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INTO THE VALLEY OF THE SHADOW OF DEATH: WAR CRIMES COMMITTED IN SERVICE OF RUSSIA'S CRUSADE TO DESTROY UKRAINE

CHRIS GALARZA*

When Russian tanks rolled across the border into Ukraine during the early morning of February 24, 2022, most in the American defense and diplomatic establishment were shocked and sure the war would be over in a few days.¹ Credible open-source tactical and strategic analysis predicted that Ukraine's regular military forces would be defeated in "days or weeks" as long as Russian military forces were determined to pursue their objectives.² The United States Government was so sure that Kyiv was under imminent threat of capture that they offered to evacuate President Volodymyr Zelenskyy so that he could rule from exile, rather than being captured by the Russians.³ Zelenskyy reportedly declined the offer with a sharp quip that quickly became famous and an apt metaphor for the war to come; "The fight is here; I need ammunition, not a ride."⁴ Now, over a year later, we know how wrong many of us were about what course the war would take and its possibilities for resolution. Russia's armed forces have suffered immense losses, potentially topping between 189,500–223,000 total casualties (between 35,500–43,000 dead, and 154,000–180,000 wounded), over 17,114 vehicles, over 2,849 artillery pieces, over 600 military aircraft, and a Slava-Class Cruiser, RTS MOSKVA (121), Russia's Black Sea Fleet flagship (cruisers are the largest, best armed, ships

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¹ Steven Pifer, *The Russia-Ukraine war at three months*, BROOKINGS INST. (May 23, 2022),

<https://www.brookings.edu/blog/order-from-chaos/2022/05/23/the-russia-ukraine-war-at-three-months/>.

² Mason Clark et al., *Russia-Ukraine Warning Update: Russian Offensive Campaign Assessment, February 25, 2022*, INST. FOR STUDY WAR (Feb. 25, 2022, 3:00 PM), <https://www.understandingwar.org/backgrounder/russia-ukraine-warning-update-russian-offensive-campaign-assessment-february-25-2022>.

³ *Live Updates: Zelenskyy Declines US Offer to Evacuate Kyiv*, BLOOMBERG (Feb. 26, 2022, 1:26 AM),

<https://www.bloomberg.com/news/articles/2022-02-25/live-updates-ukrainian-military-battles-russian-forces>.

⁴ *Id.*

...serving in modern navies).⁵ The Russian military is not the fearsome fighting machine most military analysts in the West thought it was. But unfortunately, even if most of us were wrong about how capable the Russians were, the character and disdainful manner in which the Russian military carries out the war bears many of the hallmarks of the shameless brutality of the Soviet Army.⁷ Today, we face very different questions than were asked in the early morning hours on February 24; how long will it take for the war to end? And how will the world hold Russia accountable for its military's countless war crimes?

This discussion will consist of three parts. First, it will examine what constitutes a war crime under international law and the jurisdictional requirements. Second, it will examine the evidence of Russian war crimes in Ukraine. And finally, it provides a recommendation for the appropriate venue to try Russian war crimes on the international stage. Trying the many systemic crimes committed by the Russian military will require immense international political support from every corner of the world, not just from the West alone. Failure to hold Russia accountable for what has happened in Ukraine will further cripple the rules-based international order that has endured since the end of World War II. That rules-based order was developed after World War II and put in place to prevent the types of atrocities we see unfolding in Ukraine in the twenty-first century. It was the collective trauma of two world wars that led the powerful nations of the world to act to preserve our future. Russia's invasion of Ukraine represents the single greatest threat to that system of safeguards.

⁵ The Kyiv Independent (@KyivIndependent), *Russia's Losses as of April 24*, TWITTER (Apr. 24, 2023, 3:45 AM), <https://twitter.com/KyivIndependent/status/1650405706384781312> (citing the Ukrainian Armed Forces' official Russian losses tally for the war); Jake Epstein, *More than twice as many Russian troops as Ukrainians have been killed in Putin's war, leaked estimates show*, BUS. INSIDER (Apr. 10, 2023, 4:14 PM), <https://www.businessinsider.com/russians-ukrainians-killed-putins-war-leaked-documents-2023-4?op=1> (U.S. Intelligence estimates about 15,500–17,500 Ukrainians have died in the fighting, and another 109,00–113,500 wounded); Tayfun Ozberk, *Analysis: Chain of Negligence caused the loss of the Moskva Cruiser*, NAVAL NEWS (Apr. 17, 2022), <https://www.navalnews.com/naval-news/2022/04/analysis-chain-of-negligence-caused-the-loss-of-the-moskva-cruiser/>.

⁶ The term “West” as used in this article refers to a collection of nations that are often referred to as “westernized” in that they share a common set of democratic values and support the post-World War II rules-based international world order. This group includes the United States, Canada, United Kingdom, Australia, New Zealand, Japan, South Korea, Israel, and Taiwan, as well as NATO and European Union member states. While all the states listed share a certain set of values to some extent, they are not monolithic. Many have competing interests. A notable outlier today is Turkey, a nation whose population continues to hold western values, but whose political leadership does not always practice them.

⁷ Antony Beevor, *The Russian soldiers raped every German female from eight to 80*, GUARDIAN (May 1, 2002, 6:47 AM), <https://www.theguardian.com/books/2002/may/01/news.features11>.

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I. WHAT IS A WAR CRIME, AND WHEN DOES IT APPLY?

A. *War Crimes Defined*

Simply stated, “[a] war crime is commonly defined as a serious violation of the laws of war, ‘qualified as a crime’, and committed in an international [or non-international] armed conflict.”⁸ Types and classes of war crimes are numerous. The world’s nations have worked to limit the brutality of warfare as advances in the technologies of war have become more sophisticated, precise, and deadly. The first substantive effort to develop the tenants of proscribed (and forbidden) conduct under international humanitarian law began at the first Geneva Convention of 1864, with the nations of Europe coming together to discuss the treatment of wounded soldiers in the field.⁹ Since then, multiple international efforts have developed with varying degrees of success and acceptance. The subsequent Geneva Conventions of 1949 are widely accepted and have become customary international law, irrespective of whether a state has signed or ratified its texts. A more recent effort to further codify war crimes is the creation of the International Criminal Court (“ICC”) under the auspices of the United Nations (“U.N.”) with the Rome Statute of 1998. But, there are only 123 state parties to the Rome Statute, ultimately limiting its reach, since it has not passed into customary international law.¹⁰ The United Nations War Crimes Commission defines war crimes as “a serious violation of the laws or customs of war which entails individual criminal responsibility under international law.”¹¹ Broadly speaking, war crimes can be committed systematically, and at

⁸ EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 110 (2008).

⁹ The 1864 Geneva Convention.

¹⁰ *The States Parties to the Rome Statute*, INT’L CRIM. CT., <https://asp.icc-cpi.int/states-parties>; *Customary international humanitarian law*, INT’L COMM. OF THE RED CROSS (Oct 29, 2010), <https://www.icrc.org/en/document/customary-international-humanitarian-law-0> (stating that to become customary international law a practice must be “a general practice accepted as law” within the international community).

¹¹ KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 128 (2003).

scale, by the command of a state, as seen by Nazi Germany (and the Soviet Union, though never prosecuted)¹² or by a small group of individuals, such as in the Vietnam War era incident of the murder and rape of villagers led by a United States Marine, Private First Class (“PFC”) Potter.¹³

While many acts potentially constitute a war crime, and there are many more examples throughout history, this examination will confine itself to “grave breaches” (as defined by the Geneva Conventions of 1949), the crime of aggression, genocide, and rape. Part II of this discussion will survey the widely available evidence for each of these crimes. Other crimes have likely been committed, but the focus will be on the instances for which abundant evidence exists. The history and development of war crimes go back several hundred years, but the modern understanding of what the world considers to be war crimes was established after the World War II. The International Military Tribunal at Nürnberg (also sometimes spelled “Nuremberg”), set up to hold the officials of former Nazi Germany accountable for their crimes, defined war crimes as:

[N]amely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.¹⁴

Although the Tribunal defined war crimes broadly, it was chiefly concerned with the most visible, high-level, crimes attributable to the state, such as crimes against the peace (waging an aggressive war, for example) and genocide.¹⁵ It did not necessarily concern itself with widespread crimes committed by individuals.¹⁶ Since the trials at Nürnberg and the establishment of the Geneva

¹² Ruddy Cano, *These are some of the worst war crimes committed by the Soviet Union*, WE ARE THE MIGHTY (Apr. 12, 2022, 1:49 PM), <https://www.wearethemighty.com/articles/these-are-some-of-the-worst-war-crimes-committed-by-the-soviet-union/>.

¹³ *United States v. Potter*, 39 **C.M.R.** 791, 793-98 (U.S. Navy Bd. of Rev. 1968).

¹⁴ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, 82 **U.N.T.S.** 280, Art. 6(b) (Aug. 8, 1945) [hereinafter Nürnberg Charter].

¹⁵ Kelly D. Askin, “A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003,” 11-3 *AM. U. HUM. RTS. L. BRIEF* 16, 16 (2004).

¹⁶ *Id.*

Conventions of 1949, war crimes prosecuted at scale by international bodies have been “grave breaches” under the various articles of the Geneva Conventions of 1949 and Protocols of 1977, with lesser war crimes subsumed into the broader prosecution of grave breaches. The relevant portions of the Geneva Conventions of 1949 and the Protocols of 1977 read:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.¹⁷

[C]ompelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.¹⁸

[U]nlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages.¹⁹

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.²⁰

[I]f committed against persons in the power of an adverse Party protected by [this protocol] . . . or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol. . . .

[W]hen committed willfully, . . . causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

¹⁷ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, art. 50, Aug. 12, 1949, 6 **U.S.T.** 3114, 75 **U.N.T.S.** 31 [hereinafter Geneva I].

¹⁸ *Geneva Convention Relative to the Treatment of Prisoners of War*, art. 130, Aug. 12, 1949, 6 **U.S.T.** 3316, 75 **U.N.T.S.** 135 [hereinafter Geneva III].

¹⁹ *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, art. 147, Aug. 12, 1949, 6 **U.S.T.** 3516, 75 **U.N.T.S.** 287 [hereinafter Geneva IV].

²⁰ *Protocol Additions to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, art. 11, June 8, 1977, 1125 **U.N.T.S.** 3 [hereinafter Additional Protocol I].

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . . ;

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack in the knowledge that he is hors de combat;

(f) the perfidious use . . . of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

[4] (b) unjustifiable delay in the repatriation of prisoners of war or civilians; . . .

(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, . . . the object of attack, causing as a result extensive destruction thereof, . . . and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.²¹

Reduced to more manageable terms, “grave breaches,” as defined by the Geneva Conventions and Protocols, are the willful commission of the following:

(a) The killing of civilians not a party to the conflict.²²

(b) Torture or inhumane treatment of protected persons, generally civilians, prisoners of war, or persons not (or no longer) a party to the conflict.²³

²¹ *Id.* at art. 85.

²² Geneva I, *supra* note 17, at art. 50; Geneva III, *supra* note 18, at art. 130; Geneva IV, *supra* note 19, at art. 147; Additional Protocol I, *supra* note 20, at art. 85.

²³ Geneva I, *supra* note 17, at art. 50; Geneva III, *supra* note 18, at art. 130; Geneva IV, *supra* note 19, at art. 147; Additional Protocol I, *supra* note 20, at art. 85.

- (c) Unlawful and wanton destruction or appropriation of property in a way not justified by military necessity.²⁴
- (d) Depriving a prisoner of war of their rights to a fair trial or compelling them to serve their captor.²⁵
- (e) Unlawful deportation or transfer, hostage taking, or confinement of a protected person or depriving them of repatriation.²⁶
- (f) Indiscriminate attacks upon civilian population centers, infrastructure, or unprotected/demilitarized areas.²⁷
- (g) Attacks upon installations that will result in excessive loss of life, injury to civilians, or damage to property.²⁸
- (h) Faithless or nefarious use of the emblem of the red cross, red crescent or red lion and sun, or other protective signs.²⁹
- (i) Targeting recognized historical monuments with no military value.³⁰

In addition to the war crimes described in the Geneva Conventions and Protocols, the Rome Statute of the ICC contains a more detailed list of offenses that constitute war crimes within Article 8.³¹ But, as a general matter, all of the offenses listed within Article 8 of the Rome Statute fall within one or more broad categories established by the Geneva Conventions or Protocols, even if the

²⁴ Geneva I, *supra* note 17, at art. 50; Geneva IV, *supra* note 19, at art. 147; Additional Protocol I, *supra* note 20, at art. 85.

²⁵ Geneva III, *supra* note 18, at art. 130; Geneva IV, *supra* note 19, at art. 147; Additional Protocol I, *supra* note 20, at art. 85.

²⁶ Geneva IV, *supra* note 19, at art. 147; Additional Protocol I, *supra* note 20, at arts. 11, 85.

²⁷ Geneva I, *supra* note 17, at art. 50; Geneva IV, *supra* note 19, at art. 147; Additional Protocol I, *supra* note 20, at art. 85.

²⁸ Additional Protocol I, *supra* note 20, at art. 85.

²⁹ *Id.*

³⁰ *Id.* The targeting of cultural and historical monuments, in addition to being prohibited by Additional Protocol I, was already forbidden under the Hague Convention of 1954, with Article 28 requiring High Contracting Parties to the Convention to enact laws against the unlawful damage of cultural and historical monuments. Even though the words “war crime” or “grave breach” are not found within the Convention, unlawful destruction of monuments is still forbidden and High Contracting Parties are bound to prosecute offenders, no matter the nationality. 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (May 14, 1954). Both Russia and Ukraine are party to the 1954 agreement.

³¹ 1998 *Rome Statute of the International Criminal Court*, art. 8, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

language within the statute is more specific in identifying forbidden behavior. Importantly, however, the Rome Statute of the ICC is not recognized by the United States, Russia, or Ukraine, with all three states neither signing nor ratifying the document.³² Ukraine, though not a member or signatory state to the ICC, submitted to the ICC's jurisdiction in November 2013, thus obligating its cooperation with the ICC, following Russian aggression in the Donbas region and annexation of Crimea.³³ Since the current invasion began in February, member governments have referred the situation to the ICC's prosecutor for investigation.³⁴ Since those initial referrals, the ICC has taken the bold step of issuing arrest warrants for both Vladimir Putin and his Commissioner for Children's Rights in the Office of the President of the Russian Federation, Maria Alekseyevna Lvova-Belova for alleged crimes involving the forced displacement of Ukrainian children, discussed in greater detail in Parts II and III.³⁵ Despite this development, and Ukraine's cooperation with the ICC, substantial hurdles to meaningful prosecution of Russian crimes may effectively bar the court from impacting the fates of Russian military personnel who have perpetrated crimes there.³⁶

Three additional categories of crimes are germane to, and necessarily intertwined with, any discussion about war crimes committed in Ukraine: the crime of aggression, rape, and the human rights violation of genocide. The crime of aggression features in various international treaties, principally the Kellogg-Briand Pact of 1928, the U.N. Charter, and the Rome Statute.³⁷ Although it appears in multiple places, its precise, agreed-upon definition unfortunately remains elusive. It was

³² U.N. Hum. Rights Off. of the High Comm'r, *Status of Ratification Interactive Dashboard*, <https://indicators.ohchr.org/>.

