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**Joint Conference of Ukrainian Helsinki Union for Human Rights,  
European Society of International Law,  
and Ukrainian Association of International Law**

## **POST-CONFLICT JUSTICE IN UKRAINE**

**Materials of the conference**



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- Assoc. Prof. Dr. Mykola Gnatovskyy, Ukrainian Association of International Law
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## CONTENTS

### **Plenary Session: “Contemporary Challenges for Transitional Justice”**

*Mark Kersten*, Justice in conflict-affected situations - changing and charging the narrative .....

### **Workshop 1: “Can the International Criminal Court Play a Constructive Role for the Post-Conflict Settlement in Ukraine?”**

*Iryna Marchuk*. What Can the International Criminal Court Do to Address the Conflict in Ukraine?

*Dmytro Koval*. The Eleventh Dimension of the International Criminal Courts: Collective Memory and Social Systems

*Gaiane Nuridzhanian*. How, When and Why: the ICC’s Competence to Review Completed Domestic Proceedings

*Valentyna Polunina*. Acceptance of International Criminal Justice in Ukraine

### **Workshop 2: “A Truth Commission for Ukraine: Establishing the historical truth and fighting today’s propaganda?”**

*Mindia Vashakmadze*. Post-conflict justice in Ukraine: Between accountability and social reconstruction

*Ilya Nuzov*. Turning to Truth: The Value of a Truth Commission in Ukraine’s Post-Conflict

*Uladzislau Belavusau*. Ukrainian Memory Laws from the European Legal Perspective

*Oleg Martynenko*. Truth Commissions and National NGOs: Establishing the Truth Together

*Natalia Satokhina*. The philosophical foundations of transitional justice

### **Workshop 3: “Reparations for victims of the armed conflict”**

*Vito Todeschini*. The Right to a Remedy and Reparation for Victims of the Armed Conflict in Ukraine: Challenges and Opportunities

*Antal Berkes*. International legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities

*Tetyana Antsupova*. Post-Conflict Reparation: Ukrainian remedies of restitution of property in the context of the jurisprudence of the European Court of Human Rights

*Alla Blaga.* The Question of Reparations for Damage Caused by the Armed Conflict in the East of Ukraine

**Workshop 4: “Is there an existing model of post-conflict justice suitable for Ukraine? (Does the Anna Karenina principle apply to post-conflict justice?)”**

*Eric A. Witte, Christian De Vos.* Internationalized Justice in Ukraine

*Jacopo Roberti di Sarsina.* Reassessing Vetting and the Judiciary - Some Reflections in the Light of the Ukrainian Model

*Stanislav Dmitrievsky, Nikolay Bobrinskiy.* Transitional Justice for post-Putin Russia in the context of legal interests of Ukraine and other affected states

*Oleksii Plotnikov.* Transitional Justice: Interplay of Stakeholders

*Michail Vagias.* ‘Specialist Chambers of Ukraine’ in The Hague; A suitable post-conflict judicial mechanism?

**Plenary Session: “Positive obligations for the state under international criminal law”**

*Larissa van den Herik.* The role of parliaments in recognizing and preventing international crimes .....

*Gleb Bogush.* National implementation of international criminal law: are Eastern European states able to prosecute international crimes?

**Workshop 5: “Accountability for IHL violations”**

*Wayne Jordash, Scott Martin.* Analysis of Accountability Standards Under International Humanitarian Law and Justice Mechanisms in the Government of Ukraine to Prosecute such Violations

*Asli Ozcelik-Olcay.* The law and practice of negotiating justice after armed conflicts: A framework for post-conflict justice in eastern Ukraine?

*Kateryna Busol.* Accountability for armed conflict violations through the lenses of cultural property

*Nadia Volkova.* Total Impunity in the ATO Zone: Investigations into Illegal Detentions and Forced Labour

**Workshop 6: “ECHR and other human rights bodies”**

*Ralph Wilde.* The role of international human rights mechanisms in securing post-conflict justice in relation to the Ukrainian conflict—extraterritoriality issues

*Lilian Apostol.* The role of the ECHR and other human rights bodies during the Ukrainian conflict, its eventual settlement and aftermath

***Ivan Lishchyna.*** What impact the events in Crimea and Donbas might have on the ECtHR case-law under Article 1 of Protocol 1 to the ECHR

***Gulara Guliyeva.*** The Impact of European Court of Human Rights' jurisprudence concerning property rights on the rights of IDPs in Ukraine

***John R. Morss.*** Human Rights and Times of Crisis: Justice, Terror and the Political Psychology of the Body

## Plenary Session: “Contemporary Challenges for Transitional Justice”

### JUSTICE IN CONFLICT-AFFECTED SITUATIONS -- CHANGING AND CHARGING THE NARRATIVE

*Mark Kersten*, Postgraduate researcher at the Munk School of Global Affairs, University of Toronto  
Director of Research of Wayamo Foundation & Africa Group for Justice and Accountability

What are the effects of the International Criminal Court (ICC) when it intervenes in situations of ongoing and active conflict? This question, often framed through the lens of the so-called “peace versus justice” debate, has inspired much research but little consensus. Scholars and practitioners alike have posited various theories about the potentially negative and positive effects of the Court in such contexts. Yet it remains unclear whether the ICC ultimately helps or hinders the resolution of violent political conflicts. Drawing on research published in *Justice in Conflict* (OUP 2016), the presentation will argue that a primary effect of ICC interventions into conflict-affected situations is on the conflict narrative — the dominant understandings of the causes and dynamics of a particular war. The presentation will outline how the ICC impacts conflict narratives, arguing that the Court’s interventions: entrench a ‘good’ versus ‘evil’ understanding of war; conflate the causes and dynamics of conflict with particular individuals; and imagine wars as the offspring of atrocities committed and international crimes perpetrated, rather than as a consequence of political, social, or economic forces. These effects, in turn, can shape the potential for a peaceful solution to violent political conflicts — both negatively and positively. Understanding and acknowledging these effects can help those interested in achieving a resolution to war to ensure that peace is not sacrificed on the altar of justice as well as potentially maximize the positive effects of the Court. The presentation will conclude with some reflections on what this analysis may mean in the context of the ICC’s preliminary examination, and potential investigation, into the situation in Ukraine.

## **Workshop 1: “Can the International Criminal Court Play a Constructive Role for the Post-Conflict Settlement in Ukraine?”**

### **WHAT CAN THE INTERNATIONAL CRIMINAL COURT DO TO ADDRESS THE CONFLICT IN UKRAINE?**

*Iryna Marchuk*, GMPA, Ph.D. in  
International Law, LL.M., Associate  
Professor, Faculty of Law, University of  
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The refusal of the former President of Ukraine Viktor Yanukovich to sign the EU association agreement sparked nationwide pro-EU protests in Ukraine that culminated in the killings of and injuries to protesters who took to the streets to oppose government policies. In response to those dramatic events, the interim government of Ukraine, which was instituted after Yanukovich unexpectedly abandoned his presidential post, lodged a declaration accepting the ad hoc jurisdiction of the International Criminal Court (ICC) under Article 12 (3) of the Rome Statute for the crimes committed during the Maidan protests. This move by the Ukrainian government has revived the discussion on the Ukraine’s earlier failed ratification attempts of the Rome Statute stalled by the Constitutional Court of Ukraine that had declared the Rome Statute to be contrary to the Constitution of Ukraine. A number of interesting legal issues highlighting the clash between Ukrainian constitutional law and international law arise. Does the acceptance of the ICC jurisdiction overrule the earlier decision of the Constitutional Court of Ukraine? Did the Chairperson of the Ukrainian Parliament have a constitutional right to sign the declaration in his capacity as *ex officio* Head of State, having assumed responsibilities in rather unusual circumstances when the President fled the country without tendering his resignation proper? The ratification of the Rome Statute by Ukraine is particularly relevant and timely against the backdrop of the ongoing conflict in Ukraine.

The declaration lodged by Ukraine that alleged criminal responsibility of Ukrainian senior governmental officials for authorizing the Maidan violence did not have the effect hoped for by the Ukrainian government. In November 2015, the ICC Prosecutor chose not to proceed with the investigation of the Maidan crimes, concluding that they did not constitute crimes against humanity in the absence of the “widespread or systematic” dimension of attack during which the crimes had occurred. This speech argues that by taking an overly narrow approach to the interpretation of crimes against humanity, the Prosecutor largely overlooked the interests of justice and stripped the ICC judges of the opportunity to decide whether the Maidan crimes meet the threshold of crimes against humanity.



The outcome of the first declaration is not the end of the Ukrainian saga in the ICC.

As a response to the annexation of Crimea by Russia and escalation of the conflict in eastern Ukraine, the Ukrainian government lodged yet another declaration that extended the jurisdiction of the ICC for an indefinite period of time beyond the Maidan events. The speech will highlight some sensitive political issues linked to the second declaration that the ICC Prosecutor has to grapple with in deciding whether to act on the declaration, in particular the extent of the Russian involvement in the fighting in eastern Ukraine. It is clear from the OTP 2016 report on preliminary examination activities that the ICC Prosecutor has already undertaken important steps in evaluating the events in Ukraine, which fall under the second declaration, and preliminary concluded that “the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict between Ukraine and the Russian Federation”. In the same report, the ICC Prosecutor emphasized upon the complexities of the ongoing armed conflict in eastern Ukraine, noting that an international armed conflict runs in parallel to a non-international armed conflict.

However, the ICC Prosecutor has yet to make a determination on the jurisdictional issues as well to address the interests of justice in order to decide whether to move forward with an investigation of the alleged crimes in Crimea and eastern Ukraine.

It is argued that if the ICC Prosecutor were to miss the opportunity to act on the second declaration, it would be detrimental to the interests of justice and damaging to the public image of the Court, which would be perceived by the victims and international community as incapable of dealing with ongoing conflicts.

## **THE ELEVENTH DIMENSION<sup>1</sup> OF THE INTERNATIONAL CRIMINAL COURTS: COLLECTIVE MEMORY AND SOCIAL SYSTEMS**

*Dmytro Koval*, PhD in International Law, Associate Professor, National University "Odessa Law Academy"; PhD Candidate in Sociology Graduate School for Social Research, Polish Academy of Science

The concept of collective memory is widely used in contemporary legal discourse. It is applied literally or indirectly to illuminate the importance of particular cases in international courts or to draw the details of the so-called legal and

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<sup>1</sup> The inspiration for the name of the article comes from the article written by historian Dmitriy Bilyi for the Ukrainian magazine “Focus”. Bilyi suggests that memory constitutes the eleventh dimension of the Universe in addition to ten other that are used in quantum physics’ theory of hyperspace.

sociological legacy of such courts. In the legal studies the appeals to collective memory are often being made as to the self-evident concept. Moreover, it seems that notion of collective memory is widely used in scholarship to claim that some courts (especially if it comes to the international criminal courts) or litigations play a role of positive narratives producers. This is to say that legal researchers commonly present this phenomenon as some historic record that is being formed by the significant courts decisions that establish truth and justice. Consequently, the positive effect of the courts decisions is contraposed to the negative influence of other forces (like politics, propaganda etc.) on the collective memory. Such a scheme lacks adequacy and may be easily falsified (in Karl Popper's meaning of this word).

In this speech we are trying to reshape the plain perception of the collective memory concept by adding Niclas Luman's social systems theory into the discussed discourse. This theory is of great importance to our mind for distancing from the idealistic approaches towards the role of international criminal courts in the formation of collective memory and transitional justice.

In the very beginning of this insight to the problem of collective memory we will briefly outline what we propose to understand under the notion in question. After that we will proceed to the introduction of relevant concepts of Luman's theory and their possible application to the studied issue. Finally, the conclusive theses that invites to the discussion and provokes future unconventional research will be formulated.

How to understand the notion of "collective memory" and its "formation"?

The very idea of collective memory unlike the precise term has been known for centuries. We can find it in Machiavelli's "The Prince" where author grieves that even old men can't comprehensibly compare the past and the present since their reminiscence of the remote past has been being distorted. Franz Kafka in one of his short stories describes the machinery of state's influence on Indian citizens saying that the fights from the past unfold in the present and that helps to govern the people. Abkhaz writer Fazil Iskander virtuously caught the essence of the collective memory in his "Rabbits and Boa Constrictors". He pictures the rabbits distressing on the nowadays troubles because they may be suffocated by the boa constrictors. In old times this technic was unavailable for the snakes; the death rate was the same but the cause was a hypnosis.

The notion of collective memory appeared after the books of Durkheim's successor on the throne of French sociology school Maurice Halbwachs (1877 – 1945) "Social frames of memory" (1925) and "Collective memory" (1950) were published. In first two chapters of his first book Halbwachs puts forward the idea that individuals' memory is always determined by the so-called conventions that derive from a society. These conventions, namely verbal convention and time and spatial convention (time and spatial orientation in complex images), create memory frames. People who are dreaming and those afflicted by aphasia can't rely on this frame. That is the reason why their memories are so fragmented. In return, normal environment is always

characterized by the existence of such a frame when remembering. Individuals are not able to remember events from their past without thinking about them. To think about past events means to correlate these thoughts with the reasoning incoming from the social environment. In other words, as Lewis A. Cosser summarized, ‘individuals’ conceptions of the past are affected by the mental images we employ to solve present problems, so that collective memory is essentially a reconstruction of the past in the light of the present’.

Halbwachs’ notion of collective memory will be a starting point in this research. Its development and proliferation of usage will be studied further.

## **HOW, WHEN AND WHY: THE ICC’S COMPETENCE TO REVIEW COMPLETED DOMESTIC PROCEEDINGS**

*Gaiane Nuridzhanian*, PhD, Candidate and Teaching Fellow, Faculty of Laws, University College London

The relationship between the International Criminal Court ('ICC', 'Court') and domestic systems is based on the principle of complementarity. According to this principle, which finds its reflection in the admissibility regime established by the Rome Statute, the Court can initiate investigations and proceedings, not only when there have been no action at the domestic level or pending domestic proceedings demonstrate the unwillingness or inability to genuinely carry out the investigation. It also allows the Court to step in, under certain circumstances, where the investigation has resulted in the decision not to prosecute or when trial has been completed at the domestic level.

The speaker focuses on the part of the admissibility regime of the ICC that is related to the Court’s competence to hold a trial in a case which has already been dealt with by the domestic courts. Admissibility of such domestic proceedings is governed by Article 17(1)(c) and by ne bis in idem (double jeopardy) rule found in Article 20(3) of the Rome Statute.

Article 17(1)(c) provides that the case is inadmissible before the ICC where the person has already been tried and a trial by the Court is not permitted by Article 20(3) of the Rome Statute. Article 20(3) bars, with certain exceptions contained in subparagraphs (a) and (b) and discussed below, trial by the ICC for the same conduct for which the person has already been tried by another court. Article 20(3) establishes the limits of the Court’s competence to step in where there has been trial at the domestic level. It seeks to strike a balance between, on the one hand, the principle of primacy of domestic jurisdiction and finality of judicial decisions, and on the other, the

need to ensure that there has been genuine prosecution and trial for international crimes falling within the jurisdiction *ratione materiae* of the ICC.

More specifically, it follows from Articles 17(1)(c) and 20(3) of the Rome Statute that holding a trial at the domestic level will not necessarily result in the Court being barred from exercising its own jurisdiction and trying a case which involves the same person and the same conduct. Such domestic trial should comply with certain requirements in order for the case to be inadmissible before the Court.

My speech starts with discussing various elements of Article 20(3) of the Rome Statute related to the applicability and scope of *ne bis in idem* rule. It looks into what constitute ‘another court’ for purposes of Article 20(3) and admissibility regime, and whether the *ne bis in idem* rule applies to trial before courts in states only or whether it also attaches when the person was tried by courts in non-recognised entities or by non-state organised armed groups. It further examines the meaning of the term ‘has been tried’ used in Article 20(3), more specifically whether the proceedings before non-judicial bodies such as truth and reconciliation commissions can trigger application of *ne bis in idem* and inadmissibility rules.

The discussion of the scope of *ne bis in idem* rule in Article 20(3) follows. One particular question addressed in this context is whether the domestic proceedings where the person is tried for the same conduct but as an ordinary offence (rather than a crime within subject matter jurisdiction of the ICC) render the case inadmissible before the ICC.

Finally, the author discusses exceptions to the principle of *ne bis in idem* and inadmissibility rules that allow the ICC to assess whether domestic proceedings constituted a genuine attempt to ensure accountability for international crimes. More specifically, under Article 20(3)(a) the Court can try the case involving the same conduct and the same person when the domestic proceedings ‘were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court’. According to Article 20(3)(b), the Court can try the same case where the domestic proceedings ‘otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with the intent to bring the person to justice’.

It must be noted that the provisions found in Articles 20(3)(a) and (b) are very closely related to, and to certain extent overlap with, the notion of ‘unwillingness’ contained in Article 17(2) of the Rome Statute. This standard of ‘unwillingness’ as well as practice of the ICC concerning its application are relevant for the establishment of the substance of the test for admissibility of the completed domestic proceedings – the test which is found in Articles 20(3)(a) and (b) of the Rome Statute.

At the same time, there are circumstances unique to the question of admissibility of completed proceedings. For instance, the situation in which an inadequate punishment, pardon or amnesty is applied following trial. These can serve as an

indication of the lack of genuine willingness to bring the alleged perpetrator to criminal responsibility. The speaker will therefore also examine the questions of imposition of inadequate punishment and granting of amnesty in the context of admissibility of the case before the ICC and other aspects that may indicate existence of ‘unwillingness’ to bring a person to criminal responsibility for international crimes.

The issues under examination in the present material are of particular relevance to the situation in Ukraine. Ukraine has recognised the ad hoc jurisdiction of the ICC with regard to crimes committed on its territory between 21 November 2013 and 22 February 2014 (in relation to Maidan events) and starting from 20 February 2014 onwards (which covers the crimes committed in the East of Ukraine). There is a potential for an overlap between the proceedings conducted by domestic authorities and the ICC. In such situation, and more generally, discussion of the legal framework of the ICC concerning admissibility of completed domestic proceedings may contribute to further understanding of relationship between two criminal jurisdictions, that of the ICC and of a State.

## ACCEPTANCE OF INTERNATIONAL CRIMINAL JUSTICE IN UKRAINE

*Valentyna Polunina*, PhD candidate;  
Ludwig Maximilian University of Munich,  
Researcher/Lecturer

Since Russia’s seizure of Crimea and the begin of the armed conflict in eastern Ukraine, many in Kyiv have taken to the idea of enlisting the help of the International Criminal Court (ICC) in The Hague to punish those responsible and discourage further belligerence. Political leaders in Ukraine, including President Poroshenko, like to publicly invoke the ephemeral “The Hague” as a judicial instance of last resort when describing the future of President Putin, senior Russian officials, the militants in parts of the Donbas region, and those responsible for the killings during the Euromaidan protests. At the same time, the widespread use of such a vague term as “The Hague” or “The Hague tribunal” meaning the International Criminal Court indicates that many Ukrainians – including senior officials – do not understand what the ICC stands for and how it works. At the same time, due to the lack of experience of Ukrainian national courts in prosecuting international crimes, the unprecedented scale of crimes committed, and the general lack of confidence in the judiciary, the ICC may be an important transitional justice mechanism in Ukraine.

In light of the complicated political and institutional landscape in Ukraine with regard to international justice, it is important to understand how different actors related to the current situation in Ukraine see international criminal justice (ICJ), and to look

at the reasons why they do or do not accept international courts and tribunals. The situation in Ukraine is different from many orthodox transitional justice cases of post-conflict justice where human rights violations are no longer being committed because there is an ongoing conflict, which is additionally accompanied by an economic recession, devaluation of the national currency, and high levels of unemployment. The country is also going through one of the most extensive phases of institutional reforms in its history. Diverse attitudes towards the war in eastern Ukraine, political change, and foreign policy differences provoke divisions within society and among political leaders, and create different groups with their own interests.

