7372970/> (last accessed 25 July 2023).

65 ‘Today a children’s orphanage has been fully evacuated from Kherson’, Kiril Stremousov, head of Kherson occupation administration, Telegram channel, 21 October 2022, available at: https://t.me/Stremousov_Kirill/567 (last accessed 25 July 2023).

66 Decree of the President of the Russian Federation №11 from 04.01.2024 on “Defining specific categories of foreign citizens and stateless persons eligible to apply for the citizenship of the Russian Federation”: http://publication.pravo.gov.ru/document/0001202401040003?index=3&fbclid=IwAR08rRV9qWHw1_pQ3TovbT4IbkNnf0XOn1ifDXvKpvPaXynL5ffUCHsNeKU (last accessed 22 February 2024).

67 *Supra* n. 27, para. 102 (last accessed 25 July 2023).

territories Russia displaced them from, as well as the stress of the displacement itself and being brought to Russia with barely any means to survive⁶⁸ and going through the process of adapting there, it is not difficult to imagine a lot of them will find it hard to risk everything again trying to get back to Ukraine.

Moreover, a longer stay in Russia demands formal paperwork and very often getting a Russian passport, which is an issue for crossing the border into third countries bordering Russia, as well as leaving Russia itself, as a Russian passport in the Russian legal framework burdens the person with all the citizenship obligations – including possible conscription. The mentioned simplified procedure of granting Russian citizenship to children with Russian guardians or those placed in Russian children’s institutions is arguably the final step in preventing their return to Ukraine for good. These children will be declared Russian and not included in any lists of transferred children, while Ukraine has an even harder time of identifying them.

The impact of a long stay in Russia for children, especially unaccompanied ones, is arguably extremely damaging. They are separated from Ukrainian language, culture and education, which creates a divide with their peers, who stayed in Ukraine, but is also worsened by the fact they are immersed in Russian language, culture and education, as well as heavy military propaganda. The impact it will have on the identity of children, especially the smallest ones, who did not have time to develop one yet at all, is immeasurable. Unaccompanied children and people over 18 in specialized institutions have no way to return on their own at all and require the involvement of the Government of Ukraine and pressure on Russia to enforce the return.

We should also consider “getting back” in terms of a longer stay. Around 5.1 million persons are currently internally displaced within Ukraine.⁶⁹ Those who were deported to Russia came from territories under heavy fire. For a lot of these people there is nowhere to return to in Ukraine – the territory they lived in is either still occupied, constantly shelled or there is no housing and property to return to. Starting a journey from Sakhalin oblast to end up in a center for internally displaced persons is a difficult choice to make and carry out. The overall situation in Ukraine is also a factor to be taken into consideration: daily air raid alerts, air strikes, the impact war has on every sphere of life, from income and job market to children’s education process and mental health.

The physical return of people deported, however hard it is, will only be the first step. Helping them find their place in a new reality in Ukraine will take years and the planning should arguably start now.

8. Other violations accompanying the displacements

It is asserted that the displacement from the occupied territory of Ukraine has been preceded and was followed by other violations. The violations people are victim or witness to pressure them into fleeing, leaving no other option but to “evacuate” to Russia or be subjected to these violations. Taking this into account, the violations might constitute coercion, especially if different types of violations occur subsequently or simultaneously, creating an atmosphere of terror.

There are records of at least the following violations occurring in the occupied territories:

68 ‘Survive and escape: why so few Ukrainians deported to Russia return’, BBC New Ukraine, 16 August 2022, available at: <https://www.bbc.com/ukrainian/features-62316233> (last accessed 29 January 2024).

69 Ukraine – Internal Displacement Report – General Population Survey Round 13 (11 May - 14 June 2023), IOM, available at: <https://dtm.iom.int/reports/ukraine-internal-displacement-report-general-population-survey-round-13-11-may-14-june-2023?close=true> (last accessed 27 July 2023).

- a) willful killing;⁷⁰
- b) cruel, inhuman, degrading treatment and torture;⁷¹
- c) enforced disappearances,⁷² especially of people active in the community (teachers, civil servants, activists and volunteers);⁷³
- d) sexual and gender-based violence;⁷⁴
- e) threats of use of force;⁷⁵
- f) forced labor.⁷⁶

Deliberate attacks against civilians and against civilian objects⁷⁷ can also be considered as those contributing to the coercive atmosphere and forcing people to flee.⁷⁸

The fact these violations are occurring in different regions, perpetrated, therefore, by different military units and not prevented or encouraged by their commanders, arguably indicates a pattern. The March 2023 report of the UN Independent International Commission of Inquiry on Ukraine indicates that certain violations, such as the use of torture, may amount to crimes against humanity.⁷⁹

Violations continue during the displacement as well. It can be argued that Russia violates its obligations of proper care towards the persons that are transferred, specifically ensuring, “to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.”⁸⁰

Recorded cases of violations of this obligation include not providing nutrition during the transfer and not

70 Russian Retreat Reveals Signs of an Atrocity in a Ukrainian Village, The New York Times, 29 November 2022, available at: <https://www.nytimes.com/2022/11/29/world/europe/ukraine-russia-pravdyne-grave.html> (last accessed 25 July 2023).

71 Isobel Koshiw, ‘Kherson torture centres were planned by Russian state, say lawyers’, The Guardian, 2 March 2023, available at: <https://www.theguardian.com/world/2023/mar/02/kherson-torture-centres-were-planned-by-russian-state-say-lawyers> (last accessed 25 July 2023).

72 *Ibid.*

73 ZMINA as of 11 March 2023 has recorded 503 cases of enforced disappearances of activists in the occupied territories of Ukraine.

74 *Supra* n. 27, paras. 78-85.

75 Testimony recorded by ZMINA from several residents of Mariupol in February 2023.

76 *Supra* n. 44, p. 18; testimony recorded by ZMINA in Kharkiv region in February 2023.

77 Report of the OSCE Moscow Mechanism’s mission of experts entitled ‘Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine (1 April – 25 June 2022), 14 July 2022, available at: <https://www.osce.org/odihr/522616>, p. 6 (last accessed 25 July 2023).

78 ICC, Prosecutor v. Muthaura, Kenyatta and Ali, “Decision on confirmation of charges”, ICC-01/09-02/11, 23 January 2012, para. 244.

79 *Supra* n. 27.

80 *Supra* n. 37, Article 49.

providing satisfactory nutrition at the temporary accommodation facilities,⁸¹ accommodating people at places not suitable for the stay and for the number of people brought there,⁸² as well as separating members of the same family, especially parents and children.⁸³

The filtration process itself perpetuates a number of violations, including the aforementioned separation of families. Invasive checks, which include forced nudity, are carried out at all the checkpoints and filtration camps.⁸⁴ The filtration process also includes excessive data collection, such as taking photos, fingerprints, and downloading information, especially contacts, from mobile phones.⁸⁵ There are also cameras placed in filtration camps, where people stay for several days.⁸⁶ The filtration procedure moreover involves an interrogation process, for which people are usually isolated and pressured into answering questions about their thoughts on Putin, the “special military operation”, Russia, whether they have relatives or friends in the Armed Forces of Ukraine⁸⁷, etc.

It is also important to note that violations continue after the deportation.

As was mentioned earlier, contrary to its obligation under international humanitarian law, Russia arguably does not facilitate the return of the people transferred to the territories they were displaced from, and even prevents them from returning. A case of illegal detention and torture, as well as degrading and humiliating treatment, has been recorded at the moment of a person crossing the Russian border into Estonia.⁸⁸ Moreover, detainees, both those detained lawfully for reasons not related to the conflict, as well as those unlawfully confined, are prevented from contacting their relatives, and their relatives are not informed about what is happening to them.⁸⁹

It can be asserted that Russia also violates the specific rules providing for the care of children. Once the children are transferred, whether within the occupied territory or to Russia, they are immediately immersed in the Russian educational and cultural programs.⁹⁰ One of the ways this happens is through sending children

81 Testimony recorded by ZMINA from the residents of Mariupol in February 2023.

82 Testimony of a resident of Mariupol recorded by ZMINA in February 2023.

83 Ukraine: “Like A Prison Convoy”: Russia’s Unlawful Transfer And Abuse of Civilians In Ukraine During ‘Filtration’, Amnesty International, 10 November 2022, available at: <https://www.amnesty.org/en/documents/eur50/6136/2022/en/> (last accessed 25 July 2023).

84 Testimony recorded by ZMINA from residents of Mariupol and Kharkiv region.

85 Nadia Beard, ‘Ukrainians who fled to Georgia reveal details of Russia’s ‘filtration camps’’, The Guardian, 12 June 2022, available at: <https://www.theguardian.com/world/2022/jun/12/ukrainians-who-fled-to-georgia-reveal-details-of-russias-filtration-camps> (last accessed 25 July 2023); testimony recorded by ZMINA from residents of Mariupol, Kherson and Kharkiv region.

86 Testimony recorded by ZMINA from a resident of Mariupol in Riga, Latvia, February 2023.

87 Testimony recorded by ZMINA from residents of Mariupol in February 2023.

88 Testimony recorded by ZMINA from a resident of Mariupol in Tartu, Estonia in February 2023.

89 ‘Ukraine: Torture, Disappearances in Occupied South, Apparent War Crimes by Russian Forces in Kherson, Zaporizhzhia Regions’, Human Rights Watch, 22 July 2022, available at: <https://www.hrw.org/news/2022/07/22/ukraine-torture-disappearances-occupied-south> (last accessed 25 July 2023).

90 Russia’s systematic program for the re-education & adoption of Ukraine’s children Yale School of Public Health’s Humanitarian Research Lab, 14 February 2023: <https://hub.conflictobservatory.org/portal/apps/sites/#/home/pages/children-camps-1> (last accessed 22 February 2024); Forcible transfer and deportation of children from the temporarily occupied territories of Ukraine to the Russian Federation, ZMINA Center for Human Rights, April 2023: https://zmina.ua/wp-content/uploads/sites/2/2023/06/children_eng_web.pdf (last accessed 22 February 2024).

to summer camps. The agenda in these camps involves meetings with Russian and occupation administration political figures,⁹¹ as well as field trips to cultural or patriotic sites throughout the country, lectures from Russia's veterans and historians, and military activities.⁹² Often the standard stay in the camps is prolonged beyond the three weeks, and children are enrolled in Russian school programs,⁹³ which include "patriotic education", militarization of education and false narratives about history, such as the reasons and events of the Russian invasion in Ukraine.⁹⁴ These programs are also implemented in schools in the occupied territories.⁹⁵ This is arguably a violation of the obligation of the State, when providing care to the child, to pay due regard to the continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.⁹⁶ This also goes against a state's obligations to entrust the care and education of children to persons of their own nationality, language and religion,⁹⁷ as well as persons of a similar cultural tradition.⁹⁸ The fact that these violations continue to occur after the displacement signifies the importance not only to bring accountability, but also to prevent the violations and assist those who were deported to return as soon as possible.

9. Qualifying the deportations

Investigations into cases of deportation were opened by a number of regional Prosecutor's offices in Ukraine, but it might be beneficial to build a case on deportations within the ICC, considering the scale of the crime, the involvement of high level officials in Russia in perpetrating deportations,⁹⁹ as well as the need for international attention to the issue to prevent subsequent deportations in the future and return those deported, who have no way to leave Russia on their own. While the ICC has already issued an arrest warrant¹⁰⁰ in the investigation of the war crime of deportation (children), this is and should arguably be just a beginning.

The current ICC warrant, unfortunately, concerns only the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children). The OSCE Moscow mechanism, which is

91 V Kontakte page 'Navigators of Childhood | CRIMEA' ('Navigators of childhood' is a project within the federal project 'Patriotic education of the Russian citizens'), 9 October 2022, available at: https://vk.com/wall-214910068_4716 (last accessed 25 July 2023).

92 *Supra* n. 98, p. 15.

93 *Supra* n. 98, p. 5; In Gelendzhik, children from the Kharkiv oblast began studying according to the school curriculum, Kuban 24, 22 September 2022, available at: <https://kuban24.tv/item/v-gelendzhike-deti-iz-harkovskoj-oblasti-nachali-obuchenie-po-shkolnoj-programme> (last accessed 25 July 2023).

94 Elise Morton 'How Russia is molding the minds of schoolkids to support its brutal invasion of Ukraine', Insider, 29 January 2023, available at: <https://www.businessinsider.com/russia-ukraine-invasion-propoganda-schoolkids-2023-1?international=true&r=US&IR=T> (last accessed 25 July 2023).

95 "School curriculum: Russian hidden weapon against Ukraine", a study, N. Vaskivska, K. Kornienko, D. Pidhorna, M. Petrovets, 2023, available at: <https://almenda.org/wp-content/uploads/2023/02/Doslidzhennya-Shkilna-osvita-prykhovana-zbroya-RF-proty-Ukrayiny.pdf>

<https://www.ejiltalk.org/occupation-of-minds-ihl-response-to-russian-education-policies-in-the-occupied-ukrainian-territories/> (last accessed 25 July 2023).

96 Convention on the Rights of the Child, Article 20.

97 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 50 – Children.

98 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 24 - Measures relating to child welfare.

99 *Supra* ns. 11, 32, 33, 64, 66, and 69.

100 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', Press Release, 17 March 2023, available at: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (last accessed 25 July 2023).

an instrument activated by OSCE participating states to monitor the implementation of OSCE human rights commitments that has “increasingly become an instrument for collecting evidence and shining a light on human rights abuses and potential war crimes, rather than a tool for mediating and resolving human rights violations via dialogue and cooperation”,¹⁰¹ noted in its first report that the experts received “numerous consistent reports from Ukrainian official and NGO sources and from private individuals on social media on forced deportations from occupied territories to Russia” and “if (some of) these deportations were forcible (including because Russia created a coercive environment in which those civilians had no other choice than to leave to Russia) and as they necessarily concerned civilians who had fallen into the power of Russia as an occupying power, this violates in each case IHL and constitutes a war crime”.¹⁰² The war crime of unlawful deportation and transfer means persons protected under one or more of the Geneva Conventions were deported or transferred to another State or another location in the context of an international armed conflict.¹⁰³ The existence of an international armed conflict between Russia and Ukraine, and the fact that persons in the territory of Ukraine, occupied by Russia, are considered protected persons under the Geneva Conventions is indisputable. Therefore, if the ‘forcible’ element, which is defining for the crime of unlawful deportation and transfer, is established in a particular case, the act constitutes a war crime.

The abovementioned context of the scale of deportations both in terms of numbers of people deported, different groups of people targeted, as well as the widespread geography of the crime, which also invites a conclusion on involvement of different military units and commanders in the process, point to a possible qualification of these deportations and transfers as a crime against humanity. When speaking about the possibility of qualifying the situation as a crime against humanity in terms of deportations, the element of widespread or systematic attack directed against the civilian population should be considered.

“Attack directed against a civilian population” means a course of conduct involving the multiple commission of acts listed in article 7, paragraph 1, of the Rome Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The policy in this case means that the State or organization actively promotes or encourages such an attack against a civilian population.¹⁰⁴

The second report of the OSCE Moscow mechanism noted that patterns of violent acts violating international human rights law became more evident.¹⁰⁵ As previously mentioned, the UN Independent International Commission of Inquiry on Ukraine indicated that certain violations, committed by the Russian side, might amount to crimes against humanity.¹⁰⁶ The number of cases of forcible transfer and deportation already recorded by various organisations, including ZMINA, also indicate a pattern. These cases share common characteristics, especially regionally (in certain regions, depending on local circumstances, slightly varying

101 Stephanie Liechtenstein, ‘How the OSCE helps collect evidence of potential war crimes in Ukraine’, Security and Human Rights Monitor, 12 June 2023, available at: <https://www.shrmonitor.org/how-the-osce-helps-collect-evidence-of-potential-war-crimes-in-ukraine/> (last accessed 27 July 2023).

102 Report of the OSCE Moscow Mechanism’s mission of experts entitled ‘Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022’, OSCE, 13 April 2022, available at: <https://www.osce.org/odihr/515868> (last accessed 27 July 2023).

103 *Supra* n. 14, Article 8 (2) (a) (vii)-1 War crime of unlawful deportation and transfer.

104 *Supra* n. 15, p. 4.

105 *Supra* n. 85, p. 4.

106 *Supra* n. 27.

patterns were developed). The fact that all the necessary legal and practical infrastructure has been built up in Russia for the people displaced arguably points to the planned nature of the act. Numerous statements by high level officials in Russia, including the President, and in the occupied territories, encouraging and highlighting the necessity of evacuations,¹⁰⁷ arguably show their involvement, as well as a single policy to enact the transfers. All the violations, those preceding displacement, often designed to make the stay in the territory people are fleeing impossible, those accompanying the displacement, such as a complex and organised system of filtration, and those following displacement also build a single pattern ensuring the displacement.

The deportation and transfer of children specifically might arguably also amount to genocide as an act of transferring children from one group to another.¹⁰⁸ In the context of this violation, the elements that require deliberation are the intent to destroy, in whole or in part, that national, ethnic, racial or religious group as such and the fact the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹⁰⁹

The reports currently available on the study programs Ukrainian children are enrolled in, involving re-education and military propaganda, the failure to observe the obligation to search for relatives in Ukraine and actively preventing the return of children,¹¹⁰ the fact children are placed under guardianship in Russian families and granting Russian citizenship to Ukrainian children¹¹¹ indicate the intention to sever their ties to Ukraine and prevent their return in the future. The fact that there were no attempts to transfer children from occupied territories to the territory of Ukraine under the control of Ukrainian government and the refusal to inform Ukraine or any of the international organisations with a mandate to assist these children¹¹² arguably highlight this intent.

10. Conclusions and recommendations

Forcible transfer and deportation is a continuing crime - every day Russia carries out forcible displacements/transfers of Ukrainians within the occupied territories or to its own territory. While there is progress in documenting and advancing justice for this crime, the non-repetition and restitution parts of the accountability process are lagging behind.

The reason for this is largely the lack of access to the deported people in Russia and Russia's refusal to perform its obligations thereto. Considering that the Ukrainian authorities have very limited options to see Ukrainians in Russia, a more significant involvement from organisations with a relevant mandate and a presence in Russia

107 *Supra* ns. 11, 32, 33 and 64; 'Kherson authorities announce forced evacuation in Kakhovka district from 6 November', *Kommersant*, 1 November 2022, available at: <https://www.kommersant.ru/doc/5646214> (last accessed 25 July 2023).

108 Article 2 (e), Convention on the Prevention and Punishment of the Crime of Genocide (1948).

109 *Supra* n. 14, Article 6 (e) Genocide by forcibly transferring children.

110 Prof. Veronika Bilkova, Dr. Cecilie Hellestveit and Dr. Elina Šteinerte, 'Report on violations and abuses of international humanitarian and human rights law, war crimes and crimes against humanity, related to the forcible transfer and/or deportation of Ukrainian children to the Russian Federation', p. 1, OSCE, 28 April 2023, available at: <https://www.osce.org/files/f/documents/7/7/542751.pdf> (last accessed 25 July 2023).

111 *Supra* n. 27, para. 102.

