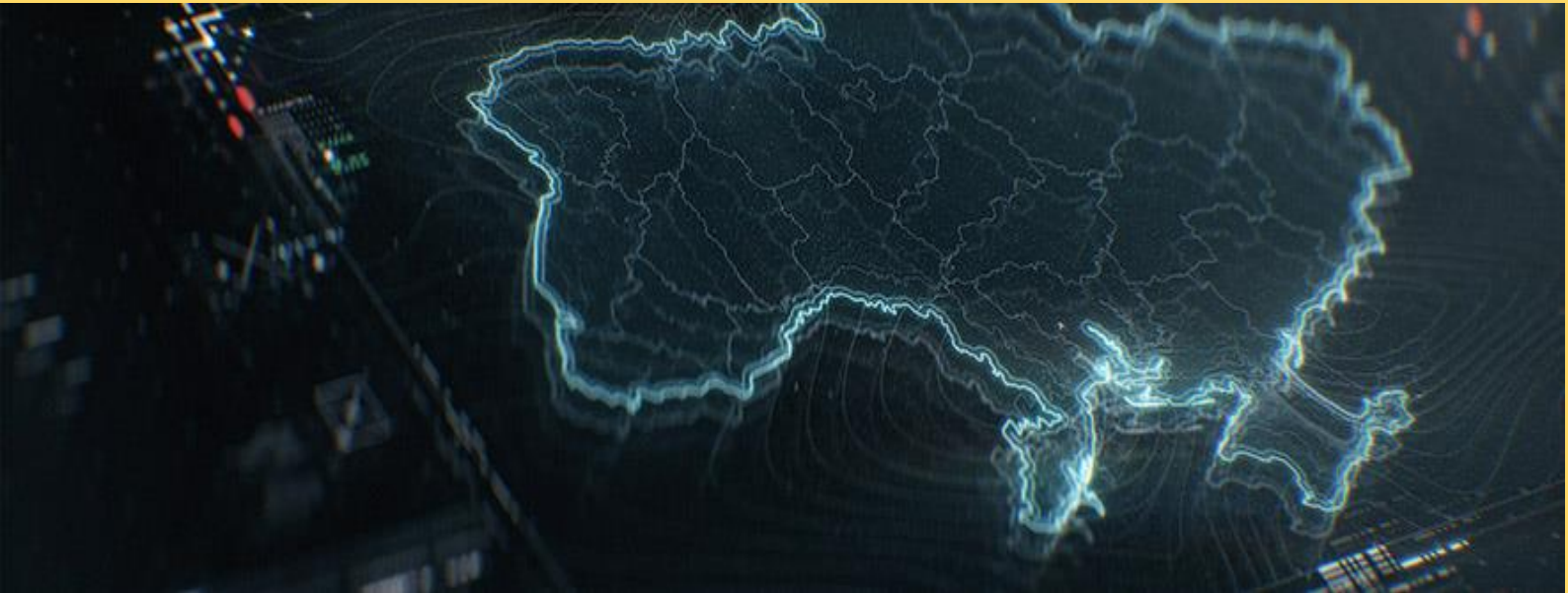




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UKRAINE SETTLEMENT PROJECT



UKRAINE SETTLEMENT OPTIONS: **War Crimes, Crimes Against Humanity and Genocide** By Melanie O'Brien

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UKRAINE SETTLEMENT OPTIONS PAPER

WAR CRIMES, CRIMES AGAINST HUMANITY AND GENOCIDE

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*A [shorter version](#) of this paper has been published on *Opinio Juris*. The views expressed in this paper are the author's alone.*

INTRODUCTION

This paper does not evaluate whether or not any or each of the categories of international crimes of war crimes, crimes against humanity and genocide have been committed, but rather presents options for solutions for justice and accountability. Some solutions are the same for all three categories of crimes; other solutions apply only to one crime category. The paper will not repeat specific topics addressed elsewhere in the Ukraine Peace Settlement project that may also deal with war crimes, crimes against humanity or genocide, such as sanctions, children, and sexual violence, or the broader transitional justice options (e.g. truth-seeking measures). There are already proceedings concerning the Ukraine-Russia conflict taking place in international courts. This paper will address these proceedings where relevant to international crimes as these are already underway and are therefore relevant options relating to justice and accountability for war crimes, crimes against humanity and genocide.

Peace agreements have frequently referred and deferred to international humanitarian law and international human rights law, and more recently international criminal law, requiring parties to the agreement to comply with obligations under these bodies of law.¹ As Kastner notes, 'the practice of relying on international law to resolve contested points in peace negotiations is informed by a sense of legal obligation assumed by certain actors, with international legal claims with respect to justice, truth and accountability having become increasingly compelling'.² Thus, any of the options outlined below can be expressly included in the text of a peace agreement, to ensure compliance by both states with these areas of international law. This paper draws on the jurisdictional fora and legal solutions presented within to conclude with some suggestions of specific options for accountability and justice for war crimes, crimes against humanity and genocide committed during the Ukraine-Russia conflict.