³³ Int'l Criminal Court *ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration* INT'L CRIM. CT. (Sept. 29, 2015), <https://www.icc-cpi.int/news/icc-prosecutor-extends-preliminary-examination-situation-ukraine-following-second-article-123>.

³⁴ Human Rights Watch, *Ukraine: Countries Request ICC War Crimes Inquiry*, HUM. RIGHTS WATCH (Mar. 2, 2022, 4:42 PM), <https://www.hrw.org/news/2022/03/02/ukraine-countries-request-icc-war-crimes-inquiry>.

³⁵ Int'l Criminal Court, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INT'L CRIM. CT. (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

³⁶ Complications arising from Russia's non-participation with the ICC will be potentially insurmountable barrier to bringing those accused of crimes to justice. This situation will be discussed further in later sections.

³⁷ U.N. Charter art. 2, ¶ 4; Rome Statute, *supra* note 31, at art. 8.

tried for the first and last times at the International Military Tribunals at Nürnberg and Tokyo following World War II. In prosecuting former Nazi officials for having “planned and waged aggressive wars,” the Nürnberg Tribunal referenced the Hague Conventions, Versailles Treaty, and Kellogg-Briand Pact as justification for prosecuting the crime of aggression.³⁸ Although the definition of “aggressive war” was not settled before or during its prosecution as a crime during the Tribunal at Nürnberg (a situation often pointed out by the defendants), the Tribunal found that the evidence “was amply sufficient for the ‘clear cases’ abundantly proven by the Nürnberg documentation.”³⁹ The lack of definition, as commented upon by Brigadier General Taylor, United States Army, Chief of Counsel for War Crimes, was due to the underdeveloped state of international law, as was true of the development of common law murder in centuries past.⁴⁰ Thus, while a lack of definition could be necessarily problematic in less than explicit situations, that lack of definition did not detract from the viability of the case against the Nazis given the “clear case” supported by overwhelming evidence.⁴¹ Notably, although the comprehensive characterization of the crime of aggression remained difficult to define at Nürnberg, the Tribunal found “[w]ar for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression” and that the Nazi’s conception of “total war” subordinated “rules regulations, assurances, and treaties . . . and so free[ing them] from the restraining influence of international law, the aggressive war is conducted . . . in the most barbaric way.”⁴² Furthermore, the more modern definition presented in Article 8 of the Rome Statute captures the spirit of the generally accepted term “crime of aggression,” even if all nations do not agree upon it. It reads:

³⁸ Telford Taylor, *Final Report to the Secretary of the Army on The Nuernberg War Crimes Trials Under Control Council Law No. 10* 145, 289 (1945); Off. of United States Chief of Couns. for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, (“Red Series”): *Opinion and Judgment*, 46-49 (1947) [hereinafter *Nazi Conspiracy and Aggression*].

³⁹ *Id.* at 220.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 50, 56.

“[C]rime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

For the purpose [of defining “crime of aggression”], [an] “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.⁴³

Two methods are available for prosecuting the crime of aggression: 1) an international military tribunal or 2) the Rome Statute of the ICC. Prosecution under international military tribunal would require the establishment of a tribunal by the United Nations or by multilateral treaty, as had previously been done to prosecute crimes committed by the German Third Reich and the Empire of Japan. Prosecution under the Rome Statute requires the consent of the U.N. Security Council, at which any permanent member of the Council (United States, United Kingdom, France, China, and Russia) may exercise veto power over the referral and thus halt the process.⁴⁴

In addition to the crime of aggression, rape merits discussion here because it is reportedly widespread in Ukraine.⁴⁵ Rape is almost universally considered a crime in various settings within national criminal codes, war crimes, crimes against humanity, and genocide. But, from the perspective of rape as a war crime on its own, its inclusion has been more recent. Rape was first featured as a war crime within the Lieber Code of 1863 [hereinafter Lieber Code], more formally known as General Order No. 100, written by Professor Francis Lieber of Columbia University (then Columbia College).⁴⁶ The Lieber Code was developed at the behest of President Abraham Lincoln

⁴³ Rome Statute, *supra* note 31, at art. 8.

⁴⁴ *Id.* at art. 15; Haroon Siddique, *Could the international criminal court bring Putin to justice over Ukraine?*, GUARDIAN (Mar. 2, 2022, 9:04 A.M.), <https://www.theguardian.com/world/2022/mar/02/could-international-criminal-court-bring-putin-to-justice-over-ukraine>.

⁴⁵ Philip Wang, Tim Lister, Josh Pennington & Heather Chen, *Russia using rape as ‘military strategy’ in Ukraine: UN envoy*, CNN (Oct. 15, 2022, 2:35 A.M.), <https://www.cnn.com/2022/10/15/europe/russia-ukraine-rape-sexual-violence-military-intl-hnk/index.html> (Pramila Patten, UN Special Representative on Sexual Violence in Conflict, stating Russia was using rape as a “military strategy” in Ukraine).

⁴⁶ Francis Lieber, *Lieber Code of 1863* (General Order No. 100), <https://www.uscbs.org/1863-lieber-code.html>

during the American Civil War, printed in pamphlets, and distributed to Union Army troops. Articles 44 and 47, respectively, codified the act of rape as a war crime.⁴⁷ Although the Lieber Code was later resourced to construct the Laws of War: Laws and Customs of War on Land at the Hague Conventions of 1899 and 1907, rape was left out of those treaties.⁴⁸ Rape was also left out of much of the Geneva Conventions and the Additional Protocols, with the exception being mentioned as a prohibited act against protected persons in Article 27 of the Geneva Convention IV.⁴⁹ It was also nominated as a crime against humanity during the Nürnberg Tribunal, but it received little attention.⁵⁰ Rape would not be charged as a crime against humanity until its inclusion in Article 5 of the Statute for the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) later on in 1993.⁵¹ Rape also loomed large in prosecutions during the International Criminal Tribunal for Rwanda (“ICTR”). The seminal case defining rape as a crime against humanity and as an instrument of genocide is that of *Prosecutor v. Akayesu*, where the mayor of the Rwandan town of Taba was convicted of violations of Common Article 3 of the Geneva Conventions and Additional Protocol II. Rape as a tool of war and genocide was used by the Hutus against the Tutsis (the two main ethnic groups party to the Rwandan Civil War) and was rampant both in Taba and elsewhere during the internal conflict in Rwanda.⁵² Although Akayesu’s conviction of rape as a war crime was overturned for lack of evidence, his conviction of systematic rape as a crime against humanity was upheld on appeal.⁵³ The *Akayesu* decision was followed by four subsequent prosecutions of rape as a war crime

⁴⁷ *Id.* § 2 Arts. 44, 47.

⁴⁸ *Convention between the United States of America and Certain Powers, with respect to the laws and customs of war on land, Jul. 29, 1899*, 32 Stat. 1803 [hereinafter Hague Conventions of 1899]; *Convention between the United States and other Powers respecting the laws and customs of war on land, Oct. 18, 1907*, 36 Stat. 2277 [hereinafter Hague Conventions of 1907].

⁴⁹ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 311 (1st ed. 2010).

⁵⁰ *Id.*

⁵¹ U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25074, at 38 (May 3, 1993) [hereinafter ICTY Statute].

⁵² *Prosecutor v. Akayesu*, Case No. ICTR 96-04, Judgment, ¶¶ 686-89, 693-96 (Sept. 2, 1998).

⁵³ *Id.*

in connection with ICTY cases, including *Delalić*, *Furundžija*, *Kunarac*, and *Kvočka*.⁵⁴ All four cases, taken together, establish sex crimes as violations of the Geneva Conventions and customary international law, with the last case, *Kvočka*, citing *Kunarac* and stating that “the prohibition of rape in armed conflicts has been long recognized in international treaty law as well as in customary international law.”⁵⁵ As the ICTY and ICTR were running their course in the 1990s and early 2000s, rape was also codified as a crime against humanity in the Rome Statute that established the ICC.⁵⁶

Finally, genocide is inextricably intertwined with a discussion about the war crimes committed in Ukraine. Genocide is not exclusively a war crime because it can be committed during peace as well as war.⁵⁷ The term genocide was developed in the wake of the startling revelations of the Holocaust perpetrated by the Third Reich under the direction of Adolf Hitler and the International Military Tribunal at Nürnberg’s inability to deal with such crimes outside the context of an aggressive war. The Nürnberg Tribunal determined that as “revolting and horrible” as the crimes perpetrated against the Jewish population of Europe were, there was an insufficient basis in international law to declare that Germany’s actions were crimes against humanity before the outbreak of hostilities in 1939.⁵⁸ The Tribunal thus charged the genocide perpetrated against the Jews as crimes against humanity committed in connection with an aggressive war post-1939.⁵⁹

⁵⁴ Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 179, 228, 261, 427, 488-507, 510, 512, 518 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (affirming Article 2 violations for rape); Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶¶ 124-27, 148-53 (Int’l Crim. Trib. for the Former Yugoslavia Jul. 21, 2000) (affirming convictions of rape in violation of the ICTY Statute); Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, ¶¶ 125-33, (Int’l Crim. Trib. for the Former Yugoslavia Jun. 12, 2002) (affirming trial court convictions of rape under customary international law and the ICTY Statute); Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, ¶¶ 167-68, 287-291, 393-398, 410 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (affirming the trial court’s judgments regarding multiple defendants and applying *Kunarac*).

⁵⁵ *Kvočka*, IT-98-30/1-A at ¶ 395.

⁵⁶ Rome Statute, *supra* note 31, art. 7 § 1(g); as previously discussed, the Rome Statute has not been universally adopted).

⁵⁷ Convention on the Prevention and Punishment of the Crime of Genocide, art. I, Dec. 9, 1948, 78 U.N.T.S. 277 (explaining the timeframes in which genocide can be committed) [hereinafter *Crime of Genocide*].

⁵⁸ Nazi Conspiracy and Aggression, *supra* note 38, at 84.

⁵⁹ *Id.*

Following the Tribunals at Nürnberg, the United Nations General Assembly unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948 [hereinafter Convention against Genocide]. To date, 152 states out of 195 in the world have ratified or acceded to the treaty as of 2019, with the most recent party state being Mauritius.⁶⁰ Although most of the world's nations have ratified the Convention against Genocide, there are over a dozen "reservations" to ratification, with many objecting states stipulating that any international prosecution for genocide must occur with the consent of that country's national government.⁶¹ The International Court of Justice ("ICJ") ruled in an advisory opinion on the compatibility of "reservations" with otherwise full ratification of the treaty in 1951, following a request by then Secretary-General Trygve Lie in 1950.⁶² "Reservations" have important implications for the jurisdiction of international bodies and tribunals over accused parties, but their mere existence alone is not a bar to being an otherwise full party to the treaty.⁶³ The ICJ ruled if one or more parties object to a "reservation," the party claiming the reservation is considered a party to the treaty as long as the reservation does not conflict with the "object and purpose" of the treaty.⁶⁴ The ICJ explains the "object" of the Convention against Genocide "was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups."⁶⁵ And, the "purpose" being that "as many States as possible should participate. The complete exclusion from the [Genocide] Convention of one or more States would not only restrict the scope of its application but would detract from the authority

⁶⁰ Off. on Genocide Prevention and the Responsibility to Protect, *The Genocide Convention*, U.N. <https://www.un.org/en/genocideprevention/genocide-convention.shtml>.

⁶¹ Ivan S. Kerno, *Advisory Opinion on Reservations to Genocide Convention*, 10 U.N. BULL. 594 (1951).

⁶² U.N. *Secretary-General Request for Advisory Opinion*, Pleading, 8 (Nov. 17, 1950), <https://www.icj-cij.org/public/files/case-related/9/009-19491128-REQ-1-00-EN.pdf>.

⁶³ *Reservations to the Convention on Genocide*, Advisory Opinion, 18 INT'L L. REPS. 364, 365 (I.C.J. May 28, 1951).

⁶⁴ *Id.* at 365.

⁶⁵ *Id.* at 370.

of the moral and humanitarian principles of its basis.”⁶⁶ The Soviet Union initially held reservations against Articles IX and XII of the Convention against Genocide.⁶⁷ But, after the fall of the Soviet Union, the new Russian Federation withdrew its reservation on Article IX on March 8, 1989, and so did Ukraine on April 20 of the same year.⁶⁸ Article IX is important because it grants jurisdiction to the ICJ for adjudication and prosecution of the crime of genocide.⁶⁹ Russia and Ukraine continue to object to Article XII, but, those objections have no bearing on the present or future accusations of genocide levied against either party in the current conflict.⁷⁰ Thus, Russia and Ukraine are treaty-bound to submit to the jurisdiction of the ICJ for any accusations of genocide arising out of the ongoing war in Ukraine. Regardless of “reservations” claimed by some nations, the Convention against Genocide enjoys broad international support.⁷¹

The Convention on the Prevention and Punishment of the Crime of Genocide defines the crime of genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

Article III

⁶⁶ *Id.* at 371.

⁶⁷ *Status of Treaties, Parties to the Convention on the Prevention and Punishment of the Crime of Genocide*, U.N. (Mar. 22, 2022, 10:15 AM), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en.

⁶⁸ *Id.*

⁶⁹ Article IX states: “Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.” *Crime of Genocide*, *supra* note 57, at art. IX.

⁷⁰ Article XII makes the extension of the Convention to non-self governing territories (aka colonies or other territorial holdings of nation-states), and ten nations (including Russia and Ukraine) oppose the fact that Article XII does not extend to these territorial holdings by default. *Supra* note 57; Article XII states “Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible. *Crime of Genocide*, *supra* note 57, at art. XII.

⁷¹ *Off. on Genocide Prevention and the Responsibility to Protect*, *supra* note 60.

