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**"Nuremberg II" – an International Tribunal for the Trial of Russian "Major War Criminals"**

# I. "Nuremberg I" – the Trial of the German "Major War Criminals"

## I.1 The Statute of the International Military Tribunal

After the military defeat of the “Greater German Reich”, the Allied victorious powers tried the German "major war criminals" in Nuremberg. The "supreme major war criminal", Adolf Hitler, had understandably avoided his certain sentence of death by hanging – and the probable display of his body on the Red Square in Moscow – by committing suicide.<sup>1</sup> The "Nuremberg Trials" set standards for the further development of international criminal law.

The Statute of the International Military Tribunal (Charter of the Nuremberg Tribunal, 1946) states:

"The Tribunal established by the Agreement referred to in Article 1 ("London Agreement") for the trial of the principal war criminals of the States belonging to the European Axis shall have the right to try all persons who, in the interests of those States, have committed, individually or as members of an organisation or group, any of the following crimes; the following acts, or any one of them, shall constitute crimes for the trial of which the Tribunal shall have jurisdiction:

- a) Crimes against peace,
- b) War crimes,
- c) Crimes against humanity.

The perpetrator of such crimes shall be personally responsible."

The "Nuremberg Judgment" is considered a legal precedent for the condemnation of wars of aggression. According to Article 6a of the Statute of the Nuremberg International Military Tribunal, as a "crime against peace", (as the "crime of aggression" was still called at Nuremberg), was considered the "planning, preparation, initiation or conduct of a war of aggression or of a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy to carry out any of the foregoing acts".

The punishability of wars of aggression was the main point of contention among the Allies in the preparation of the Nuremberg Trials. Their own wars of aggression they exempted from punishability through a restrictive clause in the introductory sentence of Article 6, which only considered the states of the "Axis Powers". His own war of aggression against Ukraine three quarters of a century later, Russian President Putin still exempts from punishability – albeit without explicitly referring to this clause.

Wars of aggression had already been outlawed in the Treaty of Paris of 27 August 1928 ("Briand-Kellogg Pact"). What was new was their punishability. Previously, not individuals but

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<sup>1</sup> Mussolini's fate may have led him to order the burning of his body. The body of Benito Mussolini (and that of his mistress Clara Petacci and other fascists) was displayed – hung by the feet – at a petrol station in Piazzale Loreto in Milan on 29 April 1945. Mussolini had been captured together with his mistress Clara Petacci in Giuliano di Mezzegra on Lake Como on 28 April 1945 by the communist (partisan) brigade Giuseppe Garibaldi and shot – without trial. An execution by firing squad was staged after the killing in order to deceive the Western Allies, who had attached importance to a trial (à la Nuremberg).

only states were obliged to refrain from acts of aggression in accordance with their international treaties.

The creation of a new special criminal court to try Russia's major war criminals, a "Nuremberg II", is being pursued by the West; if a trial before a special tribunal should actually take place, it would be in absentia of the primary accused: The prerequisite for a transfer of Vladimir Putin to a "Special Tribunal on the Russian Crime of Aggression against Ukraine" would be a military defeat of the Russian Federation on Russian soil, which is an unrealistic idea because of Russia's arsenal of nuclear weapons. Putin's extradition, even if he should survive an eventual removal from the Moscow Kremlin, is not to be expected – unlike in the case of Slobodan Milošević<sup>2</sup>; the (acting) President of the "Federal Republic of Yugoslavia"<sup>3</sup> was extradited in 2001 by then Prime Minister Zoran Đinđić to the International Criminal Court (ICC) in The Hague, where he was charged with war crimes. (The trial against him began in 2002; in 2006 Milošević died – before a verdict was reached).

## **I.2 The four "core crimes" of the Rome Statute of the International Criminal Court**

Since 2002, the International Criminal Court (ICC; French: Cour pénale internationale / CPI) has been prosecuting four "core international crimes", as defined in Articles 6-8bis of the ICC Statute ("Rome Statute"):

- a) Crimes of aggression,
- b) war crimes,
- c) Genocide,
- d) crimes against humanity.

However, the ICC cannot exercise its jurisdiction in the case of Russia, because the Russian Federation is not a state party; it has not ratified the Rome Statute (nor has Ukraine, for that matter). For crimes of aggression, the ICC only has jurisdiction if a state party is concerned. An exception to this is made, if the UN Security Council mandates the ICC to investigate. In the case of Russian aggression against Ukraine, there will be no Security Council mandate because the Russian Federation would certainly veto it.

However, the ICC has jurisdiction when the effects of a crime of aggression extend to the territory of a state that has recognised the jurisdiction of the ICC. Ukraine has not ratified the Rome Statute; however, in the case of the annexation of Crimea by the Russian Federation, it has recognised the jurisdiction of the ICC on an "ad hoc" basis under Article 12, paragraph 3. Ukraine could thus formally recognise the exercise of international criminal jurisdiction for certain crimes on its territory.

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<sup>2</sup> In 1999, in connection with the Kosovo war, Slobodan Milošević became the first head of state to be indicted for genocide by a war crimes tribunal while still in office (the indictment was later extended to include the 1991-1995 Yugoslav wars). After Milošević resigned as Yugoslav President on 5 October 2000 due to mass demonstrations, he was arrested at the instigation of Serbian Prime Minister Zoran Đinđić in 2001 and extradited to the UN War Crimes Tribunal in The Hague.

<sup>3</sup> Since 1992 "Savezna Republika Jugoslavija", "Serbia and Montenegro", "Rest of Yugoslavia".

Although not the "crime of aggression", but the other three "core crimes" – "genocide", "war crimes" and "crimes against humanity" – can be charged not only before the International Criminal Court, but also before national courts.

According to Prof. Stefanie Bock (Philipps-University at Marburg), in the case of war crimes, genocide and crimes against humanity state responsibility and criminal responsibility of individuals can be separated – at least formally.<sup>4</sup>

### **I.2.1 "Crime of aggression" – the "supreme international crime"**

A crime of aggression ("crime against peace" in the Nuremberg Trial) is the cause of all other crimes. The International Military Tribunal's statement of reasons for its judgement reads: "To initiate a war of aggression [...] is not only an international crime; it is the supreme international crime differing from other war crimes, in that it contains within itself the accumulated evil of the whole".<sup>5</sup>

On 11 June 2010, the States Parties to the International Criminal Court agreed on a definition of the crime of aggression in Kampala, Uganda. It was a surprising compromise between the Permanent Members of the UN Security Council, who so far claimed the sole right to decide on the existence of aggression, and the remaining states, who demanded an independent ICC. The parties to the Rome Statute decided in Kampala to activate the ICC's jurisdiction over a "crime of aggression" as soon as possible, which finally happened on 17 July 2018 – 20 years after the adoption of the "Rome Statute" in 1998, in which the "crime of aggression" had remained undefined.

However, the jurisdiction of the ICC was considerably weakened by a controversial "threshold clause" ("Kampala Compromise"): The "Kampala Compromise" distinguishes between an "act of aggression contrary to international law" and the "crime of aggression". Accordingly, not every violation of the general prohibition of the use of force (UN Charter, Article 2, No. 4) entails individual responsibility. Only qualitatively and quantitatively serious violations of international law are relevant under criminal law, which constitute a crime only if there is a serious manifest violation of the UN Charter. In order to be classified as a "crime of aggression", the relevant acts listed in Art. 8bis, paragraph 1, must "by their nature, gravity and extent constitute a manifest violation of the Charter of the United Nations (paragraph 2).

As a consequence of this threshold clause, the "grey area" under international law (such as "humanitarian intervention" and "preventive self-defence") is not covered. "The attack on Ukraine, however, is likely to meet the high criminal law requirements of the threshold clause, judges Stefanie Bock."<sup>6</sup>

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<sup>4</sup> Stefanie Bock: Potenziale und Grenzen. Das Völkerstrafrecht im Ukrainekrieg (Potential and Limits. International Criminal Law in the Ukraine War), in: OSTEUROPA, 72. Jg., 1-3 / 2022, S. 87-99. Stefanie Bock holds the professorship for Criminal Law, Criminal Procedure Law, International Criminal Law and Comparative Law at the Philipps-University at Marburg.

<sup>5</sup> Kirsten Sellars: "Crimes against International Peace" and International Law, Cambridge (Cambridge University Press) 2013, p. 165.

<sup>6</sup> Stefanie Bock: Potenziale und Grenzen. Das Völkerstrafrecht im Ukrainekrieg, in: OSTEUROPA, 72. Jg., 1-3 / 2022, pp. 87-99.

### **I.2.2 "War crimes" – serious violations of international humanitarian law**

Legally, the term "war crime" is defined as a serious violation of "International Humanitarian Law" (IHL), which in turn is decisively determined by the "Hague Convention on Land Warfare" of 1907 and by the four "Geneva Conventions" of 1949 (Additional Protocols I to III of 1977 and 2005). International humanitarian law comprises the rules of international law of war ("ius in bello", law in war, law of warfare). Its aim is to protect civilians, residential buildings, civilian infrastructure as well as the natural environment from the effects of hostilities in a war or an international armed conflict.

A criminal act may be considered a war crime if committed intentionally (Art. 8, para. 2 lit. A, IV) of the ICC Statute.

Para. 32, para. 1.1 of the Statute recognises „mistake of fact excluding intent“, which Russia does not invoke at all. There is no mistake of fact in the killing of fugitives and the shelling of residential buildings – typical war crimes committed by the Russian army in Ukraine.

### **I.2.3 "Genocide" – high requirements under international law**

The crime of genocide is defined in Art. II of the "Convention on the Prevention and Punishment of the Crime of Genocide" of the United Nations of 9 January 1948, and standardised in the same wording in Art. 6 of the Rome Statute of 17 June 1989. Russia and Ukraine signed the ICC Statute in 2000 but did not ratify it; however, both states have submitted to the Genocide Convention.

In order to be classified as genocide under international law, a situation must meet high standards. Article II of the Genocide Convention defines five acts as genocide if they are committed "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such", among them

- the killing of members of a group;
- the infliction of serious bodily or mental harm on members of a group;
- the intentional imposition on a group of conditions of life likely to bring about its physical destruction in whole or in part.

However, proving intent to cause total or partial destruction is difficult.<sup>7</sup>

In a claim based on the Genocide Convention, the International Court of Justice / ICJ has jurisdiction only over genocide, not war crimes or crimes against humanity. Jurisdiction over these "core crimes" lies with the International Criminal Court (ICC).

### **I.2.4 "Crimes against Humanity**

<sup>7</sup> Douglas Irvin-Erickson, Is Russia Committing Genocide in Ukraine? *Opinio Juris*, 21. April 2022, <<https://opiniojuris.org/2022/04/21/is-russia-committing-genocide-in-ukraine/>>.

Jonathan Leader Maynard, Is Genocide Occurring in Ukraine? An Expert Explainer on Indicators and Assessments, in: *Just Security*, 6. April 2022, <<https://www.justsecurity.org/80998/is-genocide-occurring-in-ukraine-an-expert-explainer-on-indicatorsand-assessments/>>.

Adam Oler, Portending Genocide in Ukraine? *Articles of War*, Lieber Institute at West Point, 21. März 2022, <<https://lieber.westpoint.edu/portending-genocide-ukraine/>>.

If it cannot be proven that the physical-biological destruction of a group was intended, the legal option remains to classify the act in question as a "crime against humanity" according to Art. 7 of the Rome Statute – also a "core crime". The international criminal offence "crime against humanity" means a systematic attack against a civilian population – first laid down by international treaty in 1945 in the "London Statute" for the International Military Tribunal. Today, Article 7 of the Rome Statute of the International Criminal Court is the most important treaty-based legal source for crimes against humanity.

### ***Flight, expulsion and abduction, deportation and "ethnic cleansing"***

When people flee, they do not leave their homes by order of the authorities, but escape a – possibly life-threatening – danger. They are not directly forced to leave their homes, but indirectly. If refugees or expellees are prevented from returning to their homes, their situation is no longer different from that of displaced persons.

Expulsion is migration by force or by threat of force, mostly of religious or ethnic minorities, who are forced to leave their region of origin. It includes forced, permanent flight, expulsion and forced resettlement from a state or during its reconstruction or transformation. Military actions against cities that trigger refugee flows fulfil the fact of expulsion. The term "expulsion" is neither legally nor historically clearly defined; for a long time it was a political term of struggle.

This distinguishes expulsion from "deportation", which refers to forced relocations within an area of rule. It is often difficult to distinguish it from other forms of migration. Deportation means the displacement of entire ethnic groups by state force to far-flung areas for long-term or lifelong forced residence. The historian Philipp Ther from the University of Vienna argues for the following definition: "Expulsion is a forced form of migration across state borders. Those affected by it are forced to leave their homes under direct or indirect duress. Expulsion is irreversible and final. According to Philipp Ther, deportation differs from expulsion in that a later return is not excluded. Moreover, it always takes place within the territory of a state."<sup>8</sup>

The geographer Peter Meusburger equates expulsion with ethnic cleansing and defines it as "the removal of a population from its homeland across the borders of the expelling state by force or other coercive means".

Historians Stefan Troebst and K. Erik Franzen define expulsion "as the forced population movement, involving the use or at least the threat of force, of people (mostly from religious or ethnic minorities) who are forced to leave their region of origin." This also includes flight, provided it is permanent and forced by violence or the threat of violence, and the expulsion or resettlement of a population group or minority from a state. Historian and migration researcher

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<sup>8</sup> Philipp Ther: Deutsche und polnische Vertriebene. Gesellschaft und Vertriebenenpolitik in der SBZ/DDR und in Polen 1945 – 1956 (German and Polish displaced persons. Society and expellee policy in the SBZ/GDR and in Poland), Göttingen 1998, p. 99. Philipp Ther is founder of the Research Center for the History of Transformations (RECET).



Jochen Oltmer defines it more succinctly: expulsion is a "spatial mobilisation through violence without measures for resettlement".<sup>9</sup>

Since, in addition to massive persecution, there is political and social discrimination or purely economic pressure of various degrees, it is often difficult to distinguish expulsion from voluntary emigration or even voluntary large-scale relocation within a state without proof of expulsion or threat of violence. There is no consensus in research on how to clearly distinguish between flight and forced migration.<sup>10</sup>

The term "ethnic cleansing" is also not a clearly defined legal term under international law, but a political term – a euphemistic term for deportation, expulsion and forcible resettlement of an ethnic group from its traditional settlement area in favour of another ethnic group.

State-enforced resettlement has also often served the purpose of mixing different population groups in empires in order to prevent separatist activities.

## **II. Russia's four "core crimes" under international law**

### **II.1 Russia's crimes of aggression**

#### ***Russia's crime of aggression in the UN Security Council and the UN General Assembly***

Russian President Putin has committed the most serious of all crimes under international law, the crime of aggression (Art 5, para. 1, letter d) of the Rome Statute of the International Court of Justice of 17 July 1998, Otto Luchterhand states. "The criminal invasion of Ukraine is [...] the cause of all further crimes under international law committed since then by the Russian armed forces and their political and military leadership on all fronts".<sup>11</sup>

A resolution opposing Russia's invasion of Ukraine failed in the UN Security Council due to the veto of the Russian Federation. In the vote in the UN Security Council on 25 February 2022, 11 of the 15 members voted in favour, 3 against; China abstained. Russia prevented the adoption with its veto.

The UN Security Council called the United Nations General Assembly ("UNGA") for an Emergency Special Session, which Russia was unable to prevent. The General Assembly condemned the Russian war of aggression in its resolution A/RES/ES-11/1 of 2 March 2022 and in resolution A/ES/-11/L.3 of 24 March 2022 with the majority of 141 votes, which was far above the quorum (129 votes). But the decision was not binding, as resolutions of the General Assembly of all UN member states – unlike resolutions of the 15-member Security Council – are not binding under international law.

#### ***Ukraine's right to "self-defence" and "collective self-defence"***

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<sup>9</sup> Jochen Oltmer: Migration. Geschichte und Zukunft der Gegenwart (History and Future of the Present), Darmstadt 2020, p. 35. Jochen Oltmer is Professor of Migration History at the Institute for Migration Research and Intercultural Studies (IMIS) at the History Department of the University of Osnabrück.

<sup>10</sup> Ibid

<sup>11</sup> Otto Luchterhand: Völkermord in Mariupol?. Russlands Kriegsführung in der Ukraine. In: OSTEUROPA, 72. Jg., 1-3 /2022, S. 65-85. O. Luchterhand is Prof. em. for Public Law and Eastern Law at the University of Hamburg.

According to Art. 51 of the United Nations Charter, the Ukraine under attack has the right to self-defence.<sup>12</sup>

According to Christian Tomuschat, legitimate self-defence can be organised as "collective self-defence"; third states are also allowed to come to the rescue.<sup>13</sup> "Other states are allowed to assist Ukraine against the attack – even without a UN mandate," confirmed the international law expert Matthias Herdegen in a (written) interview with the legal magazine "Legal Tribune Online" / LTO on 01.03.2022.<sup>14</sup> By merely supplying weapons or financial support to an attacked state, a country does not become a party to the conflict. The Russian Federation is also not allowed to react with force to aid deliveries from other states (against ships or aircraft, for example), Herdegen explained.