112 *Supra* n. 110, p.1: "To date, neither this Mission nor the Ukrainian authorities have been able to establish even a list of the children concerned, let alone their whereabouts, despite having approached the Russian authorities with such requests".

is needed. UN Entities and Bodies, such as the UN High Commissioner for Refugees, and other international organisations, such as the International Committee of the Red Cross, should mobilize efforts in order to help identify and support deported people still in Russia and unable to leave on their own. Through their own systems, or through their partner connections in the country, they should be able to monitor the places Ukrainians are brought to, as well as assist them in returning to Ukraine or leaving to third countries.

Another issue is the excessive documentation without practical follow-up steps. Recently the OSCE Moscow Mechanism was invoked again; it examined reports of the Russian Federation's forcible transfer and deportation of Ukraine's children.¹¹³ Moreover, the crime of forcible transfer and deportation, concerning children in particular, as well as adults, has been documented extensively by both Ukrainian non-governmental organisations and international organisations. In fact, as explained, the ICC has already started an investigation into the matter, with no updates on the topic since. However, the focus at the moment should shift to devising practical ways of assisting the people who were deported. For this, information on the issue from Russian authorities is essential. However, reports from both the OSCE Moscow Mechanism and the UN Independent International Commission of Inquiry on Ukraine demonstrate that the Russian authorities are not cooperating in providing such information.

This does not mean, however, that there is no role for organisations such as the OSCE. In fact, the OSCE has a uniquely wide regional composition, including countries that share a border with Russia, and is one of the few organisations Russia still participates in, unlike the Council of Europe. This makes the OSCE a viable option to be the basis or at least provide a platform for the creation of a repatriation system.

With the lack of public communication on the status of the ICC investigation into the topic it is hard to determine which further developments to expect. Not to mention the apprehension of the international judiciary in dealing with the crime of genocide due to its complexity and high standard of proof. The possible indicators for the crime of genocide in terms of the forcible transfer of children from a group to another group, however, are growing. Russian practices are not limited to transferring Ukrainian children to Russian territory and enrolling them in local schools. Ukrainian children are also placed in Russian families, and Russian legislation continues to make the process of changing their citizenship easier, arguably permanently removing them out of their national group. Taking this into account, the ICC charge of a war crime of deportation evolving into a genocide charge is not unforeseeable. In turn, a charge like this might be a better catalyst to mobilize the international efforts in establishing a mechanism to return the children. While this issue is more in the spotlight compared to others, the efforts to condemn and pressure Russia into stopping the practice are not yet truly international. While the support of the European countries, as well as of the US and Canada, is extremely important, Central and South American states, as well as African and Asian states adding pressure on Russia might be the deciding factor.

It is important to note that the return of forcibly transferred and deported Ukrainians is a time sensitive issue. While less attention is focused on the adults that were deported, they also suffer the longer they remain without assistance. The longer people stay in Russia, the harder it is for them to enter countries bordering Russia, such as Estonia, as mentioned above. The security concerns the Estonian side has need to be addressed in a way that does not make the return of deported people through that border impossible.

113 *Ibid.*

Time is also of essence for people with disabilities, who were receiving care in specialised institutions and were deported to Russia and those, who were detained or serving a sentence. They cannot return on their own due to their status. For Ukrainian citizens in Russian penitentiary or detention institutions it is also a matter of safety and the threat of subsequent violations, unlawful convictions and inhumane treatment.

It is moreover critical to return children as soon as possible, as they keep being separated from their parents or other relatives, as well as their community. The constant change of situation, as they are displaced from familiar territory to another country, placed in different institutions or put under guardianship in a Russian family, is psychologically detrimental to the child. The adverse impact of being surrounded by Russian narratives and propaganda cannot be ignored. The danger of adoption, which would make it impossible to identify and return the child later, is immense – there are already two¹¹⁴ known facts of adoption of Ukrainian children by Russian families. Much more might be not public.

Therefore, there should be constant pressure on Russia to cease the violations and perform its obligations in terms of providing information on the deported people and returning them. The Resolution adopted by the UN General Assembly on 23 February 2023 on Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine¹¹⁵ calls for the return of all deported civilians. The subsequent efforts within the UN, but also within the OSCE and other relevant organisations, should be focused on putting pressure on Russia to comply with its obligations, as well as devising a way to make sure people are actually returned.

114 'That woman chose them and will bring them to Mocsow'. The head of 'Just Russia' Sergey Mironov and his new wife adopted a child kidnapped from Ukraine and changed his identity, Important stories, 23 November 2023, available at: <https://istories.media/stories/2023/11/23/mironov-i-deti/>; Investigation: how kidnapped children from Ukraine are adopted. Exclusive material from TV Rain, TV Rain, 27 April 2024, available at: <https://www.youtube.com/watch?v=I5D0IA81RO8> (last accessed 19 June 2024).

115 Resolution 'Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine' adopted by the General Assembly on 23 February 2023, available at: <https://digitallibrary.un.org/record/4004933?ln=en> (last accessed 25 July 2023).



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The Road to Justice

Lessons for Ukraine From the USSR Invasion of Afghanistan

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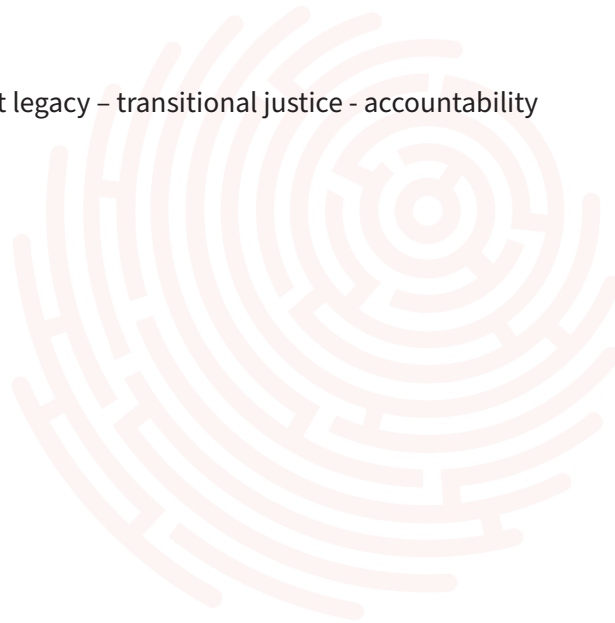
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Abstract

In February 1989, the ‘Union of Soviet Socialist Republics’ (‘USSR’) left Afghanistan following a ten-year invasion. Although an Action Plan for Peace, Reconciliation and Justice was drafted, in the quest for peace, justice for victims of the atrocities was never prioritised by authorities and the international community. Thirty-three years later, on 24 February 2022, President Putin of the Russian Federation announced the commencement of a ‘special military operation’ in Ukraine. Even as the invasion continues, questions remain as to how Ukraine will approach and implement transitional justice. Although there are clear differences between the invasions, if history is to be instructive, there is much to be learnt from the USSR invasion of Afghanistan, the response to it, and the Soviet legacy apparent in the Russian invasion of Ukraine which are of relevance to the transitional justice process in Ukraine and the international rule of law. Drawing on these historical perspectives, this paper aims to generate further discourse on peace, justice and accountability for victims, ensuring past mistakes are not repeated.

Keywords

Afghanistan - Ukraine – Soviet legacy – transitional justice - accountability



1. Introduction

On 27 December 1979, the 40th Army of the former ‘Union of Soviet Socialist Republics’ (‘USSR’) Red Army launched an invasion of Afghanistan, which faced fierce opposition from the Afghan resistance forces (the ‘Mojahedin’)¹. Ten years later, in February 1989, under the United Nations (‘UN’)-mediated Agreements on the Settlement of the Situation Relating to Afghanistan (‘Geneva Accords’), the final USSR soldier left the country. Described as ‘the most consistent – and systematic – proponent of transitional justice’ in Afghanistan, the Afghanistan Independent Human Rights Commission (‘AIHRC’) released a report in 2005 entitled ‘A Call for Justice’, which followed a national consultation on ‘Afghans’ experiences of the war and how they wanted to deal with the question of justice for past war crimes.² Based on this, the Action Plan for Peace, Reconciliation and Justice was drafted by the AIHRC and President’s Office with support from the United Nations Assistance Mission in Afghanistan (‘Action Plan’).³ However, in the quest for peace, the ‘Call for Justice’ on behalf of victims of the atrocities was left largely unmet by authorities and the international community.

Fast forward thirty-three years to 24 February 2022, when echoes of the USSR’s invasion of Afghanistan could be heard in President Putin of the Russian Federation’s (‘Russia’s’) haunting announcement of the commencement of a ‘special military operation’ in Ukraine.⁴ A Soviet legacy can be seen in a large part of Russia’s approach to and conduct during the invasion of Ukraine thus far. The Working Group on the Reintegration of the Temporarily Occupied Territories, created in 2019 and tasked with developing Ukraine’s transitional justice roadmap, ‘continues to enhance the proposed transitional framework for Ukraine, including since Russia’s full-scale invasion this year’.⁵ However, the criticisms of the parallel Draft Law on the Principles of State Policy of the Transition Period and the developments that the full-scale invasion have brought, mean that questions remain as to how Ukraine will approach and implement transitional justice.

The USSR invasion of Afghanistan and the Russian invasion of Ukraine should not be directly compared – they are both uniquely complex and can be distinguished *inter alia* in terms of legal classification, temporally, territorially, and in terms of the perpetrators and victims affected. Despite these divergences, if history is to be instructive, there is much to be learnt from the USSR invasion of Afghanistan, the response to it, and the Soviet legacy apparent in the Russian invasion of Ukraine which could shape the process for Ukraine, even as the invasion there continues. Drawing on these historical perspectives, this paper highlights key issues of relevance to transitional justice in Ukraine and the international rule of law, and provides selected conclusions and recommendations to the stakeholders involved. With the invasion of Ukraine ongoing, the authors aim to generate further discourse on peace, justice and accountability for victims, ensuring past mistakes are not repeated.

1 M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia’s historical role and its current practice*, (Nomos, 2022), p. 133.

2 Afghanistan Independent Human Rights Commission, ‘A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan’, 2005, available at: <<https://www.refworld.org/pdfid/47fdad50.pdf>>; P. Gossman and S. Kouvo, ‘Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan’, Afghanistan Analysts Network, 2013, available at: <https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf>.

3 P. Gossman and S. Kouvo, ‘Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan’, Afghanistan Analysts Network, 2013, available at: <https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf>.

4 ‘Full text: Putin’s declaration of war on Ukraine’, *The Spectator*, 24 February 2022, available at: <<https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine>>.

5 K. Busol, ‘Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process’, *Just Security*, 1 June 2022, available at: <<https://www.justsecurity.org/81680/mariupol-and-the-origins-and-avenues-of-ukraines-transitional-justice-process/>>.

2. Historical Framing

Firstly, understanding the historical framing of the invasion of Ukraine by Russia is critical to the justice process. Putin sought to provide specific *ad bellum* legal justifications⁶ for his so-called ‘special military operation’ in Ukraine: self-defence under Article 51(7) of the UN Charter in response to a security threat against Russia (and the Russian-recognised People’s Republics of Donetsk and Luhansk); the people of Crimea and Sevastopol’s right to self-determination under Article 1 of the UN Charter, and the ‘genocide’ occurring in Eastern Ukraine.⁷ In fact, there was no armed attack or threat of an imminent armed attack against Russia, nor could there be a right to collective self-defence due to the lack of legal effect of the recognition by Russia of the independence of the Donetsk and Luhansk People’s republics in the days prior to the invasion.⁸ Furthermore, the International Court of Justice ordered provisional measures that it was ‘not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory’ and as a result ‘that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine’.⁹

Themes of imperialism and patriotism instead dominate the Russian rhetoric surrounding the invasion.¹⁰ Indeed, ‘[t]his technique of presenting contemporary events through a framework of a supposed historical equivalent [is] essential to government efforts to replay and make-present a heroic Russian past’.¹¹ Russia does so selectively, not only seeking to legitimise its policies, but also to create a ‘revised understanding of patriotism’ and Russian identity to garner support domestically.¹² The restoration of ‘Soviet greatness’ has been a narrative employed by Russia, along with the revival of ‘Great Patriotic War’ or ‘de-Nazification’ ideology.¹³

In Afghanistan, the USSR’s invasion was justified under the Brezhnev Doctrine, a foreign policy promoted by USSR leader Brezhnev ‘calling on the Soviet Union to intervene—including militarily—in countries where

6 J. A. Green, C. Henderson & T. Ruys, ‘Russia’s attack on Ukraine and the *jus ad bellum*’ 2022 *Journal on the Use of Force and International Law* 9(1), pp. 4-30.

7 ‘Full text: Putin’s declaration of war on Ukraine’, *The Spectator*, 24 February 2022, available at: <<https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine>>.

8 M. Milanovic, ‘What is Russia’s Legal Justification for Using Force against Ukraine?’ *EJIL: Talk!* 24 February 2022, available at: <<https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/>>.

9 International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Summary 2022/2, 16 March 2022, available at: <<https://www.icj-cij.org/public/files/case-related/182/182-20220316-SUM-01-00-EN.pdf>>.

10 T. Snyder, ‘The War in Ukraine Is a Colonial War’, *The New Yorker*, 28 April 2022, available at: <<https://www.newyorker.com/news/essay/the-war-in-ukraine-is-a-colonial-war>>; National WWII Museum, ‘Remembrance of the Great Patriotic War and Russia’s Invasion of Ukraine’ (18 March 2022), available at: <<https://www.nationalww2museum.org/war/articles/great-patriotic-war-russia-invasion-ukraine>>.

11 J. McGlynn, ‘Reliving the Past: How the Russian Government and Media use History to Frame the Present’ University of Oxford, 2020, available at: <<https://ora.ox.ac.uk/objects/uuid:2464a1de-88de-461d-a19d-a8f5dac6b828>>.

12 J. McGlynn, ‘Reliving the Past: How the Russian Government and Media use History to Frame the Present’ University of Oxford, 2020, p. 21, available at <<https://ora.ox.ac.uk/objects/uuid:2464a1de-88de-461d-a19d-a8f5dac6b828>>.

13 J. McGlynn, ‘Reliving the Past: How the Russian Government and Media use History to Frame the Present’ University of Oxford, 2020, pp. 142-3, available at <<https://ora.ox.ac.uk/objects/uuid:2464a1de-88de-461d-a19d-a8f5dac6b828>>. See e.g. <<https://www.britannica.com/event/Brezhnev-Doctrine>>.

socialist rule was under threat.¹⁴ The USSR claimed that they had received a ‘request from the Afghan Government for assistance against insurgent movements’,¹⁵ however historical records contradict this. Instead, a ‘more conventional understanding [of the motivation for the invasion] was the desire by the Kremlin to prop up a fellow Communist state’.¹⁶

The Russian state employs memory of victories rather than losses, and thus due to the ‘political embarrassment’ of the invasion, Afghan veterans in Russia were, for many years after the invasion, denied heroic status.¹⁷ Narratives of restoring Soviet greatness and revising Russian patriotism and identity have therefore engaged pro-Russian ‘Afghantsy’ to become fundamental supporters of the invasion in Ukraine. Considering the role of ‘Combat Brotherhood’ in drumming up domestic support in Russia for the invasion, a recent article has described the transformation of what began as collectives of ‘disgruntled veterans’ into ‘the biggest ultranationalist cheerleader’.¹⁸

Deep consideration of the historical framing of the invasion of Ukraine and the role of the Soviet legacy in this regard is therefore critical to any transitional justice initiatives. As Busol and Hamilton argue, ‘any understanding of the root causes of Russia’s aggression, the policy element of Russia’s crimes against humanity, and the Kremlin’s potentially genocidal conduct now will be incomplete’ without this.¹⁹ This consideration is fundamental for criminal justice and case-building initiatives on the part of (inter)national investigatory and prosecutorial authorities and civil society organisations. Focusing on rhetoric as opposed to solely direct perpetration crimes will be essential in ensuring that the Russian leadership is held accountable.

In addition, given the conflict is still ongoing, further consideration of the Russian motives and rhetoric could also be beneficial in predicting how the invasion will continue and in determining the components of any peace agreement. It has been suggested that the invasion may become a war of attrition, or a ‘forever war’.²⁰ Concession of Ukrainian territory is not an issue on the table for Ukraine, and will only further feed into the Russian narratives outlined above.²¹ Furthermore, one only has to consider the ‘forever war’ in Afghanistan to understand that such a situation may not only provide a breeding ground for insurgency and extremism (as well as a nuclear risk in the Ukrainian case), but most importantly it will heavily impact civilians in Ukraine.²² The drive for peace should therefore be carefully navigated.

14 See e.g. <<https://www.britannica.com/event/Brezhnev-Doctrine>>.

15 United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP), ‘Background’, available at: <<https://peacekeeping.un.org/mission/past/ungomap/background.html>>.

16 P. Baker, ‘Why Did Soviets Invade Afghanistan? Documents Offer History Lesson for Trump’, *The New York Times*, 29 January 2019, available at: <<https://www.nytimes.com/2019/01/29/us/politics/afghanistan-trump-soviet-union.html>>.

17 E. Hoge, ‘The Legacy of the Soviet Afghan War and Its Role in the Ukrainian Invasion’, *Lawfare*, 25 April 2022, available at: <<https://www.lawfareblog.com/legacy-soviet-afghan-war-and-its-role-ukrainian-invasion>>.

18 E. Hoge, ‘The Legacy of the Soviet Afghan War and Its Role in the Ukrainian Invasion’, *Lawfare*, 25 April 2022, available at: <<https://www.lawfareblog.com/legacy-soviet-afghan-war-and-its-role-ukrainian-invasion>>.

19 K. Busol and R. Hamilton, ‘Transitional Justice in Ukraine: Guidance to Policymakers’, *Just Security*, 2 June 2022, available at: <<https://www.justsecurity.org/81719/transitional-justice-in-ukraine-guidance-to-policymakers/>>.

20 B. Marcetic, ‘Turning Ukraine Into Another Afghanistan Would Be a Disastrous Idea’, *Jacobin*, available at: <<https://jacobin.com/2022/03/ukraine-afghanistan-quagmire-far-right-global-economy-climate-disaster>>.

21 S. O’Rourke, ‘Territorial concessions by Kyiv would not bring peace, only ceasefire’, *The Irish Times*, 5 July 2022, available at: <<https://www.irishtimes.com/opinion/2022/07/05/territorial-concessions-by-kyiv-would-not-bring-peace-only-ceasefire/>>.

22 B. Marcetic, ‘Turning Ukraine Into Another Afghanistan Would Be a Disastrous Idea’, *Jacobin*, available at: <<https://jacobin.com/2022/03/ukraine-afghanistan-quagmire-far-right-global-economy-climate-disaster>>.