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.⁷²

The original language of the Convention against Genocide included persecution of political groups, among other broad language, such as the inclusion of speech inciting genocide.⁷³ Still, such broad language was removed to tamp down disputes among states and ensure speedy adoption.⁷⁴ The Convention against Genocide's enforcement provisions include peacetime and wartime and contemplates enforcement at both the domestic and international levels.⁷⁵ Importantly, however, the Convention against Genocide, like most other instances of international law (including those treaties and laws previously discussed), is enforceable against sovereign states which are party to a particular treaty or agreement and not necessarily individual citizens of the offending state.⁷⁶

B. When is a Crime a War Crime?

In addition to being recognized as one of the foregoing grave breaches or crimes against humanity, three requirements must be present for a crime to be considered a war crime:

- a. An armed conflict must be in progress at the time of the act.
- b. The charged offense must be found within a relevant criminal code.
- c. There must be a nexus (connection) between the act and the armed conflict.⁷⁷

First, an armed conflict must be ongoing at the time of any charged war crime. While the degree and character of armed conflicts vary and exist on a sliding scale, two major characterizations are

⁷² Crime of Genocide, *supra* note 57, at arts. 2-3.

⁷³ *Genocide: A Commentary on the Convention*, 58 YALE L. J. 1142, 1144-45 (1949).

⁷⁴ *Id.*

⁷⁵ *Id.* at 1147.

⁷⁶ *Id.* at 1147-48; L.C. Green, *International Law*, II.1 §§ 53, 66 (Can. Encyclopedic Dig., 3d ed. 1995).

⁷⁷ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 248 (3d ed. 2021).

Common Article 2 international conflict and Common Article 3 non-international conflicts. There are of course outliers and artifacts that make applying the Geneva Conventions difficult at times, like the Global War on Terror, but they do not apply to the situation in Ukraine. The first broad category of armed conflict is the Common Article 2 international conflict, which is defined as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”⁷⁸ Common Article 2 also applies in cases of “partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”⁷⁹ The term “High Contracting Parties” refers to states that are party to the Geneva Conventions and Additional Protocols. In an Article 2 conflict, all four Geneva Conventions of 1949 and Additional Protocol I apply to states who are party to the agreements.⁸⁰ While a state may try to escape liability under Additional Protocol I because they are not party to it, there is no escaping the four Geneva Conventions of 1949, as they have passed into annals of customary international law. But, even with respect to Additional Protocol I, Articles 43(1), 48, 50, 51(2)-(4), 51(4), 51(5)(b), 52(1)-(2), 57(1)-(3), 58(a) and several others were simply codifications of customary international law or previous statements in older agreements, such as the Hague Conventions that have been universally adopted.⁸¹ This cluster of Articles centers specifically on the prohibition of the indiscriminate targeting of civilians and civilian objects (usually referring to their property).⁸² Thus, parties not party to Additional Protocol I are still subject to the norms of customary international law that are just codified in greater detail therein.⁸³

⁷⁸ Geneva I, *supra* note 17, at art. 2; Geneva III, *supra* note 18, at art. 2; Geneva IV, *supra* note 19, at art. 2.

⁷⁹ Geneva I, *supra* note 17, at art. 2; Geneva III, *supra* note 18, at art. 2; Geneva IV, *supra* note 19, at art. 2.

⁸⁰ Solis, *supra* note 49, at 150.

⁸¹ 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Rules 4, 8, 14, 29, 37, 40, 46, 51, 55, 57, 60, 62, 65, 74 (3d ed. 2009).

⁸² *Id.*

⁸³ *Id.*

The second broad category of armed conflict is the Common Article 3 non-international conflict, which is defined as an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”⁸⁴ In recent history, legal and military observers have struggled, but have been mostly successful, in adapting the Geneva Conventions and traditional understanding of when an armed conflict is underway with respect to internal conflicts, such as the Yugoslavian Civil War or the genocide perpetrated during the Rwandan Civil War. This is generally because either these conflicts are internal conflicts (namely civil wars) or are waged by non-state actors across international borders and are waged with varying degrees of intensity. The Geneva Conventions did not fully consider these “messy” contexts. The 1995 landmark case, *Prosecutor v. Tadić*, described a now commonly used definition for armed conflict when it is unclear whether one exists:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a State . . . International humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁸⁵

In a Common Article 3 non-international conflict, the treaties that apply are reduced, with only Common Article 3 and Additional Protocol II (if adopted by the parties in conflict) applying to the present conflict.⁸⁶ No other portion of the Geneva Conventions apply due to the narrowed terms of the definition in Common Article 3, but customary international law drawn from other avenues likely applies.⁸⁷

⁸⁴ Geneva I, *supra* note 17, at art. 3; Geneva III, *supra* note 18, at art. 3; Geneva IV, *supra* note 19, at art. 3.

⁸⁵ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)

⁸⁶ Solis, *supra* note 49, at 153.

⁸⁷ *Id.*; see *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment, ¶ 395., (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (rejecting an argument that rape must be codified in an explicit statute to apply and instead declaring that the crime was already part of customary international law);

The second requirement for prosecuting a war crime is that the crimes to be prosecuted exist in domestic penal or military codes.⁸⁸ The adoption of treaties into domestic law is required by contracting parties, such as the Geneva Conventions of 1949, for the treaty to take effect. A statute created for the express purpose of creating an ad hoc military tribunal for prosecuting war crimes is also an acceptable avenue to pursue, such as those adopted for the prosecution of crimes committed by the former Yugoslavia in the ICTY.⁸⁹ Nearly all states' military and penal codes contain the basic prohibitions enshrined in the Geneva Conventions, even Russia's.⁹⁰ But, just because rules are "on the books" does not mean that they have been, are, or going to be, followed.

The third requirement to prosecute a war crime is that there be a nexus between the crime committed and the ongoing conflict.⁹¹ This is the principal distinguishing element that determines whether an offense falls within the umbrella of acts associated with the commission of a war crime, a domestic crime, or a human rights violation. In short, there must be a 'nexus' whereby the crime is committed within the context of, and in connection to, an ongoing armed conflict.⁹² This element requires that an act be committed during a conflict and during service to one of the parties to the conflict. As a basic example, if a military service member commits a prohibited act while on patrol, acting in his or her official capacity as a member of the armed forces of a party to that conflict, then that service member's act is a war crime. This kind of scenario is observed in the case of murder and rape committed by PFC Potter during the Vietnam war.⁹³ Conversely, if a service member leaves his posting entirely of his own accord and not under orders, any crimes he commits are not war crimes.

⁸⁸ Kenneth Watkin, *21st Century Conflict and International Humanitarian Law: Status Quo or Change?* in MICHAEL N. SCHMITT AND JELENA PEJIC, EDS., *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 264, 283 (Leiden: Martinus Nijhoff, 2007).

⁸⁹ ICTY Statute, *supra* note 51.

⁹⁰ Ugolovnyĭ Kodeks Rossiiskoi Federatsii [Criminal Code] (Russ.) (available in English at the International Money Laundering Information Network, https://www.imolin.org/doc/amlid/Russian_Federation_Criminal_Code.pdf) [hereinafter Russian Criminal Code].

⁹¹ Solis, *supra* note 49, at 307.

⁹² La Haye, *supra* note 8, at 110.

⁹³ *United States v. Potter*, 39 C.M.R. 791, 793-98 (U.S. Navy Bd. of Rev. 1968).

This was the case of Staff Sergeant (“SSgt”) Robert Bales, who left his post during his deployment to Afghanistan in 2012 and murdered sixteen Afghan villagers in the Kandahar Province.⁹⁴ SSgt Barnes was tried and convicted for his crimes under the Uniform Code of Military Justice (“UCMJ”) because his heinous acts were also violations of U.S. military law, not just breaches of international law.

Case law developed during the ICTY provides additional support and context to discussions about the required nexus. The trial court in *Prosecutor v. Tadić* stated, “[f]or a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.”⁹⁵ The court further elaborated that it is not enough for a crime to occur at the same time and place as an ongoing conflict; instead the alleged acts must be “closely related to the hostilities.”⁹⁶ But, a sufficient connection would be established if the alleged crimes were committed in occupied or controlled territories taken and held by an opposing party to the conflict by civil or military members of occupation forces.⁹⁷ And, acts connected to the conflict do not need to occur in the same areas as where substantial fighting is occurring or during active conflict if a crime is “part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict.”⁹⁸ The overarching question would be whether the criminal acts were “closely related” to the armed conflict in each instance.⁹⁹

⁹⁴ United States v. Bales, No. Army 2130743, 2017 WL 4331013, at *1 (U.S. Army Ct. of Crim. App. Sept. 17, 2017).

⁹⁵ Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 572 (Int’l Crim. Trib. for the Former Yugoslavia, May 7, 1997).

⁹⁶ *Id.* at ¶ 573.

⁹⁷ *Id.*

⁹⁸ *See id.* (declaring that international humanitarian law still applied to the alleged crimes despite there being no disagreement between the parties over the fact that they never took place within the same region of Bosnia where substantial fighting was underway, so long as those alleged crimes were “closely related” to the actual hostilities); *see also* Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, ¶ 57 (Int’l Crim. Trib. for the Former Yugoslavia Jun. 12, 2002) (holding that the laws of war apply throughout the “whole territory of the warring states” and that a breach may still occur either “at a time when and in a place where no fighting is actually taking place).

⁹⁹ *Tadić*, IT-94-1-T at ¶ 573.

The most detailed discussion of what the nexus requires is found in the appeals judgment in the ICTY *Kumarac* case:

58. What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is *shaped by or dependent upon* the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Trial Chamber’s finding on that point is unimpeachable.

59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.¹⁰⁰

The ICTR established a slightly more restrictive standard by requiring that a crime be “committed in conjunction with the armed conflict” in order to qualify as a war crime.¹⁰¹ Thus, the factors discussed above can be reduced to a requirement that a) the actor be an individual who is party to or involved in the conflict (meaning either military or civilian), b) that the act committed is recognized as a war crime, and c) that the act is directly connected to, shaped by, or dependent upon the policies of a party to the conflict.¹⁰²

The final consideration is, in certain instances, an evaluation must be made of whether the Law of Armed Conflict’s (“LOAC”) four core concepts have been violated.¹⁰³ LOAC’s four core

¹⁰⁰ *Kumarac*, IT-96-23/1-A at ¶¶ 58-59 (emphasis added).

¹⁰¹ *Prosecutor v. Akayesu*, Case No. ICTR 96-04, Judgment, ¶ 643 (Sept. 2, 1998).

¹⁰² *Tadić*, IT-94-1-T at ¶¶ 572-73; *Kumarac*, IT-96-23/1-A at ¶¶ 58-59; *Akayesu*, Case No. ICTR 96-04, at ¶ 643.

¹⁰³ While a much more thorough discussion about the LOAC is merited under the circumstances, I will discuss it in brief terms to assist the reader in understanding the elements that need to be evaluated. The purpose of this document is to provide a high-level discussion about the alleged war crimes committed in Ukraine and how they could be handled post war. A detailed discussion about the application of LOAC will take place when and if a body is convened to charge these the alleged crimes. This analysis can often be complicated and the brief treatment it’s given here should not undermine the difficulty in squaring these principles post-hoc against commander’s decisions in the field.

concepts are distinction, military necessity, humanity (unnecessary suffering), and proportionality.¹⁰⁴ This separate evaluation often must be made in instances where the act charged involves targeting civilians or civilian objects. This additional analysis becomes more salient in instances where a party is accused of bombing an unlawful target and less so when the accusation is forced deportation of a protected person or denying a prisoner of war rights to a fair trial. The principle of distinction requires that commanders and their subordinates must distinguish between combatants, usually members of the armed forces of a party to the conflict, and the civilian population.¹⁰⁵ Military operations may only intentionally target military combatants and objects.¹⁰⁶ There are surprisingly few limits upon what violence one military force may visit upon an opposing military force. But, commanders must distinguish combatants from civilians, avoid targeting civilians directly, and limit civilian collateral damage as much as possible.¹⁰⁷

The principle of military necessity justifies any and all use of force permitted by LOAC needed to defeat or subdue an enemy force as efficiently and quickly as possible with the minimum possible expenditure of life and resources.¹⁰⁸ Military necessity cannot be used to justify use of force or means of actioning force where otherwise forbidden by LOAC.¹⁰⁹ The principle of humanity, often referred to as unnecessary suffering, forbids the infliction of needless suffering, injury, or destruction that is not required for the accomplishment of a legitimate military purpose.¹¹⁰ Humanity is the “opposite side of the coin” of military necessity and both concepts must be considered at all times. Proportionality requires that the relevant release authority to weigh the desired actions

¹⁰⁴ OFF. OF GEN. COUNS., U.S. DEP’T OF DEF., LAW OF WAR MANUAL ¶ 2.1.2.3 (2015 ed., rev. 2016) [hereinafter U.S. Law of War Manual]; U.K. MINISTRY OF DEF., JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 2.1 (Joint Serv. Publ’n 383, 2004 ed.) [hereinafter U.K. Law of War Manual].

¹⁰⁵ U.S. Law of War Manual, *supra* note 104, at ¶ 2.5.1; *supra* note 105, U.K. Law of War Manual, at ¶ 2.5.

¹⁰⁶ U.S. Law of War Manual, *supra* note 104, at ¶ 2.5.2; *supra* note 105, U.K. Law of War Manual, at ¶ 2.5.1.

¹⁰⁷ U.S. Law of War Manual, *supra* note 104, at ¶ 2.5.3; *supra* note 105, U.K. Law of War Manual, at ¶ 2.5.3.

¹⁰⁸ U.S. Law of War Manual, *supra* note 104, at ¶ 2.2; *supra* note 105, U.K. Law of War Manual, at ¶ 2.2.

¹⁰⁹ U.S. Law of War Manual, *supra* note 104, at ¶ 2.2.2.1; *supra* note 105, U.K. Law of War Manual, at ¶ 2.3.

¹¹⁰ U.S. Law of War Manual, *supra* note 104, at ¶ 2.3; *supra* note 105, U.K. Law of War Manual, at ¶ 2.4.

(usually attacking a specific target) with the justification for taking that action.¹¹¹ Stated a bit differently, proportionality requires that the expected civilian losses from an attack not outweigh the expected military gain.¹¹² All four core principles must be considered together as a whole system to guide the conduct of warfare.¹¹³ When one principles is violated, the offending action tends to create problems amongst the others.

C. *Subject Matter Jurisdiction*

The matter of jurisdiction over war crimes themselves and the persons, military or civilian, who perpetrate them is simple in principle and potentially very difficult in practice. This section will discuss what crimes are covered by which treaties, who may be prosecuted, and the matter of statute of limitation. Generally speaking, a state must be party to a treaty in order to be subject to jurisdiction under said treaty, with the sole exception being to such treaties that have become customary international law. However, even if a state is subject to jurisdiction under international law, obtaining compliance as a practical matter may bar meaningful justice from being served.