The broad spectrum of opinions challenges the government's task to find common ground, and the aspect of prosecution of war criminals is not an exception. Even if there is strong support for accountability among the population, it does not necessarily mean that there is a consensus on who the victims and perpetrators are and how the punishment of the perpetrators should be constituted.

The accountability for war crimes committed in Ukraine and international criminal justice are supported by a big part of the Ukrainian population. According to the recent poll conducted by the Democratic Initiatives Foundation, most Ukrainians (72 percent) do not trust the judiciary and prosecutor's office. Two years after Petro Poroshenko became the President of Ukraine, experts point to the reluctance to carry out meaningful reform of the judicial system and the Prosecutor's Office as one of his biggest failures.

Ukrainian legal and political experts interviewed for this study were unanimous that low trust in national judicial institutions may explain why large parts of the population turn their hopes to international justice mechanisms such as the International Criminal Court (ICC). According to a 2015 survey conducted by Amnesty International, 73 percent of Ukrainian citizens support the involvement of the ICC in investigations of the war crimes committed in Donbas, while 45 percent believe that the ICC alone should deal with international crimes committed in Ukraine and 21 percent support the complementarity approach (Amnesty International Ukraine 2015). Only 17 percent of respondents support the idea of national courts dealing with international crimes (Amnesty International Ukraine 2015). This is an important indicator of the ICC's legitimacy in Ukraine, and could have an impact on the government's decision making process regarding the ICC. At the same time the process of ICJ acceptance in Ukraine is a dynamic process that changes depending on how the conflict evolves. Two years after the beginning of the war in Ukraine the support of ICJ may not be as big anymore.

In my presentation, I would like to present the results of a study that I conducted for the International Academy of Nuremberg Principles (Nuremberg, Germany). This study provides an overview of the challenges connected to the prosecution of international crimes in Ukraine, as well as an analysis of different patterns, dynamics and drivers of acceptance of international criminal justice in Ukraine. It also highlights

areas that require further research in the future, something that is particularly important given the scarcity of academic literature or empirical studies on this topic.

Acceptance is defined for this study as an agreement either expressly or by conduct to the principles of international justice in one or more of its forms (laws, intuitions or processes). The process of acceptance of international criminal justice in Ukraine is shaped by different actors: civil society, human rights activists, lawyers, experts on international humanitarian and criminal law, volunteers, journalists, as well as state officials, law-enforcement bodies, victims and victim groups, nationalistic and right-wing movements.

The study draws on sources such as Ukrainian legislation, media outlets, political debates, accessible surveys, NGO reports, as well as 70 oral and written semi-structured interviews conducted in Kyiv in March-April 2016 with victims, local politicians, chief and special prosecutors, state security officers, legal experts, practicing lawyers, human rights activists and others. Interviewees were divided into 5 separate categories of actors: experts (practicing lawyers, legal advisors, academics), government (ministerial officials, law enforcement officers, prosecutors, members of the intelligence service, in some instances MPs who are vocal about prosecution of international crimes in Ukraine), civil society (members of human rights NGOs, think tanks), communities (victims, internally displaced persons), and parties (opposition parties and movements, mostly not represented in the Parliament, nationalistic groups, members of former volunteer battalions).

Interview partners were chosen on the basis of their degree of influence on the ICJ acceptance process in Ukraine: decision-makers, actors who are clear and vocal regarding their position about ICJ in Ukraine, and those who are directly affected by international crimes committed in on the Ukrainian territory.

## **Workshop 2: “A Truth Commission for Ukraine: Establishing the historical truth and fighting today’s propaganda?”**

### **POST-CONFLICT JUSTICE IN UKRAINE: BETWEEN ACCOUNTABILITY AND SOCIAL RECONSTRUCTION**

*Mindia Vashakmadze*, PhD, Senior Research Fellow at the Max Planck Foundation for International Peace and the Rule of Law in Heidelberg

Armed conflict between the armed forces and the rebel’s armed groups is still on going in the east of Ukraine. All parties involved in armed confrontation seem to be involved in serious human rights violations [1]. OHCHR has recently emphasized “the need for accountability to promote reconciliation, the rule of law in accordance with international human rights law, and restore confidence in the institutions of the State”[2]. The International Criminal Court as well as the domestic courts could play a central role in ensuring judicial accountability. The cooperation between the two could be based on the notion of positive complementarity.

International human rights law imposes positive obligations on the Ukrainian State to ensure accountability for most grave human rights violations. An effective implementation of this obligation would require further reforms in the judiciary and the prosecution system. In addition, a victims-oriented approach needs to be taken in the framework of the respective post-conflict justice mechanism. This implies ensuring full access to justice and government services for conflict-affected individuals. Reparation initiatives should be considered and implemented. This would equally strengthen public trust in political institutions.

However, the situation is much more complicated and this is why accountability needs to be accompanied by serious reconstruction and reconciliation efforts. Reconciliation will remain a challenge. It seems difficult to overcome division and confrontation, which has further been complicated by conflicting historical narratives. Those narratives have been manipulated for political reasons and explored in the interests of certain elite groups. Therefore, measures increasing the already existent confrontation and division in the society need to be abandoned.

The Ukrainian Parliament has recently approved so-called de-communization laws. This can be viewed as an attempt to restore historic and social justice through legislation, as the Venice Commission put it. However, the appropriateness of such measures in the current context is open to question. According to the same Venice Commission commenting on the Law of Ukraine on the Condemnation of the Communist and National Socialist Regimes and Prohibition of Propaganda of their Symbols and referring to the case law of the ECtHR, “The Law pertains to history and



its interpretation. While it is not unusual or illegitimate to use legal tools to give an official assessment of a certain period of history, it is important that such tools are not used to impose a view of history on the persons living in a State or to forestall public debate” [3]. Thus, in this context it appears problematic to take a rather uniform approach by designating a single institution in charge of finding an absolute historical truth. Rather, a public debate, free historical research and exchange among civil society should create a situation in which conflicting historical narratives can to some extent be consolidated. This process should facilitate further formation of the national identity and strengthen resilience against foreign interference and manipulation.

In this context, it can also be argued that a serious reconstruction of the institutions needs to take place in the midterm, especially the creation of a free judiciary and truly accountable security sector agencies including the police and the armed forces. Confidence in political institutions needs to be restored. Reform of the security sector will acquire special relevance after peace is achieved and the issue of demobilization and integration in the security sector agencies will be raised.

It can thus be argued that a combined approach towards Post-conflict justice, which sufficiently takes into account the complexities of the Ukrainian society, its history and the root causes of the current conflict, should be adopted. To summarize, this would mean ensuring judicial accountability for grave violations of human rights and international humanitarian law; serious reconciliation efforts that presupposes certain consolidation of differing views of history and acceptance of the diversity and complexity of identities within the Ukrainian society. Moreover, a fundamental reconstruction should take place within the entire justice and security sector.

It can thus be concluded that there are no simple solutions for Post-conflict justice in Ukraine. The process should engage a wide spectrum of stakeholders and be based on a dialogue between the conflicting sides involving civil society.

#### **References:**

- 1 Office of the Prosecutor (ICC), Report on Preliminary Examination Activities 2016, 14 November 2016.
- 2 OHCHR, Report on the human rights situation in Ukraine, 16 August to 15 November 2016, para. 217.
- 3 Venice Commission Opinion No. 823/2015, 21 December 2015, para. 89.

## **TURNING TO TRUTH: THE VALUE OF A TRUTH COMMISSION IN UKRAINE’S POST-CONFLICT PEACEBUILDING**

*Ilya Nuzov*, LL.M., Legal Advisor,  
International Center for Transitional Justice

In recent years, truth commissions and other memorialization practices have matured as accepted approaches to justice, and are increasingly seen as elements of peace- and democracy-building. Among numerous reforms adopted in Ukraine's post-Maidan transition for instance, the Verkhovna Rada passed a package of four laws designed to dismantle Ukraine's totalitarian heritage, prevent the reoccurrence of abuses, and consolidate the fledgling democracy ("Decommunization Laws"). Memorialization practices could have inverse effects however, particularly when manipulated by political elites to shape expedient transitional policies. In a separate publication,<sup>2</sup> this author has claimed that politics of memory in post-Soviet Ukraine and Russia prior to the 2013-2014 Maidan revolution has facilitated the annexation of Crimea and the armed conflict in East Ukraine between Russia-backed separatists and Ukraine's armed forces. Building on this hypothesis, the proposed article argues that the Decommunization Laws, adopted in response to the Russian threat, will exacerbate the putative divide between Ukrainians along regional and linguistic lines, and between Ukraine and Russia. More importantly, it uses the lens of transitional justice (TJ) to consider whether the institution of a truth and reconciliation commission in Ukraine could advance the right to truth with respect to Ukraine's Soviet past, and to further the TJ objectives of peace-building, pluralism and democratization in post-Maidan Ukraine.

The article first offers an overview of the evolution of dominant historical narratives of the Soviet past prevailing in today's Ukraine. Focusing on state-centric narratives that shape the country's collective memory, Part I explores causality between post-Soviet memorialization practices, the current political crisis vis-à-vis Russia, and the Decommunisation Laws. Specifically, it argues that Ukrainian political elites have perpetuated one of two identity-building historical narratives around Ukraine's collective memory of its communist past: the *nationalist* or the *neo-Soviet*. Under the *nationalist* narrative, advanced by Western-leaning presidents like Viktor Yushchenko, for example, the great famine of the 1930s, known as the *Holodomor*, is memorialized as Soviet genocide against Ukrainians, and Ukraine's nationhood as the culmination of a long struggle for independence from Russian and Soviet empires. The *nationalist* narrative glorifies independence fighters like Stepan Bandera, who are controversial for their ethnocentric policies and periodic collaboration with the Nazis. By contrast, the *neo-Soviet* narrative relativizes Stalinist abuses like the Holodomor, sanctifies the victory of 'brotherly' Soviet nations against the Nazis, and depicts Ukraine's aspirations for nationhood as grounded in fascist radicalism. This narrative has been actively cultivated in Russia, where President Vladimir Putin's regime legitimizes itself and unites Russians around Soviet achievements and the 'myth of the Great Patriotic War'.

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<sup>2</sup> I. Nuzov, 'The Dynamics of Collective Memory in the Ukraine Crisis: A Transitional Justice Perspective', *International Journal of Transitional Justice* (forthcoming).

These two competing approaches to memorialization have escalated into outright ‘memory wars’ in Ukraine and between Ukraine and Russia. The *nationalist* narrative prevailed during the Maidan revolution, as the regime that overthrew Yanukovich sought to cement Ukraine’s ‘civilizational choice’ towards Europe, espousing an identity of a democratic European nation, distinct and independent from Russia. In March 2014 Russia responded to the revolution by annexing Crimea and subsequently providing military support to pro-Russian Lugansk and Donetsk separatists. In employing the *neo-Soviet* narrative in its war propaganda, the Kremlin has justified the conflict in Ukraine as a legitimate struggle to protect ethnic Russians and Russian speakers from Ukrainian ultra-nationalists. Kiev’s new government responded with the Decommunization Laws; ostensibly in order to ensure respect for human rights, to develop and strengthen the independent, democratic state, to facilitate the consolidation and development of the Ukrainian nation, and to prevent repetition of crimes of Communist and Nazi regimes.

In second part of the speech, the analysis of the manner of adoption and contents of the Decommunization Laws, viewed in light of the ongoing armed conflict, as well as Ukraine’s heterogeneous memories and strong traditional ties to Russia, reveals their undemocratic potential. Three out of the four measures, including the law criminalizing the Soviet and Nazi regimes and the law commemorating Ukraine’s controversial independence fighters, constitute little more than mnemonic security measures adopted in response to Russia’s intervention in Ukraine. These laws are contrary to their normative aspirations, as embodied in the right to freedom of expression of the European Convention on Human Rights, and are therefore not necessary in a democratic society, for several reasons. First, all Decommunization Laws were adopted hastily, without public consultations and despite appeals by the civil society and historians against their adoption. Secondly, the laws criminalize the views of a significant percentage of Ukrainians who are now forced to conform their memory of the Soviet past to the *nationalist* historical narrative. The law commemorating independence fighters, for instance, which criminalizes any criticism of the likes of Bandera, has a strong likelihood to further alienate thousands of Ukrainians, especially in the East of the country, where Bandera is equated with fascists. The laws are therefore repugnant to the notion of pluralism essential to the exercise of democratic rights. Thirdly, the toponymical aspect of the laws, which places a disproportionate financial burden on certain parts of the country, has already seen resistance on the ground and faces potential domestic and international legal challenges.

Third part of the speech builds a case for a Truth Commission as a means of furthering reconciliation among Ukrainians, fostering democracy-building, and securing peace in Ukraine. It advances five reasons for why a Truth Commission warrants due consideration. First, the author uses previous analysis as qualitative empirical basis for the establishment of a Truth Commission as a democracy-building

measure, arguing that since politics of memory has facilitated the current crisis, memorialization measures comporting with TJ objectives could generate a reverse reconciliatory effect.

Secondly, truth commissions can facilitate the establishment of the complete historical record of controversial historic events, which continue to impede democratization in Ukraine, in a procedurally fair and transparent way conducive to the establishment of the rule of law. The availability of documents, made possible by the law on access to archives, could give the Truth Commission the necessary ammunition to establish the legal truth surrounding, for example, the role of the UPA and OUN in their collaboration with the Nazis. On the other hand, confirming the achievements of Ukrainian nationalists, and the criminal nature of the Soviet regime under applicable international law, could counter Kremlin's propaganda machine with a non-biased account of Ukraine's Soviet-era past.

Thirdly, the fossilization of Ukraine's political landscape into an antagonistic dichotomy of east versus west could be diluted by way of a broad internal discussion where all of Ukraine's traditionally marginalized and geographically diverse communities will publicly discuss the past in a non-confrontational environment. Commissioners could hail from both Lviv and Donetsk, be representative of Crimean Tatars and Jews, and include women. Traditionally, commissioners have also come from a variety of professional backgrounds. Judges could include international representatives, including from Russia and other Council of Europe states, which could lend the commission greater credibility in the eyes of Ukrainians with close Russian ties. A Truth Commission could be used to uncover and establish the truth that is pluralistic, avoiding the politicized glorification of some groups of victors or victims at the expense of others, and glorification or victimization of the past.

Fourthly, as autonomous and state-driven but ad hoc institutions, truth commissions can help reestablish social trust by having Ukraine publicly and officially confront and acknowledge its traumatic past. Public debate and the corollary awareness of history help to prevent the recurrence of similar crimes in the future, and an honest and thorough debate on history, unlike an artificial imposition of a unilateral view of Soviet-era events propounded by the Decommunization Laws, could be conducive to democratic institution-building.

Lastly, concrete recommendations can be made by competent and qualified professionals regarding how to address sensitive historical issues. For instance, the glorification of Bandera makes little sense during a war that pits two opposing historical narratives. However, Bandera cannot be simply excluded from Ukrainian history or condemned out of respect for "European Values" as the EU Parliament's resolution has recently recommended. In such a context, a victim-centered, as opposed to hero-centered, mandate would be a more appropriate memorialization response. A Truth Commission report could culminate in a thorough and authoritative analysis of the regional dimensions of memory in Ukraine, including comparative and interactive

studies on memorialization practices, and include recommendations for the preparation of memorial sites and education curricula centering on victims of Holodomor or the nationalists' atrocities.

Undoubtedly, a truth and reconciliation commission would face a myriad of practical challenges, not the least of which are the ongoing armed conflict in Donbass, and Kiev's obdurate refusal to amend or revoke some of the more problematic of the Decommunization Laws. While the present time might not be the most opportune for the institution of such a project however, an inclusive dialogue and debate including members of the civil society, academics and the government regarding its merits could be a significant step forward in creating the favorable environment for its foundation, and for the future of Ukraine's democratization and security.

## **UKRAINIAN MEMORY LAWS FROM THE EUROPEAN LEGAL PERSPECTIVE**

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In my speech I will touch the mechanics of legal prescription of certain historical memories in Ukraine, from gaining independence to the recent military conflict with Russia. These memory laws and court interventions will be analyzed as a part of European mnemonic space, in particular, due to the membership of Ukraine in the Council of Europe and its clearly articulated aspirations to join the EU. From the perspective of the Council of Europe, the jurisprudence of the European Court of Human Rights supplies indispensable standards on the permissible interference of the state with historical memory. In the meantime, central to the reconstruction of the EU law and politics of memory are EU citizenship and prohibition of genocide denials. The EU politics of memory can be drawn on two distinctive and sometimes overlapping paradigms. The first one embodies soft law that invites EU citizens to remember historical events and certifies "European" viewpoint on those events. Such events (e.g. commemoration of Holocaust, acknowledgement of communist atrocities, etc.) are often projected as common European memory via various resolutions of the EU Parliament. The second paradigm of memory-building straightforwardly outlaws the denial, trivialization and minimization of certain atrocities. Since the adoption of Framework Decision 2008/913/JHA, this second paradigm has become ever visible in EU law and politics of memory. After summarizing the arising EU law of memory, the speech will zoom into the Ukrainian case study. My report will unpack five major legal engagements with memory in Ukraine: the legislative legacy of Holodomor (the

politics of the mass starvation orchestrated by the Bolsheviks), legal status and honoring of the fighters for Ukraine's independence, memory of the World War II, access to the archives of repressive bodies of the communist regime, and finally, on condemnation of the communist and Nazi regimes and prohibition of their propaganda and symbols. The military conflict with Russia has substantially accelerated legal interference with historical memory in Ukraine. In the speech, I will analyze whether these mnemonic practices in Ukraine are compatible with European standards of freedom of (academic) expression, assembly, non-discrimination, dignity, and ultimately, the rule of law.

## **TRUTH COMMISSIONS AND NATIONAL NGOS: ESTABLISHING THE TRUTH TOGETHER**

*Oleg Martynenko*, LL.D., professor,  
Ukrainian Helsinki Human Rights Union

Post-conflict states, setting the goal of restoring peace and the rule of law regime, often turn to the model of Transitional Justice<sup>3</sup>. Working with the consequences of mass human rights violations committed during the conflict, and having the ultimate goal of national reconciliation, the said model provides the activity of a state simultaneously in four main areas: Criminal prosecutions, Reparations to victims, Institutional reforms, Truth-telling.

It is namely within the last area the post-conflict states create credible commissions which must establish the truth and provide answers to the society to the questions "What happened?" and "Why did it happen?" Functions of such Truth commissions may have national differences and include, for example, documenting violation facts; documentary events recovery; declassification of archives; investigation on disappeared and missing persons; establishment of victims and perpetrators; ensuring the availability and security of documents on rights violations. For these reasons, in the history there are recorded different names for Truth commissions: Commission for Historical Clarification (Guatemala), National Commission on the Disappearance of Persons (Argentina), National Reconciliation Commission (Ghana), Truth and Reconciliation Commission (Peru, Sierra Leone, South Africa).<sup>4</sup>

Analyzing the experience of more than 30 Truth commissions, experts recognize that the most effective there were commissions created as a result of

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<sup>3</sup> UN Security Council, The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General, 23 August 2004, S/2004/616

<sup>4</sup> Truth Commissions and NGOs: The Essential Relationship. The "Frati Guidelines" for NGOs engaging with Truth Commissions. The International Center for Transitional Justice, 2004.

consultations with civil society organizations when the subject of the discussions was not only the mandate of the commission, but also issues of methods, feedback and expected results of the Commission.<sup>5</sup> Acknowledging civil society as an extremely important factor in the activity of any Truth commission, international experts ascertain also a wide range of attitude of NGOs in relation to Truth commissions - from support to criticism and even public protests.<sup>6</sup> However, active cooperation of commissions with the national NGOs today is a sort of an axiom, since otherwise a number of complications is inevitable, as shows the experience of Bosnia and Herzegovina.