¹ Philipp Kastner, 'Interactions between Peace Agreements and International Law' in Marc Weller, Mark Retter and Andrea Varga (eds), *International Law and Peace Settlements* (Oxford University Press 2021), p.165.

² Ibid.

INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) is the most likely option for accountability for the commission of war crimes, crimes against humanity and/or genocide. The ICC has jurisdiction over war crimes, crimes against humanity and genocide.³ The ICC's status as most likely forum is because the ICC Prosecutor is already mobilised and investigating any possible crimes being committed in the Ukraine-Russia conflict, and because of the limitations of the substantive laws of Ukraine and Russia (see below). After a preliminary investigation based on previous conduct by Russia on Ukrainian territory,⁴ investigations opened on 2 March 2022.⁵ While neither Ukraine nor Russia are state parties to the Rome Statute, Ukraine has submitted declarations accepting the ICC's jurisdiction over alleged Rome Statute crimes occurring on Ukrainian territory, although it is recommended that Ukraine become a state party.⁶ The ICC's investigation is supported by 43 state parties to the Rome Statute.⁷ ICC investigators are active on the ground in Ukraine and the ICC Prosecutor has made several visits to Ukraine.⁸ The Office of the Prosecutor is also collaborating with Eurojust, civil society organisations and national prosecutors to document allegations of human rights violations and international crimes for the purposes of accountability proceedings.⁹

The ICC is a crucial forum with regards to accountability for crimes against humanity, as there is no international treaty on crimes against humanity, the customary international law status of crimes against humanity is not settled, and neither Ukraine nor Russia provide for crimes against humanity in their domestic law (see below). Therefore, outside of third state domestic jurisdictions providing for jurisdiction over crimes against humanity (discussed below), the ICC is the only forum available.

³ Articles 5, 6, 7 and 8, Rome Statute. For war crimes, sub-articles 8(2)(a) and (b) are applicable to this conflict.

⁴ Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine, 11 December 2020: www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine.

⁵ See <https://www.icc-cpi.int/ukraine>.

⁶ The first declaration of 9 April 2014, 'accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014', and the second declaration of 8 September 2015, 'extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards'; see: www.icc-cpi.int/ukraine for both declarations.

⁷ Joint referral of 1 March 2022 by Republic of Albania, Commonwealth of Australia, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Canada, Republic of Colombia, Republic of Costa Rica, Republic of Croatia, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, Republic of France, Georgia, Federal Republic of Germany, Hellenic Republic, Hungary, Republic of Iceland, Ireland, Republic of Italy, Republic of Latvia, Principality of Liechtenstein, Grand Duchy of Luxembourg, Republic of Malta, New Zealand, Kingdom of Norway, Kingdom of the Netherlands, Republic of Poland, Republic of Portugal, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, Kingdom of Sweden, Swiss Confederation, United Kingdom of Great Britain and Northern Ireland. Subsequent referrals in March 2022 from Japan, North Macedonia, Montenegro and the Republic of Chile. See: www.icc-cpi.int/ukraine.

⁸ For example, 'ICC Prosecutor Karim A.A. Khan QC announces deployment of forensics and investigative team to Ukraine, welcomes strong cooperation with the Government of the Netherlands', 17 May 2022: www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine.

⁹ 'ICC Prosecutor and Eurojust launch practical guidelines for documenting and preserving information on international crimes', 21 September 2022: www.icc-cpi.int/news/icc-prosecutor-and-eurojust-launch-practical-guidelines-documenting-and-preserving-information.

However, the ICC does not have jurisdiction over all war crimes or violations of IHL, some of which have particular relevance in this conflict.¹⁰ A significant example relevant to the Ukraine-Russia conflict is the lack of provision in the Rome Statute proscribing attacking works and installations with dangerous forces (such as nuclear power plants or dams).¹¹ Another problem is Article 8(2)(b)(xx), which criminalises employing weapons that cause superfluous injury or unnecessary suffering or are indiscriminate. However, this provision is currently inoperable, as it requires that such weapons be the subject of a comprehensive prohibition and be included in an annex to the Rome Statute. No such annex exists, therefore Article 8(2)(b)(xx) cannot be used. For this reason, other options for accountability and justice must be explored to ensure violations of international law can be comprehensively addressed.