3. Institutional failures

Brutal tactics of warfare, from indiscriminate bombardments, to arbitrary arrests, mass killings and conflict-related sexual violence were not only employed in the USSR invasion of Afghanistan, but have characterised Russian involvement in conflicts since. From the earliest months of the USSR invasion of Afghanistan until the last USSR troops left in February 1989, no single tactic of war caused as much devastation nor killed as many Afghans as the relentless campaigns of aerial and artillery-fired bombardment of villages, including through the use of certain incendiary weapons.²³ The United Nations Special Rapporteur on the situation of human rights in Afghanistan at the time described ‘scenes of devastation... carefully constructed homes reduced to rubble, deserted towns, the charred remains of wheat fields, and trees cut down by immense firepower.’²⁴ For example, on 29 February 1980 USSR troops mounted an intensive air attack on Shigal, Asmar, Dangam and two other districts of Kunar Province, which resulted in the killing of hundreds of civilians and destruction of most of the villages. Furthermore, a bombing campaign which began in March 1987 and lasted for 40 days in the Jurm district of Badakhshan resulted in the death of at least 200 civilians and caused substantial damage to the majority of villages in the district, most of which needed to be evacuated.²⁵

At the beginning of the Russian invasion of Ukraine, it was clear that Russia was adopting ‘a mass shelling campaign to instill fear, terror, destruction, chaos and to create conditions in which the civilian population flees en masse, then creating conditions in which eventually, even the largest urban territories will end up falling under their control.’²⁶ Human Rights Watch, for example, reported incidents such as the dropping of multiple unguided bombs on 3 March 2022 in a residential neighbourhood of Chernihiv,²⁷ and repeated airstrikes and shelling of densely populated areas in Kharkiv, which have ‘damaged civilian buildings, including apartment blocks, schools, places of worship, and shops, impeding access to food and medicines. They also damaged infrastructure in the city causing civilians to lose vital services such as electricity, heat, and water.’²⁸ A report by Amnesty International documented that 28 indiscriminate strikes were launched by Russian forces in the city of Kharkiv alone between 28 February and 30 April 2022.²⁹ Bellingcat has additionally conducted open-source investigations of ammunitions found in Ukraine and has verified the use of cluster munitions in urban areas.³⁰ Additionally, *Médecins Sans Frontières* reported that indiscriminate shelling has

23 F. Ermacora, ‘Report on the Situation of Human Rights in Afghanistan Prepared in Accordance with Commission on Human Rights Resolution 1985/38 (UN Doc E/CN.4/1986/24), pp. 17-18.

24 Report of the Economic and Social Council, Situation of human rights in Afghanistan, Note by the Secretary-General, 5 November 1985 (A/40/843 (1985)), para 81.

25 This information was taken from notes for a AIHRC mapping of human rights report which was never officially published, but which author Nader Nadery led the documentation and writing of.

26 J. Keating, ‘What the horrors of Syria and Chechnya can tell us about Russia’s tactics in Ukraine’, GRID News, 29 March 2022, available at: <<https://www.grid.news/story/global/2022/03/29/terror-destruction-and-chaos-russian-tactics-in-ukraine-have-a-history/>>.

27 Human Rights Watch, ‘Ukraine: Russian Air-Dropped Bombs Hit Residential Area’, (10 March 2022), available at: <<https://www.hrw.org/news/2022/03/10/ukraine-russian-air-dropped-bombs-hit-residential-area>>.

28 Human Rights Watch, ‘Ukraine: Deadly Attacks Kill, Injure Civilians, Destroy Homes’, (18 March 2022), available at: <<https://www.hrw.org/news/2022/03/18/ukraine-deadly-attacks-kill-injure-civilians-destroy-homes>>.

29 Amnesty International, ‘“Anyone can die at any time”: Indiscriminate attacks by Russian forces in Kharkiv, Ukraine’ (13 June 2022), available at: <<https://www.amnesty.org/en/documents/eur50/5682/2022/en/>>.

30 Bellingcat, ‘These are the Cluster Munitions Documented by Ukrainian Civilians’ (11 March 2022), available at: <<https://www.bellingcat.com/news/rest-of-world/2022/03/11/these-are-the-cluster-munitions-documented-by-ukrainian-civilians/>>.

been utilised during the Ukrainian invasion with a lack of care to distinguish and protect citizens.³¹ Recently, indiscriminate bombardment has been used in response to the strategic targeting by Ukrainian forces, for example of the Kerch bridge linking Crimea to Russia.³² Ultimately, much like the USSR did in Afghanistan, and like that which has been seen in Syria and Chechnya, Russia continues to use bombardment as a key strategy in order to minimise its losses, but in doing so causing ‘indiscriminate carnage’ to civilians and civilian infrastructure.³³

In Afghanistan, USSR forces massacred entire villages, using trained dogs to attack and kill civilians,³⁴ and ‘systematically entered all the houses executing the inhabitants including women and children often by shooting them in the head.’³⁵ As many as ten mass graves exist, where civilians were killed and buried by Soviet forces in the northern part of Herat city.³⁶ Persons detained by USSR forces accused of supporting the Mohajedin were deprived of all contact with their family, often held incommunicado. They would be interrogated by USSR ‘advisors’ continuously while different forms of torture techniques were used, including: electric shocks; pulling out nails, pulling out teeth; breaking back bones, burning with cigarettes; sleep deprivation; being forced to stand in snow bare foot; and being forced to sit on a bottle so that it penetrated the anus.³⁷ Throughout the USSR invasion, in the absence of due process and fair trial considerations, many of those accused of fighting against the USSR were summarily executed. Mass execution sites in Kerala of Kuner province and around Pul-e-Charkhi prison in Kabul are living evidence of these atrocities. In Ukraine, Russian forces have arrested civilians without procedure, subjecting them to ill-treatment and in some cases torture. Particularly well-documented cases include the ‘torture chamber network’ in Kharkiv,³⁸ and that of a Ukrainian interpreter and Radio France fixer who was held in captivity by Russian forces in freezing temperatures, beaten, tortured and deprived of food.³⁹ Amnesty International has documented extrajudicial and other unlawful killings in several villages and cities, whereby ‘unarmed civilians in Ukraine are being killed in their homes and streets in acts of unspeakable cruelty and shocking brutality.’⁴⁰

31 Medecins sans Frontieres, ‘No Mercy for Civilians – Troubling accounts from the MSF medical train in Ukraine’ (June 2022), available at: <<https://www.msf.org/data-and-patient-accounts-reveal-indiscriminate-attacks-against-civilians-ukraine-war>>.

32 M. Hunder and J. Landay, ‘Russia launches biggest air strikes since start of Ukraine war’, Reuters, 11 October 2022, available at: <<https://www.reuters.com/world/europe/russias-ria-state-agency-reports-fuel-tank-fire-kerch-bridge-crimea-2022-10-08/>>.

33 R. M. Cassidy Major, ‘Russia in Afghanistan and Chechnya: Military Strategic Culture and the Paradoxes of Asymmetric Conflict’, (2003) *US Army War College Press: Monographs, Books, and Publications*, p. 37.

34 F. Ermacora, ‘Report on the Situation of Human Rights in Afghanistan Prepared in Accordance with Commission on Human Rights Resolution 1985/38 (UN Doc E/CN.4/1986/24)’ (1986), p. 19.

35 M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia’s historical role and its current practice*, (Nomos, 2022), p. 134, citing R. Reuveny and A. Prakash, ‘The Afghanistan War and the Breakdown of the Soviet Union’ (1999) *Review of International Studies* 25, p. 702.

36 Omar, ‘Mass grave in Ukraine revives Afghans’ memories of Soviet invasion’, Salaam Times, 27 April 2022, available at: <https://afghanistan.asia-news.com/en_GB/articles/cnmi_st/features/2022/04/27/feature-01>.

37 This information was taken from notes for a AIHRC mapping of human rights report which was never officially published, but which Nader Nadery led the documentation and writing of (see section 5).

38 A. Query, ‘How Russia organized its torture chamber network in Kharkiv Oblast’, The Kyiv Independent, 22 October 2022, available at: <<https://kyivindependent.com/national/how-russia-organized-its-torture-chamber-network-in-kharkiv-oblast>>.

39 OSCE, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity committed in Ukraine since 24 February 2022, 12 April 2022, p. 18.

40 Amnesty International, Ukraine: Russian forces extrajudicially executing civilians in apparent war crimes – new testimony’, 7 April 2022, available at: <<https://www.amnesty.org/en/latest/news/2022/04/ukraine-russian-forces-extrajudicially-executing-civilians-in-apparent-war-crimes-new-testimony/>>.

Mass execution of civilians by Russian forces have been reported in Bucha, Mariupol and Izium.⁴¹

Conflict-related sexual violence also occurred on a large scale in Afghanistan.⁴² There were some reports of rape, torture, sexual violence and sexual bribes against male and female prisoners, and the family of prisoners held by USSR forces.⁴³ However, factors such as religion, collective shame and honour practices meant that much of the conflict-related sexual violence was hugely underreported. Although evident, it remained a specific form of violence that was very rarely spoken openly about or testified to. Harrowing accounts of the commission of conflict-related sexual violence in Ukraine by Russian forces on a scale which has been described as ‘difficult for many to comprehend’ are emerging.⁴⁴ As of 3 June 2022, the Human Rights Monitoring Team of the United Nations High Commissioner for Human Rights had received reports of 124 alleged acts of conflict-related sexual violence, occurring against women, girls, men and boys in Ukraine.⁴⁵ Furthermore, a national hotline has been set up, which has so far received reports of ‘rape, gang rape, pregnancy following rape, attempted rape, threats of rape, coercion to watch an act of sexual violence committed against a partner or a child, and forced nudity.’⁴⁶ Natalia Karbowska, Co-Founder and Director of Strategic Development of the Ukrainian Women’s Fund, stated that ‘the Russian Federation is using sexual violence and rape as terror to control civilians at the temporary occupied territories.’⁴⁷ Accounts have described Russian soldiers entering homes, raping women (including repeatedly⁴⁸), sometimes killing the women, and also killing their husbands and burning down their homes.⁴⁹ One particular incident which was reported involved the systematic rape of twenty-five girls in a basement in Bucha by Russian forces, resulting

41 OSCE, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity committed in Ukraine since 24 February 2022, 12 April 2022, p. 22; <https://www.theguardian.com/world/2022/sep/16/ukraine-mass-grave-with-440-bodies-discovered-in-recaptured-izium-says-police-chief>

42 E. Sciolino, ‘4 Soviet Deserters Tell of Cruel Afghanistan War’, The New York Times, 3 August 1984, available at: <<https://www.nytimes.com/1984/08/03/world/4-soviet-deserters-tell-of-cruel-afghanistan-war.html>>; L. Ahmad, ‘Sexual violence in War and Post-War Afghanistan’, Master Thesis at the Interuniversity Institute of Social and Peace Development, September 2013, p. 90, available at: <http://repositori.uji.es/xmlui/bitstream/handle/10234/74347/TFM__Lida_Ahmad.pdf?sequence=1&isAllowed=y>.

43 L. Ahmad, ‘Sexual violence in War and Post-War Afghanistan’, Master Thesis at the Interuniversity Institute of Social and Peace Development, September 2013, p. 90, available at: <http://repositori.uji.es/xmlui/bitstream/handle/10234/74347/TFM__Lida_Ahmad.pdf?sequence=1&isAllowed=y>.

44 B. MacKernan, ‘Rape as a weapon: huge scale of sexual violence inflicted in Ukraine emerges’, The Guardian, 4 April 2022, available at: <<https://www.theguardian.com/world/2022/apr/03/all-wars-are-like-this-used-as-a-weapon-of-war-in-ukraine>>; N. Paton Walsh, et al., ‘In Russian-Occupied Kherson, Allegations of Rape Emerge’, CNN, 28 April 2022, available at: <<https://edition.cnn.com/2022/04/27/europe/ukraine-kherson-russia-rape-intl/index.html>>; D. Sheridan, ‘Ukrainian Mother Raped by Russian Soldier as She Sheltered in School’, The Telegraph, 3 April 2022, available at: <<https://www.telegraph.co.uk/world-news/2022/04/03/young-ukrainian-mother-raped-russian-soldier-sheltered-school/>>; OSCE, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity committed in Ukraine since 24 February 2022, 12 April 2022, p. 76; C. Engelbrecht, ‘Reports of sexual violence involving Russian soldiers are multiplying, Ukrainian officials say’ The New York Times, 29 March 2022, available at: <<https://www.nytimes.com/2022/03/29/world/europe/russian-soldiers-sexual-violence-ukraine.html>>.

45 UN, Sexual Violence ‘Most Hidden Crime’ Being Committed against Ukrainians, Civil Society Representative Tells Security Council’, SC/14926, 6 June 2022.

46 UN, Sexual Violence ‘Most Hidden Crime’ Being Committed against Ukrainians, Civil Society Representative Tells Security Council’, SC/14926, 6 June 2022.

47 UN, Sexual Violence ‘Most Hidden Crime’ Being Committed against Ukrainians, Civil Society Representative Tells Security Council’, SC/14926, 6 June 2022.

48 Human Rights Watch, ‘Ukraine: Apparent War Crimes in Russia-Controlled Areas’, 3 April 2022, available at: <<https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas?s=03>>.

49 Y. Limaye, ‘Ukraine conflict: ‘Russian soldiers raped me and killed my husband’’, BBC, 11 April 2022, available at: <<https://www.bbc.co.uk/news/world-europe-61071243>>.

in nine becoming pregnant.⁵⁰ Rape by the Russian forces of children, elderly women, and in front of family members has also been reported.⁵¹

The brutality in the Russian invasion of Ukraine and disregard for civilians is illustrative of continued Soviet influence within the Russian military. While broader ideology and rhetoric are at play, addressing institutional failings throughout military structures including a lack of education and training, combined with the patriarchal and hierarchal attitudes that are perpetuating such brutality will also be critical to ensuring sustainable peace. In terms of education and training, the Russian army is composed of conscripts and a contract-based professional force.⁵² The military education system employed in Russia to date is largely inherited from that same system which existed in the USSR, with ongoing reforms aiming to preserve traditions of military education in the former USSR.⁵³ Under Russian law, all able-bodied men aged 18 to 27 years are subject to conscription for 1 year of military service in the Russian armed forces.⁵⁴ New conscripts supposedly obtain 1-2 months of basic training followed by 3-6 months of advanced training, and indeed current law in Russia only requires 4-months of training.⁵⁵ There is one basic training site: 'The Hatsavita Mountain Training Center' in Labinsk in South Russia.⁵⁶ When an individual signs a contract with the Russian army, the Russian Defence Ministry website states that an intensive four week combined armed training with a survival course is essential.⁵⁷ However, when Russia sent troops to Belarus in November 2021 for example, it was suggested that some who signed military contracts only received days of training and were wholly unprepared.⁵⁸ In the case of the Ukrainian invasion, the professional Russian army is limited,⁵⁹ with Putin even

50 M. O'Brien and N. Quinevet, 'Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict' *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>; N. Vasilyeva, 'Nine Women and Girls in Bucha Pregnant After Being Raped by Russian Soldiers, Kyiv Says', *The Telegraph*, 12 April 2022, available at: <<https://www.telegraph.co.uk/world-news/2022/04/12/nine-women-girls-bucha-pregnant-raped-russian-soldiers-kyiv/>>; C. Gall, 'Bucha's Month of Terror', *NYT*, 11 April 2022, available at: <<https://www.nytimes.com/interactive/2022/04/11/world/europe/bucha-terror.html>>.

51 M. O'Brien and N. Quinevet, 'Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict' *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>.

52 K. Stepanenko, F. W. Kagan, B. Babcock-Lumish, 'Explainer on Russian Conscription, Reserve, and Mobilization' (*Institute for the Study of War*, 5 March 2022), available at: <<https://www.understandingwar.org/backgrounder/explainer-russian-conscription-reserve-and-mobilization#:~:text=New%20conscripts%20undergo%20a%20one,arrival%20at%20their%20assigned%20units>>. Note that Russia also uses private military contractors such as the Wagner Group, and less formalised fighters such as those under the command of the head of the Chechen Republic, Kadyrov, however discussion of these are beyond the scope of this paper.

53 K. Kraj, 'The System of Military Higher Education in the Russian Federation' (2019) *Bezpieczeństwo* 3, available at: <https://btip.ka.edu.pl/pdf/2019-3/btip2019-3-kraj.pdf>

54 R. Novosti, "Призыв на военную службу в РФ" [*Call for military service in the Russian Federation*] (1 October 2021), available at: <<https://ria.ru/20211001/prizyv-1752351899.html>>.

55 K. Stepanenko, F. W. Kagan, B. Babcock-Lumish, 'Explainer on Russian Conscription, Reserve, and Mobilization' (*Institute for the Study of War*, 5 March 2022), available at: <<https://www.understandingwar.org/backgrounder/explainer-russian-conscription-reserve-and-mobilization#:~:text=New%20conscripts%20undergo%20a%20one,arrival%20at%20their%20assigned%20units>>.

56 See <https://twitter.com/markhertling/status/1572571676524838915>.

57 A.Tenisheva, 'Russia Sends Army Recruits to Fight in Ukraine After Just Days of Training', *The Moscow Times*, 22 July 2022, available at: <<https://www.themoscowtimes.com/2022/07/20/russia-sends-army-recruits-to-fight-in-ukraine-after-just-days-of-training-a78314>>.

58 A.Tenisheva, 'Russia Sends Army Recruits to Fight in Ukraine After Just Days of Training', *The Moscow Times*, 22 July 2022, available at: <<https://www.themoscowtimes.com/2022/07/20/russia-sends-army-recruits-to-fight-in-ukraine-after-just-days-of-training-a78314>>.

59 S. B. Freeman and K. Kjellstrom Elgin, 'What the use of Russian conscripts tells us about the war in Ukraine' (*Politico*, 17 March 2022), available at: <<https://www.politico.eu/article/what-the-use-of-russia-conscripts-tells-us-about-the-war-in-ukraine/>>.

announcing on 21 September 2022 the mobilisation of 300,000 reservists, who may only have up to two weeks of training.⁶⁰

In addition, there is a lack of transparent information as to the extent of international humanitarian law ('IHL') training in the Russian military system and how far this feeds into the Rules of Engagement to be followed by their forces.⁶¹ The Russian government has released public statements acknowledging its obligations under IHL and has proclaimed to provide training to the Russian Armed Forces on their IHL obligations.⁶² Additionally, the ICRC has given training on IHL to Russian armed forces in the past. However, the content and recipients of the Russian government-provided training is not fully known, and it is unclear to what extent the ICRC has remained active in Russia in this regard. Overall, the lack of training, combined with harsh penalties imposed for voluntary surrender and desertification, lead to a pressure from within the system to fight irregardless of experience or the cost to civilians.⁶³

Moreover, during the USSR invasion of Afghanistan, internal hierarchies contributed to difficulty in bonding amongst USSR soldiers and thus resulted in low morale.⁶⁴ Research has suggested that differences in rank as well as between those who had served longer and the newer recruits precluded positive experiences.⁶⁵ Notably, these pressures 'were usually vented in senseless cruelty – not only towards Afghans but also towards [their fellow comrades]'.⁶⁶ Low morale and a culture of violence with impunity continues to permeate the Russian military. The 'dedovshchina' or 'rule of grandfathers', is a form of initiation or hazing involving brutality towards new young conscripts, including rape. This behaviour has been considered by the European Court of Human Rights to be a 'gross abuse of human rights'.⁶⁷ This practice remains ongoing in the Russian military today with a 2019 report indicating that the situation is getting worse.⁶⁸ Additionally, there is a culture of 'toxic masculinity', in which competitiveness between male soldiers as to their masculinity is the norm.⁶⁹ The lack of an organisational structure, in which professional non-conscript commanders are accountable for

60 See <<https://www.aljazeera.com/news/2022/9/21/russias-putin-orders-partial-mobilisation-what-did-he-say>>; and <<https://www.csis.org/analysis/what-does-russias-partial-mobilization-mean>>.