First, the four Geneva Conventions of 1949 establish the concept of universal jurisdiction for grave breaches enumerated therein. The concept of universal jurisdiction for grave breaches is supported by Article 49 of the First Convention, Article 50 of the Second Convention, Article 129 of the Third Convention, and Article 146 of the Fourth Convention of 1949.¹¹⁴ Pursuant to these articles, each High Contracting Party is obligated to enact legislation supporting the Conventions that extends to both national and international perpetrators, to search for accused perpetrators, and

¹¹¹ U.S. Law of War Manual, *supra* note 104, at ¶ 1.11.1.2.

¹¹² U.K. Law of War Manual, *supra* note 105, at ¶ 2.6.

¹¹³ U.S. Law of War Manual, *supra* note 104, at ¶ 2.1.2.

¹¹⁴ Geneva I, *supra* note 17, at art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 **U.S.T.** 3217, 5 **U.N.T.S.** 85 [hereinafter Geneva II]; Geneva III, *supra* note 18, at art. 129; Geneva IV, *supra* note 19, at art. 146.

to try them or hand them over to another state for trial.¹¹⁵ In effect, this requirement has created a regime of universal jurisdiction vested in either national courts or a relevant international tribunal to try grave breaches.¹¹⁶ Both Ukraine¹¹⁷ and Russia¹¹⁸ are party to all four Geneva Conventions of 1949, and even if they were not, much of what was established there has since become customary international law, obligating them to these aforementioned norms, at least in theory. The Additional Protocols of 1977 are another matter. While its prohibitions are generally supported by, and expansions of, the Conventions of 1949, the Additional Protocols are not universally adopted or applied today.¹¹⁹ Ukraine ratified Additional Protocol I (which concerns international conflicts) on January 25, 1990 after the collapse of the Soviet Union.¹²⁰ The Russian Federation, on the other hand, withdrew from Additional Protocol I on October 23, 2019.¹²¹ Thus, while Russia is still beholden to the requirements and obligations of universal jurisdiction for grave breaches under the Geneva Conventions of 1949, Russia does not consider itself responsible for the additional provisions laid out in Additional Protocol I.

It is unclear whether the crime of aggression is subject to universal jurisdiction under customary international law. The last time the crime of aggression was tried was against Germany

¹¹⁵ Geneva I, *supra* note 17, at art. 49; Geneva II, *supra* note 114, at art. 50; Geneva III, *supra* note 18, at art. 129; Geneva IV, *supra* note 19, at art. 146.

¹¹⁶ Henckaerts, *supra* note 81, at 604-07.

¹¹⁷ *Treaties, State Parties and Commentaries: Ukraine*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=UA&nv=4.

¹¹⁸ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol.I, Fed. Pol. Dept., Berne, pp.355-356 (2004); *Treaties, State Parties and Commentaries: Russia*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=RU&nv=4.

¹¹⁹ *Treaties, State Parties and Commentaries: 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, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.

¹²⁰ *Id.*

¹²¹ *Treaties, State Parties and Commentaries: 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. *Withdrawal of the Russia Federation*, INT'L COMM. RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=74BABBDD71087E777C1256402003FB5D4>

after World War II at the Nürnberg Tribunals established by the London Agreement.¹²² One view holds that because the Allied powers assumed supreme control over Germany following the war, the Nürnberg Tribunals were an exercise of domestic jurisdiction by Germany over officials of its former government.¹²³ The same argument has been made about the Tokyo trials, and together both tribunals were operating with the consent of the defeated Axis powers.¹²⁴ Distinct from the situation in Germany, the Tokyo trials were conducted with the consent of the same Japanese government that fought the war.¹²⁵ This view collectively holds that the post-World War II tribunals were domestic or national trials, not international ones. A second view holds that the Tribunal was in fact exercising universal jurisdiction for the following reasons:

- (a) the London Agreement designated the court the “International” Military Tribunal;
- (b) the preamble of the agreement stressed that the four signatories were “acting in the interests of all the United Nations”;
- (c) the agreement gave any government of the United Nations the right to accede to it, and nineteen countries did so;
- (d) the agreement did not restrict the tribunal’s jurisdiction to German war criminals, but rather gave the Tribunal the right to prosecute major war criminals of all other European Axis countries; and
- (e) the agreement stipulated that the determination of the tribunal that a group or organization was criminal was binding in proceedings before courts of the many signatory states.¹²⁶

The Tribunal’s judgments also referred to the use of universal jurisdiction in its judgments.¹²⁷ In support further support for the second view, the U.N. Commission of Experts on Violations of International Humanitarian Law in the Former Yugoslavia affirmed the view that that the trials at

¹²² Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT’L L. J. 358, 374 (2012).

¹²³ *Id.* at 374-75.

¹²⁴ *Id.* at 378.

¹²⁵ *Id.*

¹²⁶ *Id.* at 375.

¹²⁷ *Id.* at 377.

Nürnberg were applying universal jurisdiction.¹²⁸ Thus, while it's reasonable for states to conclude that the crime of aggression enjoys universal jurisdiction, there is evidence enough to contest that view.¹²⁹

With respect to the crime of genocide, the Convention against Genocide establishes a jurisdictional regime akin to universal jurisdiction under the Geneva Conventions of 1949.¹³⁰ Just as required by the Geneva Conventions of 1949, states are required to enact laws punishing genocide, prosecute those accused of genocide, and submit to jurisdiction of state and international tribunals who seek those accused of perpetrating the crime of genocide.¹³¹ Both Ukraine and Russia are parties to the Convention against Genocide, subjecting them to its requirements.¹³²

The Convention against Genocide was first enforced in 1996 and concluding in 2007, in connection with the Yugoslavian Civil War between Bosnia and Herzegovina and the former Yugoslavia (now Serbia and Montenegro).¹³³ In the first judgment in *Bosnia and Herzegovina v. Yugoslavia*, where the International Court of Justice established jurisdiction over the dispute, the government of Bosnia and Herzegovina accused the former Yugoslavia of crimes of genocide and violations of the Geneva Conventions of 1949 and the Protocols of 1977.¹³⁴ The court dismissed objections by the former Yugoslavia, which argued that at the time Bosnia and Herzegovina made their accusations of genocide, the two parties were engaged in a domestic conflict, which would have made the Convention inapplicable to an internal matter of a sovereign state.¹³⁵ In its holding, the court declared that by the plain text of Article I, the court had jurisdiction over contracting parties

¹²⁸ *Id.*

¹²⁹ *Id.* at 379.

¹³⁰ Crime of Genocide, *supra* note 57, at arts. IV, V, VI.

¹³¹ *Id.*

¹³² *Supra* note 67.

¹³³ *Bosnia and Herzegovina v. Yugoslavia*, Preliminary Objections, Judgment, I.C.J. REPS. 595 (1996) <https://www.icj-cij.org/public/files/case-related/91/091-19960711-JUD-01-00-EN.pdf>.

¹³⁴ *Id.* at 600.

¹³⁵ *Id.* at 615.

for crimes of genocide “whether committed in time of peace or time of war.”¹³⁶ As such, it had jurisdiction to investigate or prosecute crimes of genocide regardless of the presence of a dispute or the character of the conflict in which the crimes were committed.¹³⁷ The court also rejected a statute of limitations argument made by the former Yugoslavia, holding again by the plain text of the Conventions, that the document contemplated no statute of limitations that would prevent it from prosecuting crimes committed before Bosnia and Herzegovina became a member of the United Nations in 1992.¹³⁸ This judgment, which largely affirmed an advisory ruling of the ICJ on May 28, 1951, and the ruling by the Tribunal at Nürnberg establishes jurisdiction to prosecute the crime of genocide during peace or wartime, regardless of the form and character of the conflict in which it takes place.

The ICC, via the Rome Statute, has limited jurisdictional authority over acts committed in Ukraine. Neither Russia nor Ukraine are one of the 123 parties to the Rome Statute.¹³⁹ But, Ukraine gave the ICC permission to investigate and prosecute war crimes starting with the initial Russian invasion in 2013, which subjects Russians and Ukrainians fighting on Ukrainian soil to the jurisdiction of the ICC.¹⁴⁰ This is unlikely to extend to Russian troops and commanders who have returned to Russia since the Russian government has not responded to extradition requests, in addition to denying any wrongdoing.¹⁴¹ This issue is arguably true of accusations made under the Geneva Conventions as well, but at least in this instance, Russia has the geopolitical cover to say it is not party to the Rome Statute, in addition to denying all wrongdoing.

¹³⁶ *Id.*

¹³⁷ *Id.* at 621.

¹³⁸ *Id.* at 611, 617.

¹³⁹ Rome Statute, *supra* note 31.

¹⁴⁰ Rome Statute, *supra* note 31; *infra* pg. 7; Anthony Deutsch & Toby Sterling, *ICC faces "myriad challenges" to prosecute war crimes in Ukraine*, REUTERS (Mar. 4, 2022, 8:26 AM), <https://www.reuters.com/world/icc-faces-myriad-challenges-prosecute-war-crimes-ukraine-2022-03-04/>.

¹⁴¹ Deutsch, *supra* note 140.

D. Personal Jurisdiction

Anyone can be prosecuted for a war crime.¹⁴² Following World War II, the International Military Tribunals held at Nürnberg and Tokyo focused specifically upon prosecuting leadership in both Germany and Japan for systemic crimes ordered by their governments, but not crimes committed by individuals on the battlefield (with few exceptions).¹⁴³ The power to impose these tribunals upon those placed on trial was derived more from the power of the Allied powers over the defeated Axis powers and much less so because there was any precedent in international law to do so (sometimes criticized as an example of so-called “victor’s justice”).¹⁴⁴ The unique situation created by the war’s end permitted the Tribunals at Nürnberg and Tokyo to move forward.¹⁴⁵ But, with the adoption of the Geneva Conventions in 1949, anyone who committed or ordered war crimes, specifically grave breaches, became subject to prosecution.¹⁴⁶ This is as true for military personnel as it is for civilians who commit or contribute to grave breaches. For example, Bruno Tesch, a civilian, and two business associates were tried for war crimes, convicted, and sentenced to death by hanging after World War II for manufacturing and supplying Nazi death camps with the poisonous gas, known as Zyklon B, used to exterminate prisoners en mass.¹⁴⁷ The first time where lower level individuals were subject to prosecution for war crimes was during both ICTY and ICTR, “unequivocally support[ing] the imposition of individual criminal liability for war crimes on belligerent soldiers and civilians alike.”¹⁴⁸ Similarly, the Convention on the Prevention and

¹⁴² Solis, *supra* note 49, at 309.

¹⁴³ La Haye, *supra* note 8, at 107.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 108; Solis, *supra* note 49, at 309-10; Geneva I, *supra* note 17, at art. 49; Geneva II, *supra* note 114, at art. 50; Geneva III, *supra* note 18, at art.129; Geneva IV, *supra* note 19, at art. 146.

¹⁴⁷ *Trial of Bruno Tesch and Two Others*, U.N. War Crimes Commission, LRTWC, Vol. I (London UN War Crimes Comm., 1947), <https://phdn.org/archives/www.ess.uwe.ac.uk/WCC/zyklonb.htm>; *Synopsis of Trial Reports Received by the United Nations War Crimes Commission from National Authorities by 31st May*, 1946, U.N. Doc. C.204, 8 (1946), <https://search.archives.un.org/uploads/r/united-nations-archives/8/9/3/8937c5f22e0ea64fee5f6af167293ad1987337f634d57f6ceba024c54f7535f0/15840-00008.PDF>.

¹⁴⁸ La Haye, *supra* note 8, at 117.

Punishment of the Crime of Genocide establishes jurisdictional authority over all those accused of committing or supporting the commission of the crime of genocide, which extends even to constitutional heads of state.¹⁴⁹

E. Statute of Limitations for War Crimes

In addition to broad jurisdiction, there are no internationally recognized statutes of limitations on either war crimes or crimes against humanity, as set forth in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.¹⁵⁰ Articles I and II of the Convention provide that there are no statutes of limitation on any war crimes defined or charged during the Tribunal at Nürnberg, set forth in the Geneva Conventions, or for genocide even if acts connected with the above are not violations of domestic law.¹⁵¹ Both Russia and Ukraine are party to this international agreement as well.¹⁵²

II. THE EVIDENCE

The evidence supporting systematic Russian violations of the Geneva Conventions of 1949 and acts of genocide is legion. Russian President Vladimir Putin is wielding terror as his primary weapon of war as his military commits systematic torture, murder, rape and acts of genocide against the Ukrainian people. Since February 24, 2022, Ukrainian investigators have cataloged more than 71,000 active cases of suspected war crimes, most of which are likely grave breaches.¹⁵³ One might almost think that the Russians had forgotten that they were not the Soviet Army fighting on the

¹⁴⁹ Crime of Genocide, *supra* note 57, at art. IV.

¹⁵⁰ G.A. Res. 2391 (XXIII), Art. I (Nov. 26, 1968).

¹⁵¹ *Id.* at arts. I, II.

¹⁵² *Supra* note 67.

¹⁵³ Laura King, *Russia's 'most hidden crime' in Ukraine war: Rape of women, girls, men and boys*, L.A. TIMES (Aug. 21, 2022, 5:00 PM), <https://www.latimes.com/world-nation/story/2022-08-21/russias-most-hidden-crime-in-ukraine-war-rape>; Anthony Deutsch, *Create 'aggression' tribunal for Ukraine now: Nobel Peace winner*, REUTERS (Feb. 23, 2023, 12:11 PM), <https://www.reuters.com/world/ukraine-has-convicted-26-war-crimes-suspects-since-invasion-official-2023-02-23/>.

Eastern Front of World War II, where they were free to commit acts of atrocity that universally went unprosecuted. This conflict has produced tens of thousands of crowdsourced images, complex analysis, and systematic evidence gathering in a way never before seen in warfare. During the war's opening days, circumstantial evidence began to surface that war crimes *could* have been committed,¹⁵⁴ but more than a year later, it is a virtual certainty that crimes have been committed. While evidence of individual wrongdoing will have to be meticulously collected and built into cases against individual commanders or service members, sufficient evidence exists to show systematic crimes have indeed, been committed in violation of customary international law with the sufficient nexus to categorize them as war crimes. This section will discuss those grave breaches for which the world knows have been systematically perpetrated:

- A. The killing of civilians not a party to the conflict.
- B. Torture, rape, or inhumane treatment of protected persons, generally civilians, prisoners. Of war, or persons not (or no longer) a party to the conflict.
- C. Unlawful and wanton destruction and indiscriminate attacks upon civilian population centers and infrastructure in a way not justified by military necessity.
- D. Unlawful deportation or transfer, hostage taking, or confinement of a protected person (civilians) amounting to genocide, specifically forcibly removing Ukrainian children to Russia for readoption by Russians.
- E. Targeting recognized historical monuments with no military value.
- F. The crime of aggression.