When asked by Dr Franziska Kring and Hasso Suliak, Legal Tribune Online / LTO, what possibilities the United Nations Charter provides for reacting to the violation of the prohibition of the use of force according to Article 2 No. 4 of the UN Charter by Russia's President Putin, Prof. Herdegen replied: "The invasion of Ukraine by the Russian Federation establishes with rare clarity Ukraine's right of self-defence according to Article 51 of the UN Charter. In this context, other states may also provide support in the form of arms deliveries. At the same time, other states may provide military assistance to Ukraine. The UN Charter speaks here of the right to "collective self-defence" – *including support by armed forces* (italics by the author).

A military intervention by other states in the case of the Russian war of aggression on Ukraine would also be possible without a mandate from the Security Council, Herdegen confirms in response to the interviewers' question: "Yes, authorisation by the Security Council is not required for this. However, the Western states have not made use of this possibility so far for political reasons, so as not to escalate the conflict. The risks of military intervention by the West are difficult to assess. This is also due to the fact that the current Russian regime is "leaving the paths of customary rationality on which we could rely even during the Cold War with the old men in the Kremlin". This is shown in particular by the Russian president's undisguised threat of

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<sup>12</sup> In the view of the German Federal Government too, Ukraine is exercising its right to self-defence; see: Ukraine's right to self-defence, Auswärtiges/Antwort - Deutscher Bundestag, 24.06.2022 (hib 326/2022); <[https://www.bundestag.de/presse/hib/kurzmeldungen-900650#:~:text=Ausw%C3%A4rtiges%2FAntwort%20-%2024.06.2022%20\(hib%20](https://www.bundestag.de/presse/hib/kurzmeldungen-900650#:~:text=Ausw%C3%A4rtiges%2FAntwort%20-%2024.06.2022%20(hib%20)>.

<sup>13</sup> Christian Tomuschat: Russia's Invasion of Ukraine. Der Krieg und die Grundfragen des Rechts (War and the basic questions of law), in: Osteuropa, 72nd Jg., 1-3 / 2022, pp. 33-50. Christian Tomuschat, Prof. em. of Public Law, International and European Law, Humboldt University Berlin.

<sup>14</sup> "Militärischer Beistand auch ohne UN-Resolution möglich" (War and the basic questions of law), (written) interview by Dr. Franziska Kring and Hasso Suliak, Legal Tribune Online / LTO, with Matthias Herdegen, 01.03.2022, Legal Tribune Online / LTO; <<https://www.lto.de/recht/hintergruende/h/russland-ukraine-krieg-intervention-gewaltverbot-selbstverteidigung-un-charta/>>. Prof. Dr. DDr. h.c.. Matthias Herdegen is Director of the Institute for Public Law and Director of the Institute for International Law at the University of Bonn. He is also a member of the Center for European Economic Law and Director at the Center for International Security and Governance at the University of Bonn. In 2019, he published the work "The Struggle for World Order". Among other things, the book deals with Russia's imperial drive and the expansion of its spheres of influence.

the nuclear option and likewise his willingness to risk Russia's economic collapse and thus also the shaking of his own regime.

However, Herdegen considers targeted strikes on Russian territory to be "completely remote"; instead, he recommends "confronting the Russian regime with individual responsibility for the crime of aggression and war crimes under international criminal law".

"Remote" is certainly the invasion of Russia by Ukrainian ground troops – but not the Ukrainian strikes on Russian missile launch pads on Russian territory, from which homes in Ukrainian cities and Ukraine's civilian infrastructure are destroyed. However, the "confrontation with individual responsibility" is certainly called for, but will not force Russia to withdraw its troops from Ukraine.

## **II.2 Russian War Crimes in Ukraine – Possibilities of International Prosecution**

Who was ultimately responsible for the "crimes of the Wehrmacht"<sup>15</sup> ("Dimensions of the War of Annihilation 1941 to 1944"), as the title of an exhibition by the Hamburg Institute for Social Research reads, is beyond doubt. Hitler himself evaded his responsibility by committing suicide. Of the 24 accused "chief culprits", 12 were sentenced to death by hanging in Nuremberg in 1945 after almost a year of trial.<sup>16</sup>

While Hitler was beyond any doubt the "chief instigator" of all crimes committed by members of German units deployed in the Soviet Union (Sondereinsatzgruppen, Waffen-SS, but also the Wehrmacht), Putin is – also beyond any doubt – personally directly responsible for the aggression against Ukraine – and therefore the "supreme war criminal"; but for the misdeeds of the Russian army in the occupied localities he is only indirectly responsible – through acquiescence and encouragement. Putin not only denies the crimes of his soldiers in Ukraine, but also awards them for them: The unit of the regular Russian army involved in the atrocities in Buča has been identified: it is the 64th motorised rifle brigade of the 35th Army (64-otdelnaja motostrelkovaja brigada), nickname "Mlečnik" (a mushroom, Lat. Lactarius), troop unit 51460, stationed in the village of Knjaze-Volkonskoje in the Eastern Military District in Chabarovsk oblast. This unit was awarded the honorary designation "Guard Unit" ("gvardejskoj") by the President of the Russian Federation Vladimir Putin for its war crimes – officially "for heroism [...] in combat operations to protect the Fatherland and state interests". Putin, by ukaz of 19

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<sup>15</sup> "Wehrmacht Exhibition" is the name given to two travelling exhibitions by the Hamburg Institute for Social Research, which were on display from 1995 to 1999 and from 2001 to 2004. The first was entitled "Vernichtungskrieg" (War of Annihilation). Crimes of the Wehrmacht 1941 to 1944, the second "Crimes of the Wehrmacht. Dimensions of the War of Annihilation 1941-1944". Both made the crimes of the Wehrmacht during the National Socialist era, especially in the war against the Soviet Union, known to a broad public and triggered vehement controversy.

<sup>16</sup> On 30 September and 1 Oktober 1946.

December 2022, grants land in Crimea to veterans and relatives of fallen Russian soldiers – "for merits in the war" (against Ukraine).<sup>17</sup>

"According to international criminal law, the commanders of the Russian armed forces, headed by President Putin, are guilty of serious war crimes," Christian Tomuschat judges.<sup>18</sup> Since an international arrest warrant against the Russian leadership cannot be executed in reality, it would only have symbolic value anyway, if it were issued. But the actors hierarchically involved below this level are not immune from prosecution in The Hague; they can be prosecuted for "acts of participation", i.e. instigation and support, committed in a non-contracting state.

Prosecution for war crimes is also possible before national courts. Even Russian generals can be prosecuted before national courts of other states – "as far as they can be apprehended" (Tomuschat). In Germany, the International Criminal Code (Völkerstrafgesetzbuch, VStGB) regulates crimes against international law – adapting German national criminal law to the regulations of the Rome Statute of the ICC. The USA stated that it would document the war crimes of which it had "very credible reports".<sup>19</sup> US Attorney General Merrick Garland said on a trip to Kiev that the US would set up a team of investigators. More than 30 prosecutors and justice ministers met in The Hague on 14 July 2022 at the invitation of the Netherlands, together with the International Criminal Court, to discuss ways to prosecute war crimes in Ukraine.<sup>20</sup>

### ***Russia's attack on the Ukrainian civilian population***

Article 8 of the ICC Statute – war crimes – includes violations of the rules of warfare (*ius in bello*), according to which military force may only be used against combatants and military objects.

The war criminal in the Kremlin is systematically waging war against the Ukrainian civilian population.<sup>21</sup> The daily death toll is not "collateral damage"; the attacks on civilian targets are carried out, among other things, with precisely guided cruise missiles. Moscow's regular claims following these attacks, that these missiles had targeted military objects, are lies.

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<sup>17</sup> Roman Petrenko: Putin rešil darit' "gerojam vojny" zemlju v Krymu – SMI; (Quelle: "Ostorožno, novosti"); in: Ukrainskaja pravda (Russ. Ausgabe), 19.12.2022; <<https://www.pravda.com.ua/rus/news/2022/12/19/7381410/>>.

<sup>18</sup> Christian Tomuschat: Russlands Überfall auf die Ukraine. Der Krieg und die Grundfragen des Rechts, in: Osteuropa, 72. Jg., 1-3 / 2022, S. 33-50.

<sup>19</sup> The US government has evidence proving that the Kremlin decided to deliberately destroy civilian infrastructure in Ukraine. There is a willingness in the Biden administration to "share" this evidence with the International Criminal Court. The Department of Defense blocks the sharing of this information; it fears setting a precedent that will open the way for the prosecution of American war criminals.

<sup>20</sup> Tanja Koch: Ukraine-Krieg: Konferenz berät über Strafverfolgung von Kriegsverbrechen (War in Ukraine: Conference discusses prosecution of war crimes), in: Frankfurter Rundschau, 14.07.2022; <<https://www.fr.de/politik/ukraine-krieg-konferenz-straftverfolgung-kriegsverbrechen-russland-niederlande-91666520.html>>.

<sup>21</sup> Amnesty International, Report: War crimes in northwest areas of Kyiv Oblast, 6. Mai 2022, <<https://www.amnesty.de/sites/default/files/2022-05/Amnesty-Bericht-Ukraine-Russland-Kriegsverbrechen-Mai2022.pdf>>.

War crimes are an essential part of Russian warfare. The targeted destruction of Ukrainian cities and the burial of their inhabitants under the rubble is part of the Russian "strategy". War crimes committed by Russian soldiers – systematically and individually, tolerated or ordered by officers – are part of Russian military "craft". Murder and rape, robbery and looting are part of everyday military life in the Russian army in Ukraine. Presumably, envy of the (relative) prosperity that Russian soldiers from economically underdeveloped areas of Russia find in Ukrainian localities also plays a motivating role in their raids. The Ukrainian police found the bodies of 1314 Ukrainian civilians murdered by Russian soldiers in Kyiv oblast alone. In the towns of Buča, Irpin', Borodjanka and others, the Russian soldiery raged like lansquenets in the Thirty Years' War. There is evidence of rape and murder of parents in front of their children, violence against women and girls aged between 8 and 80.

At the beginning of the war, whenever the Russian army hit civilian objects with missiles (such as the maternity clinic in Mariupol'), the Russian government claimed that the civilian objects in question had been used by Ukraine for military purposes – a lie like all Russian protestations of innocence. From the Russian side, news about the bombing of the maternity clinic was initially dismissed as "fake news". Later, the Russian foreign minister admitted the Russian bombing, but claimed that the clinic had been used by the National Guard unit "Azov". On 29 March, 70 people were deported from the clinic to Russia.<sup>22</sup>

However, according to Stefanie Bock, targeted attacks on civilians and civilian objects are punishable under international law even if the civilians in question have lost their status under international humanitarian law, i.e. if civilians take part in combat operations, or if civilian objects are misappropriated for military tasks.<sup>23</sup>

According to Art. 1.8 of the Fourth Geneva Convention ("GC IV"), civilian hospitals may not be attacked under any circumstances. Civilian "collateral damage" (in the cynical terminology of the "Pentagon") is accepted by the law of war, provided it is not disproportionately high – for which, however, there is no objective standard.

### ***Destruction of civilian infrastructure***

"We see that President Putin is trying to use winter as a weapon of war (against civilians)," NATO Secretary General Jens Stoltenberg said on the sidelines of consultations with the foreign ministers of the 30 member states in Bucharest on 29 November 2022.

In the joint press conference with Ukrainian President Volodymyr Zelensky in Washington on 21 December 2022, US President Biden echoed Stoltenberg's assessment and also spoke of Russia's use of "winter as a weapon of war" against civilians.

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<sup>22</sup> Focus online, 03.04.2022; [https://www.focus.de/politik/ausland/foto-von-ihr-ging-um-die-welt-bloggerin-aus-geburtsklinik-in-mariupol-leugnet-in-russischem-video-die-ereignisse\\_id\\_78187720.html](https://www.focus.de/politik/ausland/foto-von-ihr-ging-um-die-welt-bloggerin-aus-geburtsklinik-in-mariupol-leugnet-in-russischem-video-die-ereignisse_id_78187720.html). Marianna Višehirskaja.

<sup>23</sup> Stefanie Bock: Potenziale und Grenzen. Das Völkerstrafrecht im Ukrainekrieg, in: OSTEUROPA, 72. Jg., 1-3 /2022, S. 87-99.

### II.3 Russian genocide against the Ukrainian population

To prove genocide, international jurisprudence generally requires that the "physical-biological destruction" of the group was intended; the destruction of their social and cultural existence is not sufficient.<sup>24</sup>

The ICC's "Srebrenica decision" was the first genocide conviction. Serbian General Radislav Krstić was sentenced to 46 years in prison for it on 1 August 2001.

In order to justify the use of force in Ukraine, Vladimir Putin invoked the right of self-defence under Art. 51 of the United Nations Charter, the only foreseen exception to the prohibition of force. The recognition of the secession territories in the Donbas, the so-called "DNR" and "LNR",<sup>25</sup> was triggered by the genocide of the Russophone population, Putin asserted. The "special military operation" was about punishing those who are responsible for this genocide. Accordingly, Putin wants his campaign against Ukraine to be understood as a punitive expedition. He infers from the alleged – or even actual – violations of the law by other states (namely the USA) the right to violate the law for his part, thus demanding "equal treatment in injustice" – contrary to the principle of international law "ex iniuria ius non oritur".

Russia complied with the formality required by Art. 8, namely officially informing the Security Council – but the justification for its use of force was "so groundless that it cannot be called "argumentation"", judges Angelika Nußberger; "...whatever is put forward – by way of suggestion – is without any substance in terms of content."<sup>26</sup> His assertion that a genocide of the Russians living in the Donbas had to be prevented, with which he invoked the postulate of "protection of the civilian population" under international law and claimed the right to "humanitarian intervention", was completely baseless.

Putin's attempts at legitimacy are only a legal sham; he does not even try to provide evidence for his claims. In reality, he is indifferent to the reaction of world public opinion. At most, he wants to provide pseudo-arguments for a pro-Russian position to "neutral" countries like India and some African states, which give priority to their current economic interests in cooperation with Russia over their genuine interest in an intact international legal order.

#### ***Genocide in Mariupol'<sup>27</sup> – one example***

In the port city of Mariupol, where some 10 000 citizens met a violent death during the period of German occupation, Russians killed 20 000 people in two months.

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<sup>24</sup> Ibid.

<sup>25</sup> Russ.: „DNR“: Doneckaja Narodnaja Respublika; „LNR“: Luganskaja Narodnaja Respublika.

<sup>26</sup> Angelika Nußberger: Tabubruch mit Ansage. Putins Krieg und das Recht (Breaking a taboo with an announcement. Putin's War and the Law), in: Osteuropa 1-3/2022, p. 5-64.

Angelika Helene Anna Nußberger, legal scholar and Slavist, Chair of Constitutional Law, International Law and Comparative Law at the University of Cologne. From 2017 to 2019, Nußberger was Vice President of the European Court of Human Rights (ECtHR).

<sup>27</sup> By usurping the Sea of Azov and as a result of building a bridge over the Kerch Strait that was only 30 metres high, Russia had already cut off Ukraine's second most important port, Mariupol', before its war of aggression against Ukraine.

"The citizens of Mariupol' are (or were) subjected to attacks (by the Russian army) which fulfil the objective and subjective elements (intent to destroy<sup>28</sup>) of genocide," Otto Luchterhand judged: "The objective elements of the crime of genocide are fulfilled by the actions of the armed forces of Russia."<sup>29</sup>

The United Nations Genocide Convention<sup>30</sup> protects the integrity of national, ethnic, racial, religious groups from destruction. The Convention also protects parts of a group ("in whole or *in part*"). "The citizens of the city of Mariupol formed a protected national group, which was specially delimited by the encirclement. "...in the case of the encircled citizenry of Mariupol', it is a significantly singled out part of the Ukrainian people by virtue of isolation. " Putin's war was specifically directed against Ukrainians. This is demonstrated by the fact that on 2 April – at the request of Turkish President Erdoğan – Putin allowed the evacuation only of foreigners from the city, Luchterhand argues.

"The criminal forms of genocide committed by Russia in Mariupol' include all deeds listed in Art. II of the UN Genocide Convention from (a) to (d)" – from (a) "killing" to (d) "birth prevention" (bombing of the maternity clinic on 9 March 2022).

"The handling of the Mariupol' case is – with all its consequences – a matter of the president and commander-in-chief of Russia's armed forces, Vladimir Putin", Luchterhand states. Putin is operationally involved in the war, which is also proven by the fact that he personally refused French President Macron's request to evacuate the citizens of Mariupol'.