61 A. Demus and O. Younossi, 'Reopening Old Wounds: Two Stories, One Lesson', RAND Blog, 16 April 2022, available at: <<https://www.rand.org/blog/2022/04/reopening-old-wounds-two-stories-one-lesson.html>>.

62 Prikaz Ministra oborony Rossiiskoi Federatsii "O merakh po sobliudeniю norm mezhdunarodnogo prava v Vooruzhennykh Silakh Rossiiskoi Federatsii" No 360 ot 8 avgusta 2001 [Order by the Minister of Defence of the Russian Federation No 360, "On Measures to Ensure Respect for International Humanitarian Law by the Armed Forces of the Russian Federation", August 8, 2001].

63 See e.g. <<https://www.rferl.org/a/russia-penalty-desertion-surrender/32049445.html>>.

64 M. Galeotti, *Afghanistan: The Soviet Union's Last War* (1st edn, Routledge 1995), pp 34-35.

65 A. Heinamaa, M. Lapanen and Y. Yurchenko, *The Soldiers' Story: Soviet Veterans Remember the Afghan War* (University of California at Berkeley, 1994) p. 11.

66 A. Heinamaa, M. Lapanen and Y. Yurchenko, *The Soldiers' Story: Soviet Veterans Remember the Afghan War* (University of California at Berkeley, 1994) p. 11.

67 M. O'Brien and N. Quinevet, 'Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict' *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>; *Peredeventsey v Russia*, Judgement of the European Court of Human Rights, Application No 39583/05, para 99, available at: <[https://hudoc.echr.coe.int/eng#{"itemid":\["001-142516"\]}](https://hudoc.echr.coe.int/eng#{)>.

68 See <https://www.documentcloud.org/documents/21042968-dedovshchina-v-rossiiskoi-armii-2019>

69 M. O'Brien and N. Quinevet, 'Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict' *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>.

the actions of their subordinates,⁷⁰ also contributes to the lack of discipline and a coercive environment with impunity. Combined, these factors all serve as a barrier to professionalism within the Russian armed forces.⁷¹

A further illustration of this point is that conflict-related sexual violence committed by Russian forces has been evident for over 70 years and appears to be a demonstration of a gendered view in keeping with ‘loyalty’ to comrades, power, and humiliation.⁷² In Russia, domestic violence only attracts administrative penalties, and within the Russian military, female soldiers are subjected to beauty contests and ultimately, exclusion.⁷³ In the case of the USSR in World War II, ‘rapes were not only a display of masculine power over other women but also reinforced the bonds between Soviet soldiers, and sent a signal to German men, unable to protect women.’⁷⁴

Ultimately, investing in education and training should be a key component in addressing the root causes of the crimes committed, including archaic patriarchal and hierarchal attitudes which have filtered through military structures, to ensure similar patterns are not repeated again.

4. Peace or justice?⁷⁵

Afghanistan has been plagued by sustained impunity with respect to the injustices that have occurred. The Afghan population’s and especially victim groups’ continued advocacy for justice have remained consistent since 1989. The consultation carried out by AIHRC and the subsequent report ‘A Call for Justice’ received overwhelming support. Although an accountability mechanism was envisaged in the Action Plan drawn up by representatives of the President’s Office, the AIHRC, and UNAMA and supported by the EU and the Netherlands, the drive for short-term security was prioritised, following the policy of ‘peace now, justice later’ promulgated by Afghan authorities and the international community.⁷⁶

In Ukraine, the picture is radically different. Transitional justice initiatives in ongoing conflicts prompt a complex dual-facing approach between accounting for the past, but also looking to the future.⁷⁷ In 2021, 54 percent of Ukrainians supported discussions on transitional justice even amid ongoing conflict, with only 11.5 percent in favour of waiting until after the Russian occupation ended.⁷⁸ Often peace takes priority in such a

70 A. Exum, ‘The Russian Military Has Descended Into Inhumanity’, *The Atlantic*, 6 April 2022, available at: <<https://www.theatlantic.com/ideas/archive/2022/04/bucha-ukraine-bodies-russian-military-crimes/629485/>>.

71 M. N. Posard and K. Holynska, ‘Russia’s Problems with Military Professionalization’ (RAND Blog, 21 March 2022, available at: <<https://www.rand.org/blog/2022/03/russias-problems-with-military-professionalization.html>>.

72 M. O’Brien and N. Quinevet, ‘Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict’ *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>.

73 M. O’Brien and N. Quinevet, ‘Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict’ *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>.

74 M. O’Brien and N. Quinevet, ‘Sexual and Gender-Based Violence against Women in the Russia-Ukraine Conflict’ *EJIL: Talk!*, 8 June 2022, available at: <<https://www.ejiltalk.org/sexual-and-gender-based-violence-against-women-in-the-russia-ukraine-conflict/>>.

75 A. N. Nadery, ‘Peace or Justice? Transitional Justice in Afghanistan’ 2007 *International Journal of Transitional Justice* 1(1) 173.

76 P. Gossman and S. Kouvo, ‘Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan’, Afghanistan Analysts Network, 2013, available at: <https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf>.

77 Peacerep, ‘The Role of Transitional Justice in Ukraine’, 18 May 2022, available at: <<https://peacerep.org/2022/05/18/the-role-of-transitional-justice-in-ukraine/>>.

78 K. Busol, ‘Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process’, Just Security, 1 June 2022, available at: <<https://www.justsecurity.org/81680/mariupol-and-the-origins-and-avenues-of-ukraines-transitional-justice-process/>>.

case due to a lack of political resources to dedicate to justice processes, however, accountability has always been the highest priority for the Ukrainian people.⁷⁹ Since the beginning of the invasion, and as the conflict continues, the drive for accountability by the Ukrainian authorities and the international community has been unprecedented. Following the invasion, the International Criminal Court ('ICC') opened an investigation into the situation in Ukraine, on the basis of the December 2020 conclusions of the Office of the Prosecutor's preliminary examination.⁸⁰ The investigation was opened on 2 March 2022, following the referral by 39 Member States, and covers any allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards.⁸¹ Several European countries have initiated universal jurisdiction investigations, including Poland, Germany, Spain, Estonia, Lithuania, Slovakia, France, Norway, Latvia, Sweden, Switzerland and Romania.⁸² A joint investigation team between Ukraine, Lithuania, Poland and the Office of the Prosecutor at the ICC has been set up with the support of Eurojust.⁸³ The Ukrainian Office of the Prosecutor General is also carrying out the majority of the work, with its War Crimes Department being supported by an Atrocity Crimes Advisory Unit, and Mobile Justice Teams consisting of international legal and investigatory experts.⁸⁴ Momentum is also building for the creation of a Special Tribunal for the Crime of Aggression against Ukraine.⁸⁵

In the case of Afghanistan, while the Geneva Accords were pitched to Afghans as a peace agreement, ultimately, ignorance of criminal justice and the promotion of a state of impunity by authorities in favour of peace did not serve the interest of victims, and resulted in more violence and insecurity, demonstrating that this was not conducive to sustainable peace.⁸⁶ It also was not reflective of victims wishes – over 76% respondents to the 'A Call for Justice' consultations favoured prioritising criminal justice initiatives, demonstrative of the 'perception is that war criminals are a source of instability, and that measures that seek to deal with them will enhance security'.⁸⁷ In the Ukrainian context, the motivation towards criminal accountability of Russian perpetrators is clear, however it is important that criminal justice initiatives are

79 K. Busol, 'Mariupol and the Origins and Avenues of Ukraine's Transitional Justice Process', Just Security, 1 June 2022, available at: <<https://www.justsecurity.org/81680/mariupol-and-the-origins-and-avenues-of-ukraines-transitional-justice-process/>>.

80 Ukraine accepted the jurisdiction of the ICC by declarations under Article 12 (3) of the Rome Statute giving the ICC jurisdiction over crimes perpetrated in the territory of Ukraine from November 2013 onward.

81 Note that further States have referred the situation, including Japan, since. See e.g. 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine', 11 March 2022, online at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and>

82 Annegret Hartig, "Domestic Criminal Courts as Gap-Fillers? Avoiding Impunity for the Commission of the Crime of Aggression against Ukraine", *Völkerrechtsblog*, 12 April 2022, online at <https://voelkerrechtsblog.org/domestic-criminal-courts-as-gap-fillers/> (accessed on 4 May 2022); <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8BCi>; <https://notesfrompoland.com/2022/03/17/icc-chief-prosecutor-thanks-poland-for-support-investigating-war-crimes-in-ukraine/>.

83 Eurojust, 'ICC participates in joint investigation team supported by Eurojust on alleged core international crimes in Ukraine', Press release, 22 April 2022, online at <https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes> (accessed 4 May 2022).

84 See e.g. <<https://www.gov.uk/government/news/joint-statement-eu-us-and-uk-establish-atrocity-crimes-advisory-group-aca-for-ukraine>>.

85 See e.g. European Parliament resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine (2022/2655(RSP)), and I. Koshiw, 'Ukraine calls for international tribunal to bring Putin to justice more quickly', *The Guardian*, 21 July 2022, available at: <<https://www.theguardian.com/world/2022/jul/21/ukraine-calls-for-international-tribunal-to-bring-putin-to-justice-more-quickly>>.

86 A. N. Nadery, 'Peace or Justice? Transitional Justice in Afghanistan' 2007 *International Journal of Transitional Justice* 1(1) 173.

87 Afghanistan Independent Human Rights Commission, 'A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan', 2005, available at: <<https://www.refworld.org/pdfid/47fdfad50.pdf>>, p. 17.

effective, do not become fragmented, that Ukraine maintains ownership of the process (while still ensuring the impartiality of it), and, as should have been the case in Afghanistan, that the accountability process is led by the victim's interests.

In this sense, concerns that the introduction of a legal procedure in Ukraine in July 2022, which allows prisoners of war accused of international crimes to be released from detention and exchanged (while the criminal proceedings against them continue *in absentia*), amount to a *de facto* amnesty should be carefully considered.⁸⁸ Ukraine's law on cooperation with the ICC of 3 May 2022 which allows for cooperation on the investigation and prosecution *only* of those who 'were subject to and/or acted with the aim of carrying out armed aggression against Ukraine, and/or on the basis of decisions (orders, directives, etc.) of officials, military command, or public authorities of the Russian Federation or another State that carried out aggression or facilitated its implementation against Ukraine' is also problematic in that it does not address victims of any crimes by the Ukrainian side.⁸⁹ An original criticism of the Draft Law on the Principles of State Policy of the Transition Period prior to the invasion was that it was 'one-sided, because it focused exclusively on the consequences of Russia's aggression and occupation (articles 1.1(4), 2.4, 13.1), and thus risked inaction in case of possible violations by Ukrainian actors, even if far less prevalent'.⁹⁰ While it is important to aim for the Russian leadership, symbolic trials *in absentia* or trials which are driven by a select number of Western states (who have not engaged themselves with existing international criminal justice initiatives in other contexts), with limited Ukrainian representation or components, or without global support, may raise issues of legitimacy or efficacy. It is also questionable whether such criminal justice processes would be truly victim-centric. For example, while targeting the leadership's rhetoric and ideologies is key, personification of the invasion through Putin and Lavrov may neglect crimes committed by lower-level perpetrators and victims of specific categories of crimes such as conflict-related sexual violence. Resources should therefore also be directed towards enhancing the capacity of the Ukrainian national criminal justice actors who will be tasked with investigating, prosecuting and adjudicating these cases. Victims should be consulted at the outset of designing the justice process as occurred in Afghanistan, and at all stages throughout.

5. Documentation

Documentation for truth-telling and the preservation of memory were both envisaged in the Action Plan in Afghanistan. The United Nations created a Special Rapporteur on the situation of human rights in Afghanistan in 1984, however he unfortunately was not able to travel in-country, meaning his reports were based on interviews from refugees and journalists. The United Nations Office of the High Commissioner for Human Rights decided to 'conduct a limited mapping exercise' which was never officially published but indirectly made its way into the public domain.⁹¹ In 2006, the AIHRC began efforts to document major incidents and patterns of war crimes in Afghanistan from 1978 to 2001, including analysis of the chain of command of the

88 J. Crawford, 'UN Points to Russian Crimes and Ukraine Justice Challenges', *Justiceinfo.net*, 11 October 2022, available at: <<https://www.justiceinfo.net/en/107587-un-points-to-russian-crimes-and-ukraine-justice-challenges.html>>.

89 K. Ambos, 'Ukrainian Prosecution of ICC Statute Crimes: Fair, Independent and Impartial?', *EJIL:Talk!*, 10 June 2022, available at: <[90 K. Busol, 'Mariupol and the Origins and Avenues of Ukraine's Transitional Justice Process', *Just Security*, 1 June 2022, available at: <<https://www.justsecurity.org/81680/mariupol-and-the-origins-and-avenues-of-ukraines-transitional-justice-process/>>.](https://www.ejiltalk.org/ukrainian-prosecution-of-icc-statute-crimes-fair-independent-and-impartial/#:~:text=Last%20but%20not%20least%2C%20concerns,been%20signed%20by%20President%20Zelenskyy.>></p></div><div data-bbox=)

91 P. Gossman and S. Kouvo, 'Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan', *Afghanistan Analysts Network*, 2013, p. 22, available at: <https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf>.

parties involved, however its final report was never released.

Ultimately, despite documentation being available, it never fed into any official truth-seeking exercise or was recognised as important to the national reconciliation process.⁹² Those involved in the conflict also did not commit to records they held being made available for scrutiny. For example, although Soviet officials most likely ‘kept records of the many arrests and summary trials, the names and sentences of those imprisoned, and the military campaigns in the countryside that targeted mujahedin insurgents and the civilians who supported them’ many of these records were likely removed following the Soviet departure or kept classified.⁹³ Although some efforts were made towards memorialisation – for example, the erection of the memorial in Dasht-e Shohada, and ‘A Way from Darkness’ (Rah-i az meyan tariky) in Herat, in the absence of comprehensive and publicly available documentation and preservation of memory, a coherent narrative of the past was never achieved.⁹⁴

In contrast, in response to the Russian invasion of Ukraine, a vast number of actors have been involved in documentation, including national civil society organisations, international non-governmental organisations, and open-source investigators, together with national law enforcement agencies, international investigators, and the UN Commission of Inquiry. The sheer number of initiatives, however, makes the documentation process complex. Documentation is currently decentralised, and may therefore be duplicated, in some cases running the risk that victims could be re-traumatised due to repeated interviews, and also leading to fatigue on the part of victims and witnesses. There are also varying purposes of the documentation. For example, many involved in the documentation process have made clear that their efforts are being conducted with the aim of feeding evidence into criminal justice processes, however questions as to how this will be operationalised in practice, especially given the diversity of the processes and lack of cooperation protocols, remain. It is also important to remember the truth-seeking and preservation of memory purposes of documentation.⁹⁵ Regardless of the exact purpose, a lesson that can be learnt from Afghanistan is that a *coherent* narrative of the invasion and the impact on victims should be built through documentation. In this sense, those involved in documentation should also consider the wider rhetoric (as described in Section 2), and further consideration should be made to military records held by the Ministry of Justice, among other institutions, which could be highly valuable. It is fundamental that documentation efforts are further coordinated in Ukraine towards this ultimate goal.⁹⁶

6. The role of the international community

92 P. Gossman and S. Kouvo, ‘Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan’, Afghanistan Analysts Network, 2013, p. 24, available at: <https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf>.

93 P. Gossman and S. Kouvo, ‘Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan’, Afghanistan Analysts Network, 2013, p. 19, available at: <https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf>.

94 P. Gossman and S. Kouvo, ‘Tell us how this ends: Transitional Justice and Prospects for Peace in Afghanistan’, Afghanistan Analysts Network, 2013, pp. 38-39, available at: <https://www.afghanistan-analysts.org/wp-content/uploads/2013/06/2013-06_AAN_TransitionalJustice2.pdf>.

95 See, e.g. the work of organisations such as the Lemkin Centre, <<https://instytutpileckiego.pl/en/instytut/aktualnosci/centrum-dokumentowania-zbrodni-rosyjskich-w-ukrainie-im>>, or the Institute for Peace and Common Ground based in Kyiv.

96 K. Busol and R. Hamilton, ‘Transitional Justice in Ukraine: Guidance to Policymakers’, Just Security, 2 June 2022, available at: <<https://www.justsecurity.org/81719/transitional-justice-in-ukraine-guidance-to-policymakers/>>.

Justice for Ukraine should be unique to its context. However, just as the USSR invasion of Afghanistan ultimately preceded the breakup of the USSR, the invasion of Ukraine by Russia is also a pivotal moment in the ‘future world order’.⁹⁷ While ‘[t]he level of international protest, sanctions and media coverage diminished after the initial outcry over the large-scale Soviet intervention in December 1979’,⁹⁸ the wider role of the international community in terms of the maintenance of international peace and security following the Russian invasion of Ukraine should be considered. In its rhetoric surrounding the Ukrainian invasion, Russia has demonstrated legal nihilism,⁹⁹ in that it appears to view international law as an ‘instrument of power’,¹⁰⁰ ultimately resulting in its refusal to engage with international legal processes.

When Russian Foreign Minister Sergey Lavrov addressed the UN General Assembly in 2019, he stated:

*In our view, the reason for the current state of affairs lies, first and foremost, in the unwillingness of the countries which declared themselves the winners in the Cold War to reckon with the legitimate interests of all other states, to accept the objective course of history.*¹⁰¹

As a result, he stated that ‘[leading] Western countries’ are trying to ‘impose standards of conduct based on the narrow Western interpretation of liberalism on others’ in the name of the “rules-based order”, ultimately aiming:

*to revise the norms of international law which no longer suit the West, to substitute it for the “rules” adjusted to its self-serving schemes which are elaborated depending on the political expediency, and to proclaim the West and only the West as an indisputable source of legitimacy.*¹⁰²

Much of the same language was used in Putin’s speech announcing his ‘special military operation’ in Ukraine.

However, Russia itself manipulates international law, as seen in Putin’s debunked *ad bellum* legal justifications¹⁰³ for his so-called ‘special military operation’ in Ukraine outlined in Section 2. Furthermore, Russia has denied the application of IHL or the facts which underpin allegations of breaches, an approach that has derived from the Soviet era.¹⁰⁴ Indeed, Riepl has argued that Russia (following the USSR’s approach) often

97 I. Brunk and M. Hakimi, ‘Russia, Ukraine, and the Future World Order’, 2022 *American Journal of International Law* 116(4) 687.

98 W.M. Riesman and J. Silk, ‘Which Law Applies to the Afghan Conflict?’, 1988 *The American Journal of International Law* 82(3), p. 459.

99 The Finnish Institute of International Affairs, Webinar: ‘Russian Approaches to International Law’, 21 April 2022, available at: <<https://www.youtube.com/watch?v=y4MFLWVFDDI>>.