Each of these violations will be discussed briefly below to provide the reader with a broad overview of the allegation and the evidence available via open-source reporting to support it. None of the

¹⁵⁴ Julian Borger, *'Leave no stone unturned': how investigators gather evidence of war crimes in Ukraine*, GUARDIAN (Mar. 6, 2022, 2:27 AM), <https://www.theguardian.com/law/2022/mar/06/leave-no-stone-unturned-how-investigators-gather-evidence-of-war-crimes-in-ukraine>.

below is or should be considered exhaustive; the ultimate catalog of the evidence briefly discussed herein will likely run into the thousands of pages.

A. The killing of civilians not a party to the conflict

There is abundant evidence to show that Russian regular military or para-military units have carried out the systematic murder of unarmed Ukrainian civilians throughout the occupied areas of Ukraine. The most visible instance of these crimes was the massacre of civilians in Bucha, a suburb of the capital, Kyiv, 30 km northwest of Kyiv's city center. Russian forces occupied Bucha from the early days of the war, shortly after February 24, 2022, until they began a messy retreat on March 31, 2022.¹⁵⁵ The scene that Ukrainian troops found there as they followed behind Russian forces was horrific.¹⁵⁶ Four hundred and fifty-eight bodies of murdered civilians were found strewn across the town in homes, cellars, and the streets.¹⁵⁷ Some 419 of those victims died of gunshot wounds.¹⁵⁸ Among the most emblematic of the murders discovered the day after the Russians left was a man lying in the street with his hands tied behind his back and a fresh gunshot wound to the back of the head, indicating he died by execution.¹⁵⁹ The civilians who survived their month-long occupation at the hands of the Russian Army told all who would listen that the Russians killed civilians indiscriminately while they occupied the town.¹⁶⁰ Since the grizzly discoveries at Bucha, several mass graves containing hundreds of men, women, and children have been discovered near Bucha,

¹⁵⁵ Cara Anna, *War Crimes Watch: A devastating walk through Bucha's horror*, A.P. (Apr. 10, 2022), <https://apnews.com/article/russia-ukraine-europe-war-crimes-7791e247ce7087dddf64a2bbdcc5b888>.

¹⁵⁶ Carlotta Gall, *Bucha's Month of Terror*, N.Y. TIMES (Apr. 11, 2022), <https://www.nytimes.com/interactive/2022/04/11/world/europe/bucha-terror.html>.

¹⁵⁷ Liz Sly & Kostiantyn Khudov, *Accounting of bodies in Bucha nears completion*, WASH. POST (Aug. 8, 2022, 6:50 PM), <https://www.washingtonpost.com/world/2022/08/08/ukraine-bucha-bodies/>.

¹⁵⁸ *Id.*

¹⁵⁹ Simon Gardner, *In Ukrainian street, a corpse with hands bound and a bullet wound to the head*, REUTERS (Apr. 5, 2022, 4:44 AM), <https://www.reuters.com/world/europe/ukrainian-street-corpse-with-hands-bound-bullet-wound-head-2022-04-03/>.

¹⁶⁰ Gall, *supra* note 156.

Mariupol, Izyum, and several places throughout the Kharkiv region.¹⁶¹ Most of the civilians exhumed from the grave sites died by gunshot, with some showing signs of torture.¹⁶² Ukrainian authorities have even accused Russia of bringing mobile crematoriums into the city of Mariupol to dispose of civilian bodies littering the city following eyewitness accounts.¹⁶³ The evidence available, most of which was meticulously collected by investigators in the aftermath of Russian withdrawals, shows the widespread killing of unarmed civilians so brazen and frequent that it cannot be attributed to unintended collateral damage or isolated incidents. The vast record, often graphically illustrated, shows the murder of civilians not party to the conflict as evidence of grave breaches conducted by Russian military personnel “closely related to the hostilities,” establishing a sufficient nexus to categorize these acts as war crimes.¹⁶⁴ Thus, there is no question of whether these crimes have been committed; the only open questions that remain turn on which individuals’ culpability may be attributed and the extent of the crimes committed.

B. Torture, rape, or inhumane treatment of protected persons, generally civilians, prisoners of war, or persons not (or no longer) a party to the conflict

Torture sites have been discovered throughout Ukraine’s formerly occupied areas following the Russian military’s evacuation or retreat. Evidence of makeshift torture chambers have been uncovered throughout Ukraine, with recently liberated citizens telling grizzly tales of what they heard and witnessed under Russian occupation.¹⁶⁵ Thirty-nine such sites were discovered in formerly occupied areas of the Kharkiv region alone as of early October 2022. More sites have been

¹⁶¹ Ewelina U. Ochab, *New Mass Graves Found In Ukraine As Putin’s Atrocities Continue*, FORBES (Sept. 22, 2022, 4:56 PM), <https://www.forbes.com/sites/ewelinaochab/2022/09/22/new-mass-graves-found-in-ukraine-as-putins-atrocities-continue/?sh=11d14fec58ba>.

¹⁶² *Id.*

¹⁶³ Bill Hutchinson, *Ukrainian officials accuse Russia of using ‘mobile crematoriums’ in Mariupol*, ABC News (Apr. 7, 2022, 5:02 PM), <https://abcnews.go.com/International/russia-accused-mobile-crematoriums-incinerate-civilians-mariupol/story?id=83932376>.

¹⁶⁴ *Tadić*, IT-94-1-T at ¶ 573.

¹⁶⁵ Louisa Loveluck, *After Russian retreat in east Ukraine, police find dozens of torture sites*, WASH. POST (Oct. 7, 2022, 4:04 PM), <https://www.washingtonpost.com/world/2022/10/07/ukraine-dead-torture-sites-victims/>.

discovered in many of the same areas mass graves have been discovered, such as Bucha and Izyum.¹⁶⁶ Reports of interrogations of both civilians and captured Ukrainian service members are commonplace throughout formerly occupied areas.¹⁶⁷ Rape of men, women, girls, and boys has also been reported as a widespread practice of occupying Russian forces to invoke terror and subjugation of the Ukrainian population.¹⁶⁸ Pramila Patten, the Special Representative of the U.N. Secretary-General on Sexual Violence in Conflict, recently told Reuters, “[t]here are indications that sexual violence is being used as a weapon of war.”¹⁶⁹ Instances of rape have been recorded throughout Ukraine, described by their victims as retribution for resisting Russian occupation.¹⁷⁰ International investigators working in the areas formerly occupied by the Russian military north of Kyiv say there is evidence that Russian commanders knew their troops were using sexual violence as a weapon and, in some cases, encouraged it.¹⁷¹ There is sufficient evidence here, as with the indiscriminate murder of civilians, that crimes were committed by Russian military personnel during the course of their duties. This is legally significant in establishing the required nexus to categorize these acts as war crimes. There is no justification for this type of barbarism by the LOAC or standards of modern warfare. Even if Russian soldiers were not ordered to commit such atrocities, the commander’s failure to control or curb such behavior makes them and the Russian government complicit in the crime.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ King, *supra* note 153.

¹⁶⁹ Joanna Plucinska et al., *Some Russian commanders encouraged sexual violence, says lawyer advising Kyiv*, REUTERS (Nov. 23, 2022, 6:17 AM), <https://www.reuters.com/world/europe/some-russian-commanders-knew-sexual-violence-or-encouraged-it-says-lawyer-2022-11-23/>.

¹⁷⁰ Laurel Wamsley, *Rape has reportedly become a weapon in Ukraine. Finding justice may be difficult*, N.P.R. (Apr. 30, 2022, 9:00 AM), <https://www.npr.org/2022/04/30/1093339262/ukraine-russia-rape-war-crimes>.

¹⁷¹ Plucinska, *supra* note 169.

C. *Unlawful and wanton destruction and indiscriminate attacks upon civilian population centers and infrastructure in a way not justified by military necessity*

This particular crime is usually the most difficult to prove due to its intersection with the normal conduct of warfare. In order to ascertain whether destruction caused by the conduct of warfare is unlawful, it must be analyzed through the lens of the four core principles of LOAC (discussed *supra* page 23). There will always be collateral damage during the course of a conflict, and stray munitions will hit non-military targets. No single incident of collateral damage would be determinative of war crimes on its own. However, after more than a year of conflict, several patterns have developed to show that Russia has chosen to target civilian objects, such as apartment buildings and civilian infrastructure.¹⁷² The pattern of targeting civilian apartment buildings and other civilian objects with no military value is widespread and appears aimed at causing terror in an attempt to force the Ukrainian population to capitulate.¹⁷³ Targets include: civilian apartment buildings, playgrounds, pedestrian bridges far from the fighting, and university campuses.¹⁷⁴ A prominent example of wanton disregard for civilian lives was the bombing of a theater where civilians took shelter in the besieged city of Mariupol on March 16, 2022.¹⁷⁵ The Mariupol theater acted as the city's primary bomb shelter, with the Russian word for "children" written with chalk in letters large enough to be seen from satellites orbiting in space in the front and back of the theater to identify it as a shelter.¹⁷⁶ The Russians bombed it anyway, killing an estimated 600 of the 1200 civilians taking shelter inside.¹⁷⁷ There appears to be no clear military objective but instead simply a

¹⁷² Adam Schreck, Associated Press, *Russia hits Ukraine apartments with missiles, detains refugees at border*, P.B.S. (Oct. 6, 2022, 5:56 PM), <https://www.pbs.org/newshour/world/russia-hits-ukraine-apartments-with-missiles-detains-refugees-at-border>.

¹⁷³ Razom Advocacy Team, *No, Russia's airstrike escalation is not retaliation for the Crimean Bridge*, ATL. COUNCIL (Oct. 12, 2022), <https://www.atlanticcouncil.org/blogs/ukrainealert/no-russias-airstrike-escalation-is-not-retaliation-for-the-crimean-bridge/>.

¹⁷⁴ *Id.*

¹⁷⁵ Lori Hinnant, Mstyslav Chernov & Vasilisa Stepanenko, *AP evidence points to 600 dead in Mariupol theater airstrike*, A.P. (May 4, 2022), <https://apnews.com/article/Russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1>.

¹⁷⁶ Andrew E. Kramer, Michael Schwartz & Eric Nagourney, *Survivors Emerge From a Bombed Theater, but Ukraine's Suffering Grows*, N.Y. TIMES (Mar. 17, 2022), <https://www.nytimes.com/2022/03/17/world/europe/russia-ukraine-war.html>.

¹⁷⁷ Hinnant, *supra* note 175.

goal of indiscriminate destruction of anything Ukrainian. More recently, Russia has begun what appears to be a deliberate campaign to destroy Ukraine's civilian power generation and delivery infrastructure as winter began to set in across Europe.¹⁷⁸ Tellingly, Russia has reportedly used precision weapons to hit Ukrainian power infrastructure far behind enemy lines.¹⁷⁹ These targets have no military value other than to deprive the Ukrainian citizenry of power as temperatures began to drop. The widespread use of precision weapons against civilian targets tends to cut against the ambiguity that Russia could try to establish to argue against the idea that it is purposefully targeting civilian objects with no military value in violation of the Geneva Conventions.¹⁸⁰

D. Unlawful deportation or transfer, hostage taking, or confinement of a protected person (civilians) amounting to genocide, specifically forcibly removing Ukrainian children to Russia for readoption by Russians

While estimates vary wildly regarding detention, Russia is suspected of having detained and forcibly deported between 900,000 and 1.6 million Ukrainian citizens since the start of the war.¹⁸¹ Russian estimates of “refugees” non-consensually taken to Russia are as high as 2.35 million.¹⁸² Widespread accounts describe people being taken from their homes against their will, even if they have expressed the desire to evacuate to unoccupied parts of Ukraine. The U.S. State Department has described these acts as a grave breach of the Geneva Conventions.¹⁸³ The ICC agreed, determining there is enough evidence to charge, and issued a historic indictment and arrest warrant

¹⁷⁸ Nathan Rott, *How Russia is weaponizing the Ukrainian winter*, N.P.R. (Nov. 20, 2022, 6:00 AM), <https://www.npr.org/2022/11/20/1137698269/russia-weaponizes-winter-ukraine-war>

¹⁷⁹ Guy Faulconbridge, *Russia says it launched major attack on Ukrainian infrastructure*, REUTERS (Oct. 17, 2022, 6:02 AM), <https://www.reuters.com/world/europe/russia-says-it-launched-massive-missile-attack-ukrainian-infrastructure-2022-10-17/>.

¹⁸⁰ Sabra Ayres, Associated Press, *Russian missile strike damages key power site near Kyiv, says Ukraine grid operator*, P.B.S. (Oct. 15, 2022, 10:58 AM), <https://www.pbs.org/newshour/world/russian-missile-strike-damages-key-power-site-near-kyiv-says-ukraine-grid-operator>.

¹⁸¹ U.S. State Dep't, *Russia's "Filtration" Operations, Forced Disappearances, and Mass Deportations of Ukrainian Citizens*, U.S. STATE DEPT. (Jul. 13, 2022), <https://www.state.gov/russias-filtration-operations-forced-disappearances-and-mass-deportations-of-ukrainian-citizens/>.

¹⁸² Karina Tsui, *At least 900,000 Ukrainians 'Forcibly Deported' to Russia, U.S. says*, WASH. POST (Jul. 13, 2022, 3:45 PM), <https://www.washingtonpost.com/world/2022/07/13/ukraine-russia-forced-deportation-antony-blinken/>.

¹⁸³ *See Id.* (emphasizing Russia's current and historical war crimes in unlawful, forced deportations).

for President Vladimir Putin and his Commissioner for Children's Rights in the Office of the President of the Russian Federation, Maria Alekseyevna Lvova-Belova.¹⁸⁴ Mr. Putin and Ms. Lvova-Belova stand accused of violating articles 8(2)(a)(vii)¹⁸⁵ and 8(2)(b)(viii)¹⁸⁶ of the Rome Statute and related provisions of the Geneva Conventions of 1949.¹⁸⁷ Specifically, Prosecutor Khan's focus is on evidence his office has gathered to indicate that Russia has forcibly removed hundreds of children from orphanages and children's care homes, deporting them to Russia, and putting them up for adoption by Russian families immediately thereafter.¹⁸⁸ Prosecutor Khan further alleges that these removals are permanent and in contradiction to the aforementioned Rome Statute and Geneva Conventions provisions.¹⁸⁹ While the exact numbers of children removed remains unknown, the true figures are likely far higher. Disturbingly, well over 100,000 Ukrainian children have been reported as forcibly deported to Russia and rehomed with Russian families.¹⁹⁰ The practice of forcibly rehoming children of one group with another is a grave breach, in addition to being considered an element of genocide, although Prosecutor Khan did not go as far as to say so.¹⁹¹ This practice has

¹⁸⁴ Int'l Crim. Ct., *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INT'L CRIM. CT. (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

¹⁸⁵ "For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: . . . (ii) Torture or inhuman treatment, including biological experiments." Rome Statute, *supra* note 31, art. 8(2)(a)(vii).