Remember that after the war, of 1992-1995 in Bosnia and Herzegovina there were started the initiatives on creation of the Truth commission, which had to deal with the consequences of war - 2.2 million refugees, 100,000 victims and 34,965 missing. However, these initiatives have shown a lack of public involvement, especially associations of victims, to the process of creation, establishment of the mandate and functioning of the Truth commission.<sup>7</sup> Lack of mutual cooperation and coordination between NGOs and the Truth Commission led to a series of sporadic and uncoordinated activities, due to that NGOs in the field of establishing facts and truths focused mainly on documenting human rights violations projects, accepting statements from victims.<sup>8</sup>

As a result, public opinion polls in 2010 showed that 70% of respondents believed that the facts about the war in Bosnia and Herzegovina are still unidentified. This view was shared by 84.4% of respondents of Serbian nationality, 57.9% of the Bosnian nationality and 64.7% of Croatian nationality.<sup>9</sup> Various databases that are available to victims associations, government agencies, the Institute of missing persons are not integrated, not systematized, and not available to the public. Yet they are the basis for the creation of a unified database of all victims of international humanitarian law violations as one of the starting points in the process of establishing the facts. Unpleasant fact for Bosnia and Herzegovina is the absence even now of objective analysis of the causes, regularity and institutional responsibility of mass human rights violations during the war and the lack of reliable estimates of the number of victims or

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<sup>5</sup> Rule-of-Law tools for post-conflict states. Truth commissions. United Nations. New York and Geneva, 2006

<sup>6</sup> Truth Commissions and NGOs: The Essential Relationship. The "Fratelli Guidelines" for NGOs engaging with Truth Commissions. The International Center for Transitional Justice, 2004.

<sup>7</sup> Graeme Simpson, Edin Hodžić, Louis Bickford. "Looking back, looking forward": promoting dialogue through Truth-seeking in Bosnia and Herzegovina. UNDP, 2011

<sup>8</sup> Bosna i Hercegovina. Ministarstvo za ljudska prava i izbjeglice/Ministarstvo pravde BiH. "Strategija tranzicijske pravde u Bosni i Hercegovini, 2012 - 2016". (radni tekst). <http://www.mpr.gov.ba/aktuelnosti/propisi/konsultadie/Strategija%20TP%20-%20bosanski%20iezik%20fin%20doc.pdf>

<sup>9</sup> Facing the Past and access to Justice from a public perspective. Special Report, UNDP BiH. 2010.

individual victims list. There is also no platform for a public hearing about the experiences of victims.

What should be done by Ukraine to avoid similar mistakes? Given that systematization of existing databases and their availability to the public is an urgent problem in the establishing the truth.

First of all, let's analyze the average parameters of the Truth commissions. Under mandate they are created as temporary non-judicial authorities to collect evidence, conduct own investigations, study materials, conduct public hearing of cases and prepare the final report.

International experience shows that the optimal duration of the commission's work is 1.5-2.5 years. Of them, a few months every commission spends for public consultation and 3-6 months more - for the preparatory period (recruitment, procurement of an office and office equipment, creating a database). Gathering evidence, as one of the main activities of the Truth commissions, takes from several months to a year, depending on the given mandate. During this period the Commission receives an average of 7,000 to 20,000 testimonies of victims and witnesses. To ensure this level of activity Commissions need 200-500 employees, among them – dozens of documenters, dozens of operators and programmers, numerous investigators, experts and researchers. Considering the above, the budget of the Commission can reach 5 to 12 million US dollars.<sup>10</sup>

Secondly, take into account at least two key issues of Truth commissions, related to work with NGOs:

1. The mandate sets deadline for work, which is why the Commissions are unable to investigate all individual cases of human rights violations, and accordingly - cannot establish the truth in its entirety, which often leads to discouragement of victims in restoring justice.
2. After the work is done a significant amount of investigative materials of public interest in terms of their subsequent use as an archive of historical memory is accumulated. However, Commissions resources may be not enough to prepare the materials for the further use by the society (blocking of confidential information, password protection, depersonalization).

How can Ukrainian NGOs help to neutralize these issues and to prepare joint work with the Truth Commission in the future?

Obviously, the biggest advantage of NGOs is virtually unlimited range of their activities and possibility to work in the field of establishment of truth both before the foundation of the Truth Commission and after it stops its work. Such a long-term perspective enable NGOs to provide certain assistance to the Commission at least in the following areas:

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<sup>10</sup> Rule-of-Law tools for post-conflict states. Truth commissions. United Nations. New York and Geneva, 2006, p. 30.



- Preparation of analytical reviews on the history of the conflict, the specificity of violations of human rights and international humanitarian law, estimation of the scale and nature of damage;
- Selection and training of personnel for work in the Truth Commission together with representatives of international organizations;
- Analysis and development of regulations to improve the commission's efficiency in work with national authorities;
- Monitoring and critical analysis of the Truth Commission activity under public control and adherence of the commission to high professional standards;
- Provision of access to their databases and help in the verification of witnesses or victims testimonies.

In the frames of this publication it should be stated that Ukraine has already have a formed segment of NGOs specializing in legal support of cases of armed conflict victims, monitoring and documenting of war crimes. Ukrainian Helsinki Human Rights Union, for example, provides documenting of testimonies of victims and witnesses in all regions of Ukraine, which allows to support more than 200 cases of former prisoners of war in the domestic courts and 40 cases in the ECtHR, collect and analyze more than 7,000 cases of human rights violations based on the established Documenting Center. Partner organizations and numerous volunteer initiatives are engaged into similar activity.

Considering this Ukrainian NGOs are already facing issues directly related to the establishment of truth and historical truth - the introduction of unified standards for work with victims, unification of the documenting process, development of algorithms for information exchange and joint use, the creation of a joint database. At the same time these issues as promising, can be addressed to international organizations interested in effective work of the Truth Commission after the end of the armed conflict in Ukraine.

## **THE PHILOSOPHICAL FOUNDATIONS OF TRANSITIONAL JUSTICE**

*Natalia Satokhina*, PhD (Law), Yaroslav Mudryi National Law University, Department of Philosophy, Assistant

Human beings exist in time, that is why they are continuously dealing with the past through the mechanisms of memory and forgetting. When the past is connected with injustice, the law is the very first way of dealing with it. However, the extraordinary nature of injustice paralyzes the usual mechanisms of memory. It is the sense in which the subtle remark by M. Blanchot should be understood: “A disaster

always happens after it has occurred”. Massive human rights violations raise questions not only about justice, but about the dealing with the past, showing the limited abilities of law as the way of the interaction with time. Thus, societies that are experiencing large-scale human rights violations as a result of dictatorship or a military conflict find themselves between times and this state lasts as long as they correlate the «space of experience» with the «horizon of expectations» (terminology of R. Koselleck<sup>11</sup>), that is, master its own past. The transitional societies face not only the challenge of retributive justice, but also the need to rehabilitate the victims and the challenge of a new normative values formation. In this sense, the law has the limited opportunities. The transitional justice (TJ) with its institutional innovations tries to overcome these limitations, linking the mastering of the past equally with the truth, justice and reconciliation.

The transition to democracy and peace is accompanied by the conflict between equally powerful moral intuitions, which appear in the key dilemmas of TJ – «truth vs. justice», «justice vs. reconciliation», «truth vs. reconciliation». For instance, South Africa was forced to compromise «amnesty for truth», and Spain transformed to democracy through the «pact of forgetting». These dilemmas are inherent legal reality as such. But if in a stable democracy they can be minimized by using legal traditions that define the priority of this or that interpretation, in the transitional period the traditions themselves are in the process of formation. Thus, the experience of transitive societies is rather appropriate optics which allow you to see the underlying contradictions of law as such.

Before any painstaking attempts to understand the interdependence of the truth, justice and reconciliation, even intuitively, they are perceived as the same way of interaction with the world – one that can be designated as «recognition». P. Ricoeur’s reflections on philosophical theory of recognition in his latest book<sup>12</sup> are very fruitful in this sense. He considers the identification of objects in memory and judgment as the first form of recognition. Then he goes on with self-identification as confirmation that we are subjects of our own experience, and then – to mutual recognition and the «state of peace». Finding a somebody’s true identity requires recognition of person’s abilities by others. The way of self-recognition ends up in mutual recognition. Does not demand for identification and proclamation of the truth about the past require the recognition-identification? And is the establishment of justice connected with the establishment of the subject of statements, actions, narration and responsibility? Finally, is the reconciliation between people possible without mutual recognition? Is the mastering of the past possible without going through this difficult path of recognition from the beginning to the end?

The official proclamation of the truth should be the very first requirement of the transitional society, that enables the realization of almost all subsequent strategies of

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<sup>11</sup> Р. Козеллек, *Минуле майбутнє. Про семантику історичного часу*, Київ: ДУХ І ЛІТЕРА, 2005, с. 350–375.

<sup>12</sup> П. Рикёр, *Путь признания. Три очерка*, Москва: Российская политическая энциклопедия, 2010.

dealing with the past. However, it is not only the question of gaining knowledge of the facts regarding the violations, but even more the matter of finding appropriate ways to acknowledge them. The truth is often known, but is not officially recognized. For the victims this is a redoubling of the basic violence, denial of their human dignity. The trials and specially created truth commissions differ fundamentally in the degree of attention to victims. Commissions provide opportunity for public hearings in which victims could share the pain and suffering with the society. So truth as acknowledgment is the most important for the victims' psychological recovery through the official recognition of their suffering.<sup>13</sup> Finally, the most famous Truth Commission – South African Truth and Reconciliation Commission worked with the motto «Truth – the road to reconciliation».

The idea of truth as acknowledgment relates to the idea of restorative justice, which is traditionally associated with TJ and in some sense opposed retributive notion of justice which first of all requires punishment. Truth commissions represent some moral compromise – sacrificing of (retributive) justice. Is the example of transitional justice extraordinary? Does it make us take a fresh look at the idea of justice itself? The essential relationship between the justice and the restoration of the state of peace is the theme of P. Ricoeur's theory of justice. According to the philosopher, the sense of justice, that is rooted in the pursuit of the good life and takes the most ascetic formulation in procedural formalism, reaches the particular fullness only at the stage of the application of the rule to a specific situation. The situational judgment is aimed at strengthening the peace. The verdict does not guarantee reconciliation, because in order to reconcile the parties should mutually recognize each other. The court can only end the conflict, although the ultimate goal of justice remains the promotion of the peace. Without dwelling on this «dream of peace that is some kind of utopia», philosopher traces the fate of the final act of judgment that pays tribute to its final goal only when it is recognized by the public, victims and defendants. In particular, the measures of rehabilitation allow the guilty to recover in the fullness of their legal capacity.<sup>14</sup> Finally, how to meet the needs of victims, who often want firstly not to hear a sentence, but to be heard and recognized. It is about the restorative justice, designed to bring back the dignity of victim and offender, restoring thus the peace.

While we can and sometimes must require the truth and justice, we can only speak about the reconciliation in the mode of desirability. But it is the «horizon of expectations», which correlates with the «space of experience» of injustice. Are the truth and justice possible without reconciliation, even in such modest version, as it sets out in the report of the South African Commission: «Reconciliation requires that all South Africans accept moral and political responsibility for nurturing a culture of human rights and democracy within which political and socio-economic conflicts are

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<sup>13</sup> On the truth commissions, see: P. Hayner, *Unspeakable truths: Transitional justice and the challenges of truth commissions*, New York, London: Routledge, 2011.

<sup>14</sup> П. Рикёр, *Справедливое*, Москва: Гнозис, Логос, 2005.

addressed both seriously and in a non-violent manner»<sup>15</sup>? After all, is not this a reconciliation with its own past, or its mastering?

To sum up, mastering the past through the application of TJ is an example that highlights some aspects of law which are less obvious in usual conditions: essential relationship of justice and reconciliation and inseparability of law, ethics and politics.

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<sup>15</sup> The South African Truth and Reconciliation Commission report. Vol. 5, <http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf> [14.04.2017].

### Workshop 3: “Reparations for victims of the armed conflict”

## THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF THE ARMED CONFLICT IN UKRAINE: CHALLENGES AND OPPORTUNITIES

*Vito Todeschini*, PhD Fellow, Aarhus University

The present speech addresses the issue of what legal remedies may be available to the victims of the armed conflict in Ukraine. The analysis considers, on the one hand, the problem of the lack of individual remedies under international humanitarian law; and on the other hand, the role of human rights law in supplementing this gap. The overall purpose is to explore whether and how the interaction between international humanitarian law and human rights law may play a role in assisting victims to get redress for the harm suffered in the Ukrainian conflict.

It is generally acknowledged that the situation in certain parts of eastern Ukraine classifies as an armed conflict: either non-international between Ukraine and the rebels; or international between Ukraine and Russia, if it is accepted that the latter exercises overall control over the rebels. In a future post-conflict scenario, individuals might bring claims in the domestic courts of either Ukraine or Russia for violations of international humanitarian law — the main legal framework regulating the conduct of hostilities during armed conflicts.

The point of departure of the analysis is the consideration that international humanitarian law does not provide individuals with domestic or international remedies against violations thereof. Whereas some scholars and courts acknowledge that Articles 3 Hague Convention IV and 91 Additional Protocol I envisage a right to reparation for victims, these provisions do not prescribe an obligation on States to establish domestic remedies whereby individuals may seek redress.

Courts in the United States, Japan, and Germany have indeed rejected WWII-related individual reparation claims on the basis of the lack of a right to a remedy under international humanitarian law directly enforceable at domestic level. More recent case law confirms this trend. In the *Varvarin* (2013) and *Kunduz* (2016) cases, individuals have claimed reparations for alleged violations committed by Germany during its participation in the military operations in Serbia/Kosovo and Afghanistan. In line with the majority of national case law, German courts have affirmed that individuals do not have a right to bring claims directly against a State for alleged breaches of international humanitarian law. To that end, victims would need to resort to an inter-

State claims mechanism via their own government. Against this background, it is worth noting that future individual claims for violations of international humanitarian law brought in Ukrainian or Russian courts might similarly be rejected.

However, human rights law also applies in armed conflict and, in contrast to international humanitarian law, it envisages the right for individuals to access a court and seek redress. Remarkably, domestic courts have so far not paid sufficient attention to human rights law when deciding on individual reparation claims relating to armed conflict. This speech also contends that the failure to take human rights norms on remedies into account explains the above-mentioned interpretive result. It is submitted that an alternative approach to the matter would lead national courts to achieve different outcomes.

The main argument is that the applicability of human rights law in parallel to international humanitarian law may allow victims of armed conflict to obtain both access to domestic courts and appropriate forms of reparation. In support, the analysis employs the principle of systemic integration codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which mandates that any international norm must be interpreted taking into account other relevant and applicable rules of international law. So far, the International Court of Justice and human rights treaty bodies have made use of this principle to interpret human rights law in light of international humanitarian law in relation to the use of force and detention in armed conflict; in turn, the International Criminal Tribunal for the Former Yugoslavia employed relevant human rights norms to define the war crime of torture. The interesting point is that rules pertaining to each of these bodies of law may be construed in light of the other.

My report argues that, in respect of the right to a remedy, international humanitarian law may be interpreted in light of human rights law. In absence of procedural remedies under international humanitarian law, individual claims may be considered in light of a State's obligation under human rights law to provide an effective remedy. The interpretive operation proposed here is based on established case law of the International Court of Justice and the various human rights monitoring bodies: the Human Rights Committee, the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, and the African Commission on Human and Peoples' Rights. The jurisprudence of these bodies shows that violations of the right to life and the right to personal liberty perpetrated in connection to the conduct of hostilities may be remedied on the basis of the concurrent application of international humanitarian law and human rights law.

In this way, victims of violations of international humanitarian law could find redress under the right to a remedy envisaged by human rights law, and bring claims directly against the allegedly responsible State in its domestic courts. With regard to the armed conflict in Ukraine, particular attention must be paid to the applicable human rights treaties — the International Covenant on Civil and Political Rights and the European Convention on Human Rights — and the pronouncements of the respective treaty bodies.

Overall, this contribution assumes a perspective of complementarity between international humanitarian law and human rights law as well as a victim-oriented

approach to the question of remedies and reparations. One of the main points of interest is that these perspectives may potentially help enforcing international humanitarian law, specifically the right to reparation for violations thereof, by means of human rights law. It is the ultimate goal of this speech to test such an approach against the Ukrainian case, in order to understand whether there may be an actual and concrete benefit for the victims of this armed conflict.

## **INTERNATIONAL LEGAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS ON THE UKRAINIAN TERRITORIES OUTSIDE THE CONTROL OF THE UKRAINIAN AUTHORITIES**

*Antal Berkes*, Postdoctoral research fellow, University of Manchester

One of the most fascinating questions of the broader topic of accountability for human rights and humanitarian law violations during the armed conflict committed in Ukraine from 2014 on is the possible legal remedies for the victims of human rights violations. Since the domestic remedies both in Crimea and in the self-proclaimed “people’s republics” of Donetsk and Luhansk do not seem effective as certain bodies of international organizations such as the Parliamentary Assembly of the Council of Europe or the United Nations High Commissioner for Human Rights concluded recently, [1] international mechanisms could provide effective remedies for victims. As a binding mechanism, the European Court of Human Rights must deal with the thousands of pending individual cases directed against Russia (800 against Russia as of 2015), Ukraine or both States, and with the three inter-State applications submitted by Ukraine against Russia. While facing the difficult question of dealing with a high number of both individual and inter-state pending cases, the Court shall certainly take into account its well-established northern-Cyprus case law and the ongoing case law on Georgian separatist areas. Whereas the northern Cyprus case law gives an excellent analogy and an already decided inter-state and individual case law, the still ongoing Georgian cases seem relevant to the extent that the Court seemingly prepares to introduce pilot-judgments, given the repetitive nature of several cases.

First of all, the Court’s precedents on unrecognized entities should certainly provide guidance for the Court’s decision on the exhaustion of domestic remedies rule: it is doubtful whether the conclusions of the above mentioned bodies will in themselves persuade the Court about the ineffectiveness of the *de facto* authorities’ domestic remedies and whether it decides to analyze deeper the available mechanisms of the unrecognized authorities. In that regard, the Court held that a law adopted by the illegal “Turkish republic of northern Cyprus” (“TRNC”) “provides an accessible and effective framework of redress in respect of complaints about interference with the

property owned by Greek Cypriots” [2] which the Court required to exhaust. As a contrary, the Court considered the internal mechanisms of the “Moldovan Republic of Transnistria” (“MRT”) as “a system which can hardly be said to function on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention”[3].

The reason for that was that the law of the “MRT” succeeded the soviet laws in force at the time of the collapse of the Soviet Union, whereas the laws of the “TRNC” continued the common law traditions of the island. Consequently, the Court held the Transnistrian domestic redress mechanisms as an ineffective mechanism that has not to be exhausted by applicants prior to their application to the Court. In the case of the Ukrainian territories outside the control of the Ukrainian authorities, two different legal systems are to be distinguished: firstly, in the Crimea, where the Russian law operates, one can certainly foresee that the Court would require the exhaustion of domestic remedies to the same extent as it does in the territory of the Russian Federation. Secondly, in the two self-proclaimed entities, transitory laws based on soviet-time models have been introduced and the Court would arguably consider them, as in Transnistria, as “a system which can hardly be said to function on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention”, and thus not requiring the exhaustion of domestic remedies.

A further question would be the order of treatment of the thousands of pending cases before the ECtHR. As it is well known, in October 2015, there were more than 1,400 individual applications related to the events in Crimea or the hostilities in Eastern Ukraine pending before the European Court of Human Rights, beyond the three inter-state applications [4].