INTERNATIONAL HUMANITARIAN LAW

The Ukraine-Russia conflict is an international armed conflict, between two states.¹² Ukraine and Russia are both parties to the four Geneva Conventions (GCs) and the First Additional Protocol (API). It is out of the scope of this paper to provide a comprehensive list of the IHL treaties to which Ukraine and Russia are party, but it will mention some IHL treaties relevant to this conflict.¹³ Ukraine is party to the Convention on the Prohibition on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Treaty) 1997, and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention as amended on 3 May 1996). Ukraine also endorsed the Safe Schools Declaration in 2019. Ukraine and Russia are parties to the Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention) 2003. Neither state is party to the Convention on Cluster Munitions 2008 or the Treaty on the Prohibition of Nuclear Weapons 2017.¹⁴

State parties to the Geneva Conventions and Additional Protocol I are obligated to ‘impose effective penal sanctions for persons committing, or ordering to be committed, any ... grave breaches during an international armed conflict’.¹⁵ States are obligated to prosecute or extradite: to ‘investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.’¹⁶

¹⁰ For some prominent examples, see Melanie O’Brien, ‘Russian Violations of IHL: The ICC is Not the Complete Answer’, *Opinio Juris*, 18 Marc 2022: <https://opiniojuris.org/2022/03/18/russian-violations-of-ihl-the-icc-is-not-the-complete-answer/>.

¹¹ Prohibited conduct under prohibited under Article 56 of Additional Protocol I 1977 and customary international law Rule 42: https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule42.

¹² See Article 2, Application of the Convention, Geneva Conventions, which ‘apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties’ and ‘to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance’.

¹³ For all IHL treaties, see: <https://ihl-databases.icrc.org/ihl>.

¹⁴ Although both are party to the Treaty on the Non-Proliferation of Nuclear Weapons: www.un.org/disarmament/wmd/nuclear/npt/.

¹⁵ ICRC, ‘Amnesties and International Humanitarian Law: Purpose and Scope’ (July 2017): www.icrc.org/en/document/amnesties-and-ihl-purpose-and-scope, p.2.

¹⁶ Customary International Law Rule 158, Prosecution of War Crimes: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158. See also First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146.

GENOCIDE

Ukraine and Russia are both parties to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).¹⁷

The Genocide Convention is already featuring in the Ukraine-Russia conflict. Ukraine commenced proceedings in the International Court of Justice (ICJ) against Russia, under Article IX of the Genocide Convention,¹⁸ alleging that Russia ‘is intentionally killing and inflicting serious injury on members of the Ukrainian nationality’ based on the ‘fals[e] claim that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine’.¹⁹ Ukraine argues that Russia’s ‘special military operation’ is ‘based on a claim of preventing and punishing genocide that is wholly unsubstantiated’.²⁰ On 16 March 2022, the ICJ ordered provisional measures which included that Russia ‘shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine’ and ‘ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations’.²¹ At the time of writing, Russia was not complying with this provisional measures order, which may work against Russia in peace negotiations, as it cannot demonstrate compliance with an order of the ICJ.

The Genocide Convention may also be used to address allegations of genocide committed by Russia in Ukraine. It has been proposed that there is a risk of genocide, and that incitement to genocide is being carried out by Russia.²² If there is sufficient evidence of genocide, the Genocide Convention can be used to bring a second case before the ICJ, with regards to state responsibility.

In addition to the state responsibility that can be triggered under the Genocide Convention, Article VI of the Genocide Convention obligates state parties to prosecute persons charged with genocide, and allows for an international criminal tribunal to prosecute such offenders. Under Article VII, genocide is an extraditable offence, and states must grant extradition for genocide crimes when requested. Amnesties issued for genocide crimes would be contrary to such state obligations under the Genocide Convention.²³

¹⁷ USSR ratification 3 May 1954; Ukraine ratification 15 November 1954.

¹⁸ Article IX permits disputes ‘relating to the interpretation, application of fulfilment of the [Genocide] Convention’ to be ‘submitted to the [ICJ] at the request of any parties to the dispute’.

¹⁹ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*): www.icj-cij.org/en/case/182.

²⁰ Application Instituting Proceedings, filed in the Registry of the Court on 26 February 2022, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide, *Ukraine v Russian Federation*: www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf.

²¹ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*), Request for the Indication of Provisional Measures, Order, 16 March 2022: www.icj-cij.org/en/case/182/provisional-measures.

²² New Lines Institute and Raoul Wallenberg Centre for Human Rights, ‘An Independent Legal Analysis of the Russian Federation’s Breaches of the Genocide Convention in Ukraine and the Duty to Prevent’, May 2022: <https://newlinesinstitute.org/russia/an-independent-legal-analysis-of-the-russian-federations-breaches-of-the-genocide-convention-in-ukraine-and-the-duty-to-prevent/>.

²³ See Case 002, IENG Sary rule 89, *supra* note 59.

Genocide is also a crime prohibited under customary international law, which would allow state responsibility to be engaged through the ICJ and provide for third party states to exercise jurisdiction over any alleged offenders captured in their territory.