¹⁸⁶ "For the purpose of this Statute, "war crimes" means: (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . . (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory." *Id.* art. 8(2)(b)(viii).

¹⁸⁷ Int'l Crim. Ct., *Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova*, INT'L CRIM. CT. (Mar. 17, 2023), <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin> [hereinafter Prosecutor Khan Statement].

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Laurie R. Blank, *Forcible Transfer of Children in Ukraine: An Element of Genocide?*, JURIST (Apr. 21, 2022, 11:09 AM), <https://www.jurist.org/commentary/2022/04/laurie-blank-russia-invasion-ukraine-genocide/>.

¹⁹¹ Ewelina U. Ochab, *Ukrainian Children Forcibly Transferred And Subjected To Illegal Adoptions*, FORBES (Apr. 10, 2022, 6:43 AM), <https://www.forbes.com/sites/ewelinaochab/2022/04/10/ukrainian-children-forcibly-transferred-and-subjected-to-illegal-adoptions/?sh=65fd4a1b30e0>; Prosecutor Khan Statement, *supra* note 187.

been systematic and sanctioned by the Russian government in all occupied areas of Ukraine.¹⁹² These actions are a clear cut case of conduct carried on in connection with the war by Russian personnel, further establishing the appropriate nexus to categorize these actions as war crimes. The forward-leaning actions by the ICC in this area are certainly welcome, although they come with serious limitations, discussed below.

E. Targeting recognized historical monuments with no military value

Russian forces appear to have deliberately targeted cultural and historical monuments throughout Ukraine. In the early days of the war, it was unclear whether Russian forces were deliberately trying to destroy civilian objects of cultural significance or if these objects had just become collateral damage.¹⁹³ Russian missiles even struck the Babyn Yar Holocaust memorial site in the war's opening days, which many thought was intentional.¹⁹⁴ At least in that instance, the memorial site sat next to Kyiv's central television and radio broadcast tower, arguably a viable military target. This left the question open for a few months. But, by June 2022, the sheer volume of cultural sites and monuments partially or wholly destroyed left little room for doubt that at least some, if not most, of the attacks were intentional, with one U.S. official calling the destruction "systemic."¹⁹⁵ UNESCO, the U.N. cultural body, estimates that seventy religious buildings, thirty historical buildings, eighteen cultural centers, fifteen monuments, twelve museums, and seven

¹⁹² Off. President Ukr., *Andriy Yermak held a meeting of the Coordination Council of Ukraine for the Protection and Safety of Children with the participation of António Guterres, ambassadors of the G20 countries and human rights defenders*, OFF. PRESIDENT UKR. (Nov 14, 2022, 9:17 PM), <https://www.president.gov.ua/en/news/andrij-yermak-proviv-zasidannya-koordinacijnoyi-radi-ukrayin-79133>.

¹⁹³ Conor Devlin, *Is Russia intentionally targeting Ukraine's cultural landmarks?*, NBC NEWS (Mar. 28, 2022, 11:58 AM), <https://www.nbcnews.com/news/world/russia-intentionally-targeting-ukraines-cultural-landmarks-rcna21604>.

¹⁹⁴ Rachel Treisman, *Russia Bombs a Kyiv TV Tower and the Babyn Yar Holocaust Memorial Site*, NPR (Mar. 1, 2022, 1:54 PM), <https://www.npr.org/2022/03/01/1083733323/russia-bombards-a-kyiv-tv-tower-and-the-babyn-yar-holocaust-memorial-site>.

¹⁹⁵ Carlie Porterfield, *In Photos: 152 Ukrainian Cultural Sites Damaged In Russian Invasion, UNESCO Says*, FORBES (Jun. 23, 2022, 11:19 AM), <https://www.forbes.com/sites/carlieporterfield/2022/06/23/in-photos-152-ukrainian-cultural-sites-damaged-in-russian-invasion-unesco-says/?sh=487283681c58>.

libraries have been partially or totally destroyed as of June 2022.¹⁹⁶ Intentional destruction of cultural sites, while being a grave breach under Additional Protocol I (to which Russia is not a party), is also a crime under the Hague Convention of 1954 (to which Russia is a party) and a crime under customary international law.¹⁹⁷ The deliberate targeting of cultural sites also violates the Rome Statute. While this crime would be difficult to try because it requires a degree of intention to satisfy its mens rea element, its apparent and ubiquitous pervasiveness throughout the conflict is notable and worth pursuing in the event the aforementioned crimes are tried.

F. The Crime of Aggression

The final crime for which there is plenty of evidence for, but will be difficult to prosecute, is the crime of aggression. Ordinarily, the stated reasons for invading another country by any modern state at least attempts to frame the situation in a way that does not flout post-World War II international norms or the U.N. Charter.¹⁹⁸ Mr. Putin's stated reasons for invading Ukraine in its

¹⁹⁶ See *Id.* (displaying photographs that visually capture the magnitude of Russia's destruction on Ukrainian historical and cultural sites).

¹⁹⁷ See Geneva IV, *supra* note 19; Henckaerts, *supra* note 81, Rule 38, pg. 127; *First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, May 14, 1954, 249 U.N.T.S. 358 [hereinafter Hague Convention of 1954].

¹⁹⁸ There are a multitude of instances where nations, the U.S. included, appeared to be at the very least disingenuous about reasoning for embarking upon an armed conflict. The instance that adversaries like Russia and China cite most is American adventurism in invading Iraq in 2003. All the stated reasons of starting that war became suspect by the end of the conflict and it severely damaged American credibility around the world. Unsurprisingly, twenty years later when U.S. intelligence signaled Russia would invade Ukraine there was healthy skepticism, even amongst our allies, that we were telling the truth. This discussion is not about that, but President Putin cites Iraq among his reasons for pitching his "version" of reality in invading Ukraine. Actions have consequences, even ones well-intended leaders did not expect. Regardless of the confidence in the intelligence that led to the invasion of Iraq two decades ago, the U.S. may have unwittingly helped weaken the international system we say we defend today. That has to be acknowledged; even if American leadership did not intend to deceive the world, that's how most of the world interpreted (and internalized) America's actions. At one point another, we'd do well to take some responsibility for that because those acts and others continue to return to visit (or haunt) the world order we want to defend. See e.g., George Packer, *A New Theory of American Power: The United States can—and must—wield its power for good.*, ATL. (Nov. 21, 2022), <https://www.theatlantic.com/magazine/archive/2022/12/american-foreign-policy-in-wartime/671899/>; *How the Iraq war became a threat to American democracy*, ECONOMIST (Mar. 22, 2023), <https://www.economist.com/united-states/2023/03/22/how-the-iraq-war-became-a-threat-to-american-democracy>.

“special military operation” were principally to “demilitarize and de-Nazify Ukraine.”¹⁹⁹ Mr. Putin claimed that Ukraine’s government is run by Nazis, with explicit ties throughout his proclamation to Nazi Germany, and accused Ukraine of genocide.²⁰⁰ He also stated his “special military operation” was meant to prevent NATO from gaining a foothold in Ukraine as he accused the West of backing Kyiv’s Nazi government.²⁰¹ There was of course no evidence for any of Mr. Putin’s claims at the time he invaded Ukraine on February 24, 2022 and no evidence has surfaced since that time.²⁰² Mr. Putin’s stated aims evolved as it became perfectly clear that his original aims to topple Ukraine’s government were becoming unachievable, adding ensuring Ukraine’s neutrality amongst his list of war aims.²⁰³ Territorial expansion appears to be amongst Mr. Putin’s conciliatory goals, having annexed four provinces of Ukraine, none of which he fully controls.²⁰⁴ Thus far, he appears to refuse even considering returning any of those territories as a part of a negotiated peace agreement.²⁰⁵ All of this is in direct conflict with the U.N. Charter, which states nations should “respect for the principle of equal rights and self-determination of peoples.”²⁰⁶ Mr. Putin’s pattern of actions and reasoning for invading Ukraine, taken together, paint a picture of military aggression to force Russian will upon the people of Ukraine, and represents a “clear case” of aggression as defined by the Nürnberg Tribunal.²⁰⁷ Without any evidence, even fabricated evidence, to back up its claims,

¹⁹⁹ Vladimir Putin, *Address by the President of the Russian Federation*, KREMLIN (Feb. 24, 2022, 6:00 AM), <http://en.kremlin.ru/events/president/news/67843>.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See Paul Kirby, *Has Putin’s war failed and what does Russia want from Ukraine?*, BBC (Feb. 24, 2022), <https://www.bbc.com/news/world-europe-56720589> (stating that Putin’s claims of Ukrainian Nazi violence “never added up”).

²⁰³ Press Release, *Telephone conversation with President of France Emmanuel Macron*, KREMLIN (Feb. 28, 2022, 6:15 PM), <http://en.kremlin.ru/events/president/news/67880>.

²⁰⁴ Matthew Luxmoore, *Russia’s Annexation of Ukraine Territories: What to Know*, WALL. ST. J. (Sept. 30, 2022, 1:06 PM), <https://www.wsj.com/articles/russias-annexation-of-ukraine-territories-what-to-know-11664554990>.

²⁰⁵ See Mark Trevelyan, *Russia’s Putin tells Germany’s Scholz that Western line on Ukraine is ‘destructive’ – Kremlin*, Reuters (Dec. 2, 2022, 6:44 AM), <https://www.reuters.com/world/russias-putin-tells-germanys-scholz-that-western-line-ukraine-is-destructive-2022-12-02/> (noting that Putin found peace talks “complicated” by the U.S. not formally recognizing Russian-annexed territories of Ukraine).

²⁰⁶ U.N. Charter, art. 1, ¶ 2.

²⁰⁷ Nazi Conspiracy and Aggression, *supra* note 38, at 50, 56.

Russia simply appears to be attempting to impose its will upon a neighboring state in direct contravention of the U.N. Charter and international law. While the crime of aggression clearly appears to have been committed, prosecuting any Russian leadership, Mr. Putin included, will be a difficult task short of a complete collapse of the current Russian government; an outcome that appears possible, but is by no means guaranteed. Thus, while the crime of aggression has likely been committed, seeking justice for it will be a tall order indeed.

Although many of the crimes discussed above probably shock the conscience of the American or Western European reader, these actions were predictable and familiar for Eastern Europeans and Ukrainians. History can be a precarious ruler to measure the present or future. Still, unfortunately for Ukraine, the actions of the modern Russian military (rape, murder, and torture) mirror the behavior of the Soviet Army that swept through the region during the closing act of World War II.²⁰⁸ The horrors the Soviet Union visited upon Eastern Europe, including Ukraine, were unspeakable and left deep cultural scars that continue to echo through time.²⁰⁹ The world would not learn of the horrors the Soviet Union perpetrated against Eastern Europe for decades due to the onset of the Cold War. They remained unverifiable whispers to the public until the Soviet Union collapsed in 1989. The principal difference between then and now can be reduced to one thing: the internet. The prevalence of access to the internet via cellular phones and social media has allowed Ukrainians to tell the rest of the world in real-time what has been happening to them as opposed to delayed media wire reports of the last century. The evidence of systemic war crimes is vivid, widespread, and certainly more than sufficient to investigate and prosecute. The Kremlin even appears to acknowledge that its armed forces have committed what international law deems war

²⁰⁸ Darryll Cooper, *The Anti-Humans*, THE MARTYRMADE PODCAST (May 30, 2021), <https://martyrmade.com/19-the-anti-humans/>.

²⁰⁹ *Id.*

crimes in its recent propaganda, even while outwardly denying any wrongdoing.²¹⁰ Margarita Simonyan, head of RT (formerly Russia Today), the Kremlin-backed Russia news agency, was recently quoted as saying “[i]f we manage to lose, the Hague, real or hypothetical, will come for even the janitor who sweeps the cobblestones behind the Kremlin,” in a television segment designed to scare Russian citizens into thinking they will all be punished if Russia loses the war.²¹¹ That may be a stark declaration, but what options do we have to bring the perpetrators of these crimes to justice?

III. VENUE

While it is obvious that war crimes have probably been and continue to be committed in Ukraine, prosecuting them remains the paramount challenge. Up to this point, the international discussion of alleged war crimes committed during Russia’s war with Ukraine has mainly been methodical and based on established international law, both customary and treaty. But international law enforcement is more than just the presence of an agreement or even a law. Parties must still willingly consent to follow the law, absent the unique set of circumstances that led to the military tribunals after World War II. Just getting the opportunity to prosecute these crimes will be a feat in and of itself.

There are at least three paths to prosecution, each with varying degrees of effectiveness and consequences for Russia, Ukraine, and the rest of the world. The first and easiest to facilitate from a process point of view is allowing the ICC to try these crimes. The second is an international military tribunal akin to those held after World War II for Germany and the Empire of Japan, and those held for crimes committed in the former Yugoslavia and Rwanda. The third is allowing domestic Ukrainian courts to handle the prosecutions, with some already underway or complete. Each path

²¹⁰ Marc Bennetts, *West will arrest Russians if we lose war in Ukraine, TV viewers told*, TIMES (Dec. 5, 2022, 12:01 AM), <https://www.thetimes.co.uk/article/west-will-arrest-russians-if-we-lose-war-in-ukraine-tv-viewers-told-5dngxdjt3>.

²¹¹ *Id.*

carries its own challenges, although some challenges are universal. Analyzing what is possible requires taking stock of the situation inside Russia today. Analysis of the political situation inside Russia is a necessary prerequisite because the outcome of this war will have political implications inside Russia and, depending on how things turn out, determine whether Russia will participate in future prosecutions of war crimes. Russia and Ukraine aside, the United States, Europe, China, and the world have a stake in whether, and how, justice is served for crimes committed in Ukraine.