Genocide – according to its strict legal definition (UN Genocide Convention of 1948) – is difficult to prove, said British lawyer Philippe Sands;<sup>31</sup> but he sees evidence of war crimes and crimes against humanity no less serious than genocide.<sup>32</sup>

### ***Russian child abduction – genocide under Art. 2 of the United Nations Genocide Convention***

The abduction of Ukrainian children by Russian occupation authorities in the areas of Ukraine, which are or were occupied by the Russian army, is reminiscent of the German child abduction

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<sup>28</sup> 90 % of all buildings in Mariupol' are destroyed.

<sup>29</sup> Otto Luchterhand: Völkermord in Mariupol'. Russlands Kriegsführung in der Ukraine (Genocide in Mariupol'. Russia's warfare in Ukraine). In: OSTEUROPA, 72nd Jg., 1-3 /2022, pp. 65-85.

<sup>30</sup> The UN Genocide Convention, the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG), was adopted by the United Nations General Assembly on 9 December 1948 and entered into force on 12 January 1951.

<sup>31</sup> Philippe Sands is a British-French lawyer and writer. He is Professor of Law and Director of the Centre on International Courts and Tribunals at the University College London. Sands pleads as counsel before the International Court of Justice, the International Criminal Court, the European Court of Justice and the European Court of Human Rights.

<sup>32</sup> Sonya Lukashova, SevGil Musaeva (Ukrains'ka pravda, English edition): The international system is broken. The British lawyer Philip Sands on how to punish Putin for the war in Ukraine; Interview with Philipp Sands of 12 April 2022; <<https://www.pravda.com.ua/eng/articles/2022/04/12/7338924/>> <<https://www.pravda.com.ua/eng/articles/2022/04/12/7338924/>>.

during World War II in occupied Poland.<sup>33</sup> "Racially valuable" (blond and blue-eyed) children were stolen from their Polish parents and first taken to Litzmannstadt (Łódź), where they were classified according to so-called "Aryan tables" of the SS, their identities falsified and their names "Germanised" before being deported to Germany for "Germanisation" and given to SS families for adoption. Some of these children were placed in homes of the so-called "Lebensborn" organization.<sup>34</sup>

Even 75 years after the end of World War II, this child robbery is a "blank spot in historiography", according to journalist Artur Wróblewski, and according to historian Joanna Lubecka of the "Institute of National Memory (Instytut Pamięci Narodowej / IPN) in Krakow, a largely unexplored topic. Bogusław Sonik, a member of parliament, is trying to get these children recognised as victims of the Second World War<sup>35</sup>.

The offence of international child abduction was condemned in the Nuremberg war crimes trials as a "crime against humanity". According to the definition of genocide in Art. 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group [...] imposing measures intended to prevent births within the group, [and] *forcibly transferring children of the group to another group*, [...]" are considered genocide (italics the author).

NS-Germany's<sup>36</sup> organised child abduction had demographic-political reasons – like the abduction of Ukrainian children by the Russian occupation authorities in the occupied territories of Ukraine. After the illegal annexation of Ukrainian territory, the Russian occupation authorities declared the children in these territories to be "Russians". An unknown number of children were abducted from orphanages before Russian troops withdrew from the oblast capital Kherson.

According to the Institute for the Study of War / ISW, Washington, Russia began to openly promote the forced adoption of Ukrainian children from the Donbas by Russian families. Russian officials are said to have abducted some 150 000 children from the Donbas by November 2022.<sup>37</sup> Russian authorities have openly admitted that they are placing children from the occupied

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<sup>33</sup> Agnieszka Waś-Turecka, Ewelina Karpińska-Morek, Monika Sieradzka, Artur Wróblewski, Tomasz Majta, Michał Drzonek: "As if I were alone in the world. Der nationalsozialistische Kinderraub in Polen", Freiburg (Herder Verlag) 2020. The book was produced as a joint project of the Polish internet portal "interia" and Deutsche Welle. "Nazi Child Abduction. The Forgotten Victims" a film by Monika Sieradzka (Poland) and Elisabeth Lehmann (Germany / MDR), produced by MDR and DW; Sieradzka and Lehmann spent years researching to find victims who were willing to talk about their lives in front of the camera.

Iris Helbing: Poland's Lost Children. Die Suche und Repatriierung verschleppter polnischer Kinder nach 1945 (The Search for and Repatriation of Deported Polish Children after 1945, Dissertation); Faculty of Cultural Studies, Europa Universität Viadrina, Frankfurt (Oder). May 2015.

<sup>34</sup> The files of the "Lebensborn" organization were destroyed during the war.

<sup>35</sup> In 2017, the Polish web portal "Interia" and "Deutsche Welle" launched the first German-Polish search for stolen children. As part of the project "Zrabowane Dzieci / Looted Children", journalists in cooperation with institutions, archives and foundations searched for victims of "Germanisation" and helped them find their true identities and relatives. Of the children estimated at over 200 000, only 30 000 were recovered.

<sup>36</sup> NS-Germany: National-Socialist Germany.

<sup>37</sup> Olha Hluščenko: Rossijska usilenno reklamiruet vyvoz i prinuditel'noe usynovanie ukrainskich detej – ISW, 17 Nojabrja 2022. <<https://www.pravda.com.ua/rus/news/2022/11/17/7376714/>>. <<https://www.dynamomania.com/ru/news/657116-isw-rossiya-usilenno-reklamiruet-vyvoz-i-prinuditelnoe-usynovlenie-ukrainskih-detej>>.



territories for adoption to Russian families in a manner that may constitute a violation of the Convention on the Prevention and Punishment of the Crime of Genocide, ISW wrote on 16 October 2022. ISW points out that programmes to deport Ukrainian children to Russia and forcibly adopt them under the guise of recovery and rehabilitation are likely to form the basis of a massive "Russian depopulation campaign, which is a broader ethnic cleansing". This is a violation of the Convention on the Prevention and Punishment of the Crime of Genocide.

The head of the UN Human Rights Office in New York, Ilze Brands Kehris said, there were "credible reports" that Ukrainian children were being separated from their parents and deported to Russia: "We are concerned that the Russians have put in place a simplified procedure so that children there can be quickly naturalised and released for adoption to Russian families."

These "credible reports" were confirmed by the Russian Commissioner for Children's Rights, Maria Lvova-Belova in a statement to The Moscow Times – but presented differently: For example, in the bombed-out city of Mariupol' children "abandoned" by their parents were "rescued" from basements and brought to Russia, Lvova-Belova said. "When we brought them to the Moscow region to nurse them back to health, at first they were very negative towards the president (Putin) and said nasty things. They sang the Ukrainian anthem and things like that [...] But later this negative behaviour turned into love for Russia." Lvova-Belova, who publicly professes to deprive the abducted children of their Ukrainian identity and teach them "love for Russia", set a good example herself by adopting a Ukrainian boy from Mariupol'.

In a press conference on 26 October 2022, Lvova-Belova said that some 2000 "unaccompanied children" had been "evacuated" from Ukraine to Russia; "350 orphans have been placed from the (Ukrainian) Donbas in foster families in 16 regions of Russia; a thousand more children are waiting for new parents". President Putin praised her zeal and condemned Western sanctions against her: "We should thank her and bow deeply to her".

Russian Deputy Prime Minister Marat Chusnullin said on 14 October 2022 that "several thousand" children from Kherson oblast in southeastern Ukraine "have already been placed in recreation homes and children's camps in other regions of Russia".

In August 2022, the Department of Family and Children in Krasnodar, southern Russia, posted on its website that more than 1,000 children from Ukraine had been adopted by families in distant cities in Russia (Tjumen', Irkutsk, Kemerovo); more than 300 were awaiting adoption. The website was quickly deleted, but a copy could be archived.

The Russian occupation authorities have Ukrainian children abducted to Russia, where they are "reprogrammed" to become Russians and put up for adoption.<sup>38</sup> Ukrainian parents trying to retrieve their abducted children face insurmountable bureaucratic barriers. Lvova-Belova called Ukrainian demands for the return of Ukrainian children "incomprehensible". She accused parents who had been separated from their children as a result of Russian attacks of abandoning them. "And now – for whatever reason – they want the children back!".

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<sup>38</sup> Robyn Dixon, Natalia Abbakumova: Ukrainians struggle to find and reclaim children taken by Russia, in: The Washington Post, December 24, 2022. <<https://www.washingtonpost.com/world/2022/12/24/ukraine-stolen-children-maria-lvova-belova/>>.

In May 2022, President Putin issued a decree allowing Russians to quickly and easily adopt Ukrainian children. Aleksandra Romancova of the (Ukrainian) "Centre for Civil Liberties" (Centr hromadjans'kych svobod) and winner of the 2022 Nobel Peace Prize, said Russia had changed its adoption law to allow Ukrainian children to be handed over to Russian families as quickly as possible.

The Ukrainian Commissioner for Children's Rights, Dar'ja Herasymčuk, said in November 2022 that 10 764 Ukrainian children had been deported to Russia without their parents, according to reports from relatives. In July 2022, the OSCE reported that 2 000 Ukrainian children had been taken to Russia. In its report of 12 December 2022 to the UN Committee on the Rights of the Child, Human Rights Watch stated that the number of Ukrainians deported to Russia, including children, "remains unclear".

### ***Plummeting birth rate***

In 2021, Ukraine's birth rate was 1.1; in 2023, it will fall to 0.8.<sup>39</sup> The foreseeable crash of the birth rate in 2023 as a result of the war, in particular as a result of the separation of families (flight of several million women from Ukraine) can – in analogy to child stealing as – be considered genocide according to Art. 2 of the United Nations Genocide Convention. A considerable part of the fled "half-families" will probably not return. In addition, there is an unnaturally high mortality rate due to war-related malnutrition and lack of medical care.

According to Élla Lybanova, director of the Ptoukha Institute for Demography and Social Studies of the National Academy of Sciences of Ukraine. (Instytut demografii ta social'nych doslidžen' im. M. V. Ptuchy), Ukraine's population will fall to 35 million by 2030. It is obviously Russia's intention to change the demographic composition of Ukraine.

## **II.4 Russia's crimes against humanity**

### ***Flight and displacement***

According to the refugee agency UNHCR, the Russian attack on Ukraine led to the largest movement of refugees since the Second World War. Almost 8 million people have fled the country, and another 6 million are "internally displaced persons" (IDPs), said Katharina Lump, UNHCR representative in Germany.<sup>40</sup> This number of almost 14 million corresponds to about one third of the total population of Ukraine (41 million).

According to UNHCR (United Nations High Commissioner for Refugees),<sup>41</sup> the number of Ukrainian refugees registered in Europe at the end of January 2023 was 7,996,573; of these, 4,952,938 had received "temporary protection".<sup>42</sup>

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<sup>39</sup> In Germany, the (statistical) birth rate (contribution of live births to population development) was 1.57 per woman in 2019; In 2021, it was 1.53. That was (expressed differently) 9.5 (newborns / live births) per 1 000 inhabitants per year.

<sup>40</sup> <<https://www.unhcr.org/dach/de/85663-unhcr-wuerdigt-deutschlands-einsatz-fuer-den-internationalen-fluechtlingsschutz.html>>.

<sup>41</sup> UNHCR, Operational Data Portal, Ukraine Refugee Situation, 23.01.2023; <<https://data.unhcr.org/en/situations/ukraine>>.

<sup>42</sup> On March 4, 2022, the European Union activated its "temporary protection directive" from 2001 (armed conflicts in the Western Balkans).

In the first weeks of the war, many russophone Ukrainians fled to Russia. According to UNHCR / OCHA (Office for the Coordination of Humanitarian Affairs), there amounted to around 2,952,000 at the beginning of January 2023.<sup>43</sup>

### ***Abduction and deportation***

After 6 November 2022, the Russian occupation authorities – under the euphemistic name of "evacuation" – deported the inhabitants of five municipalities of the Kachovs'kyj rayon located along the Dnipro on the left bank, where the Russian army established a defensive line.<sup>44</sup> Irina Vereščuk, Ukraine's Deputy Prime Minister, announced that 45 000 Ukrainians had been deported to Russia from the city of Berdjans'k on the Sea of Azov. 75 000 citizens had fled the city to unoccupied territories.

US Ambassador Linda Thomas-Greenfield told a UN Security Council meeting on 8 September 2022 that it was estimated that between 900,000 and 1.6 million people had been deported from their homes. "They are interrogated, they are detained, they are forcibly deported. Some are sent to the most remote parts of eastern Russia." The Ukrainian UN delegation even claims that up to 2.5 million people have been deported from the south and east of the country, often to far-flung regions of Siberia or Russia's Far East.

That employees of the Russian-occupied nuclear power plant Zaporizžja were also being deported was reported by the head of the operating company Energoatom. Petro Kotin told newspapers of the "Funke media group": "About 200 people have already been detained." For some of them, there is "no indication of where they are". Ukrainian nuclear workers have also been killed or tortured. "It is very difficult for our staff to work there," Kotin said. He said the 1000 or so staff still there knew it was important to provide nuclear safety and fire protection.

In its resolution of 15 September 2022, the European Parliament called on Russia to immediately end the deportation of Ukrainian citizens to Russia, especially children. Russia speaks of voluntary departures. Russia's UN Ambassador Vasilyj Alekseevič Nebenzja rejected the said accusations and dismissed them as Western propaganda. The resettled people fled Ukraine voluntarily. They could move freely in Russia. No one would be prevented from leaving the country. Many people are fleeing from a "Ukrainian regime" that abuses its citizens as human shields, Nebenzja "explained".

### ***"Ethnic cleansing"***

The US-based "Institute for the Study of War / ISW suspects that the Russian occupation authorities are conducting ethnic cleansing by depopulating occupied Ukrainian territories through deportations and repopulating them with Russian citizens. According to ISW, the occupation authorities bring Russian citizens to the occupied territories for civilian tasks

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<sup>43</sup> <<https://www.zeit.de/politik/ausland/2022-02/ukraine-fluchtbewegung-russland-krieg-uebersicht>>.

<sup>44</sup> Irina Balačuk: The occupiers deport Ukrainians from Kakhovskyj rayon, 06.11.2022. Source: Centre of National Resistance (Centr nacional'noho soprotivlenija). <<https://www.pravda.com.ua/rus/news/2022/11/6/7375198/>>

(including the Zaporizhzhia nuclear power plant). And they force Ukrainian residents to accept Russian passports. According to ISW, a forced deportation of Ukrainian citizens to the Russian Federation would be planned ethnic cleansing and thus a violation of the UN Convention on the Prevention of Genocide.

The Russian occupation authorities may be preparing a mass deportation of Ukrainian citizens from the occupied territories to the Russian Federation, the Bloomberg news service reported. In mid-December, the Russian Prime Minister (Michail Vladimirovič Mišustin, Predsedatel' Pravitel'stva R. F.) had issued a decree allocating an additional €2.5 billion in the budget to finance what was described as a "potential resettlement" of Ukrainians from Kherson oblast to Russia.

According to Ukrainian Deputy Prime Minister and Minister for the Reintegration of Temporarily Occupied Territories, Iryna Vereščuk,<sup>45</sup> an unspecified number of Ukrainian citizens have already been forcibly resettled in 57 regions of Russia, including the Far East and Siberia.<sup>46</sup>

The Russian government also faces accusations of "internal ethnic cleansing". The partial mobilisation seems to particularly affect the ethnic minorities in the Russian Federation, as indicated by the violent protests in their settlement areas – especially the resistance of the Muslim population in the ("Autonomous Republic") Dagestan in the North Caucasus (Southern Russia). Ukrainian President Zelensky made an appeal to Russia's ethnic minorities, encouraging them to resist.

### ***"Selection" in Russian "Filtration camps"***

The US government accused the Russian military in the United Nations Security Council of maintaining "filter camps" in the territory it occupies in Ukraine, from which arrested Ukrainians were deported to Russia against their will after "filtration".<sup>47</sup>

The European Parliament strongly condemned the reported atrocities of the Russian armed forces and occupation authorities in the – officially called – "filtration camps" (Fil'tracionnyje lagerja) as war crimes. In many cases, "segregated" people disappeared without a trace.

"Filtration" of people means "selection". Antje Passenheim from the ARD studio in New York quoted the US ambassador Linda Thomas-Greenfield in the World Security Council: The word "filtration" alone gives one goose bumps; it is a word for atrocities reminiscent of a very dark phase of the past.

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<sup>45</sup> Iryna Andriivna Vereščuk, „Viceprem'jer-ministerka“ – ministerka z pytan' reintegracii tymčasovo okupovanyh terytorij Ukraïny.

<sup>46</sup> <<https://de.euronews.com/2023/01/13/100000-ukrainer-plant-russland-eine-massendeportation-in-cherson>>.

<sup>47</sup> UNRIC – United Nations Regional Information Centre: Ukraine war: UN fears deportations to Russia 08. September 2022; <<https://unric.org/de/ukraine08092022/>>.