*Ratione materiae*, several claims of the inter-state and individual applications relate to the same human rights violations such as the abduction and subsequent captivity of individuals by soldiers, damage of property, killing, injury, tortured or enforced disappearance of civilians. The fact that parallel, inter-state and individuals cases claim remedies for the same violations do not hinder the Court’s proceedings and the decision about just satisfaction in each of those cases. In this regard, the principles on just satisfaction elaborated by the Court in the *Cyprus v. Turkey (jus satisfaction)* [5] judgment are relevant: Article 41 of the Convention does apply to inter-State cases, and even in such a case just satisfaction should always be afforded for the benefit of individual victims [6], e.g. by distributing the sum by the applicant Government to the individual victims of the violations found [7]. Given the related issues in both inter-state and individual applications, it is proposed that the Court should provide for just satisfaction both in the inter-state case and, at the same time, settle the materially analogous individual cases on the merits in pilot decisions, while referring to the inter-state just satisfaction decisions to be accorded by the responded government(s). Due to the persisting tension between Ukraine and the Russia, the Court should not conclude to adjourn the decision on just satisfaction in the inter-state cases after its decision on



the merits as it did in the *Cyprus v. Turkey IV* and in the *Chiragov and Sagsyan* cases on Nagorno-Karabakh, because those decisions led to a deadlock for long years since the concerned governments were unwilling to reach an agreement.

Beyond the question of exhaustion of domestic remedies and the best litigation strategy to be followed by the ECtHR, this speech will examine, as a final question, the impact of parallel pending international dispute settlement mechanisms between Ukraine and Russia on the procedures of the ECtHR. Several other mechanisms may concern human rights issues: Ukraine initiated in 2015 consultations with Russia under the International Convention on the Elimination of All Forms of Racial Discrimination, which indicates that Ukraine is taking steps to comply with the requirements set out in the compromissory clause of the CERD as interpreted by the ICJ in the *Georgia v. Russia* case. Furthermore, Ukraine expressed its intention to initiate a proceeding before the ICJ against Russia under, among other basis, the Financing of Terrorism Convention. All those parallel proceedings raise the issue of *lis pendens*. By this speech the author proposes the monitoring bodies to interpret the *lis pendens* rule with flexibility, based on their precedents. For example the ECtHR held that a criterion for finding that the application before the Court is substantially the same as another matter is that the matter has been submitted by way of a petition lodged formally or substantively by the same applicants. However, this is not the case with the inter-State status talks conducted under the auspices of an international organization such as the OSCE status-negotiations [8]. Furthermore, the Court limits the applicability of Article 35(2) of the ECHR only to individual applications and seemed to admit parallel inter-state proceedings about the same matter [9].

In the speech I critically examine the procedure of pending international legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities, based on the case law of the ECtHR, the ICJ and other human rights monitoring bodies followed in other frozen conflicts. The research outcomes propose to settle the parallel and interrelated cases in a timely manner, using the procedural facilitators any monitoring body can use such as the priority policy, the parallel and non-exclusive settlement of individual and inter-state applications or the flexible interpretation of the *lis pendens* rule.

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2 *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey* ((just satisfaction-friendly settlement), Appl. no. 16163/90, 22 April 2008, para. 127.

3 *Ilascu and Others v. Moldova and Russia* [GC], Appl. no. 48787/99, judgment of 8 July 2004 [*Ilascu*], para. 436.

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Rights communicates to Russia new inter-State case concerning events in Crimea and Eastern Ukraine, Press release, ECHR 296 (2015), 01.10.2015.

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6 *Ibid.*, paras. 43, 46.

7 *Ibid.*, para. 58.

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9 *Georgia v. Russia (II)*, *op. cit.*, § 79.

## **POST-CONFLICT REPARATION: UKRAINIAN REMEDIES OF RESTITUTION OF PROPERTY IN THE CONTEXT OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS**

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Around 1.7 million persons are currently registered as internally displaced in Ukraine. Almost 4 000 individual applications related to the events in Crimea or the hostilities in Eastern Ukraine are pending before the European Court of Human Rights.<sup>16</sup> They include a wave of complaints about property losses against the Russian Federation and Ukraine. Thus, lacking an effective national remedy, owners of damaged or destroyed property have turned for relief to international judicial and quasi-judicial bodies.

The budding hopes that Ukrainian authorities will pay appropriate attention to the problems faced by displaced persons appeared with the adoption of a National Human Rights Strategy.<sup>17</sup> In the Chapter "Protection of the rights of internally displaced persons" several provisions concerning the restoration of rights and freedoms of internally displaced persons were introduced. Moreover, the Action Plan on the implementation of the National Human Rights Strategy until 2020 has been adopted by the Government. The document includes 135 provisions that describe the government's measures intended to facilitate the implementation of the Strategy, in particular:

"121...10) formation of a working group to develop the procedure of compensation for property that was damaged as a result of anti-terrorist operation;

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<sup>16</sup> "Ukraine. Press Country Profile," Accessed April 12, 2017 [http://www.echr.coe.int/Documents/CP\\_Ukraine\\_ENG.pdf](http://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf)

<sup>17</sup> National Human Rights Strategy. Approved by the Decree of the President of Ukraine of 25 August 2015, No. 501/2015. Translated by UN OHCHR in Ukraine. Accessed April 12, 2017. [www.legislationline.org/.../Ukraine\\_NHRStrategy\\_2015\\_en](http://www.legislationline.org/.../Ukraine_NHRStrategy_2015_en)

...12) development of a draft legal act based on the analysis conducted by a working group regarding the procedure of compensation for the value of the damaged property with obligatory reference to mechanism of compensation charges, sources of payment of the compensation, mechanism of donors and investors' involvement".<sup>18</sup>

Of 25 March 2016, the working group was created pursuant to the Order No. 69 of the Ministry of Regional Development of Ukraine.<sup>19</sup> At the same time, the legal act regarding the procedure of compensation for the value of the damaged property is still under consideration in the Parliament. Four different draft laws were proposed.<sup>20</sup> Two of them (No 4301 and 4301-1) were rejected and withdrawn from consideration.

Summing up the analysis of abovementioned draft laws, we should acknowledge the significant challenge of establishing the actual extent of the damages for the residents of the Donetsk and Luhansk regions. A special Commission, which would assess the damages and decide on compensation, will not have access to the property located in the territories which are not under control of the Government of Ukraine. Ukraine still has positive obligations under Article 1 Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which was not derogated from. In order for national remedies to be effective, it is necessary to enable the local Commissions to assess the damages in the territories beyond the control of the Ukrainian authorities.

Taking into account the constant jurisprudence of the Court in cases of post-conflict reparation, it should be noted that for the potential applicants in cases against the Russian Federation and Ukraine concerning property restitution issues, at least two additional criteria seem to be the particularly problematic to meet: 1) the exhaustion of domestic remedies, and 2) the proof of an interference of the State Party to the Convention with the applicant's right under Article 1 of Protocol 1.

Returning to the issue of positive obligations, it is noteworthy that the PACE has adopted a clear position reflected in its Resolution 2133 (2016)<sup>21</sup>

*“The “DPR” and “LPR” – established, supported and effectively controlled by the Russian Federation – are not legitimate under Ukrainian or international law. This*

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<sup>18</sup> Annex to the Order No. 1393-r of the Cabinet of Ministers of Ukraine of November 23, 2015. The Action Plan on the implementation of the National Strategy on human rights for the period until 2020. Accessed April 12, 2017. <http://www.kmu.gov.ua/control/uk/cardnpd?docid=248740679>

<sup>19</sup> Ministry of Justice of Ukraine. Report on execution of Action Plan on the implementation of the National Strategy on human rights for the period 2020. Accessed April 12, 2017. [old.minjust.gov.ua/file//52389](http://old.minjust.gov.ua/file//52389)

<sup>20</sup> Draft law “On amendments to the Law of Ukraine “On combating terrorism” concerning compensation for housing damaged in a result of anti-terrorist operation” of 11 November 2015, No. 3434; Draft law “On compensation for destroyed or damaged private housing to persons, whose housing or household was damaged (destroyed) in the course of anti-terrorist operation” of 24 March 2016, No.4301; Draft law “On compensation of damages caused by a terrorist act” of 29 March 2016, No. 4328; Draft law “On compensation of damages inflicted to housing in the course of anti-terrorist operation” of 11 April 2016, No.4301-1.

<sup>21</sup> PACE. Resolution 2133 (2016) “Legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities”. Text adopted by the Assembly on 12 October 2016 (33rd Sitting). Accessed April 12, 2017. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23167&lang=en>

*applies to all their “institutions”, including the “courts” established by the de facto authorities.*

*Under international law, the Russian Federation, which exercises de facto control over these territories, is responsible for the protection of their populations. Russia must therefore guarantee the human rights of all inhabitants of Crimea and of the “DPR” and “LPR”.<sup>22</sup>*

It remains to be seen whether the European Court of Human Rights will follow the same reasoning.

Notwithstanding any position in this issue, Ukraine is not precluded from establishing a property claims mechanism allowing the applicants and others in their situation to have their property rights restored. The creation of a national mechanism for the assessment of damages of destroyed property may play a role in two important directions: 1) it may become an effective national legal remedy for the protection of property rights in Ukraine; and 2) if the applicant disagrees with the national final decision, it may provide important evidence (at least an estimate of damages) for further proceedings before the European Court of Human Rights.

Once again referring to the principle of subsidiarity, the primary obligation of reparation for violations of an applicant’s right under Article 1 of Protocol 1 is to be found at the national level.

## **THE QUESTION OF REPARATIONS FOR DAMAGE CAUSED BY THE ARMED CONFLICT IN THE EAST OF UKRAINE**

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Annexation of Crimea and the armed conflict in the East of Ukraine, which has lasted almost three years, is accompanied by numerous violations of human rights (right to life, prohibition of torture and other cruel, inhuman or degrading treatment or punishment, including gender- caused or sexual assault, the right to liberty and security, freedom of expression, economic and social rights, etc.) As of December 1, 2016 Office of the United Nations High Commissioner for Human Rights (OHCHR) registered 32,558 victims (including civilians, Ukrainian military and members of armed groups). Among them, 9,758 were killed, including more than 2,000 civilians and about 22,800 people were injured [1].

Regarding caused material damage, according to various estimates losses from the destruction of infrastructure are in the range of from 469 million [2] to 15 billion [3] US dollars. The fighting also caused widespread emergency, above all, internal

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<sup>22</sup> Ibid, paras 3,4.

migration from the above areas. As of December 5, 2016 according to the data of structural units of social protection of population of regional and Kyiv city state administrations, 1,656,662 displaced persons (1,336,031 family) have been registered from the Donbas and Crimea [4].

The performed by Ukrainian Helsinki Human Rights Union (UHHRU) analysis of human rights showed significant gaps from state authorities in the protection of victims of conflict. Oleksiy Bida, coordinator of the UHHRU Documenting Center said: "Documenting victims we faced with the fact that the Security Service in 2014-2015 questioned people only on the presence of weapons in the hands of terrorists. No criminal case on the fact of illegal detention was registered. But we know that there were more than 3 thousand civilian and military hostages." [5]. Not less severe problems occurred in connection with the establishment and recording violations of international humanitarian law, freedom of speech, property rights, rights of children, people with disabilities, people with mental health problems.

In particular, there have been such violation of both national and international humanitarian law by both separatists and pro-government forces:

- there were cases of nonobservance by the parties involved in the conflict, of immunity of civilian sites (civilian sites were used for military purposes, thus the transferred to the category of military objectives)

- during the military conflict in the territory of Donetsk and Lugansk regions direct attacks on military facilities made by parties to the conflict, caused excessive collateral damage to civilian sites;

- parties to the conflict not always carried the distinction between civilian sites and military objectives. There have been cases of deliberate attacks against civilian sites;

- during the military conflict in the East of Ukraine there have been indiscriminate attacks not directed at a specific military objectives which therefore, in each such case struck military objectives, civilians and civilian sites without distinction;

- during the military conflict in the East of Ukraine there have been indiscriminate attacks in which there were applied methods or means of combat which cannot be directed against specific military objectives and which, therefore, in each such case struck military objectives, civilians and civilian sites without distinction;

- kidnapping and unlawful seizure of property of persons deprived of liberty (captured, detained) - unlawful detention of civilians from Donetsk and Lugansk regions by pro-Russian armed formations often were accompanied by brutal violations of human rights (right to life, the peaceful enjoyment of property, prohibition of torture and ill-treatment, etc.);

- allegations of looting in the broad sense (i.e. misappropriation of another's property in an atmosphere of impunity, usually in emergencies - such as natural disasters or war) concerned almost all volunteer battalions, and soldiers of the National

Guard of Ukraine, the Armed Forces, militants of so called DPR and LPR and even locals;

- seizure and robbery of banks;
- seizure and robbery of business;
- seizure of housing;
- misappropriation of private cars;
- seizure and robbery of companies;
- the executive authorities had made some decisions that violate the right to peaceful enjoyment of property.

At that very many real victims of the conflict are not recognized as such so far, as violations of their rights for a number of reasons were not documented by law enforcement agencies (omission of law enforcement agencies, which do not establish these facts on their own, on statements of victims any investigative and operational action for crimes committed in fact are not carried out, so they remain unsolved; confidential information (statement of offense, etc.) is transferred from workers of Ukrainian law enforcement agencies to representatives of security agencies or so called "LPR", "DPL", victims do not go to the police because of intimidation by militants or because of lack of trust to the police). All this provides risks of strengthening the feeling of "utter cheerlessness" of their existence; discriminatory attitude as to people of the "third class"; dissatisfaction with the behavior of soldiers and members of security forces, actions (or inaction) of the state in conflict zone residents and internally displaced persons [6].

Accordingly, for the peaceful restoration of Ukrainian society the crucial is the equal protection of all people affected by the conflict. As stated in the UN General Assembly resolution A/RES/60/147 of 16.12.2005, adequate, real and quick reparations are to help to reach justice by restoring the victim to his rights, abused as a result of gross violations of international human rights regulations or serious violations of international humanitarian law [7]. Accordingly, Ukraine faces the issue of developing a program of action for reparations.

Experience in countries emerging from conflict, in this case should be the starting point for Ukraine. In such way, international standards and international practice refers to the basic forms of reparations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition of what happened. And since reparations require substantial human and financial resources, the first steps in this direction should be made now. For this, we believe, at the state level there should be hold discussions and consultations with civil society and victims of crimes to determine the capacity of the judicial system to reparations by reviewing and making appropriate decisions on individual incidents; in the case of obvious inability - to establish what should be the procedure for reparations; what fundamental positions should be a basis for the development of out of court reparation programs; what may international institutions assist with.

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**Workshop 4: “Is there an existing model of post-conflict justice suitable for Ukraine? (Does the Anna Karenina principle apply to post-conflict justice?)”**

**INTERNATIONALIZED JUSTICE IN UKRAINE**

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Political hurdles and capacity shortcomings have severely limited investigations and prosecutions into grand corruption in Ukraine; they have also blocked the adequate investigation and prosecution of atrocity crimes, ranging from the February 2014 Euromaidan protests to the conflicts in Donbas and the East. Recently created or reactivated special units within Ukraine’s Prosecutor General’s Office offer some potential for accountability, but obstacles abound. Where younger, reform-minded prosecutors and police have been able to move certain cases forward, they encounter obstruction from colleagues associated with the regime of former President Victor Yanukovich. Cases must also be heard by a judiciary in which investigative, trial, and appellate judges are still associated with a corrupt old guard: according to opinion polls, the Ukrainian judiciary enjoys the trust of only five percent of the population. Moves to reform the judiciary, including through vetting and the creation of a dedicated anti-corruption court, are welcome but even these limited efforts have sparked fierce political resistance. Finally, while a full investigation by the International Criminal Court would be an important step forward for accountability, this will surely be a slow process that, if it were to proceed, holds the potential for only a handful of cases to be prosecuted.

Given these limited prospects, our speech posits that Ukraine could benefit from temporarily internationalized justice institutions to deal with grand corruption and atrocity crimes (defined here as war crimes, crimes against humanity, and terrorist-related crimes set forth in the Ukrainian criminal code). If designed properly, we suggest that temporarily inserting international investigators, prosecutors, and judges—to work with and alongside Ukrainian investigators, prosecutors, and judges—could better ensure accountability for these crimes, strengthen deterrence, and serve at least a partial truth-seeking function for a country that remains deeply divided over its history. Within riven justice institutions, the approach could help tip the political balance of power



towards younger, reform-minded investigators and prosecutors. Such a model could also enhance the Ukrainian justice system's objectivity and popular trust, while helping to build domestic capacity and expertise.

Seeking accountability for international crimes and other serious crimes like grand corruption has often required such exceptional responses. Notable examples include the establishment of international ad hoc and/or hybrid tribunals, as well as the creation of "high risk courts" or even the exercise of military jurisdiction. But exceptionalism—treating or giving something the status of being unique or special—entails both promise and pitfalls. On the one hand, internationalization can compensate for existing weaknesses of the "ordinary" criminal justice system; on the other, it raises serious questions about democratic legitimacy and sustainability. These conceptual pitfalls are exacerbated when models are poorly designed and implemented. Large, bureaucratic interventions may take so long to become operational that they miss windows of political opportunity, while mechanisms conceived outside of existing institutions can run the risk of siphoning funds and political capital from other reform agendas. The international community has also too often recruited and deployed international personnel ill-suited to participate in such mechanisms: individuals motivated more by generous salaries than a sense of mission, prone to treating national colleagues with condescension, and unfamiliar with or uninterested in the domestic legal system within which they must work.

Given both the promise and pitfalls of internationalized justice, then, we argue for a flexible model of internationalized justice in Ukraine that draws from the civil law concept of the "lay jury," which the Ukrainian constitution and legislation both provide for and which was historically meant to offer a form of direct citizen participation in the administration of justice. The criminal procedure code adopted in 2012 gave new impetus to Ukraine's use of the "lay jury" system for certain types of crimes: it entails the creation of panels comprised of two "professional" and three "lay" judges. The law could be amended, however, to ensure that two or three of these lay judges would be "internationals," with specialized jurisdiction for specified crimes, including grand corruption or atrocity crimes. Similarly, internationals could be integrated into new and existing domestic institutions for investigation and prosecution, including the General Prosecutor's Office and the National Anti-Corruption Bureau. The international involvement could be organized through a consortium of interested donor states in partnership with the Ukrainian government.

We argue that such a model offers several advantages. First, rather than establishing a heavy structure parallel to the current justice system, the model could be integrated with existing institutions. Internationalization would be a common approach, but adapted to the distinct needs of the different domestic institutions that deal with investigating, prosecuting, and adjudicating atrocity

crimes and anti-corruption cases. Moreover, because it would not be one mechanism, a sequencing of international participation in Ukrainian institutions could be possible based on the type of crime or its geography. A scalable, flexible model of this sort could more easily mesh with other domestic justice reform initiatives. For instance, by pegging gradual departure of international staff to the achievement of strong, clear reform benchmarks (rather than time), the government could have new incentive to implement lasting reforms.

The imperatives of flexibility and fleetness further suggest that, on the side of the international community, an ad hoc arrangement may be preferable to a body established by the United Nations or European Union. Whether through these institutions or a consortium of states working in partnership with the Ukrainian government, the international community could partner with Ukraine to create a small international registry that would exist for the length of international involvement. The primary mandate of such a registry would be to oversee the recruitment of internationals, administer the budget for their engagement, and raise funds from donor states. Finally, this approach would stress creating the appropriate climate for capacity building by concentrating particularly on the recruitment process for internationals and their integration into such units.

In highlighting these potential benefits, our speech draws on such experiences as those in Bosnia, where international prosecutors, judges, and other officials were also inserted into the domestic system to build and adjudicate cases alongside national colleagues. There are numerous other past experiences, from Sierra Leone to Guatemala, which could also inform decisions about how to design a mechanism, including the crucial issue of recruiting the right internationals – those with the appropriate motivation, expertise, and humility to work collegially within a hybrid justice model.

## **THE NEW FRONTIERS OF VETTING**

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The purpose of this speech is to present vetting and its challenges, also in the context of postconflict Ukraine. Vetting is one of the most important measures of transitional justice policy, and one of the many institutions of *jus post bellum*.