Vladimir Putin finds himself “backed into a corner,” given the reality on the ground in Ukraine. As of November 13, 2022, Ukraine has reclaimed 54% of the territory Russia previously seized after nine months of conflict.²¹² The day before, Russia had retreated from the city of Kherson Oblast, the only regional capital Russia had been able to seize since the start of the war.²¹³ Despite the onset of winter conditions, which historically grinds combat in this region of Europe to a halt in previous wars, Ukraine appears to be intent on pressing the offensive, staging a small amphibious invasion of the Kinburn Spit, a small but strategic peninsula in eastern Kherson oblast.²¹⁴ A continued offensive is possible because NATO and the West have supplied Ukraine with an ample supply of winter equipment in addition to weapons and logistical support. The likelihood that Russia wins the war outright grows dimmer by the day as Ukraine grows bolder in the pursuit of its military objectives.²¹⁵ Western military experts assess the only viable option left for Mr. Putin is to try to drag the war out as long as possible in an effort to outlast western military aid.²¹⁶ From a raw

²¹² See Frederick W. Kagan, *Russian Offensive Campaign Assessment, November 13*, INST. STUDY WAR (Nov. 13, 2022, 3:30 PM), <https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-november-13> (identifying that the Ukrainian military has liberated 74,443 square kilometers of territory since the war’s inception); Scott Reinhard, *Maps: Tracking the Russian Invasion of Ukraine*, N.Y. TIMES (Nov. 14, 2022), <https://www.nytimes.com/interactive/2022/world/europe/ukraine-maps.html?smid=tw-nytimes&smtyp=cur>.

²¹³ Kateryna Stepanenko et al., *Russian Offensive Campaign Assessment, November 12*, INST. STUDY WAR (Nov. 12, 2022, 7:30 PM), <https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-november-12>.

²¹⁴ Kateryna Stepanenko et al., *Russian Offensive Campaign Assessment, November 22*, INST. STUDY WAR (Nov. 22, 2022, 8:30 PM), <https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-november-22>.

²¹⁵ Anne McElvoy & Gen. Ben Hodges (USA, RET.), *The Economist Asks: How could Ukraine win the war?*, ECONOMIST (Nov. 24, 2022), <https://www.economist.com/podcasts/2022/11/24/how-could-ukraine-win-the-war>.

²¹⁶ *Id.*

military perspective however, Russia lacks the troops and the equipment to turn the tide against Ukraine and it is questionable whether it can stymie further Ukrainian advances.²¹⁷

Meanwhile, Russian troops continue to be poorly trained, equipped and supplied.²¹⁸ These setbacks are deeply unsettling for the Russian political establishment and exacerbate an already precarious situation inside Russia.²¹⁹ Facing battlefield losses, Mr. Putin called up 300,000 additional reserves in September 2022, the first large-scale mobilization since World War II, and the Russian public did not react well.²²⁰ Russian citizens fled (including men of military age), potentially in the hundreds of thousands, with estimates ranging from 261,000 men to 700,000 citizens overall.²²¹ This number comes on top of the estimated 150,000 to 300,000 Russians who fled Russia in the first five months of the war.²²² Many of those who left were among the most and best educated citizens.²²³ Crime is rising, borders are becoming a mess, and private military groups are growing with little check from the government, calling into question whether Russia maintains a monopoly on the use of force within its borders.²²⁴ Russian popular support for the war appears to have cratered from 57% favoring continued fighting in July 2022 to 25% in November 2022, according to an internal poll carried out by the Kremlin's Federal Guard Service and leaked to the independent Russian news

²¹⁷ *Id.*

²¹⁸ Paul McLeary, *NATO is rushing equipment to Ukraine as troops bunker down for the winter*, POLITICO (Oct. 19, 2022, 4:39 PM), <https://www.politico.com/news/2022/10/19/ukraine-nato-russia-winter-equipment-00062596>.

²¹⁹ See Stepanenko et al., *supra* note 213 (highlighting several harsh criticisms against Putin coming from Russia's supporters of the war and nationalist constituencies); see also Stepanenko et al., *supra* note 214 (pointing out that the Kremlin has resorted to "false flag" tactics as a way to reignite Russian public support).

²²⁰ Doyinsola Oladipo et al., *Factbox: Where have Russians been fleeing to since mobilisation began?*, REUTERS (Oct. 6, 2022, 9:14 AM), <https://www.reuters.com/world/europe/where-have-russians-been-fleeing-since-mobilisation-began-2022-10-06/>.

²²¹ *Id.*

²²² *Much of Russia's intellectual elite has fled the country*, ECONOMIST (Aug. 9, 2022), <https://www.economist.com/international/2022/08/09/much-of-russias-intellectual-elite-has-fled-the-country>; Isabel Van Brugen, *Putin's Mobilization Backfires as 370,000 Flee Russia in Two Weeks*, NEWSWEEK (Oct. 4, 2022); Matthew Mpoke Bigg, *At least 200,000 Russians have left the country since Putin's draft began*, N.Y. TIMES (Sept. 28, 2022).

²²³ *Id.*

²²⁴ McLeary, *supra* note 218.

website, Meduza, and verified by the U.K. Ministry of Defense.²²⁵ The same poll found that public support for a negotiated end to the war has increased from 32% to 55%.²²⁶ While it's hard to accurately gauge public opinion in autocracies like Russia, the totality of the circumstances point to a public that is growing more discontented with the war with each passing month.

Due to the selective release of economic data, it's hard to assess the impact of sanctions on the Russian economy, with some sectors faring better than others.²²⁷ Some observers have even called into question whether the Russian state as we know it will survive this war.²²⁸ Regardless of whether the state persists, if Mr. Putin can't exit this war with at least more than he started with, his reign over Russia will likely crumble. Russia has not tolerated losses well, and again with history as our precarious yardstick, it is instructive that the three times Russia lost a war in the 20th Century, political upheaval followed, and twice the reigning leadership was removed.²²⁹ With Ukrainian success on the battlefield and only minor erosion of Western resolve, it is increasingly likely Russia will lose this war, whether on the field or through negotiations. If that event were to come to pass, Mr. Putin's leadership days are numbered, and the world will have new leadership to deal with at some point in the aftermath. This is the scenario we move forward with for analysis because if Mr. Putin managed to hold onto power, any possibility for prosecutions at the ICC or international military tribunal would almost certainly be foreclosed.

²²⁵ Marc Bennetts, *Russians losing taste for Ukraine war, leaked Kremlin polls reveal*, TIMES (Nov. 3, 2022, 5:30 PM), <https://www.thetimes.co.uk/article/russians-losing-taste-for-ukraine-war-leaked-kremlin-polls-reveal-bnfx22cb2>; U.K. Ministry of Defence (@DefenceHQ), TWITTER (Dec. 4, 2022, 1:50 AM), <https://twitter.com/DefenceHQ/status/1599295144825704448>.

²²⁶ Marc Bennetts, *Russians losing taste for Ukraine war, leaked Kremlin polls reveal*, TIMES (Nov. 3, 2022, 5:30 PM), <https://www.thetimes.co.uk/article/russians-losing-taste-for-ukraine-war-leaked-kremlin-polls-reveal-bnfx22cb2>.

²²⁷ Edward Wong et al., *Five Ways Sanctions Are Hitting Russia*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/us/politics/russia-sanctions-ukraine-war.html>.

²²⁸ McLeary, *supra* note 218.

²²⁹ David Gioe, *What a 1904 War Can Teach Vladimir Putin: The Russo-Japanese War led not just to an immediate revolution, but to deeper and longer-lasting change years later*, ATL. (Jun. 23, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/russia-war-ukraine-japan/661312/>.

While the focus of this examination has been crimes committed by Russia against Ukraine, how and whether these crimes are prosecuted have implications for the wider global rules-based international order established by the victors of World War II. The rules-based international order is under active attack by autocratic states led principally by China's Chinese Communist Party ("CCP"). The disagreement lies in the distinction between the idea of Rule *of* Law, supported by the West, and Rule *by* Law, supported by China and the autocrats of the world.²³⁰ In short, Rule of Law implies a legal system in which there is predictability and fairness; the law is applied equally to everyone (and in particular to political officials and members of the ruling regime).²³¹ Rule by Law is characterized by a legal system in which law is a tool of the state to maintain control of its population for the benefit of the government.²³² On the international stage, the concept of prosecuting war crimes sits upon the concept of Rule of Law at its foundation. China has actively worked to undermine this system from working within the U.N. to make holding states accountable for their actions more difficult because the CCP believes that the rules-based international system unduly constrains China's autonomy.²³³ The CCP is not accountable to its people at home and loathes the idea of being accountable to the world at large.

A recent example, among many, is China's active months-long efforts to delay the U.N. from releasing a damning report compiled by U.N. investigators that accuses China of human rights

²³⁰ Joseph Bosco, *America's rule of law v. China's 'rule by law'*, HILL (Dec. 29, 2020, 10:00 AM), <https://thehill.com/opinion/international/531857-americas-rule-of-law-v-chinas-rule-by-law/>.

²³¹ Josh Chin, China Real Time Blog, 'Rule of Law' or 'Rule by Law'? In China, a Preposition Makes All the Difference, WALL ST. J. (Oct. 20, 2014, 2:03 AM), <https://www.wsj.com/articles/BL-CJB-24523>.

²³² *Id.*

²³³ See Press Release, *NATO warned of Russia, China attempts to undermine rules-based order and Western values*, NATO PARLIAMENTARY ASSEMB. (Oct 10, 2021), <https://www.nato-pa.int/news/nato-warned-russia-china-attempts-undermine-rules-based-order-and-western-values> (warning that NATO members and allies must "keep a close watch" on both Russia and China's efforts "to undermine international rules-based order"); David Rennie, *An obsession with control is making China weaker but more dangerous*, ECONOMIST (Oct. 13, 2022), <https://www.economist.com/leaders/2022/10/13/an-obsession-with-control-is-making-china-weaker-but-more-dangerous>.

violations against the Uyghur population in Xinjiang province, China.²³⁴ When the report finally came out, it was clear why China fought its release, with the U.N. concluding “[s]erious human rights violations have been committed in XUAR [Xinjiang] in the context of the [Chinese] Government’s application of counter-terrorism and counter-“extremism” strategies.”²³⁵ Within hours of release, Chinese officials condemned the report “characterize[ing] the “so-called ‘assessment’ on Xinjiang” as a “farce” and a politically motivated attempt to smear China.”²³⁶ This is an instructive example of the distinction between the U.N.’s view of Rule of Law, and China’s view of Rule by Law. The report compiled by the U.N. was meant to hold China accountable for documented human rights violations against Uyghur Muslims. Meanwhile, China viewed the assessment based in international law as a politicized weapon being wielded against it.²³⁷ This fundamental distinction in the understanding of how law is or should be used undergirds current tensions in the international system. As further example of its hostility to the Rule of Law, on February 26, 2023, the CCP issued an order to professors at China’s law schools directing them to “oppose and resist western erroneous views” such as constitutional government, separation of powers, and an independent judiciary in legal education.²³⁸ Instead, the legal education community was directed to more closely adhere to Xi Jinping’s thought (such as his belief in Rule by Law) in legal education.²³⁹ This wider ideological conflict would come into play in any attempt to hold Russia accountable for war crimes. For China, which has declined to condemn Russia’s invasion of

²³⁴ Emma Farge, *China seeks to stop UN rights chief from releasing Xinjiang report – document*, REUTERS (Jul 20, 2022, 1:59 AM), <https://www.reuters.com/world/china/exclusive-china-seeks-stop-un-rights-chief-releasing-xinjiang-report-document-2022-07-19/>.

²³⁵ OHCHR *Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People’s Republic of China*, U.N. HUMAN RIGHTS OFF. HIGH COMM’R, ¶ 143 (Aug 31, 2022), <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf>.

²³⁶ Lily Kuo & Emily Rauhala, *China slams U.N. ‘farce’ on Xinjiang as Uyghur exiles praise report*, WASH. POST (Sept. 1, 2022, 9:54 AM), <https://www.washingtonpost.com/world/2022/09/01/china-united-nations-xinjiang-uyghur-human-rights/>.

²³⁷ *Id.*

²³⁸ David Rennie & Alice Su, *Drum Tower: The prince and the prime minister*, ECONOMIST at 26:51 (Mar. 7, 2023), <https://shows.acast.com/drumtower/episodes/drum-tower-the-prince-and-the-prime-minister>.

²³⁹ *Id.*

Ukraine, holding Russia accountable for war crimes means that China could be held accountable for them too. This is an outcome China, also a permanent member of the U.N. Security Council, would logically seek to prevent. Meanwhile, the U.S. and Europe are actively seeking to buttress the rules-based international order by supporting the prosecutions war crimes in Ukraine.

Against this backdrop, the best possible opportunity to hold Russia accountable for war crimes committed in Ukraine is through the establishment of an international tribunal, even if such a tribunal faces long odds. The arrest warrants issued for Mr. Putin and Ms. Lvova-Belova by the ICC in March 2023 are bold and positive developments.²⁴⁰ The push by the ICC to initiate criminal proceedings against Russian leadership should be celebrated, even if nobody expects to see Mr. Putin in the dock at the Hauge anytime soon.²⁴¹ It effectively cuts off any travel to much of the West because, for the nations that are party to the Rome Statute, his indictment means Mr. Putin could be arrested should he travel to those nations.²⁴² But Mr. Putin knows this, and will curtail his travel accordingly.²⁴³ But, short of a complete overhaul of the U.N. Security Council, all avenues for accountability via the U.N. and the ICC are likely cut off. Firstly, the ICC lacks jurisdiction in two important ways that effectively preclude it from prosecuting the vast majority of war crimes in Ukraine, up to and including the crime of aggression.²⁴⁴ Even if Ukraine has granted the ICC authority to investigate crimes committed in Ukraine, Russia is not party to the Rome Statute, limiting its ability to compel Russia's cooperation.²⁴⁵ And, the U.N. Security Council has the power

²⁴⁰ Rebecca Hamilton, *The ICC Goes Straight to the Top: Arrest Warrant Issued for Putin*, JUST SECURITY (Mar. 17, 2023), <https://www.justsecurity.org/85529/the-icc-goes-straight-to-the-top-arrest-warrant-issued-for-putin/>.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Carrie McDougall, *Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIOJURIS (Mar. 14, 2022), <https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/>; *but see* Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, OPINIOJURIS (Mar. 7, 2022), <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>.

²⁴⁵ Rome Statute, *supra* note 31.

under Chapter VII of the U.N. Charter and Article 16 of the Rome Statute to require the ICC to suspend the investigation in twelve month intervals.²⁴⁶ Whether Russia either pushes for such a move, or vetoes one to deny the ICC's legitimacy remains to be seen.²⁴⁷ Either way, Russia was quick to reject the allegations and hold up its child relocation program as a "noble humanitarian effort."²⁴⁸ It is furthermore unlikely that any new Russian leadership would sign and ratify the Rome Statute granting the ICC jurisdiction for the simple reason that it is nowhere in its best interests to do so.