DOMESTIC PROSECUTIONS

Domestic prosecutions are also possible for war crimes, crimes against humanity and genocide, depending on a state's legislative capability. A state's law will have to contain substantive law covering the relevant crimes and apply the relevant jurisdiction to those crimes.

Ukraine

Ukraine is the obvious primary domestic forum for prosecution of any crimes committed during the conflict, regardless of perpetrator nationality, as it has territorial jurisdiction.²⁴

As this author has previously noted:

Ukrainian domestic law does not have a substantial range of war crimes, although does contain a 'catch-all' provision prohibiting "use of methods of warfare prohibited by international instruments, or any other violations of rules of warfare recognised by international instruments consented to by binding by the Parliament of Ukraine, and also giving an order to commit such actions" (Article 438, Ukraine Criminal Code).²⁵ This would allow Ukraine to prosecute an individual for violations of API and any other treaty to which they are a party. Both Ukraine and Russia are dualist nations with regards to criminal law, but otherwise see international law instruments as part of the legal system, prioritised over domestic law. This would mean that Ukraine would not be able to prosecute any war crimes not already in its Criminal Code and for any crimes related to treaties it is not a party to (such as the Cluster Munitions Convention). However, on face value, the 'catch-all' provision in Ukrainian law may provide the best option for accountability for... violations of IHL.²⁶

The Ukraine Criminal Code also contains provisions including the prohibition of the use and development, production, purchasing, storage, distribution or transportation of weapons of mass destruction (Articles 439 and 440); ecocide (Article 441); genocide (Article 442); criminal offences against internationally protected persons and institutions (Article 444); illegal use of symbols [sic] of the Red Cross and Red Crescent (Article 445); and offences related to mercenaries (Article 447).²⁷ There is no provision proscribing crimes against humanity.

Ukraine introduced a bill in 2021 to introduce more comprehensive criminal law provisions for international crimes, covering war crimes, crimes against humanity and genocide, as well as providing for command responsibility. Bill no. 2689 was adopted by the Parliament of Ukraine,

²⁴ *SS Lotus (France v Turkey)* [1927] PCIJ Ser. A. No. 9.

²⁵ Ukraine Criminal Code:

https://docs.google.com/viewer?url=https%3A%2F%2Fsherloc.unodc.org%2Fcid%2Fuploads%2Fres%2Fdocument%2Fukr%2F2001%2Fcriminal-code-of-the-republic-of-ukraine-en.html%2FUkraine_Criminal_Code_as_of_2010_EN.pdf.

²⁶ O'Brien, *supra* note 10.

²⁷ There are also some general provisions that could apply to potential war crimes conduct, such as the prohibition on attacks on objects which contain any items of increased danger to the environment (such as objects with radioactive materials) (Article 261).

but is yet to be signed by the President and thus is not yet in force.²⁸ It is recommended that the President sign this Bill to bring it into force in Ukraine so that it can be utilised.

Ukraine has already convicted Russian soldiers for war crimes allegedly committed during the conflict. However, these convictions have been problematic, in that they did not involve a full and fair trial, but instead were based on guilty pleas by the soldiers.²⁹ The fact that one of the soldiers convicted had his sentence significantly reduced on appeal only two months after conviction indicates that the guilty pleas were problematic.³⁰ The appeal decision recognised the accused's guilty plea and remorse, which was not taken into account in the original sentencing.³¹ The Commentary of Geneva Convention IV recommends that trials for war crimes should not be conducted during hostilities, because it is difficult for an accused person to prepare their defence during hostilities.³²

Ukraine is already 'readying war crimes cases against 41 Russian soldiers for offences that include bombing civilian infrastructure, killing civilians, rape and looting'.³³ Going forward, any alleged perpetrators of international crimes must receive a full and fair trial, which includes the opportunity to mount a valid defence. It has also been pointed out that the Geneva Convention III obligates state parties to try prisoners of war in military courts, because of the complex and specialised nature of international humanitarian law (requiring specialised expertise), unless domestic laws permit civil courts to try their own military personnel.³⁴ Ukraine does not have military courts. GCIII ultimately requires that a prisoner of war must not 'be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105'.³⁵ Thus, any trials in Ukraine must ensure they afford any accused the rights and means of defence, such as access to legal representation, calling witness and an interpreter.³⁶ Any trials of Russians not conducted fairly will likely negatively impact Ukraine's standing in peace

²⁸ Bill no. 2689 "On amendments to certain legislative acts on the Enforcement of International Criminal and Humanitarian Law": www.pgaction.org/news/ukraine-bill-2689.html.

²⁹ Emma Graham-Harrison, 'Russian soldier pleads guilty in first Ukraine war crimes trial since invasion', 19 May 2022: www.theguardian.com/world/2022/may/18/russian-soldier-pleads-guilty-first-ukraine-war-crimes-trial-since-invasion.