### **III. "Nuremberg II" for the sentencing of the Russian “major war criminals”**

"If Putin falls over his war, the question of a Russian "Nuremberg" will be on the table," wrote the Russian-Swiss writer Michail Pawlowitsch Schischkin (Russ.: Michail Pavlovič Šiškin) after Putin's invasion of Ukraine.<sup>48</sup>

Whether there will ever be a trial of the Russian "major war criminals", a "Nuremberg II" and punishment for the Russian crime against peace, Russian war crimes, Russian crimes against humanity and genocide committed by Russia is uncertain. However, conviction by an international tribunal must take place – even if it does not lead to the sentences imposed being served – in order to brand the perpetrators – and the regime they served, says Professor of International Criminal Law (University of Marburg), Stefanie Bock.<sup>49</sup>

In the joint "Berlin Declaration" that concluded the two-day meeting of the G-7 justice ministers held in Berlin on 28 - 29 November 2022, the seven justice ministers pledged to bring those responsible for war crimes in Ukraine to justice. The "prosecution of the core crimes of international law is our top priority", said the German host, Justice Minister Marco Buschmann; there is "great agreement" that the "Russian leadership" must be prosecuted. The legal processing of the Russian atrocities in Ukraine will take years, perhaps decades. But the clear message to the world is: "War criminals [...] cannot feel safe anywhere", Buschmann explained.

#### **III.1 The Emergency Decision of the International Court of Justice of 16 March 2022**

A few days after the Russian invasion on 24 February 2022, Ukraine brought an action before the International Court of Justice / ICJ (World Court)<sup>50</sup> in The Hague, seeking emergency measures against the Russian Federation.<sup>51</sup> Ukraine sought a declaration that the Russian invasion was illegal under international law. Ukraine referred to the UN Genocide Convention on the Prevention and Punishment of the Crime of Genocide. Kiev defended itself against Moscow's claim that Ukraine was committing genocide against Russians living in Ukraine. Russia had used this baseless allegation, among others, to justify the invasion.

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<sup>48</sup> Michail Schischkin: Hoffen auf die Stunde null – ein Russland ohne Putin, Gastkommentar (Mikhail Shishkin: Hoping for Zero Hour - a Russia without Putin, Guest Commentary), in: Neue Zürcher Zeitung, 12.03.2022; <<https://www.nzz.ch/meinung/hoffen-auf-die-stunde-null-ein-russland-ohne-putin-ld.1673592?reduced=true>>.

<sup>49</sup> Stefanie Bock: Potenziale und Grenzen. Das Völkerstrafrecht im Ukrainekrieg (Potentials and limits. International Criminal Law in the Ukraine War), in: OSTEUROPA, 72. Jg., 1-3 /2022, p. 87-99.

<sup>50</sup> "Principal judicial organ of the United Nations"; the Statute of the International Court of Justice is an integral part of the Charter of the United Nations (Chapter XIV).

<sup>51</sup> International Court of Justice, Application Instituting Proceedings filed in the Registry of the Court on 26 February 2022. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation). Französisch: Court Internationale de Justice, Requête introductive D'Instance enregistrée au Greffe de la Cour le 26 février 2022. Allégations de Génocide au titre de la Convention pour la prevention et la Répression du Crime de Génocide (Ukraine c. Fédération de Russie). <<https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>>.

Article 41 of the ICJ Statute (ICJSt) gives states the possibility to apply for interim relief before the ICJ. In urgent cases, the ICJ has the power to order precautionary measures to protect the rights of the states involved.<sup>52</sup>

On 7 March 2022, the hearing of the case began, and on 8 March Russia had the opportunity to reply. On 16 March 2022, the ICJ issued an urgent decision and ordered precautionary measures ("provisional measures") that are binding on both parties.<sup>53</sup> The actual legal proceedings (main proceedings) are still pending (31.03.2023). The emergency decision does not prejudge the final judgement.

The emergency decision of the International Court of Justice of 16 March 2022 – Ukraine v. Russia – was explained by Mareike Jung and Julia Weismann of the Scientific Service of the German Bundestag.<sup>54</sup>

All Member States of the United Nations are automatically parties to the Statute of the International Court of Justice according to Article 93(1) of the Charter of the United Nations, but this does not give the ICJ automatic jurisdiction over the parties to a dispute. In principle, the ICJ only has jurisdiction if both parties have consented to it, i.e. have submitted to the ICJ's jurisdiction –

- either by a general declaration of submission (according to Art. 36 para. 2 ICJ Statute);
- or by a concurring ad hoc declaration by the parties on jurisdiction over the specific dispute (under Art. 36(1) Case 1 of the ICJ Statute);
- or by a corresponding clause in an international treaty (Art. 36(1) Case 2 ICJ Statute).

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<sup>52</sup> The Statute of the International Court of Justice: A Commentary, 2019, 3. edition. Art. 41, recital 23. Edited by: Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat, Oxford Public International Law, Series: Oxford Commentaries on International Law; <<https://opil.ouplaw.com/view/10.1093/law/9780198814894.001.0001/law-9780198814894>>.

<sup>53</sup> International Court of Justice, 16 March 2022, General List No.182: Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of Provisional Measures;

<<https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>>.

Order of 16 March 2022, Request for the indication of provisional measures, Procedure(s): Provisional measures; <<https://www.icj-cij.org/en/case/182/orders>>.

Christian Johann: „Eine kleine Sensation aus Den Haag, Der Ukraine-Krieg vor dem Internationalen Gerichtshof“ (A small sensation from The Hague, The Ukraine War before the International Court of Justice), in: Verfassungsblog on matters constitutional vom 17. März 2022, <<https://verfassungsblog.de/einekleine-sensation-aus-den-haag/>>;

Andreas Kulick: „Der Internationale Gerichtshof hat mutig entschieden – und dogmatisch überrascht“ ( “The International Court of Justice ruled courageously – and dogmatically surprised”), in: Frankfurter Allgemeine Zeitung / FAZ vom 21. März 2022, <<https://www.faz.net/aktuell/einspruch-exklusiv-der-internationale-gerichtshof-hat-mutig-entschieden-und-dogmatisch-ueberrascht-17895693.html>>.

<sup>54</sup> Mareike Jung, Julia Weismann: Die Eilentscheidung des Internationalen Gerichtshofs vom 16. März 2022 (Ukraine / Russland); (The Emergency Decision of the International Court of Justice of 16 March 2022 (Ukraine v. Russia).

<<https://www.bundestag.de/resource/blob/899274/6a63bd8ab894ad6165db6bb1655a4115/Die-Eilentscheidung-des-Internationalen-Gerichtshofs-vom-16-Maerz-2022-Ukraine-Russland-data.pdf>>. The explanations in Chapter III.1 are based on their "Infobrief". (Az.: WD 2 - 034 / 22) vom 24. Mai 2022.

Ukraine and the Russian Federation made neither a general nor an ad hoc declaration of submission; however, Ukraine was left with the option of establishing the ICJ's jurisdiction via a corresponding treaty clause: In its application, it invoked the submission clause under Article IX of the "Convention on the Prevention and Punishment of the Crime of Genocide"<sup>55</sup> of 9 December 1948 (Genocide Convention<sup>56</sup>), to which both Ukraine and Russia are parties. The ICJ considered the admissibility of the proceedings under the Genocide Convention (Article IX).

According to Mareike Jung and Julia Weismann, Ukraine's application for provisional measures was not aimed at establishing that the serious Russian attacks on Ukrainian cities and on Ukrainian civilians constituted genocide, i.e. that Russia was committing or planning genocide in Ukraine, but at Russia's justification for the attack on Ukraine. Russian President Vladimir Putin had repeatedly claimed that Ukraine was committing genocide in the Donbas region of Ukraine, which made Russian action necessary and justified it.

Ukraine's trial representative, Anton Korynevych, stated at the hearing that this claim was a "terrible lie by Putin" – and requested that the International Court of Justice find that the Genocide Convention did not provide a legal basis for the Russian invasion.<sup>57</sup> The Ukrainian application states (paragraphs 2 and 3): "[T]he Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognised the so-called "Donetsk People's Republic" and "Luhansk People's Republic," and then declared and implemented a "special military operation" against Ukraine with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact. [...] Ukraine emphatically denies that any such genocide has occurred and brings this application to establish that Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide." Ukraine's real concern was to stop the Russian attack – and for the International Court of Justice to issue interim injunctions to that effect.

The admissibility of a decision by the International Court of Justice on the merits depended on whether the Genocide Convention could be used to justify the ICJ's jurisdiction. Russia argued that the regulation of the legality or illegality of military operations was not the subject of the Genocide Convention, which was why the ICJ did not have jurisdiction (in the sense of Art. IX). The Russian use of force was justified as an act of self-defence under Article 51 of the UN Charter. The ICJ did not accept the Russian argument, finding that there was a "dispute", i.e. a "divergence of views" between the two parties on the question of whether Russia was within its

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<sup>55</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9. December 1948, UN Treaty Collection, <<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280027fac>>.

Flávia Salazar Sousa, Understanding the ICJ's Order on the Allegations of Genocide in Ukrainian Territory (Ukraine v. Russian Federation), Basic News Blog, 23. März 2022, abrufbar unter: <<https://basicint.org/understanding-the-icjs-order-on-the-allegations-of-genocide-in-ukrainian-territory-ukraine-russian-federation/>>.

<sup>56</sup> Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG, Genocide Convention); the Genocide Convention is an international treaty adopted unanimously by the United Nations General Assembly on 9 December 1948 and entered into force on 12 January 1951. By 2022, 152 states had acceded to it.

<sup>57</sup> Max Planck Institute for Comparative Public Law and International Law, interview with Christian Marxsen on March 16, 2022 : „Putin missbraucht das Völkerrecht“ (Putin abuses international law"), <<https://www.mpg.de/18426845/voelkerrecht-ukraine>>. Wissenschaftliche Dienste Infobrief WD 2 - 3010 - 034/22, p. 14.

rights in invoking genocide against Ukraine and whether the Russian invasion could be based on the Genocide Convention.

The ICJ overwhelmingly upheld Ukraine's case "(almost) in its entirety" – with 2 dissenting votes out of a total of 15 (Judge Xue of China and Judge Gevorgian of Russia). The court ordered Russia to immediately cease military operations on the territory of Ukraine – and to ensure "that all military or irregular armed units led or supported by Russia, as well as all organisations and persons under its control or direction, do not take steps in support of the military operations".

The ICJ explained its decision as follows:

Article 1 of the Genocide Convention obliges member states to prevent and punish genocide committed in other member states. In fulfilling this obligation, however, the limits of international law must be respected. Furthermore, the Genocide Convention must be interpreted in the light of Article 1 of the Charter of the United Nations, which enshrines the primary objective of the United Nations – peacekeeping. Given the importance of Article 1 of the Charter, the Genocide Convention does not permit the unilateral use of force by a Party in the territory of another State for the purpose of preventing or punishing an alleged genocide. Ukraine must therefore not be subjected to military operations to enforce the Genocide Convention. "[...] Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine."

Russia did not participate in the oral hearing, but defended itself in writing;<sup>58</sup> this had no influence on the outcome of the ICJ proceedings.

The ICJ's order of precautionary measures is legally binding on both parties. If one party – in this case Russia – does not comply with its obligations, the other party can turn to the UN Security Council. The UN Security Council may adopt measures to give effect to the judgment" (Article 94, para. 2 of the UN Charter). However, this article explicitly refers only to judgments, not to orders for provisional measures.

In the main proceedings, the ICJ, if it again considers itself competent, has to clarify whether Russia's use of force in Ukraine – under the pretext "to prevent and punish" according to Article I of the Genocide Convention – was legal. It will (have to) find a violation by Russia of the precautionary measures ordered. Possibly, the ICJ will order obligations to pay reparations.<sup>59</sup>

Unlike in the case of an order in the interim relief proceedings, a mechanism for enforcement is provided with regard to the ICJ's ruling in the main proceedings (Art. 94, para. 2 of the UN Charter). Theoretically, the UN Security Council could take action; practically, this is futile because of Russia's veto power.

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<sup>58</sup> ICJ, Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case, 7. März 2022, Randnummer 13-15, <<https://www.icjciij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf>>.

<sup>59</sup> Luke Moffett: Sanctions for War, Reparations for Peace? 1. April 2022, <<https://opiniojuris.org/2022/04/01/sanctions-for-war-reparations-forpeace/>>.



While the ICJ's 16 March 2022 precautionary measures order is not enforceable, it is nevertheless of significance that should not be underestimated, Jung and Weisman argue – and justify their opinion as follows:

The ICJ judges had clearly stated,

1. that the ICJ has the jurisdiction to judge the case on the basis of the Genocide Convention;
2. that Russia's attack constituted a violation of international law;
3. that Russia is legally obliged to cease military operations in the territory of Ukraine that began on 24 February 2022.

While the ICJ's rulings are binding, the court cannot enforce its rulings itself. Should Ukraine turn to the UN Security Council for enforcement, however, it would fail in that body because of Russia's veto.

The question of whether Russia is planning, committing or has already committed genocide against Ukrainians was not the subject of the dispute to be decided by the International Court of Justice.

### **III.2 The European Court of Human Right – Closing all cases against Russia**

Because of the invasion of Ukraine, the European Council in Strasbourg suspended Russia's membership. Russia, for its part, announced its withdrawal from the Council of Europe after 26 years of membership one day before the corresponding decision of the Committee of Ministers – thus pre-empting a decision by the other member states. Following Russia's withdrawal or expulsion from the Council of Europe, the European Court of Human Rights suspended all proceedings against Russia<sup>60</sup> on 17 March 2022 – including the Ukraine v. Russia state complaint case (No. 11055/22). A main case decision of the ECtHR on human rights violations in the course of the Russian attack on Ukraine therefore did not materialise.

Following Ukraine's request of 28 February 2022, the European Court of Human Rights had already taken "interim measures" under Article 39 of its Rules of Procedure on 1 March 2022.<sup>61</sup> In view of the military operations in Ukraine, the ECtHR had seen a risk of serious violations of the Convention rights of the civilian population, in particular the right to life (Art. 2 of the European Convention on Human Rights / ECHR), the prohibition of torture or inhuman or degrading treatment or punishment (Art. 3 ECHR) and the right to respect for private and family life (Art. 8 ECHR), and decided: "to indicate to the Government of Russia to refrain from

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<sup>60</sup> A quarter of the approximately 70 000 cases pending before the ECtHR were brought by Russians. With Russia's withdrawal from the Council of Europe, its citizens can no longer turn to the ECtHR.

<sup>61</sup> According to Art. 33 of the European Convention on Human Rights / ECHR, any party may bring an action before the ECtHR for any alleged violation of the Convention. The European Court of Human Rights / ECtHR may, according to Art. 39 (1) of its Rules of Procedure, at the request of a party or on its own initiative, "designate provisional measures which should be taken in the interests of the parties or of the proper conduct of the proceedings".

military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops".

With this decision, the ECtHR had changed course: Until now, the European Convention on Human Rights did not apply in an international armed conflict – in line with the Roman legal principle legitimising the breaking of laws in times of war: "Inter arma enim silent leges" ("For under arms the laws are silent").<sup>62</sup>

The decision of 1 March 2022, i.e. the "provisional measures" designated by the ECtHR ("provisional" pending a decision on the merits) was no more than an appeal for compliance with applicable rules of international humanitarian law;<sup>63</sup> Russia's injunctive obligations pronounced by the ECtHR did not go beyond what applies anyway under international humanitarian law. The prohibition of attacks on civilians and civilian objects is enshrined in Article 51/52 of the Additional Protocol of 8 June 1977 to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I). Failure to comply with these obligations may constitute war crimes under the Rome Statute of the International Criminal Court (Art. 8, para. 2, (b) (i), (ii) and (ix)).

On 29 June 2022, Ukraine filed a complaint (Ref. 11055/22) with the ECtHR for serious human rights violations,<sup>64</sup> accusing the Russian Federation of targeting and indiscriminately attacking Ukrainian civilians. Tens of thousands of civilians had been killed, injured, arrested or were missing. Hundreds of thousands have lost their homes and millions have been displaced. The attacks on civilians were carried out by the Russian military or by Russian-controlled paramilitary forces.

Russia was expelled from the Council of Europe but remained a party to the European Convention on Human Rights (ECHR) until 16 September 2022.

### **III.3 The International Criminal Court**

#### **III.3.1 Investigations by the ICC**

On 2 March 2022, the Chief Prosecutor of the International Criminal Court (ICC), Karim Khan, announced in The Hague that the ICC would open investigations into Russian war crimes and crimes against humanity in Ukraine;<sup>65</sup> 39 States Parties to the ICC had made a recommendation to this effect. There is "sufficient basis to believe that both war crimes and crimes against

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<sup>62</sup> First described by Cicero (Marcus Tullius) in his defence speech „Pro Titus Annio Milone“ in the year 52 BCE.

<sup>63</sup> The rights and freedoms of the Convention apply to all persons under the jurisdiction of a Party (Art. 1 ECHR).  
Quellen: <<https://verfassungsblog.de/kann-strasburg-den-krieg-zahmen/>>.

<<https://verfassungsblog.de/egmr-zerrieben-im-konflikt-russland-ukraine/>>.