Transitional justice is a “response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace,

reconciliation and democracy [1]”. It attempts to address political, moral, and legal dilemmas in the post-conflict peace-building in the pursuance of the objective of an effective and legitimate transitional justice policy.

Only by reestablishing civic trust and re-legitimizing public institutions would it be possible to address past abuses and prevent future ones, enabling a new fair and efficient system. The reform of an institution’s personnel, usually one of the first measures to be adopted in post-conflict environments, is strictly related to other forms of transitional justice, and it is even a precondition to pursue them.

The principles of individual responsibility, transparency, impartiality, effectiveness, and public awareness, fundamental to enhance the perceived legitimacy of the process, are the features that distinguish vetting from other measures, such as the recent Erdogan purges, which followed the July 2016 failed *coup*.

Although the entire public administration can benefit from a personnel reform program, priority should be given to the military, the police, and the judiciary because of their usual direct involvement in past abuses.

In my report, I will explore and present the different measures and procedures to reform the military, the police, and the judiciary using country-specific examples, especially focusing on the recent cases of Egypt and Tunisia, to assess whether some of the recommendations coming from these processes may also fit the peculiarities of the Ukrainian post-conflict.

Specifically, I will examine which of the two principal types of transitional personnel reform processes – review v. reappointment – is preferable in relation to each of the three mentioned bodies.

I will also analyze the major challenges States will face, in particular the risk of shortcoming of soldiers, policemen, judges and prosecutors, the inherent risk of manipulation of the entire process, and the risk of new human rights violations in its implementation [2].

I will, eventually, defend the point that every vetting strategy needs to consider the unique historical, social, and political peculiarities of every society in the context of past of human rights violations. In fact, vetting could only be successful as part of a broader and comprehensive approach to institutional reform, which includes prosecutions, truth-telling commissions, reparations, disarmament, demobilization, and reintegration programs.

The importance of vetting is stressed by the growing attention given by international actors, which often play a fundamental role in assisting to build peace and the rule of law, but unfortunately this attention does not encounter an equal interest among scholars.

## II. Distinguishing Vetting from Lustrations and Purges

Vetting is one of the most important tools of transitional justice that countries employ in order to guarantee transition to peace and democracy.

As defined by Meierhenrich, vetting, a form of administrative justice and institutional reform, is “the purification of state institutions from within or without”<sup>3</sup> or, for Teitel, “the processes of investigation and screening intended to shed light on the past” [4].

Nowadays, it seems that many scholars prefer to employ the more neutral word “vetting” instead of the broader word “lustration”, which has been preferably employed to refer to processes in central European countries, once members of the Soviet Bloc, on their path to democracy [5], and instead of the term “purge”, which as a form of collective punishment, has been more recently used by authors to refer to the so-called de-Ba’athification program in Iraq and, in the past, to the process of denazification in Germany [6].

Notwithstanding the lack of agreement among scholars among the different terms, which refer to the reform of an institution’s personnel, it seems that a consensus is emerging on the word “vetting”, defined as a process of “assessing integrity to determine suitability for public employment” with the aim to re-establish public trust and re-legitimize public institutions [7].

### III. The Purpose of Vetting and its Relevance

Vetting is one of the tools of a retributive justice model of transitional justice, it has a preventive nature, it is not punitive *per se*, and it is a non-judicial form of transitional justice [8].

The process of vetting, emerging as a common practice in post-conflict and post-authoritarian transitional situations, has to take into consideration the peculiarities of each country, since there is no general approach suitable for each case, but several elements that have to be considered in each situation. As explained in details by Duthie, these elements are: targets, criteria, sanctions, design, scope, duration, rationale, and coherence [9].

While vetting is applied to the public sector, from political considerations to time constraints and lack of resources, it cannot be applied to the whole public sphere, but only to certain institutions, or to a single institution, or to certain positions within an institution.

As a matter of fact, the institutions to be vetted are those, which are strongly intertwined with the previous regime, and those, which are co-responsible for human rights abuses. Two are the institutions that would benefit the most from such a process: the security sector [10] and the judicial branch [11]. These sectors often keep links with the previous regime, thus rendering changes to the *status quo* extremely difficult to occur. In addition, the security sector and the judiciary are the apparatuses directly responsible for guaranteeing stability, security, and the rule of law, in addition to the protection of human rights.

The overall result of such a process is to guarantee renewed and long-standing governance in an environment of “shared normative commitment” [12] and public trust [13]. Not only that, the process of reforming institutions is also fundamental to

prevent the resurgence of tragic abuses, and also to open the path to criminal prosecution for past violations.

#### IV. The Two Main Modalities of Vetting

After having briefly explained the meaning and purpose of vetting, it is now important to glimpse the two main modalities of personnel reform in order also to understand what is the most suitable for the Ukrainian context characterized by an ongoing “hybrid” armed conflict.

The review process and the reappointment process coincide with two different approaches to institutional reform: “institutional restructuring” and “institutional re-establishment”[14]. They involve different procedural consequences, which have to be considered in each case, in a process of weighing the pros and cons of each vetting option.

In the review process, on the one hand, public employees are screened in order to examine their background and establish their suitability for service with the aim of removing those who are unfit to hold office because of their involvement in past abuses.

In the reappointment process, on the other, the public institution is firstly disbanded and then reestablished *ex novo* through a general competition for all posts. All employees, actually serving, as well as external candidates, have to apply anew.

Differently from the review process, the reappointment one is used when significant structural changes are necessary, and when the institution suffers from a severe public distrust. This process not only represents a clear break with the past, but it is functional to reach other purposes, such as increasing or diminishing the number of personnel, or changing the composition of the body in order, *inter alia*, to guarantee the representation of minorities and women, putting thus an end to structural inequalities.

#### IV. Final Comments

In the last years, we have been confronted with several uprisings and armed conflicts from Libya to Bahrain, from Egypt to Tunisia, from Syria to Georgia, and Ukraine. In many cases, prodemocracy movements have been successful in ousting old rulers, or in halting the ill-fated designs of threatening neighbors, while others are still fighting for freedom.

It would be too naive to think that the hard part is completed now that the old tyrants have gone.

Probably only now, and for the first time, these countries are confronted with the most important decisions ever, and only if they are capable of taking advantage of the *momentum*, they will avoid the spiral of perennial instability.

For that reason, vetting is crucial in the building of the foundations of new democratic states through the exclusion from public institutions of those persons implicated in gross human rights abuses. Vetting has acquired a fundamental importance in reestablishing the rule of law and in pursuing the objective of an

effective and legitimate transitional justice policy in post-conflict countries, and it is considered an “enabling condition” for other complementary forms of transitional justice [15]/

Unfortunately – as I will argue – there is no one-size-fits-all approach, because the success of vetting mainly depends on the provision of adequate time and resources, on a thorough assessment of the specific contextual and institutional needs, and on the involvement of domestic actors [16].

### References

1 See ICTJ website, available at [www.ictj.org](http://www.ictj.org).

2 I am referring, *inter alia*, to the right to work; the right to hold a job in the public service in conditions of equality and without unlawful discrimination or unreasonable restrictions; the right to a legal counsel; the right to be protected from unlawful attacks on honor and reputation; the right to an effective remedy; the right to the presumption of innocence; the right to a fair and public hearing by a competent, independent, and impartial body; the right to the equal protection of the law without discrimination; and the right to appeal an adverse decision to a court or to another independent body.

3 See J. Meierhenrich, *The Ethics of Lustration*, Ethics and International Affairs 20, No. 1, 2006, p. 99.

4 See R. Teitel, TRANSITIONAL JUSTICE, Oxford, 2000, p. 164.

5 For an assessment of lustration, see R. Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 Colum. J. Transnat'l L. 357, 1999.

6 For an analysis of the de-Ba'athification of Iraq, see N. Roht-Arriaza and J. Mariezcurrena, “Transitional Justice and the US Occupation of Iraq”, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY, Cambridge, 2006, p. 239. Also the measures recently taken by Erdogan in Turkey, following the July 2016 failed *coup*, fall within this category.

7 *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary General, UNSC Doc. S/2004/616/, August 23, 2004; *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines*, UNDP Bureau for Crisis Prevention and Recovery Justice and Security Sector Reform, Publication II, 2006; and *Rule-of-Law Tools for Post-Conflict States-Vetting: An Operational Framework*, UNHCHR, New York, Geneva, 2006.

8 See F. Andreu-Guzman, “Due Process and Vetting”, in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES (A. Mayer-Rieckh and P. De Greiff eds.), Social Science Research Council, New York, 2007, p. 455.

9 See *id.* at p. 20.

10 I here refer to the armed forces, the police, and the intelligence.

11 Other targets include universities, and the media.

12 See JUSTICE AS PREVENTION, *supra* note 8, at p. 532.

13 Trust, as defined by Baier, is “an alternative to vigilance and reliance on the threat of sanctions, and trustworthiness an alternative to constant watching to see what one can and cannot get away with, to recurrent recalculations of costs and benefits”. See A. Baier, MORAL PREJUDICES: ESSAYS ON ETHICS, Harvard University Press, 1994, p. 133.

14 These are the expressions used by the UNHCHR in the *Rule-of-Law Tools for Post-Conflict States-Vetting: An Operational Framework*, *supra* note 7, at p. 25.

15 See JUSTICE AS PREVENTION, *supra* note 8, at p. 528. Nowadays, many scholars share the view of a holistic conception of transitional justice.

16 Mixed domestic-international commissions or domestic commissions supported by an international secretariat should be considered.

## **TRANSITIONAL JUSTICE FOR POST-PUTIN RUSSIA IN THE CONTEXT OF LEGAL INTERESTS OF UKRAINE AND OTHER AFFECTED STATES**

*Stanislav Dmitrievsky*, Norwegian Helsinki Committee, Natalia Estemirova Documentation Center  
*Nikolay Bobrinskiy*, Practising Lawyer

A government replacing an authoritarian repressive regime faces a problem of dealing with the past. Its comprehensive solution usually includes reparations for victims of gross human rights violations and criminal prosecution of those responsible for them, truth seeking, institutional reform and in particular, lustration of governmental bodies that carried on repressive policy. Systematic implementation of these transitional justice mechanisms is deemed to deter recurrence of tragic events of the past.

These observations are fairly relevant for a project of Russia after Putin, however utopian it may seem today. Recently, a group of independent experts came together to draft a report on a transitional justice concept for Russia which is intended to start discussion of this matter. It might be of interest not only for the Russian civil society, but also for other countries affected by illegal activities of Putin regime. Ukraine is undoubtedly the first among them.

My speech will outline the basic conclusions and recommendations of this report which is currently in the final stage of drafting and is scheduled to be presented in Russian in May of 2017. Below I will outline one of the key recommendations of the report on the potential scheme of transitional justice bodies in Russia. This recommendation is directly linked to the legal consequences of the armed conflict in the Eastern Ukraine.

Designing transitional justice concept for Russia is complicated by the fact that the illegal activities attributable to the Russian government or intentionally left by the government without due legal reaction has been of a comprehensive character, consisting of different-type wrongdoings committed in different parts of a vast territory over a long period of time. Some of these wrongdoings have taken place in time of peace on the Russian territory and can be regarded as crimes under the Russian domestic criminal law. Others have been committed in the context of non-international and international armed conflicts in Chechnya, Georgia, Ukraine and Syria and amount to international crimes – war crimes, crimes against humanity and the crime of aggression. Beyond that, a considerable part of violations have been carried out against foreign citizens and/or in the territory of foreign states and can be prosecuted both under the laws of a foreign state and under the Russian law and – in some instances –

also under the international law. Therefore, courts of several states and the International Criminal Court might have jurisdiction (in some cases – concurring jurisdiction) over these violations. The ICC has already started investigation of the circumstances of the Russian-Georgian armed conflict of 2008 and is currently reviewing situations in Donbass and in the Crimea.

At the same time based on factual circumstances it can be concluded that the above mentioned heterogeneous and asynchronical crimes are related to a common group of individuals who planned, aided and abetted, ordered commission or condoned the crimes or otherwise contributed to their commission. It can be assumed, for instance, that such remote and dissimilar wrongdoings as election fraud and aggression against Ukraine can be associated by a common purpose – illegal retention of power. This assumption is particularly important in relation to a group of potential high-ranking suspects holding positions of power in the governmental and military hierarchy of the Russian Federation.

However, no existing institution of criminal justice has jurisdiction to investigate all the said crimes in complex. Thus, the ICC will never be empowered to prosecute the crimes committed prior to 2002. Therefore, the unpunished atrocities committed by the Russian military forces in Chechnya will therefore remain beyond the scope of its jurisdiction. Theoretically, the Russian national courts possess jurisdiction over all abovementioned groups of crimes. But even in the case of a successful post-Putin democratic transit they might lack sufficient independence and professional integrity.

With regard to the foregoing, it appears that an optimal solution for the Russian situation is a hybrid national-international court, resembling, *mutatis mutandis*, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, international judges and prosecutors in Kosovo and the Special Panels of the Dili District Court. The charters of these institutions provide for jurisdiction for crimes both under the international law and selected crimes under domestic law. The composition of these courts is also hybrid. Some of the judges, prosecutors and clerks of secretariats are hired internationally and others are recruited from the local cadres. The latter point provides the countries affected by illegal activities of Putin regime with broad opportunities to take part in staffing of such judicial institution.

Under this scheme, the Special court may have jurisdiction to establish the guilt of persons bearing major responsibility for crimes against human rights and freedoms and international order. Such hybrid wording would allow the Prosecutor (or Co-Prosecutors) to select the most important cases, bearing in mind both the position of the accused in the governmental hierarchy and the character of crimes and their consequences from the victims' point of view. At the same time, the middle- and low-ranking defendants involved only in the crimes under domestic legislation can be prosecuted by the national institutions of justice. Bearing in mind the scale of the violations and the interest in acquiring evidence against the “main criminals”,



individuals belonging to this category can be granted conditional amnesty tied with testimonies.

## **TRANSITIONAL JUSTICE: INTERPLAY OF STAKEHOLDERS**

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Transitional justice is defined as “a full range of processes and mechanisms, associated with a society’s attempts to come in terms with legacy of large-scale past abuses” [1]. Transitional justice is not “a special kind of justice...but a strategy for the realization of the rights to justice, truth, reparations and guarantees of non-recurrence in the aftermath of gross violations of human rights and serious violations of international humanitarian law” [2].

If the terms like “mechanisms” and “strategy” are used, a question arises: who is going to develop and implement that strategy or create such mechanisms? Since transitional justice is “a society’s attempt” “with different levels of international involvement”, it is apparently not only the national government with its bodies and agencies. Opposing social groups may have different views in the aftermath of the conflict. Therefore, attempts to develop a transitional justice often fail against the reluctance of interested parties to work over the implementation of such a strategy.

Participation of diverse and often opposing non-state actors like NGO’s, non-government armed groups, businesses, professional associations, victims, may be crucial for a transitional justice effort. These actors may be characterized as transitional justice stakeholders.

Stakeholders are individuals, social groups or actors possessing an interest, a legal obligation, a moral right or other concern in the outcomes of an organization, and who either affect, or are affected by, the achievement of an organization’s objectives [4]. The UN Special Rapporteur referred to the term on multiple occasions, noting that: “the design of a transitional justice policy requires the contributions of diverse stakeholders, whose views must be integrated through effective means into the process” [5].

Transitional justice stakeholders exist on three levels. The societal or community level includes non-governmental or informal groups within a state, such as associations, businesses, professional communities, victim groups, etc. The state or governmental level encompasses formal institutions within a state charged with or used in the application of transitional justice. They include governmental ministries

and agencies, local authorities, courts, army, police, etc. On the international level, stakeholders may include international inter-governmental and non-governmental organizations, other states and groups of states [see: 6].

The effectiveness of transitional justice frameworks depends on the interplay of the stakeholders. For example, the truth and reconciliation commissions are normally formed by agreement of several stakeholders and in cooperation with various institutions. A commission can be established by a government decree or agreement between the government and an armed opposition group and consist of representatives of those parties, as well as victims, NGO's, scholars, and international organizations [7].

In Kenya, the Truth, Justice and Reconciliation Commission has been established by agreement between the parties forming a coalition government and consisted of six members appointed by the President upon recommendation of the Parliament and three members recommended by the African Union [8]. In Sierra Leone, the Truth and Reconciliation Commission has been established by a peace accord between the president and the opposition movement. The Special Court for Sierra Leone has been created by an agreement between the country's government and the UN and financed primarily by other interested African states [see: 9].

In some cases, the actors could not reach an agreement. In Libya, attempts to implement transitional justice measures have been sabotaged by local armed militias [10]. In Indonesia, the Constitutional Court struck down the legislation authorizing the establishment of the National Truth and Reconciliation Commission [11, p. 244].

The development of transitional justice policies for every region and every conflict must start with the identification of the actors interested in these policies or likely to oppose them. The second step is the determination of the possible contributions by these potential stakeholders. Finally, it is vital to develop some modus of their cooperation that would ensure effective development and implementation a transitional justice strategy. A good transitional justice policy must take the interests and opportunities of the stakeholders into account and secure their mutually beneficial interplay.

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## **‘SPECIALIST CHAMBERS OF UKRAINE’ IN THE HAGUE; A SUITABLE POST-CONFLICT JUDICIAL MECHANISM?**

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Post-conflict justice presents many serious challenges. One of them is the quest for an independent and impartial court that will administer it. Such court should be capable of making complicated legal and factual determinations in sensitive cases, involving charges of serious international crimes against high-level national actors, sometimes considered national heroes. The judicial determinations should be made without the appearance of bias and partiality.

The establishment of independent and impartial courts that will deliver justice for both sides to the conflict has been a point of contention since the first steps of international criminal justice in the Nuremberg Trial (IMT). From that point on, the question of ‘victor’s justice’ has been a constant theme in the relevant critical legal scholarship against subsequent international courts.

In the situation in Ukraine, the administration of post-conflict justice requires some thought on the proper mechanism to administer it. In addition to the complications already noted in the literature, this conflict has certain characteristics that make it additionally complicated. In particular, it involves directly a permanent

member of the UN Security Council. In that context, if the administration of post-conflict justice is deemed necessary, it will most likely not take place with UN support, unless the Russian Federation consents to it. Therefore, other alternatives must be explored.

The history of international criminal justice contains no shortage of such alternatives. From fully domestic trials to fully international trials, international lawyers cannot be faulted for lack of imagination. Many different types of hybrid institutions have been established, some more connected to a domestic legal order than others.

Among the available solutions for Ukraine, one of the most recent examples is the Specialist Chambers of Kosovo. The Chambers are a domestic court, operating in The Hague with regional support by the EU, along with donations from a handful other states (USA, Canada, Norway, Switzerland, Turkey). As a domestic court, they enjoy the powers of arrest and detention under domestic law and draw legitimacy from their position in the domestic constitutional order. International support on the other hand ensures the financial stability and security of the Court and individuals involved in its operation, be they witness, lawyers or judges.

This speech will explore whether the Kosovo model is a suitable alternative for post-conflict justice in Ukraine. Far from engaging in a publicity campaign, the speech will strive to provide a thoughtful and balanced discussion on the advantages and disadvantages that such a solution would present for Ukraine, the rights of the accused and the rights of the victims. Additionally, it will critically reflect on the value of such court not only for Ukraine and Russia, but also for international law writ large. In that context, the speech will draw from the vibrant international discussion concerning the proliferation of international courts and tribunals and assess whether the potential establishment of the Specialist Chambers of Ukraine in The Hague would be a suitable model for the establishment of peace and justice in the region.