³⁰ AP, 'Ukrainian court lowers Russian soldier's war crimes sentence', AP News, 29 July 2022: <https://apnews.com/article/russia-ukraine-kyiv-war-crimes-sentencing-1590d0aa9c36870925304fbab5cfba47>.

³¹ Although the potential negatives of guilty pleas with lower sentencing should also be considered; see, e.g., Regina E. Rauxloh, 'Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining' (2010) 10 International Criminal Law Review 739; Nancy Amoury Combs, 'Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts' (2006) 59 Vanderbilt Law Review 69.

³² Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Commentary of 1958, <https://ihl-databases.icrc.org/ihl/COM/380-600168?OpenDocument>.

³³ Associated Press, 'In a war crimes trial, a Russian soldier pleads guilty to killing a Ukrainian civilian', NPR, 18 May 2022: www.npr.org/2022/05/18/1099767017/russian-soldier-pleads-guilty-ukraine-war-crimes-trial.

³⁴ Robert Goldman, 'War crimes trial of Russian soldier was perfectly legal – but that doesn't make it wise', The Conversation, 23 May 2022: <https://theconversation.com/war-crimes-trial-of-russian-soldier-was-perfectly-legal-but-that-doesnt-make-it-wise-183586>.

³⁵ Article 84 GCIII: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=274D7903FCEF66D3C12563CD0051B1B1>.

³⁶ Article 105, GCIII: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/9ac284404d38ed2bc1256311002afd89/5cf3ffad4325ddb6c12563cd0051b359>. See also fair trial rights under Article 9 of the International Covenant on Civil and Political Rights (ICCPR) 1966, which Ukraine ratified in 1973.

negotiations, as it demonstrates a lack of respect for international humanitarian and human rights law.

Russia

Russia is the other obvious primary domestic forum for prosecution of any crimes committed during the conflict, as it can exercise jurisdiction over conduct of Russian nationals outside of Russian territory (nationality jurisdiction).³⁷ The 1996 Criminal Code of the Russian Federation contains provisions relating to crimes against the peace and security of mankind, which are limited. Genocide (Article 357), ecocide (Article 358) and mercenarism (Article 359) are prohibited, but crimes against humanity are not.³⁸ War crimes provisions are limited, covering only offences related to weapons of mass destruction (Article 355) and the use of banned means and methods of warfare (Article 356). Persons or institutions enjoying international protection are also protected from assault (Article 360). Therefore, Russia's substantive capacity to prosecute its personnel for international crimes is limited, and it is recommended that Russia amend its criminal code to incorporate more comprehensive substantive provisions for international crimes.

It should also be noted that the limitation of Ukrainian and Russian domestic criminal law may be overcome through a peace agreement. The peace agreement can be 'locate[d] ... in the domestic legal realm as a constitution', including provisions that remedy domestic law deficiencies, including through the involvement international assistance to reform domestic legal processes, or provision for international court jurisdiction (whether the existing ICC or a proposed new court or tribunal).³⁹ This will not raise the issue of retroactive application of laws with regards to war crimes, because IHL provides that a person may be prosecuted for an act that was prohibited under international law at the time when the act was committed.⁴⁰ Thus, given Russia and Ukraine are both parties to the Geneva Conventions and Additional Protocol I, the prohibitions under these conventions apply, as do customary international law rules. Non-retroactivity may be relevant, however, with regards to crimes against humanity, which do not have settled customary international law status nor a treaty to draw from; thus, these crimes may not be able to be applied through domestic law in retrospect to offences committed during the conflict.

Russia has already indicated that it plans to hold trials to try Ukrainian prisoners of war. These trials have been criticized by the UN and human rights groups, and any trials must, as noted above, be full and fair trials according all due process rights to the defendants.⁴¹ It must also be recalled that prisoners of war cannot be prosecuted for simply participating in war, only for

³⁷ *SS Lotus (France v Turkey)* [1927] PCIJ Ser. A. No. 9.

³⁸ The Criminal Code of the Russian Federation, No. 63-FZ of June 13, 1996: www.imolin.org/doc/amlid/Russian_Federation_Criminal_Code.pdf.

³⁹ Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 *American Journal of International Law* 373, pp. 391-394; 402-407.

⁴⁰ Article 99, Third Geneva Convention 1949; Article 75(4)(c), Additional Protocol I 1977.

⁴¹ Peter Kenny, 'UN alarmed by Russian plan for trials of Ukrainian POWs', AA, 23 August 2022: www.aa.com.tr/en/world/un-alarmed-by-russian-plan-for-trials-of-ukrainian-pows/2667637. See also Amnesty International, 'Ukraine: Russian sham trials of prisoners of war in Mariupol 'illegal and unacceptable'', 26 August 2022: www.amnesty.org/en/latest/news/2022/08/ukraine-russian-sham-trials-of-prisoners-of-war-in-mariupol-illegal-and-unacceptable/. Russia is a party to the ICCPR (ratification 1973).

the commission of crimes such as war crimes.⁴² Any trials of Ukrainians not conducted fairly will likely negatively impact Russia's standing in peace negotiations, as it demonstrates a lack of respect for international humanitarian and human rights law.