<sup>64</sup> <<https://www.lto.de/recht/nachrichten/n/egmr-ukraine-reicht-beschwerde-gegen-russland-ein-vorwurf-schwerer-menschenrechtsverletzungen/>>.

<sup>65</sup> <[26](https://www.lto.de/recht/nachrichten/n/internationaler-straengerichtshof-istgh-ermittlungen-russland-eingeleitet-ukraine-krieg/#:~:text=Die%20Ermittlungen%20sollen%20sich%20aber,Mittwochabend%20in%20Den%20Haag%20mi>.</a></p></div><div data-bbox=)

humanity have been committed in Ukraine", the chief prosecutor had announced the day before. The investigation would initially focus on possible crimes prior to Russia's current invasion, in particular the events surrounding the occupation of Crimea and the fighting in eastern Ukraine. However, the investigation would be extended to the current war.

Khan did not say when the ICC expected the first indictments. EU Justice Commissioner Didier Reynders said the first cases should be on the ICC's table "before the end of the year (2022) and the first trials could start".

International law expert Claus Kreß<sup>66</sup> welcomed the International Criminal Court's initiation of formal proceedings against Russia. This would allow the ICC chief prosecutor Karim Khan "to act without judicial authorisation",<sup>67</sup> which would otherwise have been necessary. The court would not currently address the question of whether the Russian war against Ukraine was a war of aggression. The prosecutor would need a green light from the UN Security Council to do so because Russia is not a state party to the ICC. "Of course, that will not happen as long as Putin is Russian president."

The investigations also do not refer to Russian President Vladimir Putin or a specific accused, but to the "entire conflict", explained Kreß. Before an arrest warrant could be issued, the suspicion against a specific accused would have to be substantiated to such an extent that the investigation could be specifically directed against him. Such an arrest warrant would have to be executed by a state, because the International Court of Justice does not have its own power of execution.

On 13 October 2022, the International Criminal Court in The Hague began official investigations into war crimes in Ukraine. According to Chief Prosecutor Karim Khan, Ukraine could extradite alleged Russian war criminals to the International Criminal Court (ICC) in The Hague if the trial could not take place in Ukraine for legal reasons. The ICC had previously stated that it was important for Ukraine to bring the suspects to trial itself, if possible. While Russia is not a state party to the Hague Tribunal, according to Khan this is "not an obstacle to our jurisdiction": if "necessary" and if there is "a reason why these trials cannot take place in Ukraine, [...] I am sure there would be cooperation with Ukraine".

### ***Evidence gathering in Ukraine***

In an interview with journalist Ruth Green<sup>68</sup> on 4 October 2022, Ukrainian Prosecutor General Andriy Kostyn, appointed in July, said that as of 3 October, 36 000 Russian war crimes had been registered. All cases were immediately documented and 28 mobile investigation teams were in

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<sup>66</sup> Claus Kreß has held the Chair of German and International Criminal Law and Director of the Institute for Criminal Law and Criminal Procedure at the University of Cologne since 2004, and has been Director of the "Institute for International Peace and Security Law" since 2012.

<sup>67</sup> Deutschlandfunk: International Criminal Court. International law expert: The issue is Russia's suspicion of numerous war crimes; Claus Kreß in conversation with Friedbert Meurer, 04.03.2022; <<https://www.deutschlandfunk.de/interview-claus-kress-voelkerrechtler-zu-kriegsverbrechen-dlf-e786f863-100.html>>. <<https://www.deutschlandfunk.de/strafgerichtshof-ermittlungen-kriegsverbrechen-100.html>>.

<sup>68</sup> Ruth Green, IBA, Interview with Ukrainian Prosecutor General Andriy Kostin, 04. 10.2022; <<https://www.ibanet.org/interview-Andriy-Kostin-Prosecutor-General-of-Ukraine>>. IBA: International Bar Association.

operation. The majority of the crimes were related to the destruction of homes and civilian infrastructure. According to official figures, 7 500 civilians were killed, including 400 children.<sup>69</sup>

In the case of the "crime of aggression", i.e. the decision to attack Ukraine, there are 626 suspects from the Russian political and military leadership.

On the genocide issue, Kostin said: "We now can prove the widespread and systematic pattern of attack against Ukrainians due to their identity, and that has nothing to do with the combatants engaged in armed clashes." Hundreds of thousands of Ukrainians were deported to Russia, many of them children. So-called "filtration camps" had been set up. But genocide is not a simple case. In Ukraine's legal system, there is no possibility of prosecuting Russia's highest political leadership – i.e. President Putin – for genocide. This case can only be dealt with at the level of the International Criminal Court.

The Ukrainian Prosecutor General's Office encourages the use of the "Berkeley Protocol"<sup>70</sup> to verify the authenticity of evidence from public sources (open-source intelligence), Kostin continued. In March (2022), a special platform – warcrimes.gov.ua – was launched to which anyone can submit information on Russian war crimes. To date, more than 18 000 messages have been received. Furthermore, the "eyeWitness app" of the International Bar Association / IBA is used, as well as the reports of international fact-finding missions such as the UN Mission and Inquiry Commission and NGOs such as Human Rights Watch.

As reported by the British news channel "Sky News",<sup>71</sup> in December 2022 a group of 90 Ukrainian judges completed a training course in conducting trials of Russian war criminals.<sup>72</sup> The programme will ensure the prosecution of war criminals on an unprecedented scale while the war is still in progress, said the British Attorney General for England and Wales, Victoria Prentis.

The European Commission and the Office of the Prosecutor (OTP) of the International Criminal Court agreed on the OTP's digital evidence processing capacity in the face of increased global demand.<sup>73</sup> The European Union is providing €7.25 million in "crisis response funding" for this purpose.

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<sup>69</sup> Andriy Kostin: The world must not turn a blind eye to genocidal intent. On 4 October 2022, Kostin spoke to Global Insight about the challenges of investigating and prosecuting war crimes during war.  
<<https://www.ibanet.org/The-world-must-not-turn-a-blind-eye-to-genocidal-intent>>.

<<https://www.ibanet.org/interview-Andriy-Kostin-Prosecutor-General-of-Ukraine>>.

<sup>70</sup> United Nations, Human Rights, office of the High Commissioner, 03 January 2022. The "Berkeley Protocol" on Digital Open Source Investigations identifies international standards for conducting online investigations into alleged violations of international criminal law, international humanitarian law and human rights law.  
<<https://www.ohchr.org/en/publications/policy-and-methodological-publications/berkeley-protocol-digital-open-source>>.

<sup>71</sup> Tamara Cohen: UK to train Ukrainian judges to carry out war crimes trials for Russian soldiers, in Sky News, 14.12.2022;  
<<https://news.sky.com/story/uk-to-train-ukrainian-judges-to-carry-out-war-crimes-trials-for-russian-soldiers-12767724>>.

<sup>72</sup> Ukrainskaja pravda (Russ. edition): Britain trains Ukrainian judges to conduct war crimes trials; 14.12.2022;  
<<https://www.pravda.com.ua/rus/news/2022/12/14/7380670/>>.

<sup>73</sup> Delegation of the European Union to Ukraine, Press and information team of the Delegation to Ukraine: EU strengthens digital evidence processing capacities of the International Criminal Court in response to increased global

"We – prosecutors, lawyers, experts, law enforcement agencies and international partners – we all believe that we need to prove to Ukrainians and to the civilized world that the rule of law prevails over the rule of force," explained Ukrainian Prosecutor General Kostyn.<sup>74</sup>

### **III.3.2 The International Criminal Court – not the Competent Court for Sentencing the Russian "Crime of Aggression"**

The International Criminal Court (ICC, "Hague Tribunal"<sup>75</sup>) is not the appropriate place to try the crime of aggression. It is true that the "crime of aggression" falls under the jurisdiction of the ICC since the amendment of the Rome Statute in 2010 in Kampala (Uganda). (The activation of the ICC's jurisdiction over crimes of aggression took place on 17 July 2018 – following a resolution to that effect by States Parties on 15 December 2017.) But the ICC does not have jurisdiction over nationals of the Russian Federation, as the RF has not ratified the Rome Statute. Article 15bis, point 5 of the Rome Statute reads literally: "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory".

There is currently no court with jurisdiction over cases of individual criminal responsibility of Russian citizens for the crime of aggression against Ukraine.

Since the ICC has no jurisdiction over the case of a "crime of aggression", the Ukrainian leadership is advocating the formation of a special international tribunal under the auspices of the United Nations to prosecute and punish Russia's top political and military leadership for the crime of aggression, Ukrainian Prosecutor General Andriy Kostyn announced. Such a tribunal would require a decision by the UN Security Council; Ukraine understood that "Russia and, probably one more permanent member, can impose a veto on such a decision", Kostyn explained. "There is no sense to wait for a successful vote at the level of the Security Council."

The ICC's prosecutor, Karim Khan, believes it would be more purposeful to focus on existing institutions, rather than creating new ones, in prosecuting the Russian Federation for the crime of aggression against Ukraine. But calls for Ukraine to use only existing mechanisms, i.e. not to pursue the constitution of a new international court (ad hoc for the crime of aggression by the Russian Federation against Ukraine), amount to limiting prosecution to only three of the four "core international crimes", namely "war crimes", "crimes against humanity" and "genocide". In fact, this request to Ukraine means accepting impunity for the "crime of aggression", Ilona Khmeleva concludes.<sup>76</sup> The crime of aggression is the cause and the trigger for the commission

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needs, 20.12.2022; <[https://www.eeas.europa.eu/delegations/ukraine/eu-strengthens-digital-evidence-processing-capacities-international-criminal\\_en?s=232](https://www.eeas.europa.eu/delegations/ukraine/eu-strengthens-digital-evidence-processing-capacities-international-criminal_en?s=232)>.

<sup>74</sup> International Bar Association, Ruth Green: The IBA interview: Andriy Kostyn, Prosecutor General of Ukraine, 4 October 2022. <<https://www.ibanet.org/interview-Andriy-Kostyn-Prosecutor-General-of-Ukraine>>.

<sup>75</sup> Franz.: Cour pénale internationale / CPI; Russ.: Meždunarodnyj ugolovnyj sud. The ICC is administered by the Assembly of States Parties ("the Assembly").

<sup>76</sup> Ilona Khmeleva: „Russlands Verbrechen der Aggression kann nicht ignoriert werden“ (Russia's crime of aggression cannot be ignored), in: „Ukraine verstehen“ (Zentrum Liberale Moderne), 5. Dezember 2022; <<https://ukraineverstehen.de/russlands-verbrechen-der-aggression-kann-nicht-ignoriert-werden-sondertribunal-ukraine/>>. Ilona Khmeleva. University of Toronto - Munk School of Global Affairs & Public Policy.

of other crimes. It is the "supreme international crime" (as it was already called in the reasons for the judgement of the International Military Tribunal in Nuremberg). It should not be ignored, Chmeleva demands.<sup>77</sup>

Referring to the ICC is the wrong approach, Chmeleva says. "If the international community really wants to hold the Russian leadership accountable for the "crime of aggression", there is no other option than the establishment of a special tribunal".

### **III.4 A new international ad hoc tribunal**

#### **III.4.1 The "gap in the architecture of international law".**

The legal definition of the term "aggression" was laid down in Resolution 3314 (XXIX)<sup>78</sup> of the UN General Assembly of 1974 and incorporated into the Rome Statute with the same wording.

This definition, however, does not cover the modern "hybridisation" of aggression as used by Russia against Ukraine since 2014 until the open conventional military invasion on 24 February 2022.

In an article in the Financial Times on 28 February 2022 – "Putin's use of military force is a crime of aggression"<sup>79</sup> – British lawyer Philippe Sands, who pleads at the UN International Court of Justice (ICJ) and the European Court of Human Rights (ECHR), proposed a "special criminal tribunal for the crime of aggression" to hold individuals accountable for the crime of aggression.

In his evening video address on 29 November (2022), Ukrainian President Volodymyr Zelenskyj also called for the creation of a special international tribunal to hold the Russian leadership criminally responsible. Justice must be done – as it was after the Second World War, he said.

In March 2022, a public statement signed by many well-known politicians and renowned jurists (among them Benjamin Ferencz, the last surviving prosecutor of the Nuremberg Military Tribunal<sup>80</sup>) called for the creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine ("Statement calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine"<sup>81</sup>).

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<sup>77</sup> Ibid.

<sup>78</sup> Resolution 3314 (XXIX) was adopted by the United Nations General Assembly on 14 December 1974 as a non-binding recommendation to the United Nations Security Council on the definition of the crime of aggression. See also Elizabeth Wilmshurst in der Audiovisual Library of International Law: Definition of Aggression, General Assembly resolution 3314 (XXIX), 14 December 1974; <<https://legal.un.org/avl/ha/da/da.html>>. Elizabeth Wilmshurst is Professor of International Law at University College London and Fellow at the Royal Institute of International Affairs, Chatham House.

<sup>79</sup> Philippe Sands: Putin's use of military force is a crime of aggression, in: Financial Times, 28.02.2022; <<https://www.ft.com/content/cbbdd146-4e36-42fb-95e1-50128506652c>>.

<sup>80</sup> Benjamin Berell Ferencz (born 1920) was "chief prosecutor for the United States Army" in the "Einsatzgruppen Trial" (September 1947 - April 1948), the ninth of the twelve successor trials to the main war crimes trial before the International Military Tribunal / IMT; the Einsatzgruppen trial took place before an American military tribunal (Nuremberg Military Tribunal / NMT).

<sup>81</sup> <<https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>>.

Unter den „Signatories“ sind  
- Gordon Brown, former prime minister of Great Britain;

One of the signatories of this declaration is the renowned French-British jurist Philippe Sands.<sup>82</sup> Aggression is a "leadership crime" for which the state leadership is responsible. If only "war crimes", "genocide" and "crimes against humanity" were investigated and prosecuted, then the main perpetrators would go unpunished, argues Sands. Philippe Sands sees a "gap in the architecture of international law" and proposes the creation of a special criminal court to prosecute the "crime of aggression" to fill this gap.

Both the European Parliament and the Parliamentary Assemblies of the Council of Europe (PACE)<sup>83</sup> and NATO<sup>84</sup> support the creation of an ad hoc international tribunal to prosecute the "crime of aggression".

The **Parliamentary Assembly of the Council of Europe** issued a resolution on 28 April 2022 urging its member states (and observer states) to establish an ad hoc international criminal tribunal with the mandate "to investigate and prosecute the crime of aggression committed by the political and military leadership of the Russian Federation". It should have the power to "issue international arrest warrants and should not be limited by sovereign immunity or immunity of heads of state or government and other public officials".<sup>85</sup>

On 19 January 2023, **the European Parliament** voted in favour of a (non-binding) resolution<sup>86</sup> calling for the creation of a special international tribunal to prosecute the Russian crime of

aggression against Ukraine. Such a tribunal would fill a major gap in the current institutional criminal justice system. (The European Parliament had already previously called on the member states of the European Union to incorporate the "crime of aggression" into national law<sup>87</sup>).

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- Nicolas Bratza, former President of the European Court of Human Rights / European Court of Human Rights.

- Angelika Nußberger, Universität Köln; former Vice-President of the European Court of Human Rights.

<sup>82</sup> Philippe Sands QC, Professor at University College London, Barrister Matrix Chambers; author of the book: „East West Street: On the Origins of Genocide and Crimes Against Humanity“.

<sup>83</sup> Council of Europe, Parliamentary Assembly (PACE), Straßburg, 28 April 2022: PACE calls for an ad hoc international criminal tribunal to hold to account perpetrators of the crime of aggression against Ukraine; <[https://www.coe.int/en/web/portal/full-news/-/asset\\_publisher/y5xQt7QdunzT/content/pace-calls-for-an-ad-hoc-international-criminal-tribunal-to-investigate-war-crimes-in-ukraine?\\_101\\_INSTANCE\\_y5xQt7QdunzT\\_languageId=de\\_DE](https://www.coe.int/en/web/portal/full-news/-/asset_publisher/y5xQt7QdunzT/content/pace-calls-for-an-ad-hoc-international-criminal-tribunal-to-investigate-war-crimes-in-ukraine?_101_INSTANCE_y5xQt7QdunzT_languageId=de_DE)>.

<sup>84</sup> Maria Stepaniuk (News editor): NATO PA recognizes Russia as a terrorist state and calls for establishment of international tribunal, in: „Fakty“, 21. November 2022, <<https://fakty.com.ua/en/svit/svitovi-novyny/20221121-pa-nato-vyznala-rf-derzhavoyu-terorystom-ta-zaklykala-stvoryty-mizhnarodnyj-trybunal/>>.

<sup>85</sup> <<https://www.coe.int/en/web/portal/-/pace-calls-for-an-ad-hoc-international-criminal-tribunal-to-investigate-war-crimes-in-ukraine>>. The unanimously adopted resolution was based on a report by Polish MEP Aleksander Pociąg.