**Plenary Session: “Positive obligations for the state under international criminal law”**

**THE ROLE OF PARLIAMENTS IN RECOGNIZING AND PREVENTING INTERNATIONAL CRIMES**

*Larissa van den Herik*, PhD, Vice Dean of Leiden Law School and professor of public international law at the Grotius Centre for International Legal Studies

Parliaments are increasingly involved in matters regarding international affairs. The wide range of activities undertaken by parliaments and their individual members is captured by the notion of “parliamentary diplomacy”. My presentation addresses a very specific type of parliamentary diplomacy, namely the role of parliaments in recognizing and preventing international crimes. It maps examples, thereby distinguishing between the recognition of past versus ongoing crimes. The obligation to prevent international crimes is particularly important in the latter scenario, where crimes are ongoing or about to be committed. In this context, it is argued that parliaments should not get embroiled in questions of terminology, such as whether the genocide label does or does not apply. Instead, attention should be geared towards substantiating the obligation to prevent international crimes and more specifically towards reflecting and debating which exact preventive measures are required in the situation concerned.

**CONFLICT IN UKRAINE: CHALLENGES FOR THE INTERNATIONAL CRIMINAL COURT**

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Situation in Ukraine is currently under a preliminary examination by the Prosecutor of the ICC. Preliminary assessment by the Prosecutor reveals the evidence multiple war crimes and crimes against humanity in Crimea and Eastern Ukraine. Notwithstanding all those facts, the Prosecutor has not yet opened the investigation into this situation.

My speech is dealing with the prospects of ICC investigation of the situation in Ukraine. The author considers situation in Ukraine as a test of the Court's ability to respond to demanding need of accountability in the region. The author proceeds from the assumption that the conflict in Ukraine is an "perfect" situation for the ICC International Criminal Court, characterized by the widespread impunity for grave international crimes and the obvious reluctance of parties to the conflict to use international and national mechanisms of criminal justice.

I've considered the situation in Ukraine from the standpoint of statutory framework of the ICC and addresses the issues of jurisdiction and admissibility, immunities of state officials and the obligation to cooperate with the court by the non-state parties.

I'd analyzed the possible obstacles in the implementation of the justice of the ICC. Among them are the apparent failure of States to cooperate. In particular, it is obvious in the light of the ICC Prosecutor's report apparently provoked Russia's decision to withdraw its signature under the Statute and the termination of even symbolic cooperation between Russia and the Court, as well as further delay in ratification of the ICC Statute by Ukraine. The author takes account of the alternatives avenues of criminal accountability, in particular the creation of a special tribunal for Ukraine as well as national establishments.

As for me, the concept of "standby complementarity," employed by the Office of the Prosecutor, is based on a misunderstanding of the role of the ICC vis-a-vis the States. Instead of active actions encouraging States to investigate and prosecute violations of all parties, it further contributes to delays in justice and the climate of impunity. This conceptual misunderstanding constitutes a serious challenge for the legitimacy of the Court.

An absolute priority in this situation must be an active investigative efforts involving the victims of international crimes, who are the primary beneficiaries of international justice.

## **Workshop 5: “Accountability for IHL violations”**

### **ANALYSIS OF ACCOUNTABILITY STANDARDS UNDER INTERNATIONAL HUMANITARIAN LAW AND JUSTICE MECHANISMS IN THE GOVERNMENT OF UKRAINE TO PROSECUTE SUCH VIOLATIONS**

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National Trials of Grave Crimes  
Open Society Justice Initiative;  
*Scott Martin*, Managing Partner, Global  
Rights Compliance LLP

1. This speech by Global Rights Compliance (“GRC”) will consider gaps and inconsistencies in the accountability standards relating to international humanitarian law (“IHL”) in the Ukrainian legal system. Building upon GRC’s myriad experience advising on IHL matters in Ukraine with nearly every relevant IHL official in the Government of Ukraine over the past two years, the speech will present GRC’s assessment and offer a detailed description on the degree of implementation of prevailing international standards.

2. Further, the author will describe the practices of the principal government actors responsible for IHL enforcement and consider the domestic regime for the punishment of IHL violations, specifically considering the establishment and implementation of post-conflict justice mechanisms under international criminal law. This includes the role of the International Criminal Court (“ICC”) and its relationship to Ukraine. It concludes by presenting GRC’s construct on comprehensive legal, policy and practice reform implementing its vision of positive complementarity in Ukraine and focuses on the assurance of even-handed justice post-conflict for perpetrators of international crimes.

3. This speech will engage with the current legal landscape in Ukraine in relation to IHL in an effort to identify gaps in the ability of its legal system to enforce IHL and fairly prosecute those who have allegedly committed international crimes during the conflict. In light of Ukraine’s ratification of most IHL treaties, the speech focuses on evaluating whether the Government of Ukraine has taken sufficient steps to adopt national implementation measures (laws, regulations, decrees, resolutions and other binding measures) necessary to give full effect to rights and responsibilities demanded by IHL legal instruments.

4. The speech will also assess the compliance of Ukrainian criminal laws and procedures with the requirements of the Rome Statute. Significant gaps identified include the lack of reference to crimes against humanity and the specification of war crimes in the Criminal Code of Ukraine. This section will also consider the role of the

International Criminal Court and its current preliminary examination into alleged crimes in Crimea and eastern Ukraine.

Part II: Analysis of IHL Implementation in Ukraine and the Government's Ability to Implement its Justice Mechanisms Post-Conflict

5. The second part of our report involves a review of the practice of Ukrainian state bodies that are responsible for implementing IHL and their capacity to address violations of IHL in conformity with relevant international standards. This practice analysis is essential to understanding how to establish post-conflict justice mechanisms to prosecute international crimes.

6. This section reviews a representative sample of the available public information concerning Ukraine's current investigation and prosecution of international crimes and analyses the steps that Ukraine has taken towards meeting those obligations. There is persuasive evidence of the commission of a range of war crimes (and, potentially, crimes against humanity) in eastern Ukraine. The approaches to prosecution appear to eschew any meaningful focus on the misconduct of combatants towards civilians. This pattern suggests that this evidence is being disregarded, or at least being investigated or prosecuted in manner that is not sufficient to fulfil Ukraine's international obligations to prosecute and provide an effective penal sanction for all serious violations of IHL.

Part III: Addressing Deficiencies in Ukrainian Law and Practice to Ensure Justice During and Post-Conflict

7. Part III sets out a number of steps that Ukrainian prosecutors should take to make use of its domestic criminal framework – particularly Article 438 of the Criminal Code - to prosecute, as war crimes, conduct that is presently not the subject of criminal charges in Ukrainian courts (or is otherwise being prosecuted as ordinary crimes). This section outlines the various war crimes and their elements that appear to be relevant to the suspected violations that have occurred and appear to be ongoing. It further outlines how these 'facts' might form the basis of viable war crimes charges that would enable Ukraine to take significant steps towards the appropriate prosecution of IHL and other serious violations of international law and the fulfilment of its obligations to provide effective penal sanctions and the repression of ongoing violations of IHL.

8. This speech will consider the principle of positive complementarity and what GRC has characterised as the 'The Five Pillars of Positive Complementarity'. Whilst complementarity is frequently interpreted as whether genuine investigations and prosecutions are being conducted at a national level sufficient to warrant deference to the domestic jurisdiction prosecution of an international crime by the ICC, considering complementarity this narrowly could lead to insufficient efforts to ensure compatibility of a domestic system to all relevant IHL and ICC standards, thereby falling short of the full potential of this principle.



9. GRC understands positive complementarity as encompassing a wider array of steps that States need to take (concurrently or consecutively) to give full effect to this principle. They can be summarised as follows: (1) law and policy reform; (2) the implementation of IHL and international criminal law ('ICL') requirements during conflict; (3) the identification and investigation of international crimes; (4) the prosecution and adjudication of international crimes; and (5) the dissemination of IHL principles. The five pillar approach will be further discussed below in light of the Ukrainian context, with particular emphasis on pillars 3 and 4 in the context of this speech.

#### Pillar 1: Law and Policy Reform

10. Pillar 1 refers to a common requirement under the complementarity principle. It aims to conduct law and policy reforms to ensure compliance with the requirements of the Rome Statute. Beyond ICL, and as a new approach, complementarity should also extend to promote compliance with prevailing IHL standards, thus ensuring the implementation of a comprehensive legal system encompassing a solid preventative (IHL) and repressive (ICL) framework.

11. In Ukraine, current law and associated legal measures, in particular the Criminal Code of Ukraine, require a series of modifications to allow effective penal sanctions for the full range of serious violations of IHL. These will be discussed.

#### Pillar 2: Implementation of IHL and ICL Requirements During Conflict

12. During an ongoing conflict, as in Ukraine, it is essential for the military, security services, police, prison officials, gendarme, and other primary IHL actors to be cognisant of IHL and ICL standards and obligations, thus preventing further violations.

13. As concerns IHL and war crimes more particularly, there is a common misconception in Ukraine that the Government of Ukraine's characterisation of the conflict as an Anti-Terrorist Operation ('ATO') prevents the applicability of IHL. The applicability of IHL is determined whenever the factual situation of an armed conflict meets the required threshold criteria irrespective of the parties to the conflict's view. The organisation of trainings for IHL actors during the armed conflict in Ukraine will certainly ensure a better understanding of and compliance with international law.

#### Pillars 3 and 4: Identification, Investigation, Prosecution and Adjudication of ICC Crimes

14. Pillars 3 and 4 stem from the ICC complementarity principle. They include capacity building with government officials, including military, intelligence, police, gendarme, and civil society, to identify, document and investigate IHL violations, as well as providing advisory services to assist domestic officials in prosecuting and adjudicating IHL violations in furtherance of fundamental fair trial rights.

15. Currently, Ukraine's pattern of prosecutions suggests that it is not fulfilling its international obligations to prosecute conduct amounting to international crimes. GRC identifies the following main issues:

- A pattern of not generally prosecuting IHL or IHRL violations as international crimes;
- A pattern of charging ‘separatists’ (or those suspected of assisting the military effort of the separatists in eastern Ukraine) with one or more domestic crimes under the Criminal Code (i.e. waging an aggressive war or participation in a terrorist group or terrorist organisation);
- A pattern of generally prosecuting or charging Ukrainian government and military officials (non-separatists) for a range of domestic crimes (i.e. failure to comply with orders or desertion);
- Occasional prosecution of conduct amounting to IHL or IHRL violations as domestic crimes (i.e. torture, rape, or illegal confinement).

*Pillar 5: Dissemination of IHL Principles and ICC and IHL Requirements at all Time*

16. Positive complementarity does not end with the conflict. The dissemination of IHL responsibilities of armed forces, police and other security services, university students, public officials and the general public long after a conflict is a central pillar. Through the effective dissemination of IHL principles and ICC requirements, sustainable justice reform will be achieved.

**THE LAW AND PRACTICE OF NEGOTIATING JUSTICE AFTER ARMED CONFLICTS: A FRAMEWORK FOR POST-CONFLICT JUSTICE IN EASTERN UKRAINE?**

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During the past three decades, negotiated peace settlements have been the norm in the resolution of internal armed conflicts with the issue of post-conflict justice becoming an essential component of peace negotiations. Simultaneously, post-conflict justice and the quest for accountability have become increasingly legalised and judicialised, especially by reference to international law and courts. As a result, post-conflict justice negotiations today take place under the shadow of international law, especially when negotiations take place within the reach of regional human rights courts or the International Criminal Court.

Negotiated justice settlements have proved to present challenges to legal and normative accounts of post-conflict justice as products of bargaining between conflicting parties, who are often wary of justice arrangements as they may be implicated in conflict-related crimes and may become targets of post-conflict accountability mechanisms themselves. Moreover, the agreement on post-conflict justice has broader implications for the peace settlement than merely dealing with the

past, as it requires an agreement on what the conflict was about, how it should be resolved and which actors would be part of the post-conflict political and legal system. These challenges have shaped the role of international law in the practice of negotiated justice.

A myriad of existing, emerging or soft legal norms is referenced in relation to peace negotiations and outcome settlements by conflict parties, mediators, donors, international and non-governmental organisations. These norms have implications both for the process and substance of the negotiation of post-conflict justice. As to the process, it is argued, for example, that the principle of self-determination requires genuinely domestic and inclusive negotiations of post-conflict justice or that contacts with perpetrators of international crimes should be avoided or limited not only as a diplomatic but also as a normative matter. Substantively, a prohibition of blanket amnesties is deduced from the international obligations to prosecute and international human rights law, and inclusion of some type of accountability mechanism in peace settlements is argued to be necessary under international law. Some of these norms have not become part of positive law, remain under-developed or vary in scope depending on the applicable laws in a particular context. Moreover, understanding the role of international law in negotiated justice requires an inquiry beyond its prescriptive outreach. International law is often assigned a symbolic role that generates “ultra-compliance” by making an impact on the participants of negotiations or adding the issue of accountability to peace negotiation agendas. Conversely, in some cases, international legal arguments have had a marginal role, the symbolic role of international law has been seized by actors aiming to derail peace negotiations, or the involvement of international courts have led to under-compliance by taking the issue of accountability off the peace negotiation agenda.

Findings of the surveys of the practice of negotiated justice reveal the varying impact of international law, as well as the limits of negotiated settlements in terms of contributing to post-conflict justice. Such findings are relevant not only to an assessment of the role of existing norms but also to the development of international law, as the negotiated settlements constitute a source of state practice that may potentially contribute to the emergence of new norms, e.g. a positive duty to negotiate/adopt post-conflict justice mechanisms.

The majority of peace settlements adopts a narrow approach to post-conflict justice as criminal accountability for conflict-related crimes and human rights violations and overlooks issues of socio-economic justice. The justice mechanisms included range from amnesties, trials, truth commissions, reparations and prisoner release to forward-looking mechanisms that aim to prevent future abuses, such as the establishment of human rights institutions and reforms in the security sector. Notably, despite an increase in the explicit exclusion of international crimes from the scope of amnesties, blanket amnesties continue to be included in peace settlements, most recently in the Philippines and Ukraine. Moreover, many peace settlements fall short

of establishing meaningful accountability mechanisms. Some peace settlements, e.g. in Colombia, on the other hand, include elaborate justice arrangements that include a mixture of limited amnesty, criminal accountability and alternative sanctions.

The report concludes with a brief assessment of the rather limited post-conflict justice component of the 2015 Minsk agreements and its potential future development, taking account of the international involvement in the conflict, the nature of the peace negotiations and the possibility of the ICC involvement. It also points at potential ‘lessons learned’ based on the past practices of negotiated justice, not in terms of the design of peace settlements, but regarding the need for a broader and long-term approach to justice that aim to cultivate domestically embraced post-conflict justice policies.

## ACCOUNTABILITY FOR ARMED CONFLICT VIOLATIONS THROUGH THE LENSES OF CULTURAL PROPERTY

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Domestic implementation of IHL in peacetime as the basis for accountability for armed conflict violations through the lenses of cultural property

### I. Introduction

In Ukraine, everyone saluted the International Criminal Court (hereafter – “the ICC”, “the Court”) Prosecutor’s Annual Report of 2016. The reason for that were Mrs Bensouda’s conclusions about the crimes allegedly committed in occupied Crimea and Donbas.<sup>23</sup> However, while the doors of the ICC keep opening to those responsible for international crimes in Ukraine, Ukraine itself lacks the understanding that the primary obligation to investigate and prosecute such crimes rests with it. This situation both stems from and is aggravated by the improper incorporation of international crimes in Ukraine’s Criminal Code and political overtones of many war crimes-related proceedings.<sup>24</sup> The above, combined with the failure to implement International Humanitarian Law (hereafter – “IHL”) domestically in peacetime and a high level of corruption, create the uneven environment for IHL compliance in armed conflict, prosecution of international crimes and lasting reconciliation in the country.

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<sup>23</sup> Report on Preliminary Examinations Activities (2016), the Office of the Prosecutor, 14 November 2016, paras. 171-183 [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf).

<sup>24</sup> *E.g.*, in a case of *Aleksandrov and Ierofeev*, two Russian servicemen captured in Donbas were denied a prisoner of war status and guarantees inherent to it. Instead, a Ukrainian court charged them with terrorism.

Considering the above issues, this speech analyses how Ukraine's failure to properly implement IHL domestically in peacetime undermines the twin purposes of holding the perpetrators of international crimes accountable and facilitating the reconciliation in the conflict-torn communities. In particular, Ukraine's steps in the field of cultural property protection will be looked at to illustrate the structural deficiencies of Ukraine's policy on IHL implementation and accountability as a whole.

## II. Domestic implementation of IHL in peacetime

### II.1. International Law

IHL is generally known as *jus in bello*, which reflects its primary purpose to regulate the conduct of hostilities. However, respective IHL obligations of states that are to be implemented domestically in times of peace are no less important. In fact, they are foundational to many wartime protection mechanisms.

All principal IHL treaties envisage that states must disseminate information about their contents, include IHL-related sections in the trainings for military personnel and, as far as possible, instruct civilians respectively to ensure that all categories of population that could be affected by hostilities know their principal rights and obligations.<sup>25</sup> Customary IHL also envisages that "states and *parties to the conflict* must provide instruction in international humanitarian law to their armed forces"<sup>26</sup> (emphasis added). Customary IHL Rule 143 further provides for states' duty to "encourage the teaching of international humanitarian law to the civilian population".<sup>27</sup>

### II.2. Ukraine

Ukraine has ratified all major IHL treaties such as the Geneva Conventions and their Protocols, the 1954 Convention and the First Protocol thereto. The state is, thus, bound by the widely codified and recognised (*see section II.1*) obligations to disseminate knowledge about IHL. It can be presumed that a country would want to take further peacetime implementation steps to strengthen the available protection options and enhance the accountability under IHL. Unfortunately, it is not fully so. The below examples analyse Ukraine's failures in this regard.

#### II.2.1. Peacetime IHL-related activities as a ground for compliance and accountability

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<sup>25</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), Article 47; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), Article 48; Convention relative to the Treatment of Prisoners of War (Geneva Convention III), Article 127; Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), Article 144; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), Article 83; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), Article 19; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Individual Distinctive Emblem (Additional Protocol III), Article 7; Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), Article 25.

<sup>26</sup> Rule 142. – Accessed <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul)> (last visited: 10 December 2016).

<sup>27</sup> Rule 143. – Accessed <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul)> (last visited: 10 December 2016).

There are three principal peacetime issues in Ukraine that undermine the potential accountability for IHL violations against cultural property:

(1) Failure to implement all domestic peacetime initiatives that will trigger all available IHL mechanisms during an armed conflict

Examples:

1. Second Protocol. There is a big public campaign for Ukraine to ratify the Second Protocol to the 1954 Convention on the Protection of Cultural Property. This instrument will allow the enhanced protection to particularly important art objects.<sup>28</sup> However, such stronger protection may be granted only to those objects that enjoy adequate protection under national law, including in the times of peace.<sup>29</sup> The availability of such protection under Ukrainian law is highly questionable due to the reasons set out below:

1.1. Inventory. Ukraine does not have a single all-encompassing inventory of its cultural property. Many institutions still record their collections in special paper books. Neither the inventories, nor the collections are properly digitalised.

1.1.1. GPS coordinates. Even if Ukraine had adequate national peacetime protective mechanisms, triggering further mechanisms, International Law would require specific information about an object, be it a building of a museum or a kurgan. The absence of precise GPS coordinates undermines both the launch of international protective mechanisms and complicates the activities of Ukrainian combatants. In particular, it brings another challenge to the compliance with the fundamental principal of distinction between civilian objects and military objectives.<sup>30</sup>

1.2. Marking. Not all historical and cultural institutions are properly marked to ensure that all sides to a conflict can distinguish its special status.

(2) Proper domestic criminalisation of international crimes

As noted in the Introduction, Ukraine's Criminal Code is not suitable for proper adjudication of war crime cases because war crimes are not fully incorporated in Ukrainian domestic legislation.