Third States

Third states may be able to exercise jurisdiction over crimes committed in the Ukraine-Russia conflict through the application of universal jurisdiction. This may be in the form of absolute universal jurisdiction, where a state may exercise universal jurisdiction regardless of whether the accused is in its custody or present within its territory; or conditional universal jurisdiction, under which a State may exercise universal jurisdiction only when the accused is in its custody. States are reluctant to undertake trials *in absentia* or may prohibit trials *in absentia*. For example, states such as Belgium and Spain have experienced external pressure from great powers to change their universal jurisdiction laws, ultimately repealing these extensive provisions. It could be anticipated that a similar application of universal jurisdiction for high-ranking officials in the Ukrainian or Russian military or government would meet with the same hostility. Generally, it will be challenging to try high-ranking officials in third states under universal jurisdiction.

Conditional universal jurisdiction is the most common form of universal jurisdiction, and is the form required by the Geneva Conventions for grave breaches and by the Convention Against Torture. A number of states provide for conditional universal jurisdiction in their domestic legislation, including Australia, Canada, the UK, Austria, Spain and Switzerland.

A state such as Germany is a significant possible domestic forum option, based on its legislative capability, commitment to accountability for international crimes, and its geographic proximity to Ukraine and Russia. Germany has specialised units in the Federal Criminal Police (BKA) and the Federal Prosecutor General (*Generalbundesanwalt*), dedicated to the investigation of international crimes.⁴³ German prosecutors may investigate without the accused's presence in German territory and may also investigate even when there is no identified suspect. However, a trial cannot proceed without the presence of the accused, as defendants have the right to defend themselves against allegations brought against them in a court.⁴⁴ Germany has a history of prosecutions for international crimes, under the German Code of Crimes Against International Law (CCAAIL) (*Völkerstrafgesetzbuch*, VStGB).⁴⁵ All trials have been conducted after the arrest of the suspects in Germany, so trials were conducted under conditional universal jurisdiction.⁴⁶

⁴² Yvette Issar, 'On trial: the Third Geneva Convention and judicial guarantees for prisoners of war', *Humanitarian Law & Policy*, 23 June 2022: <https://blogs.icrc.org/law-and-policy/2022/06/23/on-trial-geneva-convention-prisoners-of-war/>.

⁴³ Statement by the Federal Republic of Germany at the Sixth Committee on "The scope and application of the principle of universal jurisdiction", October 2021 (Sixth Committee (Legal), 76th session, 4 October-18 November 2021, agenda item 86, 'The scope and application of the principle of universal jurisdiction'): www.un.org/en/ga/sixth/76/universal_jurisdiction.shtml.

⁴⁴ Open Society Justice Initiative, 'Universal Jurisdiction Law and Practice in Germany', March 2019: www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-germany.

⁴⁵ Entered into force 30 June 2002, to comply with Rome Statute obligations. The CCAAIL supplements the German Criminal Code (*Strafgesetzbuch*, StGB) (CCAAIL, art. 2).

⁴⁶ See, e.g., the trials of Syrian officials for torture committed in Syria; Human Rights Watch, 'Germany: Conviction for State Torture in Syria', 13 January 2022: www.hrw.org/news/2022/01/13/germany-conviction-state-torture-syria. The trial of Anwar Raslan and Eyad Al-Gharib (in Koblenz) was detailed in the Branch 251

If a person suspected of committing international crimes is located on the territory of a third state, that third state is under the obligation to prosecute or extradite (*aut dedere aut judicare*). The *aut dedere aut judicare* obligation is expressly found in the Geneva Conventions (in relation to grave breaches)⁴⁷ and the Convention Against Torture 1984.⁴⁸

If a third state were to prosecute an alleged offender, they may be limited as to their access to evidence for the case, which may need the cooperation of Ukraine and/or Russia to proceed. A state is not obligated to cooperate with another state's criminal proceedings unless the two states have a bilateral mutual legal assistance agreement. However, the success of prosecutions for international crimes in domestic jurisdictions such as Germany and France reveals that prosecution and conviction is still possible without the cooperation of the state government of the offender. A peace agreement between Ukraine and Russia could not bind third states who are not party to such agreement, so a general prohibition of any prosecution of Ukrainian or Russian alleged offenders by third states could not be used as a bargaining chip in peace negotiations. However, a peace settlement could (although is unlikely to) include a commitment to extradite alleged offenders where appropriate extradition treaties exist with third states and an extradition request is received.