100 C. von Gall, ‘Russia’s Approaches to International Humanitarian Law’, *Voelkerrechtsblog*, 13 April 2022, available at: <<https://voelkerrechtsblog.org/russias-approaches-to-international-humanitarian-law/>>.

101 Statement by H. E. Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation at the 74th Session of the UN General Assembly, 27 September 2019, available at: <http://statements.unmeetings.org/GA74/RU_EN.pdf>.

102 Statement by H. E. Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation at the 74th Session of the UN General Assembly, 27 September 2019, available at: <http://statements.unmeetings.org/GA74/RU_EN.pdf>.

103 J. A. Green, C. Henderson & T. Ruys, ‘Russia’s attack on Ukraine and the *jus ad bellum*’ 2022 *Journal on the Use of Force and International Law* 9(1), pp. 4-30.

104 M. Kramer, ‘Russia, Chechnya, and the Geneva Conventions, 1994–2006’ in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?* (Oxford University Press 2017), p. 183. The perestroika was a program led by Michael Gorbachev in the 1980s to restructure Soviet economic and political policy.

uses ‘the Paintbrush’ approach to blur the lines around the characterisation of armed conflicts to impede the triggering of the applicability of IHL,¹⁰⁵ or ‘the Sledgehammer’ approach, in which Russia resorts to a denial of facts concerning IHL violations to stifle accusations of breaches.¹⁰⁶ For example, in line with the ‘Paintbrush’ approach, when reminded of their obligations under IHL during the invasion of Afghanistan, the Soviet government replied that such problems would be better directed towards the Afghan authorities, because the USSR does not participate in combat.¹⁰⁷ Similar statements have been made in the Ukraine context, with Russia categorising the conflict as a ‘special military operation’ and denying that they have invaded Ukraine.¹⁰⁸ In previous conflicts where evidence has emerged that Russia violated its obligations under IHL, Moscow has challenged the facts on which the criticisms have been founded in an attempt to deny any wrongdoing.¹⁰⁹ Moreover, in line with the ‘Sledgehammer’ approach, the Russian government has opted to deny accusations that they have been targeting civilians, with the Kremlin suggesting images and videos emerging from Bucha, Ukraine were ‘faked’.¹¹⁰ As the USSR did with the invasion of Afghanistan, Russia has been censoring details about the Ukrainian invasion and dispersing protestors opposed to the war.¹¹¹

The UN Security Council was paralysed at the time of the USSR invasion of Afghanistan, and has been paralysed again in terms of Ukraine, resulting in emergency sessions of the UN General Assembly being called, and strikingly similar resolutions being adopted which ‘deplor[ed]’ the ‘armed intervention’ (in the case of Afghanistan), and ‘aggression’ (in the case of Ukraine), and called for the ‘immediate’ withdrawal of Soviet troops and cessation of Russia’s unlawful use of force.¹¹² Russia had already withdrawn from the ICC and, since the invasion, from the Council of Europe, and cases before the European Court of Human Rights and the International Court of Justice in relation to the situation in Ukraine have so far been unenforceable against Russia.¹¹³ However, it would be naïve to suggest that a lack of engagement with international law and international legal enforcement bodies is a Russian ‘playbook’.¹¹⁴ Questions have consistently been raised

105 M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia’s historical role and its current practice*, (Nomos, 2022), p. 212

106 M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia’s historical role and its current practice*, (Nomos, 2022), p. 358

107 ICRC, ‘Annual Report 1980’ (1980), p. 45; see also ICRC, ‘Annual Report 1981’ (1981), p. 37.

108 See, e.g. <<https://tass.com/politics/1419745>>.

109 M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia’s historical role and its current practice*, (Nomos, 2022), p. 368

110 Aljazeera, ‘Russia denies military forces killed Bucha civilians in Ukraine’, 4 April 2022, available at: <<https://www.aljazeera.com/news/2022/4/4/kremlin-rejects-accusation-russian-forces-killed-bucha-civilians>>.

111 Amnesty International, ‘Russia: Kremlin censors media and disperses protesters opposed to Ukraine invasion’, 28 February 2022, available at: <<https://www.amnesty.org/en/latest/news/2022/02/russia-kremlin-censors-media-and-disperses-protesters-opposed-to-ukraine-invasion/>>.

112 United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP), ‘Background’, available at: <<https://peacekeeping.un.org/mission/past/ungomap/background.html>>; UN, ‘General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops’, GA/12407, 2 March 2022, available at: <<https://www.un.org/press/en/2022/ga12407.doc.htm>>.

113 V. Kerr, ‘Debunking the Role of International Law in the Ukrainian Conflict’ *Opinio Juris*, 8 March 2022, available at: <<https://opiniojuris.org/2022/03/08/de-bunking-the-role-of-international-law-in-the-ukrainian-conflict/>>.

114 N. J. Robinson, ‘Is Russian Brutality Toward Civilians Actually Unique?’, *Current Affairs*, 21 March 2022, available at: <<https://www.currentaffairs.org/2022/03/is-russian-brutality-toward-civilians-actually-unique>>.

about the legal basis of the US-coalition invasion of Iraq in the early 2000s,¹¹⁵ and many Western powers have been criticised for their repeated disregard for civilian lives and lack of transparency as to the suffering they have caused in Afghanistan and other conflicts they were involved.¹¹⁶ An investigation has been recently opened in the United Kingdom, for example, into claims SAS soldiers killed Afghan civilians ‘in cold blood’ between 2010 and 2013.¹¹⁷ While the United States is openly supportive of the ICC investigation in Ukraine, its moral authority in demanding justice in this respect could be questioned, as it is not a party to the ICC, and, in fact, has demonstrated an ‘an openly hostile attitude toward the Court and adopt[ed] adverse policy and legal actions during the Bush and the Trump administrations.’¹¹⁸ Heller has also argued, in the context of creating a Special Tribunal for Aggression against Ukraine, that ‘[i]t would also be a travesty if the Special Tribunal was created by the same states that were responsible for neutering the crime of aggression at the ICC.’¹¹⁹

The lack of effective response from the international community to the atrocities of the USSR invasion of Afghanistan (and indeed to many other atrocities since) and the lack of commitment of states to the enforcement of international law demonstrates a certain selectivity and fragmentation which must be addressed. Vasiliev has described a ‘crisis of multilateralism’, an ‘erosion of international rule of law’ and ‘States’ commitment to accountability ha[ving] seemingly been worn out or becom[ing] markedly less steadfast’.¹²⁰ As Vasiliev argues, ‘[t]he ‘Ukraine moment’ could, and hopefully will, mark a paradigm shift in states’ attitude, that would contribute to restoring the international rule of law and to reconfiguring the multilateral cooperation in international justice’.¹²¹ Rather than acting in a reactionary fashion, the international community must demonstrate a renewed commitment to sustainable peace and security, including through ensuring that no victims are left forgotten.

7. Conclusions and Recommendations

Despite the USSR invasion of Afghanistan and the Russian invasion of Ukraine being separated by three decades and distinguishable in a number of respects, there are nonetheless a number of lessons which can be drawn from a historical analysis of the two. In-depth consideration of the historical framing of the invasion of Ukraine through imperialism and the role of the Soviet legacy in driving patriotism will be critical to the transitional justice process in Ukraine. Rhetoric will not only be essential in ensuring that the Russian leadership is held accountable, it could also be beneficial in predicting how the invasion will continue and in determining the components of any peace agreement. While broader ideology and rhetoric are at play,

115 E. MacAskill and J. Borger, ‘Iraq war was illegal and breached UN charter, says Annan’, *The Guardian*, 16 September 2004, available at: <<https://www.theguardian.com/world/2004/sep/16/iraq.iraq>>.

116 S. Jager, ‘Lost Innocents: The US Military’s Shameful Failure to Protect Civilians’, Human Rights Watch, 28 January 2022, available at: <<https://www.hrw.org/news/2022/01/25/lost-innocents>>.

117 D. Sabbagh, ‘Inquiry launched into claims SAS soldiers killed Afghan civilians’, *The Guardian*, 15 December 2022, available at: <<https://www.theguardian.com/uk-news/2022/dec/15/inquiry-launched-into-claims-sas-soldiers-killed-afghan-civilians>>.

118 Y. Dutton and M. Sterio, ‘The War in Ukraine and the Legitimacy of the International Criminal Court’, *Just Security*, 30 August 2022, available at: <<https://www.justsecurity.org/82889/the-war-in-ukraine-and-the-legitimacy-of-the-international-criminal-court/>>.

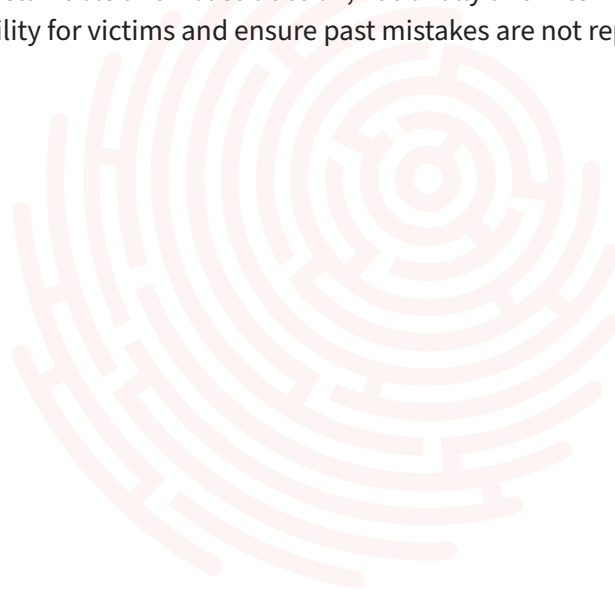
119 <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>

120 S. Vasiliev, ‘Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice’, *Journal of International Criminal Justice* 2022, available at: <<https://academic.oup.com/jicj/advance-article/doi/10.1093/jicj/mqac044/6827886#381139094>>.

121 S. Vasiliev, ‘Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice’, *Journal of International Criminal Justice* 2022, available at: <<https://academic.oup.com/jicj/advance-article/doi/10.1093/jicj/mqac044/6827886#381139094>>.

addressing institutional failings throughout military structures illustrative of continued Soviet influence within the Russian military including a lack of education and training, as well as patriarchal and hierarchal attitudes that are perpetuating brutality will also be critical to ensuring sustainable peace. Criminal justice initiatives must be effective and coordinated, Ukraine must maintain ownership of the process, and the accountability process should be led by the victims' interests. A coherent narrative of the invasion and the impact on victims should be built through coordinated and purposeful documentation.

While justice for Ukraine should be tailored to its specific context, in contrast to the response from the international community to the USSR invasion of Afghanistan, the Russian invasion of Ukraine should be seen as a pivotal moment for the international community to demonstrate a renewed commitment to sustainable peace and security, including through ensuring that no victims are left forgotten. Reactionary and selective action will not prevent future illegal invasions nor civilian suffering in Ukraine or elsewhere. Ultimately, the reflections given in this paper demonstrate that further discourse is needed on how to go forward. Only through decisive steps and sustainable and holistic action, nationally and internationally, will we achieve peace, justice and accountability for victims and ensure past mistakes are not repeated.





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Sanctions against Russia: Legal Setting, Intermediate Economic Impact and Potential Political Outcome¹

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Abstract

We discuss the sanctions against Russia from three perspectives: legal, economic, and political. The sanctions fit into a trend towards recomprehensivation and the use of autonomous rather than UN sanctions. We highlight (1) new sanctions-senders and sanction innovation, indicating which of those are a context-specific development and which are potentially of a more lasting nature, (2) the determinants and economic dynamics of sanctions that are important for an intermediate evaluation of this case, and (3) the uncertainty of the ultimate political outcome of large-scale sanctions. The case suggests that autonomous sanctions are and will remain a central response to serious violations of international law and that they thus require further legal thought.

Keywords

Russia - Ukraine - Sanctions - International law - International peace and security - United Nations

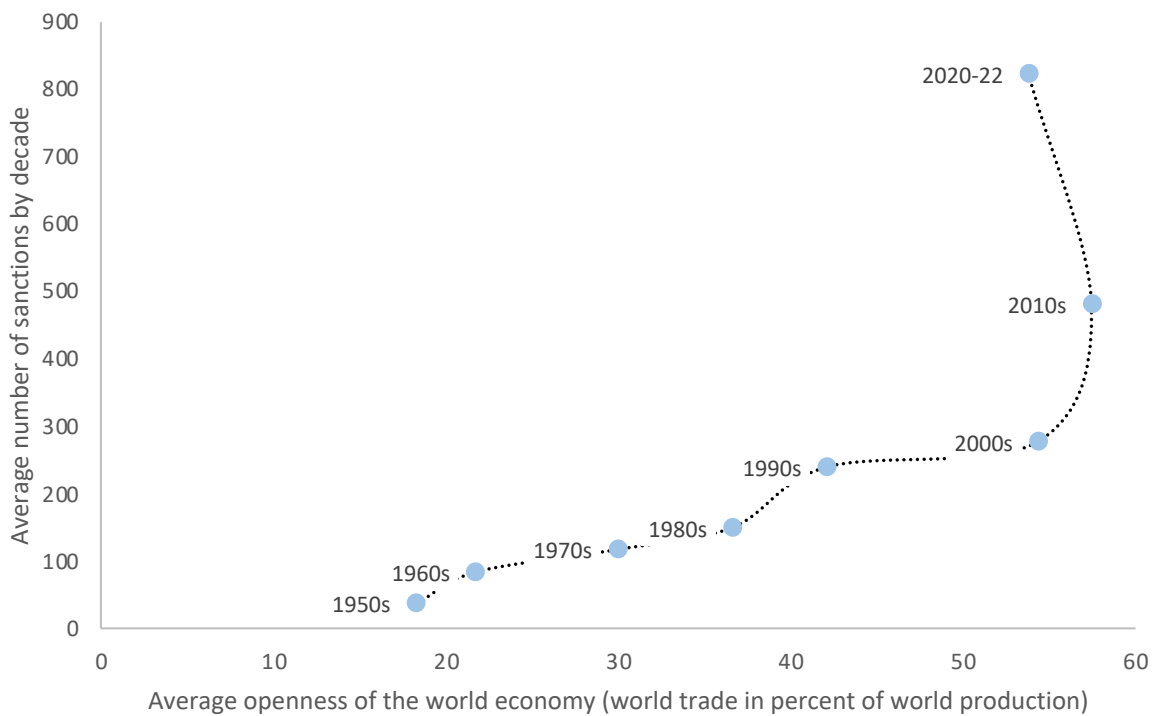


1. Introduction

The imposition of sanctions against Russia is a key component of the Western response to Russia's aggression against Ukraine. The resort to sanctions against Russia aligns with three trends in the sanctions domain, namely (i) a move towards sanctions as the go to tool to respond to international illegal behaviour, (ii) a move away from the system of collective security towards a practice of parallel autonomous sanctions, and (iii) a move to more comprehensive sanctions instead of a focus on targeted sanctions.

Already before the Russian invasion on 24 February 2022, sanctions had become the instrument of choice to deal with threats to international peace and security and breaches of international law. Indeed, as illustrated in Figure 1 a sanction tsunami can be discerned since 2010.

Figure 1 The number of sanctions increased significantly in the past two decades



Note: period averages per decade; for 2020s (the years 2020-2022, inclusive) only three years are available.

Sources: Calculated from the third vintage of the Global Sanctions Data Base⁵ (accessed April 27, 2023) and Peter A.G. van Bergeijk, (2022) COVID-19 and World Trade: In the Eye of the Perfect Storm?, Trade, Law & Development 14 (1) . 39-53.

5 Constantinos Syropoulos et al. 2022. "The Global Sanctions Data Base - Release 3: COVID-19, Russia, and Multilateral Sanctions," School of Economics Working Paper Series 2022-11, LeBow College of Business, Drexel University, Gabriel J. Felbermayr et al., 2020. "The Global Sanctions Data Base," European Economic Review, Volume 129 and Aleksandra Kirilakha et al., 2021. "The Global Sanctions Data Base: An Update that Includes the Years of the Trump Presidency," in Peter A.G. van Bergeijk (ed.) Research Handbook on Economic Sanctions. Cheltenham 2021.

Initially this development was driven by the coincidence of the end to the superpower conflict and an increasingly open world economy that enabled an increase in multilateral sanctions under the aegis of the UN⁶. Until the sanctions adopted against Mali 2017⁷, the UN Security Council had created around one new UN sanctions regime per year since 1990. Over the past decade though, UN sanctions have been rapidly complemented and finally replaced by autonomous sanctions. Stalemates in the UN Security Council have led to a new practice of the imposition of parallel autonomous sanctions by predominantly Western states. The paralysis in the UN Security Council increased after February 2022 as its functioning was contaminated by the ongoing aggressive behaviour of one of its permanent members, Russia. Consequently, autonomous sanctions are now at the forefront.

With sanctions against Russia already in place since the illegal annexation of Crimea in 2014, new sanctions packages swiftly followed one another after February 2022. The sanctions on Russia reinforced the trend of a recomprehensivisation of sanctions,⁸ that is: a return to more comprehensive and encompassing sanctions, not targeting only individuals or narrowly selected sectors of the economy. The broad sanctions packages that were adopted by the US, the EU and the UK aim to take on the economy and military capacity of Russia as such. The overall aim of the sanctions was to maximize the cost of war and to ensure Putin's strategic failure, as well as to signal strong attachment to the norm that borders cannot be redrawn through the use of force.⁹ The concerted sanctions response by Western actors has been met with greatly varying appraisals centered on the question of the efficacy of sanctions. Do sanctions work? Within the context of the broader sanctions landscape, this contribution reflects on the legal setting of the assortment of sanctions against Russia (Section 2), as well as their economic impact (Section 3) and political potential (Section 4). Section 5 offers some concluding remarks.

2.1 Legal setting of the assortment of sanctions imposed on Russia

The Russian invasion of 24 February 2022 that reinforced the lingering aggression since 2014 drew a great variety of international responses. The UN General Assembly condemned the aggression in the strongest terms.¹⁰ While no UN sanctions were imposed by the UN Security Council – for obvious reasons – a whole range of other actors did exercise their political and economic muscle. And perhaps precisely because of Security Council paralysis, others acted much forcefully and pervasively than they had ever done before. The result was an assortment of various measures, ranging from institutional sanctions imposed by international organizations, corporate self-sanctioning by multinationals which en masse wanted to voluntarily exit and divest from Russia, and an increasingly thick web of autonomous sanctions imposed by several states as well as the EU.

6 Peter A.G. van Bergeijk (ed.), 2021, *Research handbook on economic sanctions*, Edward Elgar: Cheltenham; and Larissa van den Herik (ed.), 2017, *Research handbook on UN sanctions and international law*, Edward Elgar: Cheltenham.

7 UN Doc. S/RES/2374, 5 September 2017.

8 This trend is also signalled in Larissa van den Herik, *Unilateral and Extraterritorial Sanctions Symposium: Unilateral Sanctions and Geoeconomics – What Role for International Law?*, *Opinio Juris Blog*, 28 February 2022.