Without Russian cooperation, there is no way to bring many of the alleged perpetrators of war crimes in Ukraine to justice. There is an additional complexity with attempting to prosecute the crime of aggression via the ICC. The ICC requires a referral from the U.N. Security Council in order for it to exercise jurisdiction for the crime of aggression over a non-state party to the Rome Statute, such as Russia.²⁴⁹ Even if post-Putin leadership would consent to a one-time permission of ICC jurisdiction over itself, China, as a permanent member of the Security Council would undoubtedly veto such an action because it is not in China's best interests to allow Russia to be held accountable for its acts in Ukraine.²⁵⁰ China has shown itself unwilling to be held accountable for any of its actions internationally and using the U.N. or its subordinate bodies to hold Russia accountable would reinforce precedents China is actively seeking to undermine. So, while the ICC is an already established body which could act relatively quickly to prosecute all the alleged war crimes committed in Ukraine, due to the geopolitical realities facing the U.N. today, it probably will not be the venue for prosecuting Russian war crimes. With the Security Council configured as it presently is with China's membership, roads that lead to ICC jurisdiction are effectively cut off.

²⁴⁶ Hamilton, *supra* note 240.

²⁴⁷ *Id.*

²⁴⁸ Alex Leff, Michele Kelemen & Charles Maynes, *The International Criminal Court issues an arrest warrant for Putin*, NPR (Mar. 17, 2023, 7:28 PM), <https://www.npr.org/2023/03/17/1164267436/international-criminal-court-arrest-warrant-putin-ukraine-alleged-war-crimes>.

²⁴⁹ McDougall, *supra* note 244.

²⁵⁰ *Supra* notes 231–239.

The same issues plaguing ICC jurisdiction will probably quash any attempt to establish an international tribunal via the U.N. proceedings. Establishing a tribunal via the U.N., like referring jurisdiction for a member not party to the Rome Statute has to come from the Security Council exercising their Article 41 powers.²⁵¹ Article 41 of the U.N. Charter provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.²⁵²

It was pursuant Article 41 that the U.N. established the ITCY and ITCR.²⁵³ As with ICC jurisdiction, the establishment of a tribunal would require the assent of all sitting members of the Security Council. Here, as with ICC jurisdiction, even with Russian consent, China would more likely than not exercise its veto power. Some have argued that the General Assembly could bypass the Security Council in this situation and establish a tribunal pursuant to its Article 22 powers.²⁵⁴ This attempted bypass of the Security Council would likely fail. Article 22 of the U.N. Charter states “[t]he General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.”²⁵⁵ The suggestion that the General Assembly could bypass the Security Council to establish a judicial body that could enter binding legal judgments relies upon an overly broad reading of the U.N. Charter.²⁵⁶

The prevailing reading of Article 22 is that the General Assembly may only establish subsidiary bodies that have the same powers as the General Assembly itself wields, which do not

²⁵¹ Derek Jinks, *Does the U.N. General Assembly have the authority to establish an International Criminal Tribunal for Syria?*, JUST SECURITY (May 22, 2014), <https://www.justsecurity.org/10721/u-n-general-assembly-authority-establish-international-criminal-tribunal-syria/>.

²⁵² U.N. Charter art. 41.

²⁵³ Jinks, *supra* note 251.

²⁵⁴ *Id.*

²⁵⁵ U.N. Charter art. 22.

²⁵⁶ Jinks, *supra* note 251.

include judicial powers.²⁵⁷ There is further support for the idea that there are limits upon what powers the General Assembly can exercise via Article 22 in an 1954 ICJ Advisory Opinion.²⁵⁸ The U.N. tried to establish an Administrative Tribunal to resolve internal staff disputes, and the ICJ found that Article 22 did not grant the General Assembly the power to establish even an administrative tribunal.²⁵⁹ If the General Assembly lacks the power to establish an administrative tribunal, then it surely lacks the power to establish a criminal one on its own.²⁶⁰ Thus, unless the U.N. Charter is amended to change who can establish a criminal tribunal and how, all roads to justice for the victims of Russian war crimes are blocked by either a Russian or Chinese veto on the Security Council.

There is one remaining opportunity for international accountability for Russian war crimes; a multilateral treaty establishing an ad-hoc international criminal tribunal akin to the ones that established the tribunals at Nürnberg and Tokyo. If Mr. Putin leaves power, one way or another, at the conclusion of this war, Russia will be a severely diminished state economically and diplomatically. It will be in an objectively weak position geopolitically even with support from China and other allies like India. Any new Russian leadership will undoubtedly seek to lift economic sanctions imposed upon it by the collective West. Economic sanctions are the sole bargaining chip the West maintains to compel Russian behavior at the end of the war, however it ends, since a Russian veto on the Security Council precludes other punitive actions. A wholesale collapse of the Russian government is an objectively unlikely outcome at the conclusion of the war, and any new government would assert the same authorities the Russian Federation currently holds, just as it did

²⁵⁷ See SIMMA, ET AL., *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 427–28 (2d ed. 2002); GOODRICH, ET AL., *CHARTER OF THE UNITED NATIONS* 191 (3d ed. 1969).

²⁵⁸ *Effect of awards of compensation made by the U. N. Administrative Tribunal*, Advisory Opinion of July 13th, 1954, I.C.J. REPORTS 1954, p. 47.

²⁵⁹ *Id.*

²⁶⁰ Jinks, *supra* note 251.

after the collapse of the Soviet Union. How and what to compel Russia to do at the end of the war is a hotly debated issue. Some have argued that reparations should be paid and the General Assembly passed a resolution demanding Russia to pay reparations on November 14, 2022.²⁶¹ The General Assembly, as discussed above, lacks the power to compel Russia to do any such thing. Others have argued that frozen Russian financial assets housed abroad should be liquidated to pay for Ukrainian reconstruction.²⁶²

Economic sanctions would likely be used to attempt to compel Russia to comply with the demand to pay reparations. While it is objectively justified that Ukraine and the West demand that Russia pay for the damage it caused, it is not the best use of the leverage the international community will hold over Russia at the end of the war. While the West has and continues to shoulder the economic costs of the war for Ukraine, with the U.S. alone contributing over \$75 billion dollars and counting, the simple truth is the West can afford to help Ukraine rebuild.²⁶³ Relatively recent history of the causes of World Wars I and II tell us that we must be mindful of how we punish an aggressor nation following armed conflict matters for the future. The imposition of crushing reparations upon Germany at the end of World War I effectively set the stage for World War II. Certainly, compelling arguments can be made that the Russian population bears at least some, if not most of the blame for the war.²⁶⁴ But leaders in Ukraine and in the broader West should think about what long-term outcomes they desire, and how broad punishment of the Russian population could ferment anger that sets the stage for the next imperialist dictator in Moscow. In light of the fact that the West is more than capable of helping Ukraine rebuild, the leverage it holds

²⁶¹ Press Release, *General Assembly adopts resolution on Russian reparations for Ukraine*, U.N. NEWS (Nov 14, 2022), <https://news.un.org/en/story/2022/11/1130587>.

²⁶² Lawrence Norman, *EU Says It Can't Seize Frozen Russian Central-Bank Assets for Ukraine*, WALL ST. J. (Nov. 30, 2022), <https://www.wsj.com/articles/eu-says-it-cant-seize-frozen-russian-central-bank-assets-for-ukraine-11669827828>.

²⁶³ Jonathan Masters & Will Mellow, *How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts*, COUNS. ON FOREIGN RELS. (Feb. 22, 2023, 9:00 AM), <https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts>.

²⁶⁴ Elliot Ackerman, *Ukrainians Don't Blame Just Putin For the War. They Blame Russians.*, TIME MAG. (Mar. 25, 2022, 2:00 AM), <https://time.com/6160347/ukrainians-blame-russians-for-war/>.

over the next Russian government should be used instead to compel new Russian leadership to submit to a one-time international criminal tribunal via treaty to hold perpetrators of war crimes accountable for their actions. Leaders in Europe have already begun to accept that idea, at least in part. On November 30 2022, the European Union proposed options for setting up a tribunal to try war crimes in Ukraine.²⁶⁵ During the announcement, European Commission President Ursula von der Leyen, described a tribunal that could prosecute the crime of aggression, and likely other crimes.²⁶⁶ President von der Leyen outlined two possible tracks: 1) creation of an ad-hoc tribunal for the crime of aggression and 2) a hybrid court that internationalizes a domestic court.²⁶⁷ Separately, the day before the EU announcement, the Group of Seven wealthy democracies (G7) agreed to setting up a network to coordinate the various ongoing investigations into the alleged war crimes.²⁶⁸ These proposals are still in their infancy and do not address the issues they will run into if they intend (as the EU proposal does) to use the U.N. as the primary vehicle for their ultimate implementation. The unfortunate fact is that the U.N. will probably need to be bypassed and a multilateral treaty as a part of the ultimate negotiated peace at the end of the war, or after its conclusion and the departure of Mr. Putin, remains the best hope for implementation. It is lamentable that the current construction of the U.N. Security Council permits states like Russia and China to flout hard won international norms for their benefit, but it is the reality we deal with today.

If all else fails, Ukraine can prosecute, as it has been, the war criminals it captures on the battlefield. In May, Ukraine began prosecuting crimes for which it had captured Russian soldiers accused of.²⁶⁹ By March 2023, Ukraine's courts tried and convicted 26 war criminals of rape, murder,

²⁶⁵ Emily Rauhala, *E.U. proposes special tribunal to investigate Russian crimes in Ukraine*, WASH. POST (Nov. 30, 2022, 5:15 AM), <https://www.washingtonpost.com/world/2022/11/30/eu-russia-ukraine-tribunal-war-crimes/>.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Mathis Richtmann, *G7 justice ministers agree to coordinate Ukraine war crime probes*, REUTERS (Nov. 29, 2022, 3:53 PM), <https://www.reuters.com/world/europe/g7-justice-ministers-agree-coordinate-ukraine-war-crime-probes-2022-11-29/>.

²⁶⁹ Greg Myre, *Ukraine begins prosecuting Russians for war crimes*, NPR (May 14, 2022, 8:39 AM), <https://www.npr.org/2022/05/14/1098941080/ukraine-begins-prosecuting-russians-for-war-crimes>.

and shelling of residential buildings.²⁷⁰ Ukraine has charged 276 others with war crimes and has 99 cases pending before its courts.²⁷¹ Both universal jurisdiction afforded such prosecutions by the Geneva Conventions and violations of domestic laws provide that Ukraine can legally prosecute such criminals. But, the vast majority of perpetrators lie across enemy lines and in Russia, far beyond Kyiv's reach. Mr. Putin himself lies beyond the jurisdiction of a Ukrainian court because international law affords him head-of-state immunity.²⁷² Beyond issues of extradition of Russian war criminals, there is likely the perception by Russians that anyone standing trial in Ukraine is not standing before an impartial judge or jury, regardless of the pains Ukraine takes to make trials legitimate. Justice requires the perception of impartiality. Ukraine can and should try those it has in custody for which it has evidence to prosecute, but these trials will never serve the justice that both Ukraine and the world need.

IV. CONCLUSION

The most important outcome Ukraine and the West should seek to achieve is accountability for the atrocities the Russian military has visited upon Ukraine, the integrity of the post-World War II international legal system depends upon justice being served. Holding those responsible for these crimes will send the important message to ambitious autocrats that the world will not stand for the use of force to seize territory or terrorize populations. Such an outcome would show China's CCP and future autocrats that the world continues to put a premium on accountability. The better outcome would be for the U.N. and the ICC to function as intended, but that result does not seem possible with the current condition and construction of the U.N. (and the Security Council). If a means to prosecute these crimes is available outside the construct of the U.N., the West must take it.

²⁷⁰ Deutsch, *supra* note 153.

²⁷¹ *Id.*

²⁷² Hamilton, *supra* note 240.

The U.N., like the League of Nations before it, must evolve past its current form to rise to the challenges it faces today or be replaced with a system built with the lessons the world has learned since the end of World War II. None of this should detract from the U.N.'s many successes, but the inconvenient truth is actors such as Russia, China, Iran, and North Korea have learned to game the system and the same actors work tirelessly to undermine it. The rules-based system of international law must change with the threats that face it.²⁷³ The rules-based post-World War II system faces the greatest challenges since its inception with Russia's invasion of Ukraine and looming conflict over Taiwan. When this war is done, the world must do the work to accomplish the same our forefathers did to prevent the next act of aggression. When World War II came to a close, President Truman, in his address to a nascent U.N. articulated a hard fought lesson the West would be wise to recall:

By harmonious cooperation, the United Nations repelled the onslaught of the greatest aggregation of military force that was ever assembled in the long history of aggression. Every nation now fighting for freedom is giving according to its ability and opportunity.

We fully realize today that victory in war requires a mighty united effort. Certainly, victory in peace calls for, and must receive, an equal effort.

Man has learned long ago, that it is impossible to live unto himself. This same basic principle applies today to nations. We were not isolated during the war. We dare not now become isolated in peace.

All will concede that in order to have good neighbors, we must also be good neighbors. That applies in every field of human endeavor.

For lasting security, men of good-will must unite and organize. Moreover, if our friendly policies should ever be considered by belligerent leaders as merely evidence of weakness, the organization we establish must be adequately prepared to meet any challenge.²⁷⁴

²⁷³ *The UN at Seventy-Five: How to Make it Relevant Again*, COUNS. ON FOREIGN RELS. (Sept. 24, 2020, 9:00 AM), <https://www.cfr.org/article/un-seventy-five-how-make-it-relevant-again>.

²⁷⁴ Harry S. Truman, *Address to the United Nations Conference in San Francisco*, AM. PRESIDENCY PROJECT (Apr. 25, 1945), <https://www.presidency.ucsb.edu/documents/address-the-united-nations-conference-san-francisco>.

The simple fact is that failure to prosecute these war crimes is likely to “damage international law and undermine global security for decades to come.”²⁷⁵ A tribunal will be costly and time consuming to set up and run, but considering the geopolitical and legal ramifications of inaction, it will be worth it in the long run. The options to prosecute war crimes committed in Ukraine are all fraught with risk of failure. The ICC lacks jurisdiction on multiple fronts and the U.N. Security Council is paralyzed by the indisputable single member veto. Despite the overwhelming evidence available that systematic crimes have been committed by the Russian military, there is no clear path to justice. The West must use its economic leverage to establish an international judicial body, outside the auspices of the U.N. if needs be, to ensure that justice is served. The consequences of allowing these war crimes to go unprosecuted will undoubtedly return to visit us in future conflicts, with the ultimate casualty being the rules-based international world order we have fought so hard to establish and maintain.

²⁷⁵ Maryna Venneri, *War crimes in Ukraine: Failure to prosecute Russia will damage international security for years to come*, MIDDLE EAST INSTITUTE (Nov. 22, 2022), <https://www.mei.edu/publications/war-crimes-ukraine-failure-prosecute-russia-will-damage-international-security-years>.