HUMAN RIGHTS LAW

While human rights law does not specifically deal with international crimes, offences committed that amount to international crimes also amount to human rights violations.⁴⁹ State responsibility for such conduct may be addressed through human rights law, and human rights law may also obligate states to ensure accountability and remedy for individual conduct amounting to human rights violations.

As a relevant example, Ukraine and Russia are both parties to the Convention Against Torture (CAT).⁵⁰ Article 5(1) of the Convention Against Torture requires states to exercise territorial and nationality jurisdiction over torture offences. Amnesties issued for torture and related CAT crimes would be contrary to state obligations under the CAT.⁵¹ The Human Rights Committee has declared that:

podcast: www.branch251podcast.com/. JusticeInfo.Net lists a number of cases being brought throughout European states for torture committed by Syrian officials; see AFP, 'Syria's Assad regime on trial in Europe', JusticeInfo.Net, 10 January 2022: www.justiceinfo.net/en/86261-syrias-assad-regime-on-trial-in-europe.html. Germany has also tried and convicted Rwanda Hutu militia leaders and persons associated with ISIS/Da'esh or other terrorist organisations.

⁴⁷ Articles 49, 50, 129, and 146 of the Geneva Conventions, respectively. 'For war crimes other than grave breaches, the exercise of universal jurisdiction may be permissive and not obligatory'; Cedric Ryngaert, 'Litigating Abuses Committed by Private Military Companies' (2008) 19 *European Journal of International Law* 1035, p. 1041, fn. 32.

⁴⁸ Article 8 of the Convention Against Torture deems torture offences to be extraditable offences. Article 5 requires a state party to exercise universal jurisdiction over alleged offenders if the state does not extradite the alleged offender as outlined under Article 8. See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ Judgment of 20 July 2012.

⁴⁹ Melanie O'Brien, 'Human Rights and Atrocities' in Barbora Hola, Maartje Weerdesteijn and Hollie Nyseth Brehm (eds), *Oxford Handbook on Atrocity Crimes* (Oxford University Press 2022), p. 115.

⁵⁰ Ukraine ratification 24 February 1987; USSR ratification 3 March 1987.

⁵¹ The ICTY found that issuing amnesty for torture, given the prohibition on torture has *jus cogens* value, would be 'senseless'; *Prosecutor v Furundžija*, Trial Judgment, IT-95-17/1-T, 10 December 1998, paras. 155-6. See also Case 002, IENG Sary rule 89, supra note 59; *Abdulsamet Yaman v. Turkey*, No. 32446/96, ECtHR (Second Section), 2 November 2004 (final 2 February 2005), para. 55.

Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.⁵²

Ukraine is also a state party to the European Convention on Human Rights (ECHR), and has already commenced proceedings against Russia in the European Court of Human Rights, with the Court issuing interim measures ordering Russia to refrain from military attacks against civilians and civilian objects.⁵³ The proceedings have received support from other states, with 23 states and one non-governmental organisation requesting leave to intervene as third parties in the proceedings.⁵⁴ Further proceedings in the European Court of Human Rights are possible, but only with regards to Russian activities until 16 September 2022, as Russia was expelled from the Council of Europe in March 2022, remaining bound by the ECHR until 16 September 2022.⁵⁵ However, as has been noted, it is unlikely that Russia will continue to engage with the European Court of Human Rights, so these cases may have little impact.⁵⁶ Russia's disengagement with this Court, as with the ICJ, and its refusal to comply with either court's orders, may work against Russia in peace negotiations, as it cannot demonstrate good faith under international law with regards to compliance with international courts.

AMNESTIES FOR INTERNATIONAL CRIMES

Under IHL, amnesties are expressly permitted in non-international armed conflict for those who have participated in armed conflict,⁵⁷ but they are not addressed under IHL with regards to international armed conflicts. Under IHL applicable to international armed conflict, provisions provide for combatant immunity, under which prisoners of war cannot be prosecuted for participation in conflict.⁵⁸ Nonetheless, amnesties should not apply to atrocity crimes. Providing amnesties for war crimes would be contrary to states' obligations to investigate and prosecute war crimes. The Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) have supported the proposition that amnesties are not applicable to war crimes.⁵⁹ The SCSL also held that amnesties in one state do not

⁵² Human Rights Committee, General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) (1992), para. 15.

⁵³ Marko Milanovic, 'Update on ECtHR Interim Measures Concerning Russia and Ukraine', EJIL:Talk!, 1 April 2022: www.ejiltalk.org/update-on-ecthr-interim-measures-concerning-russia-and-ukraine/.

⁵⁴ Justine Batura and Isabella Risini, 'Of Parties, Third Parties, and Treaty Interpretation: Ukraine v. Russia (X) before the European Court of Human Rights', EJIL:Talk!, 26 September 2022: www.ejiltalk.org/of-parties-third-parties-and-treaty-interpretation-ukraine-v-russia-x-before-the-european-court-of-human-rights/.