The current version<sup>31</sup> of Ukraine's Criminal Code contains one article expressly dedicated to IHL. Article 438 of the Code is called "Laws of Rules and Customs of War". On the one hand, the logic of the Article remains blurred as it addresses the cruel treatment of prisoners of war and civilians, forced labor, "pillage of national treasures on occupied territory" and use of prohibited means of warfare.<sup>32</sup> Not only is this list of

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<sup>28</sup> Preamble, Articles 1, 10, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999).

<sup>29</sup> Article 10.b, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999).

<sup>30</sup> Rule 7, – Accessed <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7)> (last visited: 10 December 2016); Articles 48, 52(2), Additional Protocol I.

<sup>31</sup> As of 12 December 2016.

<sup>32</sup> Article 438.1, Criminal Code of Ukraine: Law of Ukraine No. 2341-III [Online resource]. – 5 April 2001. – Accessed: <<http://zakon5.rada.gov.ua/rada/show/2341-14/print1449499672671606>> (last visited: 10 December 2016).

war crimes mixed, but also incomplete even as regards grave breaches of the Geneva Conventions. On the other hand, the list is inexhaustive. Which means the Code may apply to “other violations of laws and customs of war recognized by international instruments consented to as binding by the Verkhovna Rada of Ukraine, and also giving an order to commit any such actions.”<sup>33</sup>

At least the following misconduct against cultural property is not listed as a war crime in the Criminal Code of Ukraine:

- Attacking;
- Causing serious destruction;
- Improper use of the protective emblem.

Such offences were introduced in national criminal legislations even in times of peace. For instance, Georgia added a new chapter on “International Crime in the Area of Cultural Heritage” for armed conflict violations in 2007, *i.e.* even before the 2008 armed conflict with Russia. The UK with its Cultural Property (Armed Conflicts) Bill [HL] is another example.<sup>34</sup> The UK is not part to any armed conflict *per se* now. However, as the state is preparing to ratify the 1954 Hague Convention, it has already come up with a draft bill to address war crimes against artworks and art institutions.

## **TOTAL IMPUNITY IN THE ATO ZONE: INVESTIGATIONS INTO ILLEGAL DETENTIONS AND FORCED LABOR**

*Nadia Volkova*, Lawyer of Strategic  
Litigation Center UHHRU

In 2014 Ukraine became one of the latest casualties in the long history of power struggle for the world order. Although the conflict is ongoing, there is already an urgent need for triggering transitional justice mechanisms.

Presently, Ukraine suffers from the symptoms typical of those that the states which were put through an armed conflict grinder normally suffer from coupled with a lack of political will for reform, lack of institutional independence within the justice sector, lack of domestic technical capacity, lack of material financial and professionally competent human resources, lack of public confidence in Government and lack of official’s respect for human rights and corruption on a massive scale<sup>35</sup>. And although there is much support provided by the international community, very

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<sup>33</sup> Article 438.1, Criminal Code of Ukraine: Law of Ukraine No. 2341-III [Online resource]. – 5 April 2001. – Accessed: <<http://zakon5.rada.gov.ua/rada/show/2341-14/print1449499672671606>> (last visited: 10 December 2016).

<sup>34</sup> Cultural Property (Armed Conflicts) Bill [HL]. – Accessed: <<http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0066/17066.pdf>> (last visited: 14 December 2016).

<sup>35</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, report of the Secretary – General, UNSC, S/2004/616, 23 August 2004: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

often it falls on deaf ears and the reason for this is lack of understanding how it should be used in order to achieve positive results in settling the ongoing armed conflict. Therefore, the best solution in such a context would be for Ukraine to trigger transitional justice mechanisms *self-reliantly*, based on its independent realisation of such a need, using all the specialist help and support complementarily in order to ensure as thorough running of the processes as possible.

Although Ukraine is yet to ratify the Rome Statute, it has already recognized the jurisdiction of the International Criminal Court (hereafter – the “ICC”), by filing its two declarations and inviting the ICC Prosecutor to investigate violations that occurred in Ukraine with respect to the IHL violations. Therefore, Ukraine, has full access to the ICC, the ICRC and the use of customary international law and Geneva Conventions which form a legal framework and a solid backdrop for Ukraine to fall against when prosecuting the war crimes and crimes against humanity.

However, despite the opportunity to use international legal framework as a spring board for adapting domestic criminal justice system according to the demands of the today’s realities in order to achieve positive results in prosecuting war crimes and crimes against humanity domestically successfully, the state of Ukraine seems to be struggling to make any meaningful progress in this direction instead using the unadapted “ordinary crimes” approach which is proving to be less than suitable in the current conflict setting for investigating the IHL violations.

Practice shows that prosecutions for international crimes have more potential for impact when they are held domestically, within the society where the crimes are committed<sup>36</sup>. However, there are two problems that the state is typically faced with. Firstly, the large-scale nature of crimes means that often they cannot be processed through the ordinary criminal justice system and, secondly, societies that are going through or emerging from the conflict lack the political will, necessary skill and competence to prosecute such crimes against more general background of the young and underexperienced criminal justice systems.

Ukraine’s current legal system does not allow for effective investigations of the IHL violations which can be demonstrated by analysing crimes of illegal detentions and forced labor during conflict in the East of Ukraine.

According to the official statistics from the beginning of the conflict in Eastern Ukraine over 3000 persons have been through illegal detentions, around 126 currently still remain in illegal detention.<sup>37</sup> There is extensive evidence of ill-treatment of the detainees on both sides.<sup>38</sup>

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<sup>36</sup> *Criminal Justice*: <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice>

<sup>37</sup> “Poroshenko: Almost 3000 People Have Been released from the Militants’ Captivity”, <http://gordonua.com/news/war/poroshenko-iz-plena-boevikov-osvobozhdeny-pochti-3-tys-chelovek-97754.html> ; “Tandyt: Militants Resort to Blackmail When It Comes to Prisoner Swaps”: <http://gordonua.com/news/war/tandyt-boeviki-v-voprose-obmena-plennymi-pribegayut-k-shantazhu-116520.html>

<sup>38</sup> “Total Impunity in the ATO Zone: Investigations into Illegal Detentions and Forced Labour”, Report UHHRU, October 2016, p. 2



As regards forced labour, based on the testimony of victims who have complained about the violation of Article 4 of the European Convention of Human Rights and Fundamental Freedoms (hereafter – “ECHR”) it is evident that those who had been detained were also used for various types of labour that ranged from cleaning up to heavy building and restoration works.<sup>39</sup>

With respect to the ill-treatment of the illegally-detained persons (who under current misplaced conflict qualification as “anti-terrorist operation” are considered to be “hostages”) and forced labour, the investigations are conducted by the Division on Investigating Crimes against National security of Ukraine, Peace, Human Security and International Legal Order of the Main Military Prosecutor’s Office of the Prosecutor general of Ukraine. These crimes are qualified in accordance with Part 1 and 2 of Article 438 of the Criminal Code of Ukraine (hereafter – “CCU”)<sup>40</sup>.

Article 438 of the CCU provides for the criminal punishment of “violations of the laws and customs of warfare” encompasses international treaties and customary international law. While this method of criminalisation presents the advantage of covering most serious violations of IHL, such an approach may also present some serious limitations to investigating and prosecuting the crimes in that it only applies in the case of a declared war or of any other armed conflict between states (when one of the states does not recognize the state of war); in all cases of occupation of the whole territory or of a part of the territory of the other state, even if this occupation faced no armed resistance.<sup>41</sup>

The use of a person for forced labour is yet to be criminalised. Similarly, Art. 438 of the CCU provides for hard labour as one of the aspects of cruel treatment of PoWs and there is a separate crime of the coercion of civilians into forced labour.<sup>42</sup> Special provisions of the CCU do not contain an offence which would criminalise the use of persons for forced labour in a non-international armed conflict. For that reason, currently forced labour is not an offence which is investigated by the prosecuting authorities because it does not exist as a separate offence<sup>43</sup>.

In conclusion although Ukrainian legal measures provide the basis for a degree of IHL prosecution action, they require substantial modification to produce an effective IHL enforcement system based on the appropriate criminalisation of specific conduct.<sup>44</sup>

But the underlying problem and the main source of such poor result of domestic prosecutions is a misplaced conflict qualification which restrains the state’s ability to

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<sup>39</sup> *Ibid*

<sup>40</sup> *Ibid* at 4, pp 47-49

<sup>41</sup> The Criminal Code of Ukraine, Scientific and Practical Commentary: in vol. 2/Under total. Ed. V.Y.Tatsyi – 5<sup>th</sup> ed. ext.- Kh.: Pravo, - 2013 – Vol 2 – 1040 p. – P. 986.

<sup>42</sup> *Ibid*, at p. 987

<sup>43</sup> *Ibid* at 7

<sup>44</sup> Global Rights Compliance LLP, *The Domestic Implementation of International Humanitarian Law in Ukraine*, Kyiv, Ukraine, May 2016, p.39

see the big picture of how the current domestic legislation should be modified in order to allow for effective investigations of the IHL offences including those of ill-treatment illegal detentions and forced labour.

## **Workshop 6: “ECHR and other human rights bodies”**

### **THE ROLE OF INTERNATIONAL HUMAN RIGHTS MECHANISMS IN SECURING POST-CONFLICT JUSTICE IN RELATION TO THE UKRAINIAN CONFLICT—EXTRATERRITORIALITY ISSUES**

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There are currently several cases pending before the European Court of Human Rights relating to Russia’s actions in the Crimea and eastern Ukraine. The present speech aims to engage in a critical evaluation of these cases. The point of this exercise is to consider the potential and limitations of this type of mechanism in delivering justice in relation to the situation in Ukraine, and more broadly, to use this case study to draw general lessons about the significance of international human rights review mechanisms in securing post-conflict justice. Within these themes, the focus is on whether and to what extent the extraterritorial nature of the subject-matter - Russia’s actions within Ukraine - makes a material difference to this appraisal.

There are many and varied mechanisms that can be potentially utilized in the pursuit of post-conflict justice. The Ukraine ECtHR cases typify particular options within this broader palette. They operate internationally, not within the national legal systems of the states involved. As a matter of legal formality, they concern state responsibility and the rights of individuals only, not also individual responsibility and the rights of states (although as inter-state cases they have, of course, been brought by the state of Ukraine, not by individual applicants). Within the focus on individual rights, they can only address civil and political rights, not also economic, social and cultural rights, and not the collective right of self-determination.

Although Ukraine is currently seeking recourse to other international mechanisms of judicial settlement, the ECtHR cases are effectively some of the most important options available, because the Court’s jurisdiction over situations like those raised in these cases is well-established, and more generally its inter-state jurisdiction can be triggered by one state without any special arrangement for consent, beyond being a party to the European Convention, needing to be established on the part of the respondent state. In consequence, it may be that these cases end up being some of the leading, if not the leading, international judicial determinations of the situation. Given this, what is at stake in having the complex set of issues raised by the situation in Ukraine processed by the international judicial settlement system through a mechanism manifesting these particularities?

Moreover, bearing in mind the extraterritorial nature of the subject-matter, the speech will also explore what these cases, and others like them, indicate about the role of international human rights mechanisms, when compared to national mechanisms of

this type, when the subject-matter is extraterritorial in nature. Embedded within the system of international human rights review is the notion of subsidiarity: that international mechanisms are there to step in if the domestic/national system has in some way been deficient. Put differently, the domestic is the ideal, and so preferred default; the international is a back-up. Hence the requirement of exhausting domestic remedies, and, more controversially, the doctrine of the ‘margin of appreciation’, whereby an international human rights mechanism should somehow defer, to a certain extent, to domestic determinations on permissible rights limitations, because the domestic system is better placed to appreciate local particularities.

But in an extraterritorial situation such as Russia’s actions in Ukraine, these issues look differently. One only needs to engage in the thought experiment of considering how cases about the situation could be brought against Russia in either the Ukrainian or Russian domestic legal systems. A case brought by Ukraine against Russia in either legal system is unthinkable (and even if thought about, raising multiple legal problems from lack of applicable law to issues of immunity and non-justiciability). An equivalent case brought by individuals is only marginally less fanciful. But the legal impediments to such cases, which would of course enable international jurisdiction on the grounds that domestic remedies were not available or were illusory, are perhaps not incidental to the issue at hand. Perhaps they raise a fundamental question of whether the domestic/municipal legal system should actually ever be regarded as the ideal, and the international system as the reserve option, on issues of inter-state, extraterritorial post-conflict justice. Perhaps on issues of post-conflict justice involving the extraterritorial actions of one state on the territory of another state, the inter-state character of the issues involved suggest that an international mechanism is preferable, not subsidiary, to domestic mechanisms. The speech will explore this question, to appraise both the potential significance of the cases for post-conflict justice in Ukraine, and broader lessons for how we understand the role of international human rights mechanisms when addressing post-conflict justice in relation to extraterritorial situations.

## **THE ROLE OF THE ECHR AND OTHER HUMAN RIGHTS BODIES DURING THE UKRAINIAN CONFLICT, ITS EVENTUAL SETTLEMENT AND AFTERMATH.**

*Lilian Apostol*, Active Expert of Council of Europe, Lawyer, Former Agent for the Government before the European Court of Human Rights

In my time of being the Governmental Agent, I occasionally wondered why the Republic of Moldova, after almost of 25 years, has not yet initiated its inter-state case against Russia concerning Transnistria, yet having successful quasi-inter-states cases. Ukraine lodged its inter-states in about 1 year while the conflicts were pending. I have comforted myself that this is not my question to answer. The decision rests on other shoulders - of the senior officials who seem to be reluctant. They kept asking me: "Suppose we authorise such an inter-state in attempt to solve the "frozen question", - then what? Will it actually help us or otherwise – make the things even worse?"

Essentially, the research concerns the role of the European Court and other Council of Europe human rights bodies in eventual settlement of the Ukrainian conflicts. But ultimately it deals with the above dilemma between the perspectives and effectiveness of an inter-state dispute before these bodies.

The has two parts. The first explores overall the European Convention inter-state and quasi-inter-state adjudication. The second, refers to the particular Ukrainian cases. In the end, the speech predicts some reasonable short- and long-term scenarios how the Ukrainian inter-states and individual applications may evolve.

The whole Convention inter-state adjudication is still founded by the fundamental idea of "shared responsibility". Still the last inter-state cases appear rather as a tool pursuing the given State's own grievances (sometimes well founded) and, even, "its own clear political interests".

After the "shared responsibility" époque, the next generation of inter-states started to be justified by concerns of individual's rights abroad. This first inter-state model, called "substitution", has been resurrected in the Georgian 1<sup>st</sup> v. Russia case and now is being used by Ukraine in its "child abduction inter-state". The second, "impersonal", model of inter-state cases observes systemic dysfunctions or an official state tolerance incompatible with the Convention. This type of adjudication prevents massive violations or even their likelihood. This is actually the principal element justifying almost all of the Ukrainian cases.

Notwithstanding these models, there are typical situations giving rise to inter- and a number of quasi-inter-state cases. In the Court's case-law these are mainly internal or international territorial disputes in the aftermath of military conflicts. In time they tend to become the so-called "frozen conflicts", such as the Transnistrian region of the Republic of Moldova with competing Russian interests; the Nagorno-Karabakh region of Azerbaijan and its conflicting jurisdiction with Armenia; as well as Abkhazia and South Ossetia, the conflictual zones of Georgia; and the already classic example of Northern Cyprus.

All these zones gave sufficient "headaches" to the judges of the Court and not only. Except Northern Cyprus, neither of these "frozen zones" in the post-soviet aria lead to inter-state applications, at least not yet. However, they are biggest source of quasi-inter-state disputes with similar effects to an inter-state. What are these quasi-inter-state cases and how they are relevant to Ukraine?

Briefly, a quasi-inter-state is pursued by an individual on behalf of the state. It is an effective substitute to the inter-state application with 2 forms of attribution - against one state exclusively or both states simultaneously. Such cases reveal systemic problems and by implication involve jurisdictional questions on extraterritorial overall effective control and competing territorial positive obligations.

The landmark case of *Loizidou* is the first example followed by the *Demopolous*, *Varnava*, *Foca*, *Protopapa*, cases. The cases of *Ilaşcu*, *Catan*, *Mozer* illustrate the quasi-inter-states concerning the Transnistria. The recent evocative cases are the cross-twin cases of *Chiragov* and *Sargysan* dealing with Nagorno-Karabakh dispute.

How they are interconnected with the inter-state Ukrainian adjudication?

To date, the Court resolves these cases by 2 scenarios, both potentially applicable to Ukraine.

The first *Ilaşcu* (or Transnistrian) scenario employs positive obligations doctrine and effective overall extraterritorial control. The responsibility of the states is determined by conflicting jurisdictions, meaning the extent of positive obligations and effective control. The Court balances out the position between the states, eliminating the power disproportion. But it leaves the final resolution at the disputing States discretion. The Court just adjudicates the cases by allocating the burden of international responsibility.

The second *Chiragov* and *Sargsyan* (or Nagorno-Karabakh) scenario employs mediation by attributing responsibility in crisscross manner, without any preferences. It distributes the responsibility equally seeking to impose the duty to cooperate. Here the Court appears rather as a mediator than a true adjudicator.

In this context the most difficult element for the Court is the jurisdiction. Even though it so controversial, the jurisdiction does not resolve the question of the state's responsibility. It just opens the gate to the merits of the case, setting up the degree of responsibility and positive obligations. In my speech, I imply that the Court gives its own specific jurisdictional interpretation by territorial formal presumption and extraterritorial functional approach. Anyway, the "positive obligations" is what links the jurisdiction and the responsibility.

Now about the Ukrainian cases. I expect the following scenarios.

Firstly, the procedural scenarios. Indeed, Ukraine will have inter-state cases separated geographically concerning Crimea and Eastern part. In what remains, different factors such as interim measures, the much expected ICJ judgment on the merits of the *Ukraine v. Russia* inter-state, will play their role in the Court's adjudication. I expect separate decisions on the admissibility criteria following the pattern from all previous inter-states and the *Ilaşcu* and *Catan* quasi-inter-states. In any case, the rulings on jurisdictional questions in the Ukrainian cases will be long due because they, most probably, will be joined to the merits. So, do not expect a prompt answer from the Court, which will definitely refrain from rulings on the legitimacy of

the Crimean Peninsula annexation and will be dealing only with formal and functional jurisdiction of both states.

The Court will pick up some representative individual cases making them leading authority. It may engage pilot- or quasi-pilot judgment rationale, recognising a number of repetitive applications, therefore imposing duty to adopt remedies, or it could recognise the legitimacy of certain existed remedies (Cyprus v. Turkey Namibia exception scenario).

Secondly, the substantial scenario presupposes that the selected individual cases may pave way for the inter-state cases predicting their outcomes. In such way, they will become quasi-inter-states. There will be a separate assessment of the Crimean Peninsula and Eastern Ukraine events, without forgetting the big context and the responsibility of both states.

Here the Court will be dealing with the most disputed jurisdictional questions:

- extraterritorial Russian jurisdiction and its effective control, in particular, in the Eastern part of Ukraine and
- the extent of the Ukraine's positive obligations as expression of its territorial jurisdiction, both in the Crimean Peninsula and Eastern Ukraine.

However, the jurisdictional assessment will differ geographically, because

- what concerns the Crimean Peninsula Russia will recognise its jurisdiction with temporal objections, starting from March 2014 official annexation,
- whereas Ukraine will assert its territorial right but lack of effective control and the impossibility to fulfil its positive obligations (Ilaşcu scenario).
- what concerns Eastern part of Ukraine the jurisdictional pleadings will be similar to the Transnistrian cases,
- where the Russia will ignore its control and extraterritorial jurisdiction
- and Ukraine will claim territorial but no effective control jurisdiction and very limited positive obligations

In any case, the jurisdictional conclusions will shape the merits of all Ukrainian individual and inter-state cases. To the consequential extent they will determine the perspectives of their execution and supervision before the Committee of Ministers, which now is highly hypothetical.