<sup>86</sup> European Parliament, Ukraine war: MEPs push for special tribunal to punish Russian crimes, Plenary Session, Plenary Session, AFET (Acronyme, French: Affaires ETrangères, Committee on Foreign Affairs, Human Rights, Common Security and Defense Policy), Press Release, 19.01.2023;

<<https://www.europarl.europa.eu/news/en/press-room/20230113IPR66653/ukraine-war-meps-push-for-special-tribunal-to-punish-russian-crimes>>. European Parliament: JOINT MOTION FOR A RESOLUTION on the establishment of a tribunal on the crime of aggression against Ukraine, 18.01.2023; <[https://www.europarl.europa.eu/doceo/document/RC-9-2023-0063\\_EN.html](https://www.europarl.europa.eu/doceo/document/RC-9-2023-0063_EN.html)>.

<sup>87</sup> Ursula von der Leyen, President of the European Commission, proposed on Twitter on 30 November 2022 "the establishment of a Special Committee supported by the United Nations to investigate and prosecute Russia's breaches of aggression".

### III.4.2 The Legal Opinion of the European Parliament

On behalf of the European Parliament's Directorate-General for External Policies / Subcommittee on Human Rights (DROI), the international law scholars Olivier Corten and Vaïos Koutroulis of the Université libre de Bruxelles (ULB) wrote a legal opinion on the – innovative – project of creating an ad hoc tribunal to try the Russian crime of aggression against Ukraine.<sup>88</sup>

For the authors, two options come into question:

The first option is to anchor the creation of such a tribunal in Ukrainian national law and base it on the right to self-defence – complemented by an agreement with the United Nations or another regional organisation: Thus, the tribunal would be established by law and allow the prosecution of foreigners for the crime of aggression.

The second option seems more "legitimate" to the authors: it would be based on the United Nations Charter and would interpret legal mechanisms already in general use, in particular the United Nations "Uniting for Peace" Resolution<sup>89</sup> of 3 November 1950, which had been initiated by the USA during the Korean War (June 1950 - July 1953) as a way to circumvent the Soviet veto of the United Nations mandate to continue military action in Korea. The General Assembly recommended the continuation of intervention in Korea in 1950.

### III.4.3 The Resolution of the Parliamentary Assembly of the Council of Europe of 26 January 2023

On 26 January 2023, the Parliamentary Assembly of the Council of Europe (PACE) in Strasbourg adopted – unanimously – Resolution 2482 calling for the creation of a special international tribunal to prosecute the Russian leadership.<sup>90</sup>

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<sup>88</sup> Directorate-General for External Policies Policy Department, EP/EXPO/DROI/FWC/2019\_01/Lot6/1/C/21 EN, December 2022 - PE 702.574: In-Depth Analysis, Tribunal for the crime of aggression against Ukraine - a legal assessment. European Parliament coordinator: Policy Department for External Relations, Directorate General for External Policies of the Union PE 702.574 - December 2022. Project Coordinator (Contractor): Trans European Policy Studies Association (TEPSA).

<[https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO\\_IDA\(2022\)702574\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf)>. Olivier CORTEN, Professor of Public International Law, Université libre de Bruxelles, Faculty of Law and Criminology, International Law Centre, Belgium; Vaïos KOUTROULIS, Professor of Public International Law, Université libre de Bruxelles, Faculty of Law and Criminology, International Law Centre, Belgium.

<sup>89</sup> Christian Tomuschat (Professor emeritus, Humboldt University, Berlin): Uniting for Peace. General Assembly resolution 377 (V), New York, 3 November 1950. The Audiovisual Library of International Law; <<https://legal.un.org/avl/ha/ufp/ufp.html>>.

<sup>90</sup> Parliamentary Assembly of the Council of Europe: Legal and human rights aspects of the Russian Federation's aggression against Ukraine, Resolution 2482 (2023); Assembly debate on 26 January 2023 (7th sitting); Text adopted by the Assembly on 26 January 2023. <<https://pace.coe.int/en/files/31620/html>>. The plenary approved the resolution based on the report of the Swiss parliamentarian Damien Cottier: Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Report by Damien Cottier (Alliance of Liberals and



In point 1 of the resolution, the Parliamentary Assembly not only reiterates that "the Russian Federation's armed attack and large-scale invasion of Ukraine launched on 24 February 2022 constitute an "aggression" under the terms of Resolution 3314 (XXIX) of the United Nations General Assembly adopted in 1974 and are clearly in breach of the Charter of the United Nations"; it also recognises that Russian aggression against Ukraine did not begin with the invasion on 24 February 2022, but that "the ongoing aggression is a continuation of the aggression started on 20 February 2014, which included the invasion, occupation and illegal annexation of Crimea by the Russian Federation" – a remarkable recognition of the hybrid intervention in the Donbas and the military occupation of Crimea as "aggression".

Point 3 states that Belarus participated in the aggression of the Russian Federation by making its territory available, for which the Belarusian leadership should be held accountable.

The aggression lacks any justification under *jus ad bellum*, such as self-defence, it says in point 4, and therefore meets the definition of the "crime of aggression" under Article 8bis of the Statute of the International Criminal Court. The Russian political and military leaders who planned, initiated, and executed this aggression, and who were in a position to control the political and military action of the state, should be identified and prosecuted. Without their decision to wage this war of aggression against Ukraine, the resulting atrocities (war crimes, crimes against humanity and possibly genocide) would not have taken place.

Under item 12, the Parliamentary Assembly is receiving increasing evidence that the official Russian rhetoric justifying the aggression against Ukraine, "the so-called de-Ukrainianisation process", bears the hallmarks of public incitement to genocide or reveals genocidal intent to destroy Ukrainians as a national group ("group" in the sense of the Genocide Convention) as such, or at least parts of it. The Assembly recalls that all States Parties to the Genocide Convention have a duty to punish genocide. They have a duty to prevent genocide and a corresponding duty to act, it says in paragraph 13.

Because the ICC currently has no jurisdiction over the crime of aggression against Ukraine (point 5), and because no other international criminal court has jurisdiction to prosecute and punish the crime of aggression against Ukraine due to the likely abuse of the veto power by the Russian Federation, and because national courts (in Ukraine or in other countries) face many legal and practical challenges (such as impartiality, legitimacy, immunity) on the basis of the principles of territoriality or universal jurisdiction, the Assembly reiterates (under item 6) its unanimous call to all member countries of the Council of Europe (and countries with observer status) to establish a special international criminal tribunal for the crime of aggression against Ukraine (Russ.: Special'nyj tribunal dlja nakazanija za prestuplenie agressii protiv Ukrainy), which would be supported by as many states and international organisations as possible, but in particular by the United Nations General Assembly.

The Parliamentary Assembly believes that the Summit of Heads of State and Government of the Council of Europe, scheduled for 16/17 May in Reykjavik, should support the creation of such a tribunal. The crimes committed in Ukraine should "not go unpunished", said the Prime Minister

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Democrats for Europe), Switzerland, Legal and human rights aspects of the Russian Federation's aggression against Ukraine, Document 15689, 24.01.2023; <<https://pace.coe.int/en/files/31576#trace-1>>. Deutschlandfunk, 27.01.2023; <<https://www.deutschlandfunk.de/europarat-fordert-internationales-kriegsverbrechertribunal-100.html>>.

of Iceland and Chair of the Ministerial Committee of the Council of Europe, Katrín Jakobsdóttir.<sup>91</sup>

The Parliamentary Assembly even claims for the Council of Europe the leading role in the creation of this special court (point 6). Already in April 2022, there had been talk of this in the documents of the Parliamentary Assembly of the Council of Europe. In fact, the "PACE" is the first international body that promoted this idea. The European Parliament, the Parliamentary Assemblies of the OSCE and NATO joined this initiative.

Point 7 of the resolution lists the parameters of such a tribunal:

7.1 Its jurisdiction would be limited to a "single crime trial"<sup>92</sup>, namely to try and punish the crime of aggression against Ukraine, which was started by the Russian Federation on 24 February 2023.

7.2 Its definition of the "crime of aggression" would be in line with Article 8bis of the ICC Statute and customary international law.

7.3 Its Statute would clearly state that functional immunities would not apply to the crime of aggression, in line with the practice of other international criminal tribunals. This principle would apply in particular to citizens of the aggressor state.

7.5 Its role would be complementary to the jurisdiction of the ICC and would in no way affect its jurisdiction over war crimes, crimes against humanity and possibly genocide.

7.6 Its seat should be in The Hague with a view to cooperation with the ICC.<sup>93</sup>

A Special Criminal Court would not be necessary if the United Nations Security Council referred the case (of the Russian crime of aggression) to the International Criminal Court in The Hague, which the Russian Federation would be absolutely certain to veto. The Parliamentary Assembly of the Council of Europe therefore supports (in its resolution of 26 January 2023, point 23) all efforts to break the deadlock in the United Nations – including the request to the United Nations International Court of Justice for a legal opinion ("advisory opinion") on existing limitations on the right of veto implicit in the United Nations Charter.

In paragraph 9 of the resolution, the Parliamentary Assembly calls on all member states to take the necessary steps to amend the ICC Statute to either allow referrals to the ICC by the UN General Assembly in the event of a Security Council deadlock, or to remove the existing limitations on the ICC's jurisdiction over crimes of aggression. These changes would strengthen the consistency, legitimacy and universality of international criminal justice. A longer-term reform of the ICC Statute (to be able to prosecute future acts of aggression) and the proposal to create a special tribunal for Russia's current aggression against Ukraine should be pursued in parallel.

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<sup>91</sup> Council of Europe, Committee of Ministers, Communication on the activities of the Committee of Ministers, Address by Ms Katrín Jakobsdóttir, Prime Minister of Iceland, representing the Chair of the Committee of Ministers (Strasbourg, 26 January 2023), CM Documents, CM/AS(2023)1, 27 January 2023; <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a9f433](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a9f433)>.

<sup>92</sup> The other three "core crimes" committed by Russian forces in Ukraine can be tried at the International Criminal Court, which has no jurisdiction over the crime of Russian aggression.

<sup>93</sup> In Ukraine, Kharkiv had been proposed as the seat of the "Spectribunal".

### III.4.4 The Ukrainian Proposal of a "Special Tribunal"

Article 437 of the Ukrainian Criminal Code states that (1) "planning, preparing and waging a war of aggression or an armed conflict, or conspiring for such aims, shall be punishable by imprisonment for 7 to 12 years", and (2) "waging a war of aggression or aggressive military operations shall be punishable by imprisonment for 10 to 15 years".<sup>94</sup>

As an approach to the creation of a special court, Ukraine proposed an international agreement between Ukraine and a certain number of states, or an agreement between Ukraine and an international organisation (UN, Council of Europe, EU).

The Ministry of Foreign Affairs of Ukraine formulated five characteristics for a future "Spetstribunal"<sup>95</sup>:

1. the Special Tribunal will investigate and prosecute the crime of aggression against Ukraine according to the rules of the Rome Statute (of the International Criminal Court) as defined in Article 8;
2. the jurisdiction of the Special Tribunal shall extend to the events of February 2022, specifically the commencement of the armed attack by the Russian Federation on Ukraine;
3. the special court has jurisdiction over natural persons who control or directly direct the political or military actions of the state.
4. the official status of an accused – such as the status of a head of state or other state-level official – does not exempt such a person from individual criminal responsibility and does not mitigate the penalty.
5. the Special Tribunal, as an ad hoc tribunal, will only prosecute the crime of (military) aggression by the Russian Federation against Ukraine.

The limitation of jurisdiction to the case of aggression against Ukraine avoids competition with the International Criminal Court.

### III.4.5 The two-level model of the German international law expert Claus Kreß

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<sup>94</sup> <[https://kodeksy.com.ua/kriminal\\_nij\\_kodeks\\_ukraini/statja-437.htm](https://kodeksy.com.ua/kriminal_nij_kodeks_ukraini/statja-437.htm)>.

<<https://consultgroup.com.ua/zakonodavstvo-ukrainy/kodeksy/kku/kku-stattya-437/>>.

<sup>95</sup> Ministerstvo zakordonnykh sprav Ukraïny: Dmytro Kuleba v Gaazi nazvav p'jat' parametriv majbutn'ogo Spectrybunalu dlja pokarannja kerivnytva RF za zločyn agresii proty Ukraïny, 14. Juli 2022;

<<https://mfa.gov.ua/news/dmitro-kuleba-v-gaazi-nazvav-pyat-parametriv-majbutnogo-spectribunalu-dlya-pokarannya-kerivnictva-rf-za-zlochyn-agresiyi-proti-ukrayini>>.

<<https://www.pravda.com.ua/eng/news/2022/07/14/7358084/>>.

In an interview with Nils Behrndt, Deputy Director General of the EU Commission's Directorate General for Justice and Consumers, Claus Kreß,<sup>96</sup> Professor of German and International Criminal Law, argued for a special international tribunal:

"The crime of aggression is an absolute "leadership crime" ("Führungsdelikt"), Kreß explained. "Criminal liability is limited to persons who are in a position to control and direct the political and military actions of a state...", i.e. in the case of the Russian aggression against Ukraine to President Vladimir Putin, Prime Minister Mikhail Mishustin, Foreign Minister Sergei Lavrov, and Defence Minister Sergei Šoigu (more appropriate would be the classical designation of this office as "Ministry of War") – as well as the Chief of the General Staff of the Russian Armed Forces, Valeriy Gerasimov – and last but not least Dmitry Medvedev, the (bellicose) Deputy President of the Security Council of the Russian Federation, who (apparently in a fit of mental derangement) predicted on 27 December 2022 war between France and Germany in the coming year 2023, as well as civil war in the USA, from which Elon Musk would emerge as president<sup>97</sup> (Musk: "Epic thread!!"). He also foresaw the fulfilment of his cherished wish to see the European Union disintegrate – after Britain's return to the EU.

Claus Kreß proposed a two-stage model for the creation of a special tribunal: A corresponding resolution of the General Assembly of the United Nations expressing its support for the creation of a special tribunal – followed by the conclusion of an international treaty between Ukraine and the Secretary General of the United Nations on the establishment of such a tribunal.

### **III.5 The Mechanism of the UN "Uniting for Peace" Resolution**

#### **III.5.1 The "Uniting for Peace" Resolution 377 A (V) of the General Assembly of the United Nations in 1950**

The United Nations General Assembly (UNGA) Resolution 377 A (V) "Uniting for Peace" Resolution states that in cases where the United Nations Security Council is unable to safeguard international security and peace as required by it due to lack of unanimity of its five permanent members, the United Nations General Assembly shall promptly consider the case; the General Assembly may recommend to the members of the United Nations appropriate joint action – including the use of armed forces, if necessary, to restore international security and peace.

The Uniting for Peace Resolution provides the United Nations with an alternative course of action when a permanent member vetoes the Security Council from carrying out its function in

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<sup>96</sup> Claus Kreß, holder of the Chair of German and International Criminal Law and Director of the Institute for Criminal Law and Criminal Procedure Law at the University of Cologne; Director of the newly founded „Institute for International Peace and Security Law“.

<sup>97</sup> Published on his personal accounts on Twitter and Telegram; Reuters: Star rising in Kremlin, Russia's Medvedev predicts war in West, December 27, 2022; <<https://www.reuters.com/world/europe/star-rising-kremlin-russias-medvedev-predicts-war-west-2022-12-27/>>. Medvedev formulates Russia's war against Ukraine in religious, apocalyptic terms and refers to Ukrainians as "cockroaches" („tarakany“). <<https://rg.ru>>, 2022/11/20; <<https://rubryka.com/2022/11/20/nova-zayava-medvedyeva-kyiv-rosijske-misto-i-jogo-potribno-povertaty/>>.

accordance with the mandate of the UN Charter – namely peacekeeping. The resolution was adopted on 3 November 1950 by 52 votes to 5 with 2 abstentions.

The resolution thus created the mechanism of the "**Emergency Special Session**" (ESS).<sup>98</sup>

### **III.5.2 Reactivation of the "Uniting for Peace" Resolution in 2022**

On 25 February 2022, one day after the start of its invasion of Ukraine, Russia vetoed a UN Security Council resolution strongly condemning Russia's attack on Ukraine and calling for an immediate withdrawal of Russian troops from Ukraine.

In order to obtain a condemnation of Russia's attack on Ukraine by the UN General Assembly on 24 February 2022, the US resorted to the "Uniting for Peace" ("UfP") Resolution of 1950. On 27 February 2022, the Security Council decided by a two-thirds majority to convene an emergency session of the UN General Assembly – under the Uniting for Peace / UfP procedure – on 28 February 2022 to discuss the Russian invasion of Ukraine (Resolution 2623). Eleven members of the Security Council voted in favour of the US draft resolution, with Russia voting against and three abstentions (China, India, United Arab Emirates).

The last time the General Assembly had been convened under the UfP resolution was on the initiative of the USA in response to the Soviet invasion of Afghanistan in 1980.

### **III.5.3 The 11th Emergency Special Session of the United Nations General Assembly**

At the Emergency Special Session (ESS) of the General Assembly on 28 February 2022, an overwhelming majority of United Nations member countries expressed their disapproval of Russian aggression. The representative of the USA had urged countries to vote in favour of the resolution introduced by Ukraine. The representative of the EU had stated, "This is not just about Ukraine, this is not just about Europe, this is about defending an international order based on rules."