9 Statement by Daleep Singh, former Deputy National Security Advisor for International Economics and Deputy Director of the National Economic Council, Hearing on Advancing National Security and Foreign Policy Through Sanctions, Export Controls, and Other Economic Tools, U.S. Senate Committee on Banking, Housing, and Urban Affairs, 28 February 2023.

10 UN Doc. A/RES/ES-11/1, 2 March 2022.

2.1 Institutional sanctions

Institutional sanctions are sanctions imposed by international organizations against member states. After February 2022, a number of political and technical international organizations resorted to the institutional sanction of non-participation.¹¹ Some international organizations, such as the Council of Europe, expelled Russia as a member while others, including the International Council for the Exploration of the Sea (ICES), the OECD Nuclear Energy Agency (OECD NEA), and the European Conference of Postal and Telecommunications Administrations (CEPT), fully or partially suspended voting rights and other membership rights and privileges.¹² The institutional framework of some of these organizations did not offer an explicit legal basis for the institutional sanctions that were imposed, raising questions about whether indeed international organizations can take such measures beyond their mandate and the more abstract question whether international organizations can take countermeasures¹³. These questions tie into a broader interrogation of the public mandate of international organizations, and specifically whether they can and should take over public order responsibilities that the UN Security Council is failing to exercise. There is some precedent for such a policing function of international organizations beyond their mandate, dating from 2021 when the Organization for the Prohibition of Chemical Weapons suspended some of Syria's rights and privileges.¹⁴ There is an ongoing discussion on whether such a more outspoken role for international organizations reinforces core rules of the international legal order or whether it rather undermines multilateralism.¹⁵ It is not necessarily the case that the overwhelming number of institutional sanctions against Russia tips the balance in this discussion and that it forebodes a new public role for international organizations as such.¹⁶ The fact that such a great number and variety of international organizations resorted to sanctions in this context can also be understood to underline the truly exceptional and extraordinarily serious circumstances to which the sanctions reacted rather than that it initiated a new trend per se.

2.2 Corporate self-sanctioning

Another form of sanctioning that was particularly prevalent as a response to the Russian aggression was corporate self-sanctioning, in the sense that hundreds of multinational corporations announced plans to leave Russia or suspended operations without being obliged to do so by a formal sanctions regime.¹⁷ The rather chaotic and uncoordinated exit from Russia raised some questions about how to exit responsibly and, moreover, it has often been more difficult to leave than anticipated.¹⁸ And while in other sanctions situations, such as Afghanistan, there have been negative consequences of voluntary overcompliance by corporations going beyond what was required by the formal sanctions regime, particularly in terms of impact on the

11 Martina Buscemi, 2022, *Outcasting the Aggressor: The Deployment of the Sanction of "Non-participation"*, 116 *American Journal of International Law* 4: p. 764-774.

12 For a full overview, see Martina Buscemi, *ibid.*

13 *Ibid.* See also Maurizio Arcari, 'Sanctions' at the crossroad of parallel regimes of responsibility, in Giovanna Adinolfi, Alessandra Lang, Chiara Rachni (eds.), *Sanctions by and against International Organizations*, Intersentia (forthcoming).

14 OPCW, Conference Decision C-25/DEC.9: Addressing the Possession and Use of Chemical Weapons by the Syrian Arab Republic, 21 April 2021.

15 Martina Buscemi, 2022, *Outcasting the Aggressor: The Deployment of the Sanction of "Non-participation"*, *American Journal of International Law* 116 (4), pp. 764-774, 2022.

16 *Ibid.*

17 Irene Pietropaoli, *Do foreign companies have a responsibility under international law to leave Russia?*, BIICL Blog, 14 March 2022; Richard L. Kilpatrick, Jr., *Self-sanctioning Russia*, EJIL: Talk!, 11 May 2022.

18 Daniel Aguirre and Irene Pietropaoli, *Responsible Exit from Russia: Business and Human Rights in a Global Governance Gap*, 22 March 2022.

civilian population, overall the phenomenon of self-sanctioning or private sector moral sanctions reflects the prominence of human rights due diligence processes for corporate actors, which is inspired by the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. This, in itself, is in our view a positive development.

2.3 Autonomous sanctions

In addition to institutional sanctions and corporate self-sanctioning, autonomous sanctions were imposed by states, most importantly by the US, the EU, and the UK as well as by other states like Japan, South Korea, Singapore, New Zealand, Australia, Norway and Switzerland. Autonomous sanctions are non-UN sanctions, that is: sanctions imposed by states on their own motion without an underlying obligation to do so from the UN Security Council. These sanctions that are adopted outside the UN system of collective security are often also called unilateral sanctions. The EU sanctions are strictly speaking not unilateral as they can only be imposed if all EU member states agree,¹⁹ but they are in many respects comparable to unilateral sanctions in their design and in how they operate. Notably, the EU sanctions against Russia are different from EU institutional sanctions imposed against own members such as Hungary. The EU imposes sanctions, which it calls restrictive measures, as part of its foreign policy. It is atypical for an international organization to have a foreign policy, so this underlines the sui generis character of the EU. When adopting autonomous sanctions as part of its foreign policy, the EU acts like a state. And in fact, the EU is a prominent sanctions-sender, both on Russia as well as on other non-EU member states responding to different situations and violations.²⁰

While UN sanctions are well accepted tools in international legal circles, having a firm basis in Article 41 of the UN Charter, there is a divide in the international community about the legality of non-UN sanctions.²¹ The question of legality becomes particularly acute when autonomous sanctions violate pre-existing international obligations that the sanction-sender has towards the sanctions-recipient and when the sanctions-sender is not responding to a violation of which it is a victim itself. On several occasions, China and Russia have voiced their opposition to unilateralism, including the imposition of unilateral sanctions without a Security Council obligation to do so.²² Yet, those states and interestingly also China have over time also resorted to this instrument themselves, formally or informally. For instance, China imposed sanctions against Australia in retaliation to Australia's request for an international COVID-inquiry.²³

19 On EU foreign policy decision-making see Ramses A. Wessel, Elias Anttila, Helena Obenheimer, Alexandru Ursu, *The future of EU Foreign, Security and Defence Policy: Assessing legal options for improvement*, 26 *European Law Journal* 5-6, 2020, pp. 371-390.

20 Nina M. Brehl (2023) *The inconsistency of EU sanctions in Sub-Saharan Africa. Hypocrisy or careful policy making? A systematic literature review*, ISS working paper 713, Erasmus University.

21 Dapo Akande, Payam Akhavan and Eirik Bjorge, *Economic Sanctions, International Law, and Crimes Against Humanity: Venezuela's ICC Referral*, 115 *American Journal of International Law*, Issue 3, July 2021, pp. 493 - 512.

22 President Xi Jinping and Russian President Vladimir Putin Sign Joint Statement of the People's Republic of China and the Russian Federation on Deepening the Comprehensive Strategic Partnership of Coordination for the New Era and Stress Settling the Ukraine Crisis Through Dialogue, 22 March 2023; Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development, 4 February 2022.

23 Kath Sullivan, *China's list of sanctions and tariffs on Australian trade is growing. Here's what has been hit so far*, ABC News, 16 December 2020.

China also used economic coercion against Lithuania after that state had allowed the establishment of a Taiwanese – rather than Taipei - Representative Office,²⁴ resulting in the creation of an EU anti-coercion instrument.²⁵ Beyond China and Russia, other states opposed to autonomous sanctions are mostly concerned about the humanitarian impact of these measures on the civilian population. These concerns are justified and based on experiences in states like Iran, Syria and Afghanistan. Those concerns do not necessarily have the same weight when discussing sanctions imposed on Russia, given Russia's different economic status as a G20 state. Moreover, in discussions about accountability for violations of socio-economic rights of populations, it is not easy to disentangle the humanitarian impact of sanctions from the consequences that poor internal policy planning and grand corruption has on the living standards of populations. This is referred to as the “causality conundrum”.²⁶ In the specific case of Russia, an additional element to consider is that the sanctions responded to an inter-state situation where the violation of the prohibition of aggression was at stake rather than to an internal situation.

The fact that Russia's violation of international law involved the prohibition of aggression, one of the most important norms of the international community, also raised different questions, particularly about whether third states had any obligations under international law to do what they could to end this very serious violation.²⁷ In such a setting, unilateral sanctions can also be presented as a means to implement the legal obligation to cooperate to end the violation of an erga omnes norm. The question whether sanctions may be imposed is then replaced by the question whether sanctions ought to be imposed. Hence there has been a certain shift in focus from questions surrounding the legality of sanctions to questions regarding what third states are actually obliged and expected to do to stop the aggression.

2.4 Sanction innovation

Despite this subtle shift, questions on the legality of autonomous sanctions remain outstanding and they have not been fully settled. Moreover, as novel types of sanctions were imposed against Russia, new questions arose. One new type of sanctions that was imposed were the so-called media sanctions. While certain Eastern European states and particularly Baltic states as well as the US had already imposed such sanctions and prohibitions before, the EU targeted the media via sanctions for the first time in the context of the sanctions against Russia. Recognizing the hybrid threats coming from Russia and the “international campaign of media manipulation and distortion of facts” with a view to destabilizing neighboring states and the EU as such, and specifically the propaganda action to support and justify its aggression, the EU suspended broadcasting activities of Russia Today subsidiaries and of Sputnik on 2 March 2022.²⁸

24 Marcin Szczyński, Briefing on EU Legislation in Progress regarding Anti Coercion Instrument, European Parliamentary Research Service, November 2022. China's silent boycott is detailed in this briefing on p. 3.

25 Tom Ruys and Felipe Rodríguez Silvestre, The Union strikes back – The proposed EU ‘Anti-Coercion Instrument’ (ACI) seen through the lens of international law, GRILI Working Paper No. 8, December 2022.

26 Ioannis Prezas, From targeted states to affected populations: exploring accountability for the negative impact of comprehensive unilateral sanctions on human rights, in Charlotte Beaucillon (ed.), Research Handbook on Unilateral and Extraterritorial Sanctions, Elgar, 2021, pp. 385-404.

27 Dutch Advisory Committee on Public International Law, Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression, Advisory Report 41, 17 November 2022. The first author of this article was the chair of the Advisory Committee at the time of publication of this advisory report.

28 Council Regulation (EU) 2022/350, 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

The measures have been challenged before the General Court of the EU.²⁹ In rejecting the challenge, the EU General Court referred to the prohibition of war propaganda as contained in the main human rights treaties, it underlined the temporary character of the measures as well as the fact that this particular sanctions measure was part of a broader package that responded to the aggression that was condemned by the UN General Assembly and that constituted an *erga omnes* violation. The Court also found that it had been established that the media organization concerned was under the “permanent direct or indirect control of the leadership of the Russian Federation”, and the judgment illustrated at length that the applicant of the case had broadcast the official Russian position and used similar wording as Russian authorities with a view to justifying and supporting the Russian aggression and influencing European civil society.³⁰ It is clear from the Court’s reasoning that the media sanctions are context-specific in their design and their application. Indeed, the references to the condemnation by the UN General Assembly and its characterization of the invasion as aggression, as well as the reference to the concept of *erga omnes*, limit the precedential value of this specific type of sanction and its potential to become a new tool in the EU sanctions toolbox, despite calls for a wider use of sanctions to combat foreign influence operations.³¹ Notably also, Norway, which generally aligns with EU sanctions, chose not to implement the sanctions against Russia state-controlled media pursuant to a constitutional assessment. The Norwegian government considered that the high media literacy of its population and a culture of strong editorial opinion was sufficient to resist manipulation.³² This underlines a preference to deal with disinformation via other tools than sanctions.

A-typical are also the financial nationality-based sanctions, which prohibit to accept deposits from Russian nationals that exceed 100.000 euro or to provide crypto-asset wallets, accounts or custody services.³³ These sanctions predated the invasion of 2022 and were already adopted in 2014. The sanctions contribute to the aim of constraining Russia and of limiting its ability to finance the aggression. The sanctions do not apply to dual citizens who hold both the Russian citizenship and an EU citizenship. Such persons, like Roman Abramovich who is also a Portuguese citizen, can be sanctioned individually. Nationality-based sanctions are exceptional and if they are implemented without sufficient justification, they risk violating the non-discrimination principle.³⁴ So far, the EU has not imposed a visa-ban for all Russians, even though the EU-Russia visa facilitation agreement has been suspended. Given the reservations regarding sanctions that are applied solely on the basis of nationality,³⁵ it is unlikely that they will become a standard new type of sanction. Rather one can presume that these sanctions were considered necessary in the case of Russia given the extremity of the situation and the need to do everything possible to curb financial flows to and from the Kremlin.

29 RT France v Council of the European Union, Judgment of the General Court, Case No. T-125/22, 22 July 2022. Similarly, a case was brought by Dutch media organizations, Case No. T-307/22.

30 RT France v Council of the European Union, Judgment of the General Court, Case No. T-125/22, 22 July 2022, paras. 127, 142, 143, 154, 159, 164, 165, 172-174, 177-191, 209.

31 Council conclusions on a Framework for a coordinated EU response to hybrid campaigns, 21 June 2022, ST 10016/22, para. 14.

32 European Audiovisual Observatory, Sanctions on RT and Sputnik not to be adopted in Norway, IRIS Merlin 2022-5:1/5.

33 Article 5b of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine.

34 Larissa van den Herik, *Verbindendheid sanctieregeling Iran 2007 ter uitvoering van Veiligheidsraadresolutie 1737*, *Ars Aequi* 62(6), pp. 496-500, 2013.

35 Francesca Finelli and Javier García Olmedo, *The Implementation and Legality of EU Sanctions Against ‘Russian Nationals’*, paper presented at the Workshop From cradle to grave - The policy cycle of EU restrictive measures, Groningen, The Netherlands, 24-26 November 2022.

2.5 Lasting legal effects

Contrary to those novel sanctions which are not necessarily prone to being repeated, other developments in the EU sanctions domain are more likely to have lasting effects, such as the decision to render sanctions evasion an EU crime.³⁶ This decision has not remained without criticism as sanctions evasion seems to be of a different character than the other current EU crimes, which are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. It is also not beyond discussion whether criminal law is the best means of enforcement to deal with sanctions circumvention. Moreover, given the highly political nature of sanctions and particularly the fact that the design of sanctions happens ad hoc and in immediate response to an unfolding situation, there is tension with the legality principle which is central to criminal law.³⁷ In contrast to the two novel sanctions discussed above, which are more likely to remain unique to the Russia sanctions, the decision to render sanctions evasion an EU crime is generic and will apply to all current and new sanctions regimes. There is logic in the reflex to resort to strong measures when confronted with extreme violence, but caution is needed when these are given generic applicability.³⁸

3. Economic impact

The great variety of sanctions imposed also implies that an analysis of impact cannot be mono-dimensional. Moreover, an impact or effectiveness analysis depends on goals set and on existing expectations. In the end sanctions are not about imposing damage but about changing behaviour, constraining and signaling.³⁹ Effective sanctions that only work in the sense that they create a lot of damage but do not change the target's behaviour are often considered a failure. The translation of economic damage into behavioural change is not straight-forward though, due to several aspects of the sanctioning process.

3.1 Determinants of sanction success

First and foremost, sanctions are characterized by uncertainty regarding implementation and a reluctance to impose those particular sanctions that bite most. This is so because a sanction that bites will hurt both the sanction target and the sanction sender that both must forego the mutual benefits of international trade. Given these costs, senders may want to avoid the welfare loss of sanction application so that sanctions remain in the threat stage only. This fundamental uncertainty means that the credibility that the sanction will be effectively applied after a threat is a key determinant for behavioural change, that is: success. Indeed, sanctions application may be necessary to restore political credibility. Second, sanctions can create rally-around-the-flag effects: external threats may bolster popular support for the regime. Relatedly, sanctions may be eroded by third parties and sanction busting activities.⁴⁰

36 European Commission, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the definition of criminal offences and penalties for the violation of Union restrictive measures, COM/2022/684 final, 2 December 2022.

37 Francesca Finelli, The uncertain contours of member states' obligation to ensure that EU restrictive measures are not circumvented, in Giovanna Adinolfi, Alessandra Lang, Chiara Rachni (eds.), *Sanctions by and against International Organizations*, Intersentia (forthcoming).

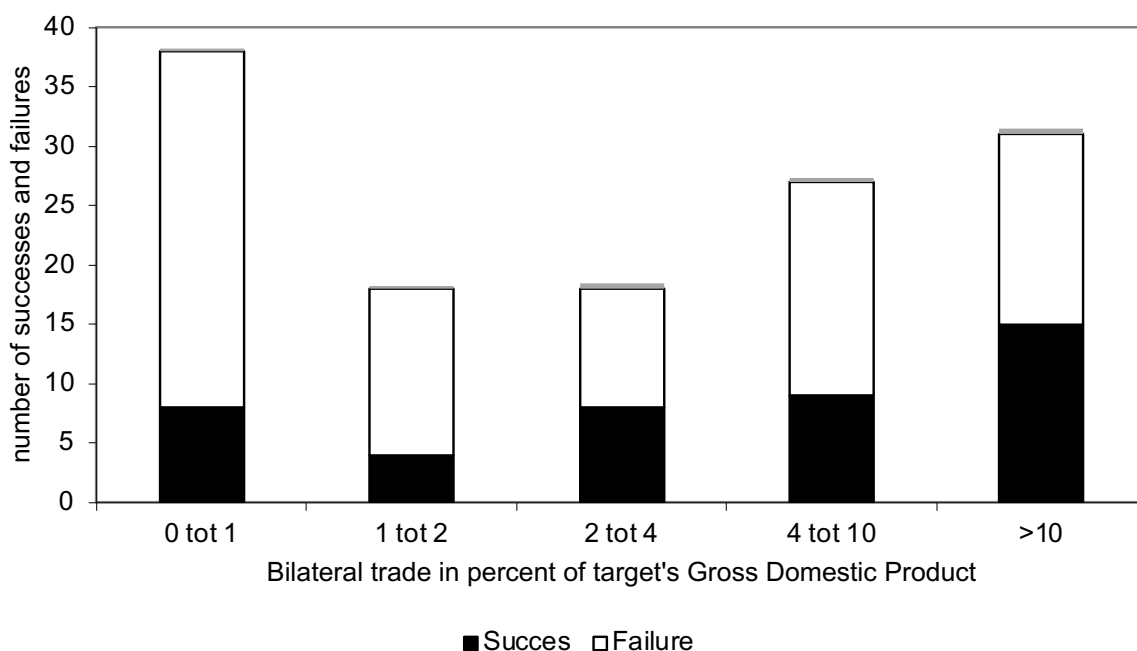
38 General lessons can be learnt from the Security Council's response to 9/11. See for an appraisal of twenty years of counter-terrorism efforts and the need to right-size, *Securing the Future Initiative, Counterterrorism and the United Nations Security Council Since 9/11: Moving Beyond the 2001 Paradigm*, September 2022.

39 Francesco Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions After the Cold War* Paperback, ECPR, 2011. Also see Thomas J Biersteker, Sue E Eckert, Marcos Tourinho, *Targeted sanctions: the impacts and effectiveness of United Nations action*, Cambridge University Press, 2016.