Back to my question whether inter-state adjudication is “necessary” or it is “evil” for the perspective of inter-state dispute resolution? I would say that it is the “necessary evil”. Indeed, a careful consideration is needed on the perspectives and chances of success before starting an inter-state litigation. Otherwise, there is no greater embarrassment than a failed inter-state. It is better to restrain from it than to lose it eventually. In any case, it is the “necessary evil” because once engaged an inter-state litigation is preserved for posterity, which is the most important value and feature, usually unfairly ignored.

## WHAT IMPACT THE EVENTS IN CRIMEA AND DONBAS MIGHT HAVE ON THE ECTHR CASE-LAW UNDER ARTICLE 1 OF PROTOCOL 1 TO THE ECHR

*Ivan Lishchyna*, Government Agent for the European Court of Human Rights

1. By now the European Court of Human Rights (“Court”) has examined the violations of property rights related to the following situations:

(a) Limitation of the right of access to the one’s property due to the military occupation or the ongoing hostilities:

- *Cyprus v. Turkey* the refusal of the local Northern-Cyprus administration, controlled by the Turkish occupying forces, to allow the return of Greek-Cypriots, displaced during and following the occupation of Northern Cyprus by Turkish forces in 1974, to their homes in northern Cyprus, thereby Greek-Cypriot owners of property in northern Cyprus were being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights (violation of Art. 8 and P1-1);

- *Sargsyan v. Azerbaijan*: the impossibility for the applicant, displaced in the context of the Nagorno-Karabakh conflict between Armenia and Azerbaijan (full-scale war ended in 1994, but the sporadic hostilities continue up to this time), to gain access to his property in the village of Gulistan (the “grey area” between Azerbaijan and NKR) without the Government taking any alternative measures in order to restore his property rights or to provide him with compensation had placed an excessive burden on him (violation of Art. 8 and P1-1).

(b) intentional burning down of the property by the governmental forces in the course of guerilla war:

- *Orhan v. Turkey* the applicant complained about the destruction of his property in the hamlet of Deveboyu south-east Turkey and the hamlet’s evacuation by the Turkish security forces in the context of the guerilla warfare between Turkey and Workers Party of Kurdistan (PKK). The Court had no doubt that these acts amounted to serious and unjustified interferences with the peaceful enjoyment by the applicant of his property and possessions (violation of Art. 8 and P1-1);

(c) Shelling of the civilian’s homes by indiscriminate aerial bombardments by governmental forces in the course of guerilla war:

- *Esmukhambetov and Others v. Russia*: the applicants complained that two Russian military planes, in the context of the armed conflict between the Russian Federation and the Chechen insurgents, raided their village in Chechnya, firing machine gun shots and dropping a number of bombs, resulting in approximately 30 houses destroyed or severely damaged as the result of which many of the applicants became refugees. The Court did not recourse to the balance of interests test because



the preliminary criterion: the lawfulness of the interference, was not met. It found that Suppression of Terrorism Act, referred to by the State as a legal ground for the attack, could not serve as a sufficient legal basis for such a drastic interference as the destruction of an individual's housing and property.

(d) Airstrike on the territory, not controlled by the attackers:

- *Banković and Others v. Belgium and 16 Other Contracting States* (did not address specifically the destruction of property, but relevant to the present discourse): the application was brought by six people living in Belgrade, Serbia against 17 NATO member States concerning the bombing by NATO, as part of its campaign of air strikes during the Kosovo conflict, of the Serbian Radio-Television headquarters in Belgrade which caused damage to the building and several deaths. The Court declared the application inadmissible, finding that while State jurisdiction was, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. The then Federal Republic of Yugoslavia clearly did not fall within that legal space of the States-Respondents.

2. Importantly, the Court based its findings exclusively on the European Convention of Human Rights and Fundamental Freedoms ("Convention") without any (or with very little) heed to the norms and principles of humanitarian international law ("HIL"), which could inform the Court on how the human rights law, predominantly designed for the peacetime application, should be applied in the context of armed conflicts. This differs sharply, from the approach, taken by Inter-American Commission of Human Rights, which in *Abella v. Argentine*, concerning attacks that took place at military barracks in La Tablada (Argentina) which gave rise to a combat between the attackers and Argentinean military forces that lasted for more than 30 hours, found that "the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance"

3. If the application of HIL was unlikely to significantly alter the outcome in *Cyprus v. Turkey* and *Sargsyan*, it, in particular the notions of "military objective", "acceptable collateral or incidental damage", could influence the findings in *Orhan* and *Esmukhambetov* and in all probability would deliver an opposite result in *Banković*.

4. The present armed conflict in the Eastern Ukraine between the Ukrainian forces on the one side and the Russian forces and Russia-backed insurgents, may force the Court to reconsider its approach of strict delimitation between Convention and HIL. This conflict has characteristics of both the internal and international conflict with clear front line, partitioning the forces, with constant shelling of the opponent's territory, each of the parties to the conflict being a party to the Convention (given that the Court would recognise the Russian Federation's effective overall control of the

insurgents' held territory of Ukraine, which in view of the current case-law does one may reasonably expect). Moreover, the development of HIL, exhibited by, inter alia, ICTY findings in the Tadic case, show the gradual withering away of the border between international and internal conflicts for the purpose of the rights of non-combatants in HIL.

5. Thus, the Court's case-law in the cases related to the current conflict in the Eastern Ukraine may contribute to the development of the understanding of the interaction between the human rights and humanitarian law and deliver currently unexpected results, not easily reconciled with the standing case-law on the matter of property rights in armed conflicts.

### **THE IMPACT OF EUROPEAN COURT OF HUMAN RIGHTS' JURISPRUDENCE CONCERNING PROPERTY RIGHTS (UNDER ARTICLE 1 OF PROTOCOL 1 ECHR) ON THE RIGHTS OF IDPS IN UKRAINE**

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In February 2014, Russian Federation began a military operation to annex Ukraine's Autonomous Republic of Crimea. Following a swift occupation, on 18 March 2014, President Putin signed a bill declaring reunification of Russia with the Crimean peninsula. Subsequently, in April 2014, Russian militants and pro-Russian separatist groups occupied government buildings in Donbas and Luhansk, and proclaimed themselves to be independent of Ukraine. The war that ensued on Ukraine's eastern borderlands led to the death of at least 9,300 people, with over 21,500 injured.<sup>45</sup> Around 1,7 million people from Crimea and eastern Ukraine fled their homes and registered as internally displaced people (IDPs) in other parts of Ukraine. Not only these people lost their property, but also they experienced a number of difficulties associated with the receipt of pensions and social allowances. Currently, there are over 3,500 individual applications from Ukraine pending before the European Court of Human Rights (ECtHR), who mainly complain about damage to their property in the course of military activity.<sup>46</sup> A large number of applicants also complain about the impossibility to receive a pension and other social payments. These two categories of cases are brought under Article 1 of Protocol 1 ECHR against Ukraine, Russia or both. Under international law, Russia, which exercises de facto control over Crimea, Donbas and Luhansk is responsible for guaranteeing the human

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<sup>45</sup> PACE, 'Political consequences of the conflict in Ukraine', Doc. 14130, 31 August 2016, para 2.

<sup>46</sup> Committee on Legal Affairs and Human Rights (PACE), Report by Rapporteur Ms Marieluise Beck, AS/Jur (2016) 25, para 49.

rights of all inhabitants.<sup>47</sup> Significantly, the loss of control over territory does not absolve Ukraine of its obligation to respect human rights and it carries a number of positive obligations towards its IDPs too.<sup>48</sup>

This speech focuses on property rights as interpreted by the European Court of Human Rights, and their potential impact on the rights of IDPs in Ukraine. It is noteworthy that the term ‘property’ has autonomous interpretation under the ECHR, which includes not only movable objects and real estate, but also welfare entitlements.<sup>49</sup> First part of the speech analyses the case law of the ECtHR in relation to the loss of property of IDPs who had to flee their homes, and Part 2 deals with the jurisprudence on pensions and other welfare entitlements. Part 3 assesses how the ECtHR’s case law is likely to impact the right of Ukrainian IDPs to enjoy their property.

Part 1. Frozen Conflicts and the ECtHR’s approach to remedying displacement.

With a number of frozen conflicts rising in Europe, such as in Cyprus, Nagorno-Karabakh, Abkhazia, South Ossetia, Transnistria, and now also Eastern Ukraine, the ECtHR has a growing body of case law dealing with property rights of IDPs. In *Sargsyan v Azerbaijan*,<sup>50</sup> *Demopoulos v Turkey*<sup>51</sup> and *Chiragov v Armenia*,<sup>52</sup> the ECtHR found that respondent state has an obligation to remedy the rights of displaced people. This jurisprudence, combined with PACE Recommendation 1877(2009) on Europe’s forgotten people: protecting the human rights of long-term displaced persons, PACE Resolution 1708(2010) on Solving property issues of refugees and internally displaced persons, and CoE Committee of Ministers Recommendation Rec(2006), indicates the need for durable solutions to displacement, such as local integration at the site of displacement or return to one’s original home in safety and dignity.<sup>53</sup>

Part 2. Pension Rights and Welfare Benefits.

In 2014, to support IDPs, Cabinet of Ministers of Ukraine introduced a monthly targeted assistance to cover their living expenses, such as housing and utilities. Not only the value of payments decreased (due to increase in prices and inflation in 2015),<sup>54</sup> but also thousands of IDPs were left without any payments for a prolonged period of time, following a residence verification procedure introduced by the government of Ukraine in February 2016. Thus, in March 2016, without any prior

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<sup>47</sup> PACE, ‘Legal Remedies to Human Rights Violations on the Ukrainian territories outside the control of the Ukrainian authorities’ Doc. 14139, 26 September 2016, para 4.

<sup>48</sup> Ganna Yudkivska, ‘Territorial Jurisdiction and Positive Obligations of an Occupied State: Some Reflections on Convention’, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2825208](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2825208) (last accessed on 12.12.16).

<sup>50</sup> Application No 40167/06 (2015), paras 236-237.

<sup>51</sup> Application No 46113/99 (2010), 50 EHRR SE 14.

<sup>52</sup> Application No 13216/05 (2015).

<sup>53</sup> PACE Resolution 1708(2010) on Solving property issues of refugees and internally displaced persons, para 4.

<sup>54</sup> Nataliia Fedirko, ‘Social Protection of Migrant Workers in Ukraine: Striving towards European Standards under Crisis,’ (2015) 6(2) *Easter Journal of European Studies*, 103.

notification, payments of 600,000 IDPs were suspended.<sup>55</sup> The situation was further aggravated by a number of amendments to Cabinet of Ministers Resolutions concerning IDP registration. Thus, as of 14 March 2016, IDPs can no longer register their address at ‘non-residential premises’, forcing thousands of IDPs to re-register, if their certificates were linked to state institutions.<sup>56</sup>

The ECtHR case law suggests that cases brought by IDPs for discontinuation of payments, as well as cases submitted by persons residing in non-government controlled areas concerning the non-payment of their pensions are likely to succeed. Thus, in *Moskal v Poland*, the ECtHR ruled that legitimate concerns of the state (in the case of Ukraine to verify whether IDP status still applied to individuals) must be balanced against principles of fairness, equal treatment and individual dignity.<sup>57</sup> Furthermore, in *Pishkur v Ukraine*, the ECtHR ruled that ‘If a Contracting State has legislation in force providing for the payment of a welfare benefit as of right, whether conditional or not on the prior payment of contributions, that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for those satisfying its requirements.’<sup>58</sup> Lastly, two days ago, on 13 December 2016, the ECtHR’s found in *Belane Nagy v Hungary*<sup>59</sup> that disproportionate refusal of the government to grant a disability pension violated Article 1 of Protocol 1. The court found that the applicant belonged to a vulnerable group and had had no other significant source of income.

In light of this jurisprudence, it is likely that the ECtHR may find breach of property rights of IDPs.

Part 3. Impact of the ECtHR’s jurisprudence on the rights of IDPs in Ukraine.

Following *Sargsyan v Azerbaijan* and *Chiragov v Armenia*, it is likely that the ECtHR will reiterate the importance of offering an effective remedy to displaced people. The established case law suggest the need for a domestic institution with a special mandate to offer appropriate remedies to IDPs in relation to their lost property.<sup>60</sup>

As to social benefit payments, following the *Nagy v Hungary* case, Ukraine may need to establish a clear and transparent procedure for the verification of IDP status and the suspension of payments to persons who are no longer displaced; furthermore, any discontinuation of payments should only take place with prior notification to the persons concerned and follow necessary legal safeguards.

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<sup>55</sup> Commissioner for Human Rights of the Council of Europe, Report of 11 July 2016, CommDH(2016)27, para 57.

<sup>56</sup> *Ibid*, para 58.

<sup>57</sup> *Moskal v Poland* (Application No 10373/05), Judgment of 15 September 2009, paras 49-51, 61 and 64.

<sup>58</sup> *Pishkur v Ukraine*, Judgment of 7 February 2014, para 41.

<sup>59</sup> *Belane Nagy v Hungary* (Application No.53080/13), Grand Chamber Judgment of 13 December 2016.

<sup>60</sup> Nasia Hadjigeorgiou, ‘Remedying Displacement in Frozen Conflicts: Lessons from the Case of Cyprus’ (2016) Cambridge Yearbook of European Legal Studies

## HUMAN RIGHTS AND TIMES OF CRISIS: JUSTICE, TERROR AND THE POLITICAL PSYCHOLOGY OF THE BODY

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In debating the design of a justice system adequate to the needs of a community following a period of conflict, it is important to establish the legal connections between times of conflict and times of peace. Both continuities and breaks must be recognised. It is not adequate to describe times of conflict in the apocalyptic vocabulary of ‘exception’ as in the writings of Schmitt and more recently of Agamben. Especially in the conflicts of the twenty-first century, civil violence, the international use or threat of force and the activities of non-state actors, both collectively and individually, intermingle. The time of conflict and the time after conflict have in common more than what distinguishes them. One aspect of this is that when large-scale conflict recedes the threat or the actuality of violence continues. The coordinates of this situation are clarified by considering the nature of terrorism within this context since violence directed at civilian populations, for political or ideological purposes, occurs both in circumstances of conflict and in the aftermath of such conflicts.

*A Vocabulary for Crisis: Deleuze, Agamben and International Legal Theory/*

Conceptual analysis of the role played by crisis in law, including in international law, has been dominated for several decades by reference to the Schmittian tradition especially as more recently articulated and developed by Agamben. Yet Agamben’s treatment of crisis and of the so-called ‘State of Exception’ is deeply flawed. Whatever the merits of Schmitt’s complex and nuanced analysis, the effect of Agamben’s development and application of it to more recent circumstances, especially as further relayed by scholars of international legal theory, has been to paralyse critical and constructive conceptual engagement with contemporary crises. For example, the challenges posed by contemporary terrorism, by massive refugee flows into Europe, and by the state-based techniques of surveillance and control that to some extent react to these situations (and in other respects, contribute to their maintenance and exacerbation), call for fresh thinking that brackets the somewhat mystical/theological dogmatism of the Agamben contribution.

Here the contribution of French philosopher Gilles Deleuze may well be a breath of fresh air. Already subject to some preliminary and limited interrogation in the literature of international legal theory, for example in relation to human rights and to sovereignty and the political, the vocabulary and ethical momentum of Deleuze offers important alternative conceptual frameworks. In relation to the nature of democracy in the contemporary world, itself undoubtedly at a point of crisis in many respects, there is also an important convergence with the writings of political philosopher Jacques Ranciere. This speech will among other objectives, investigate the value of these

sources of ideas and of conceptual vocabulary as alternatives to the deeply conservative and inward-looking ruminations of the Agamben school.

*'At Their Disposal': Terrorism.*

It is sometimes argued that contemporary terrorism is in some sense qualitatively different from that of past decades and previous centuries. Iconic events of the current century are commonly taken to represent watersheds in the geopolitical landscape of terror and state response to terror. It is certainly the case that the continuing advancement in technology and access to that technology has provided non-state actors opportunities for communication, planning and the broadcasting of information unimagined in the twentieth century. It also cannot be denied that geopolitical events continue to generate new complexities of conflict and ideology. But terrorism in its essentials remains the same phenomenon that the world has long known. That which is special to the terrorism of the twenty-first century is its ubiquity and its role in times of civil conflict. Even so those differences are dwarfed by that which it shares with the terrorism of the twentieth such as the activities of the IRA, the Tamil Tigers, the Red Army Fraktion, the Stern Gang, and so on. Members of such groups, as well as individuals presenting as unaligned, act in a manner which treats the bodies and thus the lives of others as at their disposal. In so doing they act in the way that the state acts when subjecting a person to state-sponsored violence, including the death penalty. And as with the state there is a pervasive discourse of the delivery of justice.

Just as important, what is central to terrorism is also central to two other scourges of humanity: torture and slavery. In each case the body and the life or death of the victim is at the disposal of the perpetrator. While all three of these evils can be deployed by states as well as by non-state actors – and by criminal gangs as well as by politically motivated gangs – the significance of the state as perpetrator varies across the three scourges as will be discussed in more detail. Again, therefore, while differences need to be given due weight, it is communalities across instances or categories (such as the state versus non-state actors as perpetrator) that should be given central attention. The connections and communalities help us to discern the key processes in complex scenarios. Terrorism is akin to torture and in important respects to slavery. What they share is the circumstance of one person's life and death being at the disposal of another. One outcome of this argument is that debate over the definition of terrorism may be resolved by setting aside if only temporarily the questions of political motivation and of political legitimacy (the 'freedom fighter' problem and the state-sponsored violence question). It may even be the case that debate over an international criminal tribunal convention regarding terrorism may be assisted because if the key 'mischief' of terrorism is the same as in torture then the robust enforcement of an internationally agreed torture prohibition may contribute significantly to the response to terrorism itself.

*Executive Power.*

The response might be made that the bodies of citizens are in any case always (“always-already”?) at the disposal of the State (the executive). If this response is valid then the argument suggested above is a non-starter. Such a response might be articulated in Marxist or Foucauldian terms or, within a legal theory setting, in Schmittian or Agambenian terms. The claim would be that to focus on individual actors or groups of actors as constituting the key ‘their’ of the ‘at their disposal’ would be to fall into a trap of liberal ideology. To focus our attention on the ‘bad apples’ is to be taken in by the system. This corrosive critique would apply just as much to the suggestions above concerning State culpability as it would to suggestions about non-state actors, because the state as perpetrator in the above is understood as such, that is to say as perpetrator. An articulation in terms of perpetrators, acts and victims presupposes that some people, some of the time, are neither perpetrators nor victims, that is to say it presupposes some baseline or horizon of functional freedom from such persecution. The absence of ongoing persecution, however temporary or fragile, must be allowed to exist just as much within the theoretical landscape as the presence of persecution. In effect this represents no more or less than an orthodox (liberal) attitude to criminal law, in the sense that if state sovereignty is thought of as inherently and criminally violent then there is no such thing as criminality. To put it another way, any legitimacy in the appeal to a state of emergency (for example as justifying temporary compromise over human rights) is undermined by the argument that emergency is ever-present; but much more is undermined by such a claim.

It might be counter-claimed, in response, that we are all structurally at the disposal of entities or forces way beyond the ken of liberal individualism. Our bodies are perhaps, in a very general sense, ‘at the disposal of Law.’ But the executive is not to be thought of as absolutely untrammelled. The reach and the claims to sovereignty of the executive is always contested or at least vulnerable to contestation however absurd the effort, and however slight the chance of success of such contestation. The calamitous, apocalyptic or defeatist discourse of a ubiquitous Schmittian decisionism merely serves to obstruct what little avenues of resistance actually offer themselves.

The design of post-conflict justice, including the role to be played by collective human rights protections – for surely all significant human rights challenges relate to communities not to individuals as such – must take account of these conceptual matters. An era after conflict is not *status quo ante bellum*. Much has changed for ever even while much remains the same. It is the task of the law to both recognise and respond to such complexity – our co-citizens deserve no less.