This 11th Emergency Session / ESS of the General Assembly since the establishment of the United Nations ("General Assembly Emergency Special Session on Ukraine"<sup>99</sup>) on 28 February 2022 was opened by the President of the 76th Session (2021-2022), Abdulla Shahid. Shahid stressed that the military offensive undertaken by Russia was a violation of Ukraine's integrity

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<sup>98</sup> Resolution 377 A (V) states that an "ESS" of the General Assembly may be convened if requested by the UN Security Council with the consent of seven members (in 1965 the Security Council was expanded from 11 to 15 members), or if requested by a majority of the member states of the United Nations.

<sup>99</sup> UN News: General Assembly holds emergency special session on Ukraine, 28 February 2022; <<https://news.un.org/en/story/2022/02/1112912>>.

and sovereignty. He cited the United Nations Charter, which states that conflicts must be settled peacefully, without the threat or use of armed force. "The ongoing military offensive is inconsistent with this. It is an affront to the founders of this Organisation and everything it stands for," Shahid declared. "The violence must stop. [...] international humanitarian law must be respected; diplomacy and dialogue must prevail."

After Abdulla Shahid, United Nations Secretary-General António Manuel de Oliveira Guterres spoke. Guterres; in his speech called for an immediate end to the fighting in Ukraine: "We have credible accounts of residential buildings, critical civilian infrastructure and other non-military targets sustaining heavy damage." Ukraine is facing a "tragedy" – "with potentially disastrous consequences for the whole world", Guterres declared.

Afterwards, the Ukrainian representative Serhij Oleghovyč Kyslycja and the Russian representative Vassilyj Nebensja presented their positions.<sup>100</sup> Ukrainian UN Ambassador Serhij Kyslycja said, "If Ukraine does not survive, international peace will not survive. [...] the United Nations will not survive, [...] we cannot be surprised if democracy fails next." Russia's UN Ambassador Vassilyj Nebenzja (Russ.: Vasilij Alekseevič Nebenzja) said Russia's actions were being "distorted". The media and social networks were spreading "lies". The aim of the "special military operation" was to protect the people of "Lugansk" and "Doneck", two regions of eastern Ukraine that had been subjected to "torment and genocide by the Kyiv regime" for eight years, Nebenzja claimed. "To that end, there is a need to de-militarize and de-nazify Ukraine."<sup>101</sup>

### **III.5.4 The Assembly Resolution ES-11/1**

On the third day (2 March 2022) of the emergency session, the United Nations General Assembly adopted resolution ES-11/1 by 141 votes – with 5 votes against and 35 abstentions.<sup>102</sup> It called on Russia to immediately cease its unlawful use of force against Ukraine.

Resolution ES-11/1 fell short of some of the previous "UfP" resolutions: it did not call for sanctions, the deployment of peacekeepers or the collective use of force. But it did characterise the Russian invasion as an act of "aggression" – a crime under international law. The resolution strongly condemned "the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter" (of the United Nations) and condemned Russia's declaration as to the necessity of this "special military operation." Resolution ES-11/1 called on Russia "to cease its use of force against Ukraine" and "to immediately, completely and unconditionally withdraw

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<sup>100</sup> On the second day of the session, the Federal Minister for Foreign Affairs, Annalena Baerbock, spoke on behalf of Germany.

<sup>101</sup> While the Assembly was meeting, representatives of both sides were negotiating in Minsk, Belarus, Shahid told some ambassadors.

<sup>102</sup> U.N. Press Release, Eleventh Emergency Special Session, 2 March 2022; <<https://press.un.org/en/2022/ga12407.doc.htm>>. UNGA Res. ES-11/1 (2022): <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/27/PDF/N2227227.pdf?OPENELEMENT>> <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/293/36/PDF/N2229336.pdf?OpenElement>>.

all of its military forces from the territory of Ukraine within its internationally recognised borders". It also condemned "all violations of international humanitarian law and violations and abuses of human rights."

United Nations General Assembly (UNGA) Resolution ES-11/1 may be legally relevant in criminal proceedings both before national courts and before an international ad hoc tribunal against the Russian leadership for the crime of aggression.<sup>103</sup> In the case "Ukraine vs. Russia", the International Court of Justice (ICJ) referred to this United Nations General Assembly Resolution ES-11/1 in its reasoning for imposing provisional measures to protect the rights of Ukraine "from being subject to the use of force by Russia based upon false allegations of genocide under the Genocide Convention".

### **III.5.5 Further emergency sessions of the United Nations General Assembly on the Russian aggression**

On 23 March (2022), another emergency session of the General Assembly was convened after a draft resolution (S/2022/231) tabled by Russia in the Security Council on the protection of civilians and unimpeded humanitarian access was approved only by Russia itself and China, with thirteen abstentions and no votes against. It was seen by the other Security Council members as an attempt by Russia to justify its attack on Ukraine.

In the vote the following day, on 24 March 2022, draft resolution A/ES-11/L.2 – "Humanitarian consequences of aggression against Ukraine" – received a large majority of 140 member votes, with five votes against and 38 abstentions.<sup>104</sup> This resolution called for, among other things, an immediate cessation of hostilities by the Russian Federation against Ukraine, in particular all attacks on civilians and civilian objects, the immediate withdrawal of all armed forces of Russia from Ukraine, a halt to attacks on schools and hospitals; furthermore, the danger of an impending global hunger crisis due to the loss of grain exports from Ukraine was pointed out.

At the emergency session convened for 7 April 2022, draft resolution A/ES-11/L.4, on the suspension of the Russian Federation's membership rights in the UN Human Rights Council, was adopted by a two-thirds majority of 93 votes in favour, 24 against and 58 abstentions.<sup>105</sup> The Russian Federation remained a member of the UN Human Rights Council until the scheduled end of its term in 2023; however, it was deprived of all rights, such as the right to attend sessions.

On 3 October 2022, Russia vetoed a draft resolution introduced by the Ukrainian UN Ambassador Serhij Kyslycja, condemning the Russian annexation of southern and eastern Ukraine as illegal under international law.<sup>106</sup> Several states then introduced draft resolution

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<sup>103</sup> Scharf, Michael P., "Power Shift: The Return of the Uniting for Peace Resolution" (2023). <[https://scholarlycommons.law.case.edu/faculty\\_publications/2153](https://scholarlycommons.law.case.edu/faculty_publications/2153)>. Michael P. Scharf is Co-Dean of Law School and Joseph C. Hostetler Professor of Law at Case Western Reserve University and President of the American Branch of the International Law Association.

<sup>104</sup> The Assembly refused to put a competing text to the vote.

<sup>105</sup> When calculating the two-thirds quorum, abstentions are not counted, only votes in favour and against are counted.

<sup>106</sup> The proclamation of annexation was preceded by pseudo-referenda in the oblasts of Luhans'k, Donetsk, Kherson and Zaporizhzhya from 23 to 27 September 2022.

A/ES-11/L.5 "Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations" on 7 October. In the emergency sessions of the General Assembly on 10 and 12 October (in continuation of the 11th "ESS"), this draft was finally adopted as resolution A/RES/ES-11/4 by a large majority.<sup>107</sup>

The attempted annexation had no validity and was not a basis for changing the status of these regions of Ukraine. States and international organisations were asked not to recognise a change of status. Russia was demanded to withdraw its forces immediately, completely and unconditionally from the territory of Ukraine within its internationally recognised borders.

Serhij Olehovyč Kyslycja, Ukraine's Permanent Representative to the United Nations since February 2020, had before denounced the Russian Federation for having violated international law since 23 September 2022, and that the "pseudo-referenda" in four Ukrainian oblasts posed an existential threat to the United Nations and its Charter. "We are now at a tipping point where the UN will either restore its credibility or ultimately fall in failure."

The European Union representative, Swedish diplomat Olof Skoog, said (in his capacity as observer) that the indiscriminate attacks on civilians (on cities and infrastructure) were war crimes and that the perpetrators would be held accountable. He urged UN members to vote in favour of the text of the resolution, warning: "If we do not condemn the actions of the Russian Federation in Ukraine today, then we condone similar blatant attacks on any and all of our countries tomorrow."

Turkey's representative too declared the referendums illegal and called for an end to the war, calling for negotiations to end hostilities.

In his response, the representative of the Russian Federation, Vassilyj Nebenzja, accused NATO of escalating the conflict as part of its plan to undermine the Russian Federation. Ukraine, he said, was now a testing ground for Western weapons. Kiev had covered up many crimes, he said. Nebenzja moved to suspend Rule of Procedure No. 87 to allow the draft resolution to be decided by secret ballot; the motion was defeated.

Another emergency session was convened by Ukraine for 14 November 2022 to debate and vote on draft resolution A/ES-11/L.6 "Furtherance of remedy and reparation for aggression against Ukraine", tabled by Ukraine and 45 other States. The corresponding resolution A/RES/ES-11/5 was intended to create the basis for subsequent reparation payments by Russia to Ukraine. The vote resulted in a two-thirds majority of 94 votes in favour, 14 against and 73 abstentions (not taken into account).

### **III.5.6 The limited powers of the United Nations General Assembly**

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<sup>107</sup> United Nations, Meetings Coverage and Press Releases, ELEVENTH EMERGENCY SPECIAL SESSION, 12TH MEETING, General Assembly Takes Up Draft Resolution Condemning Russian Federation's Annexation of Several Territories in Eastern Ukraine, Resuming Emergency Special Session, GA/12456, 10 OCTOBER 2022; <<https://press.un.org/en/2022/ga12456.doc.htm>>. <<https://media.un.org/en/asset/k1z/k1zt3lnr03>>.



In four resolutions,<sup>108</sup> the General Assembly condemned the Russian Federation, but so far has not decided on "joint action" – certainly not on the use of armed forces to restore international security and peace.

Assembly resolutions are not binding; they merely express the political will of a majority of members. The powers of the United Nations General Assembly are limited to recommendations. The power to take enforcement action is the exclusive prerogative of the Security Council.<sup>109</sup> However, the United Nations General Assembly's practice in the past has demonstrated a way around its limitations: The Assembly can support the exercise of criminal jurisdiction by one or more of its member states. Since 2000, so-called "hybrid criminal courts" have been formed, based on agreements between the states concerned and the United Nations. In contrast to criminal courts of the United Nations, they are not decided by the latter as a coercive measure. They differ from the previous international criminal courts in that they "involve the state of the offence".<sup>110</sup> In most cases up to now, the initiative came from national governments supported by the Secretary-General of the United Nations (or also by the Security Council); the sponsor is solely the respective state. In terms of the composition of judges, they are a mixture of national and international courts, and they have both national and international (i.e., international law) legal bases.<sup>111</sup>

However, there is no consensus on this matter in the European Union: at a conference of European Union justice ministers in Stockholm on 27 January 2023, some of them expressed their support for an international tribunal of the political and military leadership of the Russian Federation. German Foreign Minister Annalena Baerbock, in a keynote speech at the Hague Academy of International Law on 16 January 2023, had advocated for a so-called "hybrid court", a special court based on Ukrainian domestic law but staffed by international

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<sup>108</sup> In total, the following resolutions were adopted in the emergency sessions of the UN General Assembly on Ukraine:

- Resolution A/RES/ES-11/1, 02.03.2022; Aggression against Ukraine. In total, the following resolutions were adopted at the UN General Assembly emergency sessions on Ukraine: 141 states voted in favour. Only Belarus, Eritrea, North Korea, Russia and Syria voted "no". A further 35 states abstained.

- Resolution A/RES/ES-11/2, 24.03.2022; Humanitarian consequences of the aggression against Ukraine (Humanitarian consequences of the aggression against Ukraine). It received a majority of 140 votes in favour, with 5 votes against, 38 abstentions and 10 representatives of Member States not present.

- Resolution A/RES/ES-11/3, 07.04.2022; Suspension of the rights of membership of the Russian Federation in the Human Rights Council (Suspension of the Russian Federation's membership rights in the Human Rights Council). The resolution was adopted by a two-thirds majority of 93 votes, with 24 votes against and 58 abstentions.

- Resolution A/RES/ES-11/4; 12.10.2022; . Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations (Territorial integrity of Ukraine: defence of the principles of the United Nations Charter). It was adopted by an overwhelming majority of 143 votes to 5, with 35 abstentions).

- Resolution A/RES/ES-11/5, 15.11.2022; Furtherance of remedy and reparation for aggression against Ukraine. The resolution was adopted with a two-thirds majority of 94 votes in favour, 14 against and 73 abstentions (not taken into account).

<sup>109</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) made it clear in the Tadić case that the establishment of a criminal tribunal is a form of coercive or enforcement action.

<sup>110</sup> Lisbeth Zimmermann: Prinzip Pragmatismus: Das Comeback der hybriden Gerichte (Principle of pragmatism: the comeback of hybrid courts), in: HSFK-Report Nr. 6/2017; <[https://www.hsfk.de/fileadmin/HSFK/hsfk\\_publicationen/report0617.pdf](https://www.hsfk.de/fileadmin/HSFK/hsfk_publicationen/report0617.pdf)>. HSFK: Hessische Stiftung Friedens- und Konfliktforschung (Peace Research Institute Frankfurt).

<sup>111</sup> Examples are the Special Tribunal for Lebanon, the Khmer Rouge Tribunal and the Special Court for Sierra Leone.

judges, a second option presented by the European Commission as an alternative to the creation of a special international court. Baerbock received support for her proposal only from France.

### **III.5.7 The UN resolution "Uniting for Peace" – an Assembly mandate for "enforcement action"?**

The legitimacy of the Security Council is questioned because of the blatant abuse of the veto power – namely abuse in situations involving a Permanent Member acting in its national interest. The inability of the Security Council to authorise humanitarian intervention in the case of Kosovo updated the question of reforming the UN collective security system.<sup>112</sup>

There are calls from many quarters for the Assembly to make use of the “Uniting for Peace” resolution in the case of Russian aggression against Ukraine. However, the authorisation of enforcement action by the Assembly under the “Uniting for Peace” resolution is highly unlikely in the case of Russian aggression. A mandate from the UN General Assembly for the establishment of (armed) peacekeeping forces by member states – under the operational control of the UN – for peace enforcement is not only legally problematic, but in reality impossible: No member state of the United Nations would provide troops for armed combat against Russian forces operating in Ukraine. A direct military intervention by the West – only NATO would be considered for this – would indeed probably be the beginning of a third world war. In fact, NATO member states deliver arms to Ukraine, but avoid by all means being drawn into a direct military confrontation with Russian armed forces.

Seventy years after the Soviet Union vetoed the UN mandate for a continuation of international military intervention in the Korean War (1950 - 1953), the United Nations General Assembly no longer generates majorities in favour of the states of the "West", Michael Ramsden states, which is why the "Uniting for Peace / UfP resolution was practically not used for a long time.<sup>113</sup> Changes in the international balance of power have made the "UfP" an unpredictable mechanism, a "double-edged sword".

Michael Ramsden analysed in 2016 (!) the legal room for manoeuvre, which the UN General Assembly has, in order to perform a function analogous to the task of the UN Security Council in authorising enforcement action when the Security Council itself is blocked by the veto of a permanent member. However, this analysis was concerned with "humanitarian intervention", not "crimes of aggression";<sup>114</sup> however, it is still relevant for the challenge the UN General Assembly faces today.

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<sup>112</sup> Security Council Report, Security Council Deadlocks and Uniting for Peace: An Abridged History, October 2013, available at: <[https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security\\_Council\\_Deadlocks\\_and\\_Uniting\\_for\\_Peace.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security_Council_Deadlocks_and_Uniting_for_Peace.pdf)>.

<sup>113</sup> Michael Ramsden: "Uniting for Peace" and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly, 25 Wash. Int'l L.J. 267 (2016); <<https://digitalcommons.law.uw.edu/wilj/vol25/iss2/4>>.

<sup>114</sup> Ibid. See also: Michael Ramsden, Uniting for Peace, the Emergency Special Session on Ukraine, Harvard International Law Journal Online (2022). Professor Michael Ramsden is Director of the Research Postgraduate Programme, The Chinese University of Hong Kong. Member of the Advisory Board of the Universal Rights Group (Geneva and New York) and the International Rule of Law Initiative (Ottawa).

According to the UN Charter, only the Security Council is empowered to take coercive measures, while the General Assembly can only discuss and recommend. Unlike decisions of the Security Council, the recommendations of the Assembly are not binding.

In this legal situation, can the Assembly authorise (military) humanitarian intervention? In answer to this question, Ramsden refers to the wording of the "Uniting for Peace" / UfP resolution: The General Assembly "resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, *including in the case of a breach of the peace or act of aggression the use of armed force* when necessary, to maintain or restore international peace and security" (italics the author).

And it goes on to say that if the Assembly is not in session at the time, it can meet in an Emergency Special Session within 24 hours of being convened.