40 See Early, B. R. (2015). *Busted sanctions*. Stanford University Press.

The low success rate of economic sanctions has drawn attention from many observers and often leads to the erroneous conclusion that sanctions cannot work. Typically, this is a fallacy of hasty generalization that ignores the fact that sanction cases that do not meet the requirements for potential success should fail. For example, when pre sanction trade between sender and target is small (i.e. less than one percent of the target's Gross Domestic Product (GDP)) then the failure rate is 80% while at a substantial level of pre sanction trade (more than 10% of the target's GDP) the chance that a sanction succeeds becomes slightly better than fifty-fifty (Figure 2).

Figure 2 Success rate and trade linkage between sender and target



Source: Peter A.G. van Bergeijk Economic diplomacy and the geography of international trade. Edward Elgar, 2009.

Empirical research on the determinants of success and failure of economic sanctions has identified a number of factors that are instrumental for case selection, i.e. to determine ex ante if sanctions in a specific case could in principle succeed. In general, the research strategy has been to estimate the relationship between a measure of sanction success and a set of explanatory variables. The sanction mechanism was generally approached as a black box, although science has progressed and uncovered many mechanisms⁴¹ such as

- imposition versus threat,
- actual versus potential costs,

41 See in order of appearance Sylvanus Kwaku Afesorgbor, (2019) 'The impact of economic sanctions on international trade: How do threatened sanctions compare with imposed sanctions?' *European Journal of Political Economy* 56: 11-26. Peter A.G. van Bergeijk 1989, 'Success and failure of economic sanctions,' *Kyklos*, 42 (3), pp. 385–404., Victoria Golikova and Boris Kuznetsov. "Perception of risks associated with economic sanctions: the case of Russian manufacturing." *Post-Soviet Affairs* 33, no. 1 (2017): 49-62., William H. Kaempfer and Anthony D. Lowenberg, 1988, 'The Theory of International Economic Sanctions: A Public Choice Approach,' *American Economic Review*, 78 (4), 768–93., Peter A.G. van Bergeijk, (1999) 'Economic sanctions; Why do they fail; why do they succeed', in: W. van Genugten and G.A. de Groot (eds), *United Nations Sanctions*, Intersentia, Antwerpen, 97-112, and George Tsebelis, (1989), 'The abuse of probability in political analysis: The Robinson Crusoe fallacy', *American Political Science Review*: 77–91.

- sanction risk versus trade uncertainty,
- the political system or
- deterministic versus strategic.

Moreover, increasingly it was recognized that culture and socio-economic factors also are important components of the sanction mechanism. Cultural factors are important for both the sender's choice to use economic sanctions and the target's response (that is: the outcome of economic sanctions) while developments in the informal sector may be drivers of sanctions outcomes especially in democracies.⁴²

Unfortunately, the multitude of theories on the determinants and success and failure of sanctions has led to a great many – often contradictory – hypotheses. Significant bias is a problem of the empirical literature.⁴³ While this means that the empirical debate on the (in)effectiveness of economic sanctions continues, five policy recipes have emerged by way of consensus as these have statistically strong and robust support:⁴⁴

- (a) 'No trade, no effect'. Sanction damage and pre sanction trade linkage are associated with political success of implemented sanctions.
- (b) 'Smash the hammer instead of turning the vice'. Sanctions should be applied quickly and be as strong as possible from the start. The longer it takes before the sanctions are fully in place the lower the probability of success.
- (c) 'Single sender country sanctions suck'. The involvement of international institutions is associated with larger sanction success.
- (d) 'Don't overreach'. The higher the aim or goal of sanctions the lower the probability of sanction success.
- (e) 'Sanctioning democracies works better than sanctioning autocracies'.

3.2 Sanctioning Russia: an intermediate evaluation

In the case of the West's economic sanctions on Russia, trade linkage (factor a) is significant and the emergence of institutional and parallel sanctions (factor c) that we discussed in the previous section are both factors that support the potential success of these measures. However, Russia's increasingly autocratic organization (factor e), the high goal of ending a war (factor d) and the slow startup of sanctions (factor b) especially by the EU are sobering from this perspective. Whether sanctions are considered successful thus

42 See Donna Driscoll, Dennis Halcoussis, and Anton D. Lowenberg. "Economic sanctions and culture." *Defence and Peace Economics* 22, no. 4 (2011): 423-448 and Brian R. Early and Duncan Peksens, 2020, 'Shadow Economies and the Success of Economic Sanctions: Explaining Why Democratic Targets Are Disadvantaged,' *Foreign Policy Analysis*, 16 (3), pp. 353–372.

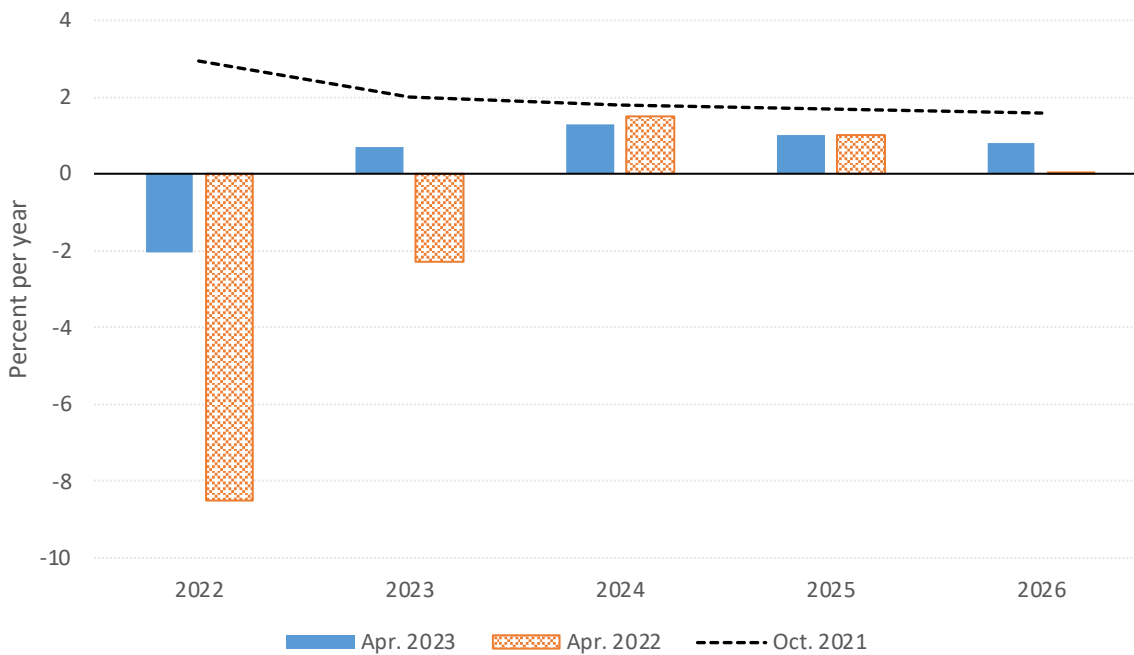
43 Binyam A. Demena et al. (2021) "Publication bias of economic sanctions research: a meta-analysis of the impact of trade linkage, duration and prior relations on sanctions success." in P.A.G. van Bergeijk (ed.) *Research Handbook on Economic Sanctions*. Edward Elgar Publishing: Cheltenham, pp. 125-150.

44 See Bapat, Navin A., Tobias Heinrich, Yoshiharu Kobayashi, and T. Clifton Morgan 'Determinants of sanctions effectiveness: Sensitivity analysis using new data', *International Interactions* 39, (1) (2013): 79–98 and Bergeijk, Peter A.G. and Muhammed S.H. Siddiquee, 2017, 'Biased sanctions? Methodological change in Economic Sanctions Reconsidered and its implications,' *International Interactions*, 43 (5), pp. 879–893.

largely depends on the factors taken into account, but also the goal that is set. If the sanctions are understood as a united response that translates the UN General Assembly’s condemnations into actions, hence emphasising its signalling function over its aim to change behaviour, then indeed they can be considered relatively successful.

Yet, often the focus lies with the idea that sanctions should in themselves end the war, which is arguably an excessive expectation. It is from that perspective though that currently the most frequently asked question for international economists regarding the Russian war on Ukraine is ‘why do the economic sanctions not work?’. With no apparent change in Russian behaviour the focus on the debate has shifted toward the economic consequences of the sanction packages on the Russian economy. Consider Figure 3 that presents three forecasts for the growth rate of Russia’s GDP that have appeared in three issues of the IMF’s biannual flagship publication The World Economic Outlook.

Figure 3 IMF forecasts for Russian GDP growth before, at the start and one year into the full-scale invasion)



The IMF in April 2022 at the start of the sanctions following the full-scale invasion in February 2022 predicted a 9% collapse for Russia in 2022, but the ex post (April 2023) assessment is a reduction of 2% ‘only’. Moreover, a return to positive growth in 2023 is foreseen. So, the impact of the sanctions appears to be much smaller than originally anticipated by the IMF. Moreover, the forecasted growth rates turn from negative into positive earlier on. So, the economic sanctions that from the start have been praised as ‘unprecedented’ do not seem to bite as hard as originally expected. Indeed, the question why the sanctions do not bite seems to be quite relevant. Four factors, however, need to be considered when discussing the economic impact so far.

Firstly, both strategic data opaqueness and national accounting practices may bias the reported impact of economic sanctions. Also, not all the effects of sanctions on domestic players become visible⁴⁵.

45 Erica Moret, Sanctions and the Costs of Russia’s War in Ukraine, IPI Global Observatory, 12 May 2022.

Official statistics are among the first victims of wars since it is rational to hide the costs of conflict from public opinion and foreign intelligence and to conceal economic assets including details on supply lines and sanctions evaders. A tradition for distorting statistics goes back a long way in history in this case that concerns the former USSR, that hid many central planning failures from the population and observers in other countries.⁴⁶ The latter aspects of the unreliability of statistics is well recognized and moreover the upward reporting bias tends to be stronger in autocracies than in democracies.

Secondly, GDP in the war economy is a perverse measure of economic impact and economic welfare. The destructive creation of weapons by National Accounting conventions generates income, and this provides a cushion in the GDP numbers. Russia is producing rockets and grenades, and this directly enhances GDP although it does not create anything of value.⁴⁷ Weapons production drives out civilian production and if the increase in the military industrial complex exceeds the civilian loss, GDP rises while the country has less goods to invest and consume than before. This problem is exaggerated by some of the rules that statisticians use to report on the economy. Relatedly and also by convention, a reduction of Russian imports due to sanctions in the short-term increases measured Russian GDP by virtue of the macroeconomic accounting identity.⁴⁸ In the somewhat longer-term, however, production will come under downward pressure because civilian investment and consumption are squeezed out by war damage while inventories of raw materials, spare parts and intermediate goods run down, thus creating supply side bottlenecks.

Thirdly, the focus on observed and predicted growth rates is a common source of mistake. The first reason for the confusion is that the growth that 'is' is taken as the outcome of the economic sanctions, but the 'is' is meaningless without the 'what could have been', that is: what would have happened if these measures had not been imposed by the West. So, key in understanding sanction impact is that we ask ourselves a 'what-if' question: 'What if the sanctions had not been imposed?'. This what-if question is called the counterfactual. One could make this counterfactual wide ranging by considering the impact of non-sanctioning on the battlefield or perhaps even on further future expansion by Russia or rather the inevitable impact of the energy transition on Russia's economy that would have affected Russia's exports anyway,⁴⁹ but in order to keep the question manageable and answerable we will limit the counterfactual to the economic domain proper. Now let's take a look again at Figure 3 with our what-if question in mind. The most obvious counterfactual is the October 2021 forecast of the IMF that predates the 2022 Russian invasion of Ukraine. For a proper understanding of the economic impact of sanctions it is therefore crucial to make a comparison between the economy's growth trajectory before and after the imposition of sanctions. The forecast of October 2021 (dashed line in black) predates the 2022 full-scale invasion: it is what according to the IMF would have happened if Moscow had not invaded Ukraine in 2022. The most recent IMF forecast was published in April 2023 (solid bar in blue). According to the IMF, the Russian GDP contracted by 2 percent in 2022 and for 2023 a meagre growth rate of ¾% is in the books (this should be compared to the forecasts before the 2022 invasion of 3% and 1¾%, respectively). Figure 3 also illustrates the longer run impact of the sanction up to 2025.

46 Peter A.G. van Bergeijk, (1995), 'The accuracy of international economic observations', *Bulletin of Economic Research* 47 (1), pp. 1-20.

47 In 2022 military spending increased to 4.1% of Russian GDP (Lucie Béraud-Sudreau et al., *Trends in World Military Expenditure*, SIPRI April 2022 <https://doi.org/10.55163/PNVP2622>).

48 Imports of goods and services in 2022 contracted by 15% according to IMF data

49 Alexander Etkind, *Russia Against Modernity*, Polity Press, 2023, chapter 7, referring to the book of Thane Gustafson, *Klimat: Russia in the Age of Climate Change*, Harvard University Press, 2021, 13-15.

Finally, we need to consider the dynamics of sanctions. Firstly, goods that have been shipped before the imposition of an embargo or a boycott will sometimes be underway for considerable time and arrive at their destination sometimes months after the imposition of sanctions. Secondly, while the US imposed a full ban on Russian oil, gas and derivative products, the EU did only impose a ban on Russian crude oil shipping on December 5, 2022, and a ban on petroleum on February 5, 2023. (Also, exemptions were and are granted to several EU members.) The EU at the time of writing did not impose sanctions on gas but ‘only’ strived for significant independence from Russia. Thirdly, price movements of oil and gas initially significantly increased thus compensating for quantity reductions. It was not until the sixth EU sanction package and the reduction of oil and gas prices in early 2023 that sanctions started to bite the macroeconomy in a significant way.⁵⁰ Up to that point in time, the only really important measure had been the freezing of the foreign currency holdings of the Russian Central Bank that effectively immobilized Moscow’s war chest, but other measures were either applied at the level of selected individuals and firms with insufficient coverage (for example, SWIFT sanctions initially aimed at a rather limited share of the Russian Banking sector). From this perspective, sanctions simply have at the time of writing simply not been applied long enough to expect to see their full impact.

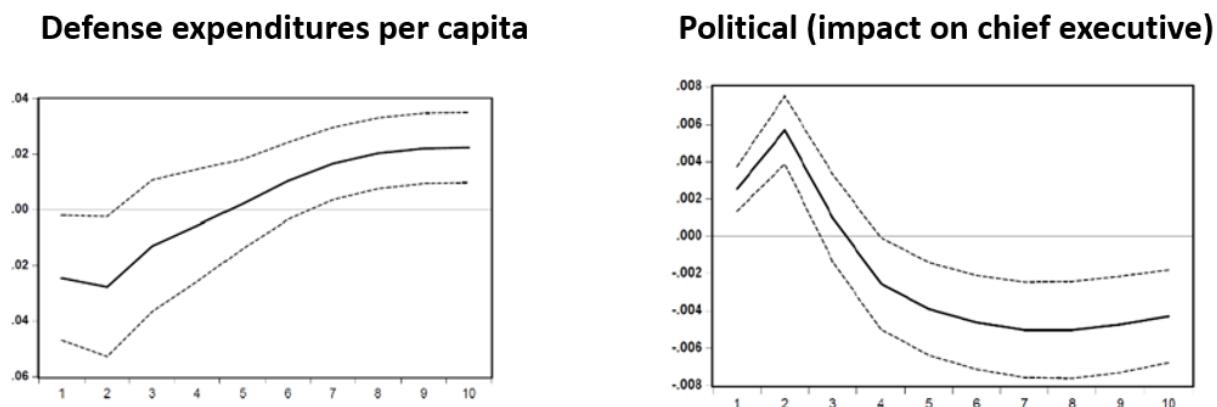
4. Potential political-economic impact

In this context of uncertainty and delays economic modelling provides a tool to investigate how sanctions may work out in the near future. Figure 4 provides an empirical perspective based on a recent econometric exercise that investigates the economic and political impact of sanctions on Russia. The horizontal axis shows the number of years since the effective implementation of sanctions. Vertically the impact variables are reported in terms of their standard deviations. The middle line is the predicted impacted; the dashed (---) lines are the confidence intervals.⁵¹ Two outcome variables were selected with a view on the potential military and political impact of the sanctions. As to defense expenditures (lefthand panel) the graph indicates that per capita military expenditures are initially under downward pressure. This effect is statistically significant in the first two years of sanction application. However, after seven years the effect is the opposite. As to the political impact (right hand panel) we see a similar picture. Impact on the Chief Executive of Russia is significantly positive in the first three years, but from then on will be on a downward trajectory and that influence turns statistically significant in the fifth year of sanction imposition.

50 Peter A.G. van Bergeijk (2022), ‘Sanctions against the Russian war on Ukraine: Lessons from history and current prospects’, *Journal of World Trade* 56 (4), pp. pp. 571 – 586.

51 The selection is representative of the patterns found for other outcome variables including investment, public consumption and imports as well as alternative measures of political impact. The technical details are beyond the scope of this short contribution.

Figure 4 Simulated sanction impact (impulse response functions)



Source: Peter A.G. van Bergeijk and Sajjad F. Dizaji (2022), Energy Sanctions and Russia's Political System: Short Term and Long Term Consequences, Paper presented at the European Trade Study Group, Groningen, September 9, 2022: dx.doi.org/10.2139/ssrn.4127031

These findings should not be interpreted as exact predictions, but rather as a numerical assessment that establishes that the boycott of Russian oil (and potentially gas) meets a necessary condition for sanction success. The model results show that the boycott initially both indirectly and directly contributes towards weakening both the Russian military and the autocratic leadership. The modelling exercise, however, does not demonstrate that the sanctions meet a sufficient condition for success. It could, for example, be argued that sanctions against Russia are less promising because of its (a) autocratic system, (b) its opportunity and ability to adjust (c) the continuation and in some cases intensification of oil trade relations with countries that do not participate in the boycott measures and (d) the weak 2014 sanctions that reduced the credibility of broad-based EU sanctions and/or the threat of scaling up targeted sanctions.⁵² However, even under these conditions a boycott of Russian oil negatively impacts on the Russian war capacities and contributes to behavioural change. Importantly, the impact of sanctions on the political system is strongest in the second year of sanction implementation and after that their impact wanes off until the impact turns insignificant in the fourth year. Hence, sanctions do create a window of opportunity in this case, but the model also shows that this window closes in the medium to long term.

5. Concluding remarks

Sanctions do generally not sort change on their own, they operate in tandem with other measures, and it is difficult to isolate the effects of sanctions from other measures taken. In any event, the unity and intensity with which the US, the EU, the UK and other states have acted as of 2022, have displayed great resolve and reaffirmed a strong commitment to core norms of the post-1945 international order and most prominently to the prohibition of aggression. At the time of writing resolve was still high with a further extension towards a full export ban being discussed at the G7 meeting in Hiroshima, setting a further step on the path of recomprehensivisation, and also with increased efforts to address sanctions circumvention in the 11th EU sanctions package. It is, however, as yet an open question whether the sanctions against the Russian war on Ukraine will indeed be a steppingstone to improvement of the situation, if only, because the usefulness and efficacy of such comprehensive sanctions will need evaluation and may in the end be too limited in view of the

52 Peter A.G. van Bergeijk, Sanctions against the Russian war on Ukraine could be made to work, VoxEU, March 28 2022.

considerable costs involved. And even if sanctions play an important role in reaction to the Russian aggression and are justified in that context given the plight of the Ukrainian population, there are several reasons why the use of comprehensive sanctions more generally needs to be critically evaluated.