⁵⁵ Kanstantsin Dzehtsiarou and Laurence Helfer, 'Russia and the European human rights system: Doing the right thing ... but for the right legal reason?', EJIL:Talk!, 29 March 2022: www.ejiltalk.org/russia-and-the-european-human-rights-system-doing-the-right-thing-but-for-the-right-legal-reason/.

⁵⁶ Milanovic, *supra* note 53.

⁵⁷ Article 6(5), Additional Protocol II of 1977.

⁵⁸ Commentary of 2020 to Third Geneva Convention relative to the Treatment of Prisoners of War 1949, para. 20: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1B9A4ABF10E7EAD2C1258585004E7F19>.

⁵⁹ *Prosecutor v Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004; Case 002, Decision on IENG Sary's rule 89 preliminary objections (Ne bis in idem and amnesty and pardon), 2011, para. 39: Regarding a Royal Decree that granted amnesties and pardons, the ECCC held that: 'As Cambodia is under an absolute obligation to ensure the prosecution or punishment of perpetrators of grave breaches of the 1949 Geneva Conventions, genocide and torture, the 1996 Royal Decree cannot relieve it of the duty to prosecute these crimes or constitute an obstacle thereto.' The ECCC accordingly

remove another state's right to prosecute under universal jurisdiction, and that there is a norm crystallising in international law that 'a government cannot grant amnesty for serious crimes under international law' (thereby acknowledging the inapplicability of amnesties to war crimes, crimes against humanity and genocide).⁶⁰ In 2004, the UN Secretary-General recommended that it is ensured that peace agreements '[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity... ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court'.⁶¹

ACCOUNTABILITY AND JUSTICE OPTIONS

This paper has detailed a variety of fora and legal avenues for accountability and justice for war crimes, crimes against humanity and genocide committed during the Ukraine-Russia conflict. These options may be drawn upon to provide a number of solutions that could be included in a peace settlement:

- Priority may be given to domestic investigations and trials, with provision for assistance from third states or other bodies (such as the UN) to support domestic investigations and trials (with, for example, funding and/or expertise).
- A mixed Russian-Ukrainian tribunal. This may be an appealing option for Russia, under which Russia might consider a process it has at least partial control over with Ukraine, and where criminal liability is addressed on both sides.
- Jurisdiction may be shared between domestic courts and the International Criminal Court.
- An *ad hoc* international tribunal, which could be authorised in the peace settlement or by the Ukrainian and/or Russian governments. Such a tribunal would follow the models of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Noting, however, the potential challenges of establishing such a tribunal, which may or would likely require UN Security Council authorisation.
- An *ad hoc* hybrid tribunal, which could be authorised in the peace settlement or by the Ukrainian and/or Russian governments. A hybrid tribunal would combine international and Ukrainian and/or Russian personnel and legal systems, drawing from the examples of the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone. A hybrid tribunal may or may not require UN Security Council authorisation, although at a minimum it will require UN or EU collaboration.
- With regards to the ICC and *ad hoc* tribunals, a suggested relational and jurisdictional structure would be to provide the ICC/*ad hoc* tribunal with jurisdiction over high-ranking military commanders and civilian superiors, with domestic courts supported to

held that the Royal Decree did not grant amnesty for 'grave breaches of the Geneva Convention, genocide or torture'. See also the Declaration of the Government of the Democratic Republic of Congo at the End of the Kampala Talks, 12 December 2013, Article 1.1, which permitted a general amnesty for 'acts of war and insurrection', but the amnesty expressly excluded war crimes, genocide and crimes against humanity.

⁶⁰ *Kallon and Kamara*, *ibid*, paras. 88 and 82, respectively.

⁶¹ 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', Report of the Secretary-General, 23 August 2004, UN Doc S/2004/616, para. 64 (c). Para. 64(e) requires all judicial process be fair and impartial. See also UN Commission on Human Rights, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity', UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 24.

try lower-ranking perpetrators, along the lines of the relationship between the ICTY and Bosnian/Croatian/Serbian courts, or the ICTR and Gacaca courts in Rwanda.

- Proceedings in human rights bodies, such as the European Court of Human Rights or UN human rights bodies, in addition to those already underway.
- Proceedings in the International Court of Justice, in addition to those already underway.

These are accountability and justice options that could be discussed in peace negotiations, although it must be noted that not all options will appeal to both parties, and some options will be more achievable than others. For example, Russia's P5 seat on the UN Security Council will likely result in a blocking of the creation of any mechanism through the Security Council; and Russia's collaboration with courts such as the ICJ and ICC seems unlikely. Therefore, hybrid or multi-jurisdictional options will have the highest likelihood of success.