According to Ramsden, there are two competing interpretations ("theories") of the "Uniting for Peace" resolution: According to one, the UfP is "weak" ("Weak UfP"), according to the other "strong" ("Strong UfP"). According to the "weak UfP" theory, the General Assembly cannot authorise coercive action under any circumstances.

According to the "strong UfP" theory, the meaning of the UN Charter allows the General Assembly to authorise coercive action if the Security Council fails in its responsibility – arguing that the main purpose of the UN Charter is to secure international peace through "collective action". Chapter I – Purposes and Principles, Article 1 – reads as follows: "The United Nations shall set itself the following purposes: 1. To maintain international peace and security and, to this end, to take effective collective measures to prevent and remove threats to the peace, to suppress acts of aggression and other breaches of the peace, and to settle or settle by peaceful means, in accordance with the principles of justice and international law, international disputes or situations which might lead to a breach of the peace."<sup>115</sup>

Article 1 (1) does not specify which body should take these collective measures. According to Ramsden, peace and security are the foundations of the UN Charter as a whole ("writ large") and not the function of the Security Council alone.<sup>116</sup>

On the other hand Article 24 (1) of the UN Charter reads: "In order to ensure prompt and effective action by the United Nations, its Members entrust to the Security Council the *primary*

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<sup>115</sup> U. N. Charter, Chapter I – Purposes and Principles, Article 1: "The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

<<https://www.un.org/en/about-us/un-charter/chapter-1>>.

<sup>116</sup> Michael Ramsden: "Uniting for Peace" and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly, Washington International Law Journal, Volume 25 Number 2, 2016; <<https://digitalcommons.law.uw.edu/wilj/vol25/iss2/4>>.

responsibility for the maintenance of international peace and security and recognize that the Security Council, in discharging the responsibilities arising from this responsibility, acts on their behalf."<sup>117</sup> According to Ramsden, the word "primary responsibility" implies that "secondary responsibility" rests on the General Assembly – "given that it is the only organ within the U.N. that represents all members (and thus is the collective that conditionally confers power on the Council)". Ramsden cites further references which, in his view, show that "the U.N. thus provides the Assembly with the power to recommend enforcement measures where the Council is deadlocked".<sup>118</sup>

According to Article 11 of the "Uniting for Peace" resolution, when the Assembly makes a judgement on the need for the use of force, it should forward a recommendation for "enforcement measures" to the Council.<sup>119</sup> The text of the "UfP" thus confirms the limited role of the Assembly by suggesting that it can only make a recommendation in the case of a "breach of the peace or act of aggression".

Whether the UN General Assembly is ultimately entitled to even recommend coercive measures, let alone carry them out itself, ultimately depends, in Michael Ramsden's opinion, on the resolution of the conflict between "attributed powers" and "implied powers".<sup>120</sup> While the "weak UfP" is supported by the text of the UN Charter, the "strong UfP" is more broadly based on the teleological argument that the UN should effectively ensure and maintain international peace and security.

The doctrine of assigned powers maintains that a UN organ may only perform acts that have been authorised by the members of the UN. Powers not expressly assigned are the result of deliberate omissions that must be respected. In contrast, the doctrine of implied powers allows a UN organ to assume powers that are essential to or further the function of the UN.

While the Security Council has explicit and mandatory powers, a "creative and teleological approach" is needed in shaping the implicit powers of the Assembly. The UN Charter is sufficiently vague to allow for different interpretations regarding the scope of powers and objectives, Ramsden argues.

While the United Nations General Assembly (UNGA) cannot unilaterally suspend the membership of the Russian Federation in the UN (Article 5 of the UN Charter); it can block the participation of Russian diplomats in UN bodies. The General Assembly has in the past used the

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<sup>117</sup> Charter of the United Nations, Chapter V – The Security Council, Article 24, "1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." <<https://legal.un.org/repertory/art24.shtml>>.

<sup>118</sup> Siehe Nigel D. White: From Korea to Kuwait: The Legal Basis of United Nations' Military Action, in: The International History Review, Vol. 20, No. 3 (September 1998), pp. 597-617; published by: Taylor & Francis, Ltd.

<sup>119</sup> <[https://www.un.org/en/sc/repertoire/otherdocs/GAres377A\(v\).pdf](https://www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf)>. Tomuschat, Christian: Uniting for Peace, United Nations Audiovisual Library of International Law 3 (2008); <[http://legal.un.org/avl/pdf/ha/ufp/ufp\\_e.pdf](http://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf)>.

<sup>120</sup> The "implied powers doctrine" is a teleological rule of interpretation originating in US law, according to which unwritten powers in international treaties must also be taken into account. The European Court of Justice (ECJ) also applies this doctrine.

"Uniting for Peace" resolution to call on member states to impose diplomatic sanctions and trade embargoes in order to achieve compliance with international law by the offending state. For example, for many years the credentials of the South African Republic regime were rejected by the General Assembly for "flagrant violation" of the United Nations Charter.

The UN General Assembly – in cooperation with Ukraine – could set up a tribunal to prosecute the crime of aggression on the basis of the "UfP" resolution, Ramsden sums up.

#### **IV. Punishing the "main culprit" – Putin**

At the end of their virtual meeting in London on 12 December 2022, which was attended by Ukrainian President Volodymyr Zelenskyj via video link, the "G-7" leaders declared that they would hold Russian President Putin accountable for the invasion of Ukraine. "There must be no impunity for war crimes and other atrocities. We will hold President Putin and those responsible accountable in accordance with international law," the final statement reads verbatim.

Acting British Foreign Secretary James Cleverly said that Russia's leadership, including President Vladimir Putin, must be held accountable for war crimes. French President Emmanuel Macron also believes that Putin should be held accountable.

##### **IV.1 Putin – Commander-in-Chief and Major War Criminal**

A major difficulty for war crimes trials in the past has been the preservation of evidence. In the Russian war of aggression against Ukraine, this is hardly a problem any more. According to the British daily newspaper "The Guardian", specialists from The Hague are on site alongside Ukrainian investigators.

No problem either is the investigation of the chain of command, which is a crucial element in charging a commander-in-chief with war crimes. The responsibilities of the generals are public, and Article 87 of the Constitution of the Russian Federation designates the President as the "Supreme Commander" of the Russian Armed Forces (Russ.: "Verchovnyj Glavnokomandujuščij Vooružënnymi silami Rossijskoj Federacii").

After the failure of the planned blitzkrieg against Ukraine, President Putin reportedly pulled the operational supreme command to himself in August (2022), according to reports from Russia: The US news channel CNN reported that Putin was personally commanding the generals on the Ukrainian front. By changing the chain of command, he is reacting to "dysfunctional command structures that have plagued the Russian army since the beginning of the war".

According to an analysis by the US think tank "Institute for the Study of War" at the end of August 2022, commanders in the Ukraine war must now report directly to the president. In this way, Putin is bypassing his Defence Minister Sergej Šojgu, as well as the Russian Chief of General Staff Valerij Gerasimov. Allegedly, President Putin is now taking military advice from Colonel General Aleksandr Pavlovič Lapin, the commander of the Central Military District ("Central'nyj voennyj okrug"), and Army General Sergej Vladimirovič Surovikin, the

commander of the Russian Aerospace Forces ("Vosdušno-kosmičeskie sily R F"). The "Hero of the Russian Federation" Lapin has been commanding the Army Group ("Gruppirovka rossijskich vojsk") "Centr" in the war against Ukraine since 22 November 2022. The "Hero of the Russian Federation" and "Hero of the LNR" Surovikin has commanded the Army Group "Yug" ("South") in the war against Ukraine since June 2022. On 8 October 2022, by order of the Russian Minister of Defence, he was appointed commander of the "United Russian Army Group" ("komandujuščij Ob"edinënoj rossijskoj gruppirovkoj vojsk" (in the war against Ukraine).

On 1 January 2023, the Russian Defence Minister appointed the Chief of the General Staff, Valerij Gerasimov as commander of the "United Forces" in Ukraine in place of Sergej Surovikin, who was appointed in October 2022. Gerasimov is considered one of the main participants in the planning of the invasion.<sup>121</sup> Days earlier, General Aleksandr Lapin had been appointed Chief of Staff of the Russian Ground Forces. Both were openly attacked in the media by Evgenij Prigožin, the owner of the Private Military Company / PMC "Wagner" (Častnaja voennaja kompanija / ČVK, also Privatnaja voennaja kompanija / PVK "Vagnera") for the problems in the Russian army.

President and "VGK VS RF"<sup>122</sup> Vladimir Putin is said to have clearly instructed the new Commander-in-Chief Gerasimov to take the Donbas by March 2023, the spokesman of the Ukrainian military intelligence service HUR (Holovne upravlinnja rozvidky Ministerstva oborony), Andrij Juzov, told the TV channel "Freedom TV".

## IV.2 Putin on trial?

British jurist Geoffrey Nice, a member of the International Criminal Tribunal for the former Yugoslavia and lead prosecutor in the trial of Slobodan Milošević, believes that the President of the Russian Federation, Vladimir Putin should be held personally accountable for Russian war crimes, as he told a BBC "Radio 4" programme on 1 January 2023. "There is no doubt that the chain of command leads directly to Putin. [...] He is guilty, Nice said.

Geoffrey Nice expressed surprise that this was not "much more freely and openly stated" by prosecutors. "The International Criminal Court, [...] has so far not made any statements regarding Putin's responsibility...". Possibly the prosecutor (of the ICC) assumes, Nice said ("or is led to assume"), that not indicting Putin is politically useful. Politically useful means "settlement" (a deal?). It was quite possible that "from the third side" (certainly not from the Ukrainian side) a political agreement would be sought not to put Putin on trial – "a terrible prospect!" But it was particularly important to prosecute Putin, not individual officers; this would "put moral responsibility first", Nice argues.

According to former prosecutor Geoffrey Nice, the trial could start "as early as tomorrow"; and it should be conducted by Ukrainians – in Ukrainian language. Putin's presence would not be necessary.

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<sup>121</sup> Regarding the theory of "perfecting the art of war" of the Chief of Staff of the Armed Forces of the Russian Federation, Valerij Gerasimov, and its application in Russia's hybrid war in the Ukrainian Donbas, see: Schneider-Deters, W.: *Ukraine's Fateful Years 2013 - 2019, Volume II, Chapter III.1, The Hybrid War as "Continuation of Politics by Other Means*, pp. 383 - 394.

<sup>122</sup> Russ.: „Verchovnyj Glavnokomandujuščij Vooružënnymi silami Rossijskoj Federacii“.

The International Criminal Court responded to Geoffrey Nice's allegations by stating that the ICC's prosecutor, Karim Khan, was himself gathering evidence of Russian war crimes in Ukraine, and that he intended to sign arrest warrants as soon as there was sufficient evidence. "Allegations of third-party pressure or influence on the prosecution or the prosecutor himself to delay the investigation [...] do not reflect reality," the ICC said.

### **IV.3 "Functional immunity"**

The President of the Russian Federation, Vladimir Putin, is not only protected from international criminal prosecution by Russia's veto power in the UN Security Council, but also for a reason under international law: he enjoys so-called "functional immunity". High-ranking officials of a state – presidents, prime ministers and foreign ministers – are protected from prosecution by third countries by functional immunity for acts they perform in their official capacity. The "functional immunity" of such persons is justified by the fact that their actions in these functions can be equated with those of the state. The principle of state sovereignty results in state immunity under international law, i.e. that a state cannot be subject to the jurisdiction of another state. (The principle – an equal has no power over an equal – derives from Roman law: *par in parem non habet imperium*). Moreover, according to traditional legal understanding, persons who have enjoyed functional immunity while in office cannot be prosecuted for acts committed while in office, after the end of their term of office.

Heads of state enjoy immunity under customary international law, as confirmed by the International Court of Justice / ICJ in its 2002 decision "Democratic Republic of Congo v. Belgium" – even in cases of "international crimes".<sup>123</sup> However, the protection of heads of state from prosecution under international criminal law in cases of "core crimes" (crimes of aggression, war crimes, genocide, crimes against humanity) is increasingly being lowered by recent developments in international law. Criminal proceedings became admissible before international courts even against sitting heads of state. Serbian President Slobodan Milošević was indicted before the International Criminal Tribunal for the former Yugoslavia / ICTY. The President of Liberia, Charles Taylor, was convicted by the Special Court for Sierra Leone; he was acting President of Liberia at the time of the indictment. Claus Kreß refers to the case of former Sudanese President Omar Hassan Ahmad al-Bashir (1993 - 2019). In March 2009, the International Criminal Court (ICC) issued an arrest warrant for the incumbent President Al Bashir, which triggered a discussion on the relevance of international immunities for the ICC. The Sudanese military government extradited Al Bashir to the ICC in 2021.

Until the First World War, the "Act of State Doctrine" applied, the rule of international law (according to Anglo-American interpretation) stating that legal acts of foreign states may not be subjected to national judicial control. Today, it is considered "outdated" by the development of international law since then.

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<sup>123</sup> Nikolaus Schultz: Ist Lotus verblüht? Anmerkung zum Urteil des IGH vom 14. Februar 2002 im Fall betreffend den Haftbefehl vom 11. April 2000 (Demokratische Republik Kongo gegen Belgien) (Has Lotus Faded? Comment on the ICJ judgment of 14 February 2002 in the case concerning the arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium); <[https://www.zaoerv.de/62\\_2002/62\\_2002\\_1\\_a\\_703\\_758.pdf](https://www.zaoerv.de/62_2002/62_2002_1_a_703_758.pdf)>. (Max Planck Institute for Comparative Public Law and International Law, Heidelberg).

The ICC Statute "standardises a blanket and general exclusion of immunity; any official capacity or immunity is declared irrelevant," states Helmut Kreicker.<sup>124</sup> Art. 27, para. 2 reads: "Immunities [...] which under [...] international law attach to the official capacity of a person shall not prevent the Court from exercising its jurisdiction over such person." Thus, immunities under international law do not prevent prosecution by the ICC; this even applies to the exemptions for acting heads of state – including the President of the Russian Federation - Vladimir Putin.

#### **IV.4 Extradition of Putin and waiver of punishment for his "entourage" – a chance for a coup against Putin?**

The internationally renowned Russian economist Vladislav Inozemcev believes that a coup against Putin – and thus an end to the war – would be most promising if the West could split the Moscow leadership, i.e. if President Putin were extradited to the International Court of Justice in The Hague, and in return Russia's political elite were exempted from prosecution. The prospect of an end to sanctions would do another. But at the end of the first year of the war, a coup against Putin does not seem likely.

#### ***Hitler's suicide in the "Führerbunker" – an option for Putin?***

Possibly Vladimir Putin himself will become a victim of his war of aggression against Ukraine, with which he hopes to regain Russia's old greatness. Putin's delusions of Russia's – and his own – greatness are ruining not only Ukraine but Russia itself. Just as Adolf Hitler dragged Germany down with him, Putin may well drag Russia down with him in his downfall – whatever form his departure from the Kremlin may take – perhaps even to a nuclear end of the world.

But Putin is no suicide, says Russian writer Dmitry Gluchovsky, author of "post-apocalyptic" novels. "This is not a fanatic who dies for an idea ("Velikaja Rossija)", or kills himself in a hopeless situation – like Hitler. If Gluchovsky's hypothesis is correct, then this "elegant" solution à la Hitler is unfortunately not to be expected.

#### **IV.5 The "Case of Putin" – an extra-legal solution?**

Since Russian President Vladimir Putin enjoys – albeit controversial – legal protection from criminal prosecution, and probably also de facto protection from extradition, prima facie there remains only one – extra-legal – way of dispensing justice. Because suicide (à la Hitler) is unlikely, a "tyrannicidium" would be needed to do justice. Whether a Russian Claus Schenk Graf von Stauffenberg can be found, however, is uncertain. And since a modern-day Damon (after Friedrich Schiller) is unlikely to be found, the only option is the (secret) hunt for Putin, analogous to the 10-year hunt for Osama bin Laden. Perhaps a "faithful Heinrich" ("getreuer Heinrich" like Heinrich Himmler, who betrayed "his Führer" in the last days of the war to save his own skin), or a "Brutus" ("et tu, Brute?", Shakespeare) – historical and literary models abound

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<sup>124</sup> Helmut Kreicker: Immunität und IStGH. Zur Bedeutung völkerrechtlicher Exemtionen für den Internationalen Strafgerichtshof (Immunity and the ICC. On the Significance of Exemptions under International Law for the International Criminal Court); <[https://www.zis-online.com/dat/artikel/2009\\_7\\_336.pdf](https://www.zis-online.com/dat/artikel/2009_7_336.pdf)>. Helmut Kreicker has been a judge at the Federal Supreme Court since 2020.



– from the court of the "new Tsar" (Caesar) will be found to free the Russian Republic from Vladimir Putin.

Winfried Schneider-Deters  
Kyjiw, 28. Februar 2023

Note: Transliteration of (Cyrillic) Ukrainian and Russian names according to DIN 1460, which seems more adequate than LC Romanization.