A key issue is the unintended impact of comprehensive sanctions on livelihoods of a population that often has little or nothing to do with the activities of the elite that sanctions try to influence. Sanctions tend to increase income inequality⁵³ and thus, a negative trade-off exists with SDG 10 (reduction of inequality). A potentially negative trade-off also exists for such diverse areas as SDG 2 ('End hunger:'),⁵⁴ SDG 4 (education),⁵⁵ SDG 5 (gender equality),⁵⁶ SDG 3 (health)⁵⁷ and SDG 13–15 (environment).⁵⁸ The debate about the sign and significance is still ongoing.⁵⁹ Indeed, nowadays, it is widely accepted that the design and implementation of sanctions need to be improved, and their humanitarian costs to ordinary citizens minimized as far as possible.

There is a question to what extent such considerations apply to the same extent in the case of Russia, given its stronger economic status and the fact that the sanctions are a response to the act of aggression, than for instance that of states like Afghanistan or Syria. Indeed, the sanctions against Russia are quite special in several respects, and this is also illustrated by the use of novel types of sanctions. While it is difficult to engage in too many predictions at this stage, it is clear that autonomous sanctions are and will remain a central response to serious violations of international law. Open questions concern the type, design and desired effect of sanctions, but not their use as such. Given the resort to autonomous sanctions, further international regulation, or at least a principled approach, on sanctions is desired addressing questions on when they may and must be imposed, and how.⁶⁰

53 Sylvanus Kwaku Afesorgbor and Renuka Mahadevan, 2016, 'The impact of economic sanctions on income inequality of target states,' *World Development*, 83 (1), pp. 1–11.

54 Sylvanus Kwaku Afesorgbor, 2021, 'Sanctioned to starve? The impact of economic sanctions on food security in targeted states' in: Peter A.G. van Bergeijk (ed.), *Research Handbook on Economic Sanctions*, Edward Elgar, Cheltenham, Chapter 23.

55 Munyaradzi Hwami, 2021, 'A comparative scoping review of the impact of international economic sanctions on education,' *Compare: A Journal of Comparative and International Education*, doi: 10.1080/03057925.2020.1846120.

56 A. Cooper Drury, and Duncan Peksen, 2014, 'Women and economic statecraft: The negative impact international economic sanctions visit on women,' *European Journal of International Relations*, 20 (2), pp. 463–490.

57 Jerg Gutmann et al., 2021, 'Sanctioned to death? The impact of economic sanctions on life expectancy and its gender gap,' *Journal of Development Studies*, 57 (1), pp. 139–162.

58 Qiang Fu et al., 2020, 'The impact of international sanctions on environmental performance,' *Science of The Total Environment*, 745, doi: 10.1016/j.scitotenv.2020.141007

59 Jerg Gutmann, et al., 2020, 'Precision-guided or blunt? The effects of US economic sanctions on human rights,' *Public Choice*, 185 (1), pp. 161–182.

60 As also called for in the advice of the Dutch Advisory Committee on Public International Law, *Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression*, 17 November 2022. The first author of this article was the chair of the advisory committee at the moment of publication of this advice. See also Nathanael Tilahun & Obiora Okafor, *Economic Sanctions and Humanitarian Principles: Lessons from International Humanitarian Law*, *Yale Journal of International Law*, 26 June 2023.

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Crisis and opportunity for the OSCE

Walter Kemp

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Reports of the OSCE's death are an exaggeration. Without a doubt, the organization is in trouble.¹ In the past few years, all ten principles of the Helsinki Final Act have been violated. There is war in Europe instead of cooperation. Since decisions in the OSCE are taken by consensus, the polarized geopolitical environment is making it difficult to agree on anything – from the agenda of meetings to who should hold leadership positions in OSCE institutions. No unified budget has been adopted since 2021. But the OSCE is still alive, it is one of the few remaining European security organizations where Russia and the West can talk and seek to manage relations peacefully. For that reason, it could play a key role in rebuilding the European security order when the time comes.

On standby not on life support

The OSCE is facing its biggest challenge since it was established in 1975. The problems listed above have made it almost impossible for participating States to take decisions. There is almost no constructive dialogue in the OSCE's permanent bodies: instead there are toxic monologues. This trend is not new, but it has become significantly worse since Russia's invasion of Ukraine in February 2022. Furthermore, the organization's operations – both through its field activities and its institutions – are in jeopardy. Instead of the OSCE's hallmark comprehensive and inclusive approach to security, there is a trend towards “OSCE à la carte”. This manifests itself as: “Chair's conferences” instead of commonly agreed meetings; extra-budgetary contributions instead of a Unified Budget; and cherry-picking among some participating States about which commitments they chose to implement. More generally there is a move away from multilateralism – which could be exacerbated depending on election results in 2024. As a result, at a time when the OSCE is so badly needed, it is in a deep crisis.

Nevertheless, the OSCE has managed to survive. The Ministerial Council meeting in Skopje on 30 November and 1 December 2023 showed that participating States – including the United States and Russia – want the OSCE to continue.² Furthermore, the decision to appoint Malta to chair the OSCE in 2024 solves a serious leadership crisis.

But survival should not be an end in itself. Despite the worst crisis in Europe since the Second World War, the OSCE still has room for maneuver, particularly through the activities of its institutions and field operations. Moreover, instead of dismissing the OSCE as being on life support, it should be thought of as being on standby - ready to assist when conditions are ripe for de-escalating tensions and managing relations between Russia and the West.

Business unusual

When the war in Ukraine ends, the OSCE would be the logical place to rebuild the European security architecture because of its inclusive membership and comprehensive approach. Furthermore, it could play a key role as a regional arrangement of the United Nations in addressing a wide range of threats and challenges

1 See Walter Kemp, *Showdown in Skopje: Can we Still Cooperate?*, *Security and Human Rights Monitor*, 26 November 2023, <https://www.shrmonitor.org/showdown-in-skopje-can-we-still-cooperate/>. The current article builds on the latter publication from November 2023.

2 Stephanie Liechtenstein, *Back from the Brink: OSCE Ministerial Council in Skopje takes decisions on OSCE leadership*, *Security and Human Rights Monitor*, 4 December, 2023, <https://www.shrmonitor.org/back-from-the-brink-osce-ministerial-council-in-skopje-takes-decisions-on-osce-leadership/>

that have an impact on peace and security in the OSCE area.

At the moment, the prospects for peace are low. As long as war is raging in Ukraine it will be difficult to convene meetings in the OSCE about the future of European security.

But no “business as usual” does not have to mean no business at all. There are plenty of useful things that the OSCE can do through the substantive units in the Secretariat, field missions and institutions. While the OSCE will probably not have a major role in ending the conflict in Ukraine, its toolbox could be used for example to promote local stabilization measures, confidence-building measures, and to maintain channels of communication. The experience of the Special Monitoring Mission to Ukraine, which was the eyes and ears of the international community in eastern Ukraine between 2014 and 2021, could be valuable if a peace operation or monitoring mission is deployed to Ukraine in the future. Furthermore, the OSCE, particularly through the (extra-budgetary) Support Programme for Ukraine, can implement a wide range of projects including humanitarian demining, addressing chemical threats, monitoring environmental damage from the war, protecting displaced persons from risks of trafficking in human beings, strengthening human rights protection, providing psychological support for conflict-affected people, and strengthening democratic institutions.

While the OSCE’s role in reducing tensions between Moscow and Kyiv may be limited, it could play an important role in managing relations between Russia and the West. The Structured Dialogue process, which was launched in 2016, would be a suitable forum. It may also be necessary to create informal spaces for dialogue, including at the Ministerial level.

Track 2 or track 1.5 conversations involving experts with good links to policymakers in capitals could develop scenarios or options for rebuilding some degree of trust between Russia and the West. This has already started, for example by the Friedrich Ebert Stiftung and the Geneva Center for Security Policy. When the time is ripe, these ideas could be taken out of the drawer and brought to the inter-governmental table.

While inter-state dialogue and innovation are difficult in the current geopolitical environment, civil society can be a catalyst. In the 1970s and 80s, civil society organizations, inspired by the Helsinki Final Act, took to the streets to hold their leaders accountable to the promises that they had made, fostered grassroots initiatives to defend human rights and fundamental freedoms and raised CSCE-related issues in the media and parliaments.³ Today there are very few remaining Helsinki Commissions or Committees. Something like them should be created to keep alive OSCE principles, to foster people-to-people contacts, generate political will, and create a community of champions of cooperative security in a world increasingly defined by violence, aggression, and illiberal governance. It is also vital to generate more interest in the OSCE and ideas on how to revitalize it – as is done in this journal or the OSCE academic network. The 50th anniversary of the OSCE in 2025 would be a good opportunity to remind the public, parliamentarians, and politicians about OSCE principles and commitments, the importance of dialogue, and the link between human rights and security. The OSCE Secretariat, Parliamentary Assembly and Finland as chair in 2025 should consider a public information campaign.

³ See Michael Cotey Morgan, *The Final Act: the Helsinki Accords and the Transformation of the Cold War*, Princeton University Press, 2020.

Cooperative security is not appeasement

Critics argue that now is not the time for cooperative security. Rather, Russia needs to be compelled to change its behavior and this requires deterrence. There is no question of the need for a firm and united position from the West, particularly NATO. President Putin seems to follow Lenin's advice that "you probe with bayonets: if you find mush, you push. If you find steel, you withdraw". Therefore, the West together with Ukraine needs to maintain a steely defence.

However, there is no need to choose between NATO and the OSCE. They play different roles and have different memberships. One could argue that NATO is the organization for security against Russia, the EU for security without Russia, and the OSCE is the organization for security with Russia. If enough countries still think it is worthwhile to have a pan-European forum to meet – including with Russia – a platform for joint action based on common principles and commitments and a normative basis for fostering security through cooperation then the OSCE has a future.

Under current circumstances, it is hard to make the case for cooperative security. Nevertheless, it is worth trying since the expression is often misunderstood as appeasement or *détente*.

First, rather than regarding cooperative security as a goal, such as the vision of a "security community" defined in the 2010 Astana Summit document or Emmanuel Kant's ideal of Perpetual Peace, cooperative security should be considered as an approach.⁴ This implies the need for consultation and constructive dialogue and a willingness for states to work together to prevent and resolve common problems that affect their security.

Second, the tone of this dialogue needs to be constructive, which has not been the case in many meetings of the Permanent Council and other OSCE dialogue bodies over the past few years, where states have engaged in public policy and verbally bashing each other.⁵

Third, cooperative security relies on actions and not just words. States need to demonstrate in deeds that they are serious about implementing their commitments. After all, cooperation is not unconditional. Furthermore, cooperation is based on a series of interactions over time. If a country is to be trusted, it needs to respect its side of the bargain. There must be reciprocity of trust-inducing steps or else there will be a lengthy and dangerous escalation of harmful tit-for-tat reprisals. Rebuilding trust between Russia and the West and between Kyiv and Moscow will take time, and it will be difficult. But the OSCE with the tools that it has developed during difficult times, such as confidence- and security-building measures, can help to build the scaffolding of a more peaceful Europe.

Fourth, cooperative security implies a sense of sovereign equality and burden sharing. That means, at a minimum, all states paying their dues to the OSCE. Cooperation cannot be fostered where free riders are also spoilers. As in the United Nations,⁶ ways should be found to strip participating States of their voting privileges

4 For more on cooperative security, see Walter Kemp, *Security through Cooperation: to the same end*, Routledge, 2022.

5 'Threats, insults, and Kremlin 'robots': How Russian diplomacy died under Putin', BBC, 3 September 2023, BBC, <https://www.bbc.com/news/world-europe-66509180>.

6 Article 19 of the UN Charter states that "A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years."

if they are in arrears: no pay, no play. As a result, a country would de facto suspend itself from the OSCE if it does not contribute to the budget.

Fifth, and very much related to point one, it is important to emphasize that cooperation does not imply the absence of conflict. Far from it. Cooperative security is a reaction to conflict or an attempt to prevent it. As Robert Keohane has pointed out, “without the spectre of conflict, there is no need for cooperation”.⁷ Cooperative security, particularly in tough times, may not bring all states together, but it can help to prevent them from falling apart. Following this logic, the OSCE is a place where states can work through their disagreements in a peaceful way.

Of course, the sticking point is the consensus rule. It is one thing to have a forum where states that have serious disagreements can meet and seek to reduce tensions. It is another to expect that these non-likeminded countries will all agree on a common course of action. The perennial problem is that unanimity would be required to change the consensus rule. But again, a good start would be to disallow voting rights to states that have not paid their dues, and to explore how to have at least administrative decisions adopted by, for example, a 90 percent rule.

Golden jubilee, golden opportunity

Until a few years ago, it was hoped that the 50th anniversary of the Helsinki Final Act in 2025 could revive cooperative security,⁸ not least in the OSCE area. As recently as December 2021, Finnish President Sauli Niinistö suggested the idea of a Summit in Helsinki. However, the much-heralded “spirit of Helsinki” now looks more like a ghost. Some even mutter that the organization’s Golden Jubilee could turn into its funeral; ironically the final act could occur in Helsinki. Finland, which will chair the OSCE in 2025, is managing down expectations.

Others have suggested that if the situation improves, a Summit in Helsinki could be an opportunity to look ahead rather than to simply commemorate the signing of the Final Act that took place under significantly different circumstances than the situation in which Europe finds itself today.

What could be done in the meantime? Since it will be difficult to broker consensus on almost anything until the war is over, the chair may consider having informal consultations that could try to identify a common understanding of the principles of the Helsinki Final Act, keep in place guardrails and channels of communication, and identify a few areas where interests converge. A discussion should be initiated by the Troika and the Secretary General on setting priorities. This would shift debates on resources that currently take place in the Advisory Committee on Management and Finance into more political and strategic discussions among heads of delegations. Such a process could help to identify “islands of cooperation” where participating States (still) have converging interests, highlight the added value of the OSCE at a time of limited resources and low political will, and map out a shared and forward-looking set of security-related priorities, which would enable the OSCE to get on with its important work and be both well-positioned and well-prepared for when changes come.

7 Op cit Kemp 2022 p. 47.

8 S. Niinistö, ‘It’s Time to Revive the Helsinki Spirit’, *Foreign Policy*, 8 July 2021, <https://foreignpolicy.com/2021/07/08/its-time-to-revive-the-helsinki-spirit/>.

As with negotiations on the Helsinki Final Act, there will have to be something for everyone. Nevertheless, a Christmas tree approach should be avoided. Instead, the OSCE tree should be pruned; cut back to focus on core issues.⁹ As has been suggested, “in order to survive as a useful institution, the OSCE first of all must engage in what it was originally established to do — political dialogue on issues of interest and importance to all the states of Europe.”¹⁰

Ideally, these priorities should be agreed to by all participating States at Ministerial level in a short-term workplan. This politically agreed roadmap or “agenda for cooperation” could also guide OSCE budgetary discussions. Indeed, it could be the basis for a two-year Programme Outline for 2025/26 – of course subject to change on an annual basis depending on developments, particularly in relation to the war in Ukraine. Failing agreement on such a roadmap, the “agenda for cooperation” could at least be agreed upon by the Troika to ensure continuity, and to help set priorities and a work plan for 2025 and beyond.

It may also be time to start thinking about, and even discussing discreetly, what a post-war security order could look like. Among topics to be considered are: Would there be a recognition of certain security guarantees for what are awkwardly described as “in-between states”, and could there be an end to grey zones in Europe? How could basic principles – like those in the Helsinki Final Act – be reaffirmed credibly? Should there be a signature document agreed to at the highest political level such as the Helsinki Final Act or the Charter of Paris? Could one go even further and consider drafting a constituent document for a “new” OSCE that would reflect a changed European security order and define the organization’s status and the rights and obligations of its members or participating States?

Sadly, history shows that it usually takes a crisis to reform the multilateral system as witnessed in 1815, 1919 and 1945. But the security structures and arrangements that emerged after those wars were months if not years in the making, for example at the Congress of Vienna, Versailles as well as Dumbarton Oaks and San Francisco. Debates and drafts on a new order were already being carried out (among the Allies) before the old one fell away. Therefore, if and when security and peace are to be restored in Europe, it is time to start planning.

For inspiration, it is worth recalling the guidance that was provided to participating States at a meeting in Dipoli, Finland in 1973 in which members of the committee drafting the Final Recommendations of the Helsinki Consultations were encouraged to “proceed from the premise that the strengthening of security in Europe is not directed against any State or continent and should constitute an important contribution to world peace and security.”¹¹ Of course, all states would have to follow this advice, and all would have to demonstrate a willingness to seek a more cooperative approach. There is no point in trying to develop a security architecture with Russia if Moscow shows no interest in engaging. Russia would have to make it clear that it wants to be part of a post-war European security architecture, that it still agrees to the Helsinki decalogue, and that it is willing to engage constructively in arms control and confidence- and security-building measures. It should show contrition and pay compensation for its aggression against Ukraine. For its part, the West could afford some self-reflection on how opportunities were missed to more constructively engage Russia in the post

9 Walter Kemp, “Time to Prune the OSCE Tree”, *Helsinki Monitor*, 2006, no. 3 pp. 207-213.

10 William Hill, “Will the OSCE Survive?”, in Cornelius Friesendorf and Stefan Wolff (eds.): *Russia’s War Against Ukraine: Implications for the Future of the OSCE*, OSCE Network Perspectives I/2022 (OSCE Network of Think Tanks and Academic Institutions, June 2022), p. 36.

11 OSCE, Final Recommendations of the Helsinki Consultations, 3 July 1973, <https://www.osce.org/mc/40213>, p. 7.


Cold-War period. Leaders should pledge to reduce the risk of any future violent conflict and avoid the nuclear sabre-rattling witnessed in relation to Russia's invasion of Ukraine, and rebuild arms control treaties that could enhance trust, transparency and cooperation and avoid nuclear proliferation. Furthermore, as outlined above, they should agree on a way forward to work together – by necessity – on a number of issues where their interests converge; things that they can do together in their region through the OSCE that they cannot do unilaterally, bilaterally or in a different forum.

Preparing and positioning the OSCE for the future

In the short term, the OSCE will likely continue to muddle through. But with a slightly higher level of ambition, the Troika – currently North Macedonia, Malta and Finland – could develop a plan of action centered around the OSCE's 50th anniversary in 2025 and work with the Secretary General to propose a two-year program outline and budget. At the same time, track 2 “conversations” on the future of European security should continue, and feed ideas into informal meetings with participating States as well as the Secretary General's office when appropriate. Furthermore, risk reduction and confidence- and security-building measures drawing on the OSCE toolbox. This would make the OSCE more relevant and visible and put it in a better position to play an important role when conditions are more conducive to cooperative security.

To conclude and summarize, the OSCE faces its biggest crisis since 1975 yet also its biggest opportunity since 1990. With effective leadership and enough buy-in from participating States the OSCE could become a key venue for rebuilding some degree of predictability and order in Europe.





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